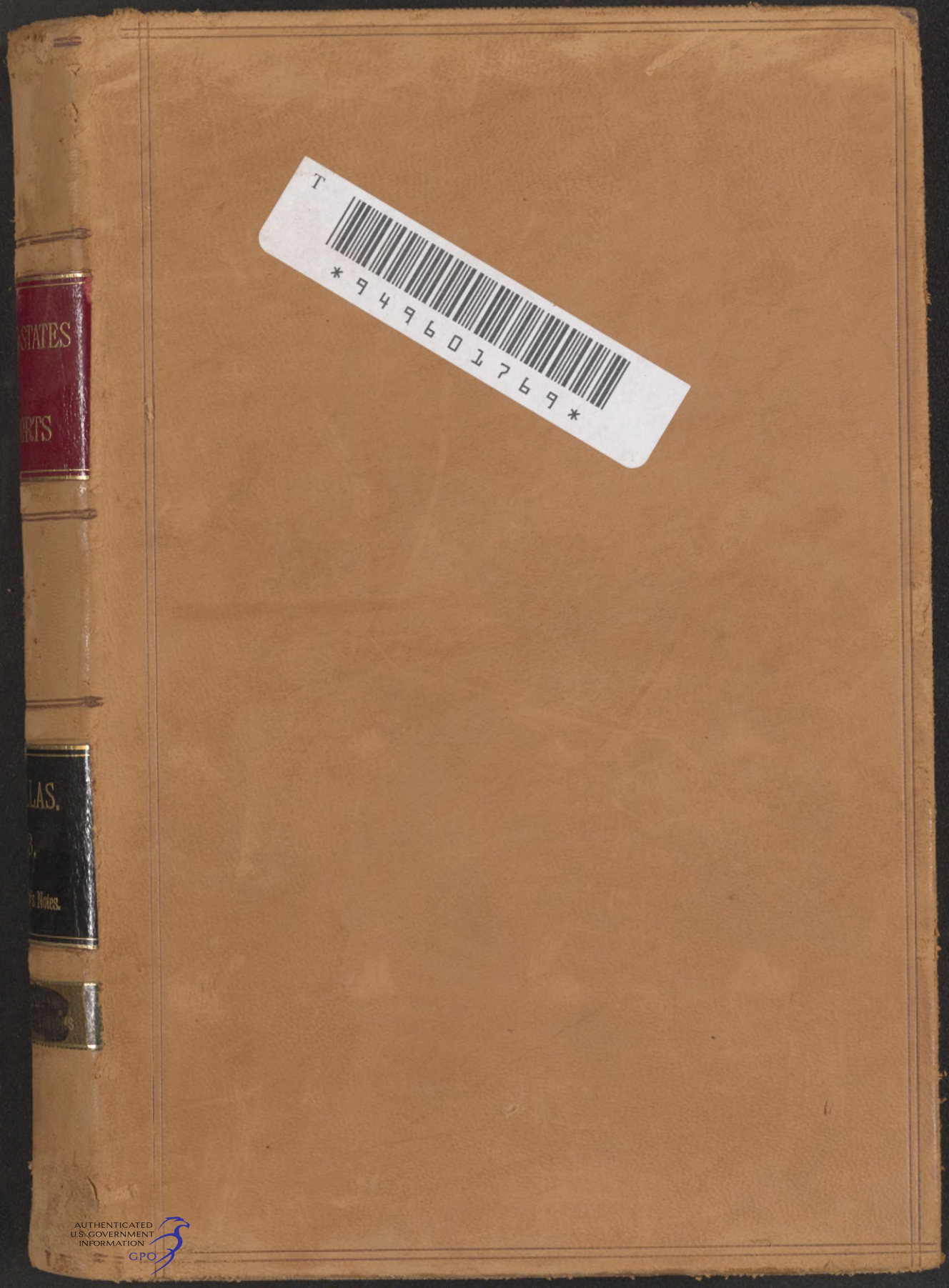
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REPORTS OF CASES

RULED AND ADJUDGED

IN THE SEVERAL

COURTS OF THE UNITED STATES

AND OF

PENNSYLVANIA,

HELD AT THE SEAT OF THE FEDERAL GOVERNMENT.

BY A. J. DALLAS.

Atque eo magis necessaria est hæc opera, quod et nostro sæculo non desunt, et olim non defuerunt, qui *hanc juris partem* ita contemnerent, quasi nihil ejus præter inane nomen existeret.—GROTIUS.

VOL. III.

SECOND EDITION.

EDITED, WITH NOTES AND REFERENCES TO LATER DECISIONS,

BY

FREDERICK C. BRIGHTLY,

AUTHOR OF THE "FEDERAL DIGEST," ETC.

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CASES DETERMINED

IN THE

SUPREME COURT OF THE UNITED STATES.

PROPERTY OF UNITED STATES SENATE COMMITTEE COPY

FEBRUARY TERM, 1794.

On the meeting of the Court, a commission was read, dated the 28th of January 1794, appointing William Bradford, Esquire, Attorney-General of the United States.(*a*)

State of Georgia *v.* Brailsford *et. al.*

Confiscation.— Law and fact.

The act of the state of Georgia, of the 4th May 1782, did not confiscate, but only sequestered debts owing to British subjects; and the right to recover them revived at the peace.[1]

It is the province of the court to decide the law, and of the jury to decide the facts.

The jury, nevertheless, have a right to take upon themselves to determine both the law and the fact.

This cause was now tried, by a special jury, upon an amicable issue, to ascertain whether the debt due from Spalding, and the right of action to recover it, belonged to the state of Georgia, or to the original creditors, under all the circumstances which are set forth in the pleadings and arguments on the equity side of the court? See 2 Dall. 403, 415.

For the plaintiff, *Ingersoll* and *Dallas* proposed two objects for inquiry: 1. Was the debt due from Spalding, at any time, the property of the state? 2. Has the title of the state ceased or been removed, and the right of action revested in the defendants?

1. On the first point, they contended, that Georgia, as a sovereign state,

(*a*) Mr. Bradford was appointed in the room of Edmund Randolph, who had accepted the office of secretary of state.

[1] A statute confiscating the estate of a mortgagor, did not destroy the security of the mortgagee, an alien enemy, whose debt was only sequestrated during the war. Higginson *v.* Mein, 4 Cr. 415. In that case, it was said by Chief Justice Marshall, that the decisions of the supreme court had been uniform, that the acts of the states, confiscating debts, were repealed by the treaty of peace, and therefore, it had been held, that the treaty enabled British creditors to recover debts previously owing to them by American citizens, notwithstanding a payment into a state treasury, under a state law of sequestration. Ware *v.* Hylton, *post*, p. 199; Hamilton *v.* Eaton, Mart. (N. C.) 1; s. c. 1 Hughes 249.

had power to transfer the debt in question, from the original creditor, an alien enemy, to herself, notwithstanding some of the debtors were citizens of another state; that by her confiscation law, she had declared the intention to make the transfer; and that, without an inquest of office, her intention had
*2] been carried into effect, in due form, and according to *law, as well in relation to her own citizens, as to the parties who were citizens of South Carolina. In support of these several propositions the following authorities were cited: 1 H. Bl. 149; Vatt. lib. 3, c. 77; Lee on Capt.; Bynk. lib. 1, c. 7; Vatt. lib. 3, c. 18, § 295; Jenk. 121; Sir T. Park. 121; Plowd. 243, 324; 1 H. Bl. 413; 2 Bl. Com. 405, 409; 2 Wood. 130; 4 Bl. Com. 386; 1 Hale P. C. 413; 3 Inst. 55; 1 Hawk. 68; 3 Bl. Com. 259; 3 T. R. 731, 2 3, 4; 1 Woodes. 146; Cro. Car. 460; 16 Vin Abr. 85–6; 3 Bl. Com. 260; Park. 267; 1 P. Wms. 307; 1 Dall. 393; Hind. Ch. 129; 1 Vern. 58.

2. On the second point, it was urged, that although the word "sequestration" was used in the Georgia law, yet, that the law directed the debt to be collected, in the same manner as debts confiscated, and to be put into the treasury, for the use of the state, until it should be otherwise appropriated; and that the state had never made any other appropriation; but, on the first opportunity, claimed it as a forfeiture. The election, therefore, to consider it as a confiscation, was reserved by the state to herself; and her subsequent conduct makes the reservation absolute. The exception of debts in the South Carolina law, cannot govern the case as to Powell & Hopton; for that law is only referred to, for the manner and form, not for the subjects of confiscation. It only remains, therefore, to inquire, whether, independent of Georgia, the operation and existence of her law can be, and has been defeated and annulled. The peace merely does not affect the right of the state; for the condition of things at the conclusion of the war is legitimate; and all things not mentioned in the treaty, are to remain as at the conclusion of it. The treaty of 1783 does not affect the right of the state; for though it provides, generally, in the 4th article, that creditors, on either side, shall meet with no lawful impediment, in recovering their debts, this ought to be understood merely as a provision that the war, abstractedly considered, shall make no difference in the remedy, for the recovery of subsisting debts; that the remedy shall not be perplexed by instalment laws, pine-barren laws, bull laws, paper-money laws, &c.; but it does not decide what are subsisting debts, which can only, indeed, be decided on the general principle of the law of nations. Laws of sequestration and confiscation are not, however, the object of the 4th article of the treaty of peace; but of a subsequent article, in which congress only promise (all, indeed, that they could do) to recommend to the states, revision and restitution. Debts discharged by law, where they originated, are everywhere discharged. Such is not only the doctrine of Georgia, but of the British statesmen and judges, wherever the question has arisen. The federal constitution does
*3] not affect the right of the state: for though *it gives effect to the treaty of peace, it furnishes no rule for construing the meaning of the parties to that instrument. In relation to these arguments, the following authorities were cited: State papers, *Jefferson* to *Hammond*; Hinde Ch. 127; 1 Bro. Ch. 376; 3 Bac. Abr. 310; *Caermarthen's Memorial*, American Museum, May 1787; 1 Hen. Bl. 123, 135; 3 T. R. 732; 1 H. Bl. 149; 2 Bro. Ch. 11; 1 H. Bl. 146.

For the defendants, *Bradford* (the attorney-general), *E. Tilghman* and *Lewis* made the following points: 1st. That the debts due to Powell & Hopton, had not been confiscated by the law of South Carolina, and therefore, were not confiscated by the words of reference in the law of Georgia; nor had Georgia a right to confiscate the property of the citizens of other states. 2d. That even if the law of Georgia had confiscated Brailsford's interest in the debt, the right to recover the two-thirds belonging to Powell & Hopton was unimpaired. 3d. That the debt, as it respects Brailsford himself, is not confiscated, but sequestered; and that the sequestration had not been enforced by any inquest of office, seizure or other act tantamount to an office or seizure. 4th. That the peace alone, without any posittve compact, restored the right of action to the original creditors. 5th. That without recourse to the general principle of the law of nations, the treaty expressly revives the right of action, by removing all legal impediments to the recovery of *bonâ fide* debts, and the treaty is the supreme law of the land, by virtue of the federal constitution. In support of these propositions, the following authorities were cited: 3 Bac. 203; 2 Co. 67; 1 P. Wms. 307; Curs. Canc. 89; 1 Dom. Civ. L. 138, 147; Magna Carta; Sir T. Park. 267; 3 T. R. 734; Vatt. lib. 4, c. 1, § 8; Ibid. c. 2, § 20, 22; Burn. Ecc. L. 157; Carth. 148; Grot. lib. 3, c. 20, § 16, p. 700; 1 Dall. 233; 1 H. Bl. 123, 136; 2 Bro. Ch. 11; 1 Bl. Com. 409, 240; Sir T. Raym.; Saund. 45; Plowd. 259; 3 Inst. 55; 1 Hawk. 68; State papers; Bynk. lib. 1, c. 7; 1 Vern. 58; Circular letter of Congress.

The argument having continued for four days, the Chief Justice delivered the following charge, on the 7th of February.

Jay, Chief Justice.—This cause has been regarded as of great importance; and doubtless it is so. It has accordingly been treated by the counsel with great learning, diligence and ability; and on your part, it has been heard with particular attention. It is, therefore, unnecessary for me to follow the investigation over the extensive field into which it has been carried: you are now, if ever you can be, completely possessed of the merits of the cause.

*The facts comprehended in the case are agreed; the only point that remains, is to settle what is the law of the land arising from [*4 those facts; and on that point, it is proper, that the opinion of the court should be given. It is fortunate, on the present, as it must be on every occasion, to find the opinion of the court unanimous: we entertain no diversity of sentiment; and we have experienced no difficulty in uniting in the charge, which it is my province to deliver.

We are then, gentlemen, of opinion, that the debts due to Hopton & Powell (who were citizens of South Carolina) were not confiscated by the statute of South Carolina; the same being therein expressly excepted: that those debts were not confiscated by the statute of Georgia, for that statute enacts, with respect to Powell & Hopton, precisely the like, and no other, degree and extent of confiscation and forfeiture, with that of South Carolina. Wherefore, it cannot now be necessary to decide, how far one state may, of right, legislate relative to the personal rights of citizens of another state, not residing within their jurisdiction.

We are also of opinion, that the debts due to Brailsford, a British

subject, residing in Great Britain, were by the statute of Georgia subjected not to confiscation, but only to sequestration; and therefore, that his right, to recover them, revived at the peace, both by the law of nations and the treaty of peace.

The question of forfeiture, in the case of joint obligees, being at present immaterial, need not now be decided.

It may not be amiss, here, gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court, to decide.[1] But it must be observed, that by the same law, which recognises this reasonable distribution of jurisdiction, you have, nevertheless, a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy.[2] On this, and on every other occasion, however, we have no doubt, you will pay that respect which is due to the opinion of the court: for as, on the one hand, it is presumed, that juries are the best judges of facts; it is, on the other hand, presumable, that the court are the best judges of law. But still, both objects are lawfully within your power of decision.

Some stress has been laid on a consideration of the different situations of the parties to the cause. The State of Georgia sues three private persons. But what is it to justice, how many or how few, how high or how low, how rich or how poor, the contending parties may chance to be? Justice is indiscriminately due to all, without regard to numbers, wealth or rank.

*5] Because, to the State of Georgia, composed of many *thousands of people, the litigated sum cannot be of great moment, you will not for this reason be justified in deciding against her claim; if the money belongs to her, she ought to have it; but on the other hand, no consideration of the circumstances, or of the comparative insignificance of the defendants, can be a ground to deny them the advantage of a favorable verdict, if in justice they are entitled to it.

Go then, gentlemen, from the bar, without any impression of favor or prejudice for the one party or the other; weigh well the merits of the case, and do on this, as you ought to do on every occasion, equal and impartial justice.

The jury having been absent some time, returned to the bar, and proposed the following questions to the court.

---

[1] Roberts *v.* Cooper, 20 How. 467; United States *v.* Battiste, 2 Sumn. 240; United States *v.* Morris, 1 Curt. 23; United States *v.* Wilson, Bald. 79; United States *v.* Riley, 5 Bl. C. C. 204; Stettinius *v.* United States, 5 Cr. C. C. 573.

[2] United States *v.* Poillon, 1 Car. L. Rep. 60; United States *v.* Smith, Trials of Smith and Ogden, 236–7; United States *v.* Lynch, 2 N. Y. Leg. Obs. 51; United States *v.* Wilson, Bald. 79; United States *v.* Hodges, 3 Wheeler C. C. 477; Stettinius *v.* United States, 5 Cr. C. C. 573. In a criminal case, the jury have not only the power, but the *right*, to determine the law as well as the facts, by a verdict of "not guilty." Kane *v.* Commonwealth, 89 Penn. St. 522. It is, nevertheless, proper for the judge to instruct them as to the law, to inform them that their only safe course is to take the law from the court, and to warn them of the consequences of disregarding it. Nicholson *v.* Commonwealth, 91 Penn. St. 390. And see United States *v.* Greathouse, 2 Abb. U. S. 364; United States *v.* O'Sullivan, 3 Whart. Cr. L. § 2802 n. The only way in which the jury can decide the law of a case is, by finding a general verdict. United States *v.* Watkins, 3 Cr. C. C. 443; United States *v.* Stockwell, 4 Id. 671; Stettinius *v.* United States, 5 Id. 573.

The Betsey.

1. Did the act of the State of Georgia completely vest the debts of Brailsford, Powell & Hopton, in the state, at the time of passing the same?

2. If so, did the treaty of peace, or any other matter, revive the right of the defendants to the debt in controversy?

In answer to these questions the CHIEF JUSTICE stated, that it was intended, in the general charge of the court, to comprise their sentiments upon the points now suggested; but as the jury entertained a doubt, the inquiry was perfectly right. On the 1st question, he said, it was the unanimous opinion of the judges, that the act of the state of Georgia did not vest the debts of Brailsford, Powell & Hopton, in the state, at the time of passing it. On the 2d question, he said, that no sequestration divests the property in the thing sequestered; and consequently, Brailsford, at the peace, and indeed, throughout the war, was the real owner of the debt. That it is true, the state of Georgia interposed with her legislative authority, to prevent Brailsford's recovering the debt, while the war continued, but that the mere restoration of peace, as well as the very terms of the treaty, revived the right of action to recover the debt, the property of which had never, in fact or law, been taken from the defendants; and that if it were otherwise, the sequestration would certainly remain a lawful impediment to the recovering of a *bonâ fide* debt, due to a British creditor, in direct opposition to the 4th article of the treaty.

After this explanation, the jury, without going again from the bar, returned a—

Verdict for the defendants.

---

*The BETSEY. [*6

GLASS *et al.*, appellants, *v.* The Sloop BETSEY *et al.*

Consular jurisdiction.—Admiralty.

The admiralty jurisdiction exercised by the consuls of France, in the United States, was not of right; such jurisdiction could only be exercised by virtue of a treaty.

The district courts possess all the powers of courts of admiralty, both instance and prize; and may award restitution of property claimed as prize of war, by a foreign captor.

CAPTAIN Pierre Arcade Johannene, the commander of a French privateer called the Citizen Genet, having captured as prize, on the high seas, the sloop Betsey, sent the vessel into Baltimore; but upon her arrival there, the owners of the sloop and her cargo filed a libel in the district court of Maryland, claiming restitution, because the vessel belonged to subjects of the king of Sweden, a neutral power, and the cargo was owned jointly by Swedes and Americans. The captor filed a plea to the jurisdiction of the court, which, after argument, was allowed; the circuit court affirmed the decree; and thereupon, the present appeal was instituted.

The general question was—whether, under the circumstances of this case, an American court of admiralty had jurisdiction to entertain the complaint or libel of the owners, and to decree restitution of the property? It was argued by *E. Tilghman* and *Lewis*, for the appellants; and by *Winchester* (of Maryland) and *Du Ponceau*, for the appellee.

For the *appellants*, the case was briefly opened, upon the following principles. The question is of great importance; and extends to the whole judicial authority of the United States; for if the admiralty has no jurisdiction, there can be no jurisdiction in any common-law court. Nor is it material, to distinguish the ownership of the vessel and cargo; since, strangers, or aliens, in amity, are entitled, equally with Americans, to have their property protected by the laws. Vatt. lib. 2, § 101, 103, p. 267. There can be no doubt, that this is a civil cause of admiralty and maritime jurisdiction, and so within the very terms of the judicial act. Restitution or no restitution, is the leading point; that, necessarily, indeed, involves the point of prize or no prize, as a defence for capturing; but if the admiralty is once fairly possessed of a cause, it has a right to try every incidental question. That the vessel is a legal prize, may be a good plea to the suit; but it is not a good plea to the jurisdiction of the court; and the captor, by bringing his prize into an American port, has himself submitted to the American jurisdiction, which is, in this instance, to be exercised by the judicial, not the executive, department. Const. U. S. art. III., § 1; Jud. Act, § 9; Doug. 580, 584–5, 592–4; Carth. 474; 1 Sid. 320; 3 T. R. 344; 4 Ibid. 394–5; Skin. 59; T. Raym. 473; Carth. 32; 6 Vin. Abr. 515; 3 Bl. Com. 108; 1 Vent. 173; 2 Saund. 259; 2 Keb. 829; Lev. 25; Sid. 320; 4 Inst. 152, 154; 2 Bulst. 27–9; 2 Vern. 592; 3 Bl. Com. 108; 2 L. Jenk. 755, 727, 733, 751, 754, 755, 780.

*7] *For the *appellees*, the captors (after some exceptions to the regularity of the appeal, which were waived by consent),(*a*) it was observed, that this is not a libel for a trespass, and so within the jurisdiction of the district court; because a seizure as prize is no trespass, though it may be wrongful. Nor can any act, subsequent to the seizure, for securing and bringing the prize into port, give jurisdiction, if the seizure does not. Doug. 571. Neither can the question be, whether the taking was so illegal as to amount to piracy; and therefore, that there ought to be restitution; for piracy can only be decided in the circuit court. But the question raised by the libel is a question of prize; and the decision of that must precede the subsequent one of restitution; which, so far from being the main and original question, is the consequence of the former. Admitting, then, the present capture to be unlawful, because it is neutral property, still the district court has no jurisdiction of a question of prize, by the constitution and laws of the United States, nor by the laws of nations.

I. The district court has no jurisdiction by the constitution and laws of the United States (which form the only possible source of federal jurisdiction), for although it is admitted, that be the 1st and 2d sections of the 3d article of the constitution, and the judicial act, the jurisdiction of the district court extends to all civil causes of admiralty and maritime jurisdiction; yet, it is denied, that prize is a civil cause of that description; nor can the expression vest a power in the district court to decide the legality of a prize, even by a citizen of the United States. A citizen, indeed, can only make a

(*a*) The appeal had not been presented to any court or judge of the United States, but to a notary-public of Baltimore. The court directed, that the waiver of the exception, by consent, should be entered, as they would not allow any judicial countenance to be given to the proceeding before the notary.

prize, when the United States are at war with some foreign power; but being at peace with all the world, no such question can now be agitated; and of course, no jurisdiction, in such a case, can exist in any of its courts. By comparing the act of congress with the constitution, it is obvious, that the former does not vest in the district court, the same, or so extensive, a judicial power, as the latter would warrant. The constitution embraces admiralty cases of whatever kind—whether civil or criminal, done in time of peace or in time of war; but the act of congress limits the power of the district court to civil causes of admiralty and maritime jurisdiction; and the court can have no other or greater power than the act has given. Civil causes cannot possibly include captures, or the legality of a prize which can only be made in time of war. The words are used to denote that the causes are not to be foreign causes, or arising from, and determinable by, the **jus belli;* but are such as relate to the community, arising in the time of peace, and are determinable by the civil or municipal law; [*8 whereas, prize is not a civil marine cause; nor is it a subject of civil jurisdiction. Doug.; 2 Ruth. Inst. 595. The jurisdiction of the admiralty courts of England, and of the United States, arises from the same words; but it is manifest, that the latter has no other jurisdiction by law, than that which has been exercised by the instance court in England, which is widely different from the prize court, though the powers are usually exercised by the same person. The prize court can only have continuance during war, and derives its powers from the warrant which calls it into activity. Doug. 613; 2 Woodes. 452; Collect. Jurid. 72. The instance court derives its jurisdiction from a commission, enumerating particularly every object of judicial cognisance; but not a word of prize; any more than is contained in the act of congress, when enumerating the objects of judicial cognisance in the district court. The manner of proceeding in these courts is totally different. The question of prize or no prize, is the boundary line, and not the locality; and the nature of that question not only excludes the instance, but the common-law, and all other courts; so that, whenever a cause involves the question of prize, and a determination of that question must precede the judgment, they will decline the exercise of jurisdiction and refer it to the prize court. Besides, congress have not yet declared the rules for regulating captures on land or water (Const. art. I., § 8); and if the district court is now a court of prize, it is a court without rules, to determine what is, or what is not, lawful prize; for the rules of an instance court will not apply. If, upon the whole, the district court has no jurisdiction, under the act of congress, of a case of prize by a citizen of the United States, it cannot have jurisdiction of a prize by a citizen of France, which is the question raised by the libel.

II. The district court has no jurisdiction, by the law, usage and practice of nations. The injury, if any, by the capture, is done by a citizen of France to the subjects of the King of Sweden, and to a citizen of the United States; and the question is, whether that injury is to be redressed in any court of the United States, who are in peace and amity, by treaties, with France and Sweden, and who are neutral in the present war? Admitting, in the first place, that Sweden is also at peace with France, and neutral in the war, the injury, so far, is an attack upon the sovereignty of Sweden, which Sweden alone can take cognisance of: a neutral nation has nothing to

say to a capture, or any other injury perpetrated by a citizen of France on
*9] the subjects of Sweden. 2 Bynk. 177 ; Vatt. lib. 2, § 54, 55 ; *4 Bl. Com. 66 ; Vatt. lib. 2, c. 6, 18, p. 144, 249–52 ; 2 Ruth. Inst. 513–15 ; 9 Wood. 435, 439 ; Lee on Capt. 45–8. 2. If the government of the United States could not interfere, *à fortiori*, its courts of justice cannot. The same reasoning applies to the case of the American, whose property is alleged to be captured ; his application ought to be made to his government ; the injury he complains of being of national, not of judicial, inquiry ; and, indeed, the very case is provided for in the treaty between the United States and Sweden.(*a*)

Hitherto the case has been considered as it appears from the allegations in the libel ; but it is proper likewise to consider the law, as it arises upon the facts disclosed in the plea. This plea to the jurisdiction states formally the existence of war between France and England ; the public commission of the captor ; the capture of the vessel and cargo on the high seas, as prize, alleging the same to be the property of British subjects, and the bringing the prize into port, by virtue of the treaty between America and France. Upon this statement, two additional objections arise to the jurisdiction of the district court : 1st. That by the law of nations, the courts of the captor can alone determine the question of prize or no prize ; and 2d. That the courts of America cannot take cognisance of the cause, without a manifest violation of the 17th article of the treaty between the United States and France.

1. The right of a belligerent power to make captures of the property of the enemy is incontestable ; and to enforce that right, the law of nations subjects the ships of neutral nations to search, and, in cases of justifiable suspicion, to seizure and detention ; when the event of the inquiry, if an acquittal is pronounced, will furnish the criterion of damages. Doug. 571. By capture, the thing is acquired, not to the individual, but the state ; and the law of nations gives, as to the external effects, a just property in movables or immovables, so acquired, whether from enemies or offending neutrals ; and no neutral power can be permitted to inquire into the justice of the war, or the legality of the capture. 2 Wood. 446; Vatt. lib. 3, § 202; Lee on Capt. 82. The great case of the *Silesia loan* is a decided authority in support of this argument. It is there expressly stated, "that prize or no prize can only be decided by the admiralty courts of that government to whom the captor belongs," and consequently, "the erecting of foreign jurisdictions elsewhere, to take cognizance thereof, is contrary to the known practice of all nations in like cases—a proceeding which no nation can
*10] admit." Collect. Jurid. That an *American is a party to the suit, can make no difference, because, if the jurisdiction does not exist, it cannot be assumed or exercised, in any case. In proof of the practice, innumerable authorities may be adduced, from which, however, the following are selected : Treaty of 1699, between *Great Britain* and *Denmark ;* of 1763, between *Great Britain, France* and *Spain ;* of 1753, between *Great Britain* and *France ;* of 1786, between the same parties ; and the several treaties between the United States and *Holland, Sweden* and *Prussia*, respectively. Harg. Law Tracts, 466 ; Lee on Capt. 238 ; Doug. 616.

(*a*) See the second separate article. (3 U. S. Stat. 76.)

If, as has already been shown, the district court is not vested with any separate power as a prize court, neither can it, on the instance side of its admiralty jurisdiction, take cognisance of the question of prize, upon any principle or usage heretofore received as law. The question of prize is to be determined by the *jus belli;* whereas, the instance court is a court of civil jurisdiction, regulated by the civil law, the Rhodian law, the Laws of Oleron, or by peculiar municipal laws and constitutions of countries, towns or cities bordering on the sea. It is not bounded by the locality of an act; but regulates its decisions by the laws peculiar to the nation by which it is constituted, in matters happening on the sea, which, if they had happened on land would have been cognisable in the common-lawcourts. 1 Bac. Abr. 629; 1 Com. Dig. tit. Admiralty, E. 12; 4 Inst. 134. But a tort on the high seas, being merged in the capture as prize, the instance court cannot have jurisdiction, unless the main question is at rest, which will never be the case, whether the libel is for restitution or condemnation. 2 Lev. 25; Carth. 474.

It is urged, however, that the captor, by his own act, in bringing the thing seized into port, and coming himself within the territory of the United States, made it necessary to proceed in the present forum. But the original act derived its quality from the intention of the seizure, which was as prize; and the law precludes any court from deciding on the incident, that had no jurisdiction of the original question. *The Case of the Silesia Loan,* Coll. Jurid. Before the bringing into port, the legality of the capture was triable only in the prize courts of France; the bringing into port was lawful by the law of nations, and if the American courts had no jurisdiction at the time of the capture, a subsequent lawful act could give none. 1 Lev. 243; 1 Sid. 367; 2 Lev. 25; Carth. 474. The cases cited by the appellant's counsel do not militate against this doctrine. The cases in 2 Saund. 259; 1 Vent. 175; Sid. 120, did not involve the question of prize; the sole controversy was, whether the taking of the vessel was piratical or not, *and whether a [*11
subsequent sale on land transferred the jurisdiction from the admiralty to the common-law courts. The observation of Justice Blackstone (3 Bl. Com. 108) is not supported by the authorities to which he refers; and evidently arose from inadvertency or inaccuracy of expression. *Palache's Case,* 4 Inst. 154; 3 Bulst. 27–9, was founded on particular statutes, which facilitated the mode of obtaining restitution of goods piratically seized; the question of prize never occurred in the investigation. Sir L. Jenkins reports a number of cases before the King in council, upon captures within the limits of the government; but they do not instance the exercise of any judicial authority in effecting restitution. If the act of bringing the thing into the territory gives any jurisdiction, it is to the sovereign, not the judicial, power. 2 Wood. 439. And the captain of the French privateer has done no act which can authorize the exercise of jurisdiction over his person. The rule authorizing the exercise of jurisdiction over persons coming within the limits of a country, has been narrowed down, by the voluntary law of nations, to cases where there is either a local allegiance or voluntary submission. To this source might be referred the right of a government to punish faults and decide controversies between strangers, or between citizens and strangers; but such state has no right over the person of a stranger, who still continues a member of his own nation. Vatt. lib. 2, § 106, 108. Local

allegiance is not due from a stranger brought in by force, or coming by license; nor, if it does exist, does it give jurisdiction over faults committed out of the country, before a residence. Vatt. lib. 4, § 92. The captors, in the present case, came hither by license, under the sanction of a treaty; and therefore, it cannot be presumed, that they intended to submit to the municipal authority, unless the presumption arises from the treaty. It does not so arise from affirmative words, and any implication is rebutted by the provision of the treaty, that they shall be at full liberty to depart. But, on the other hand, the principle on which depends the right of the country of the captors to decide, whether the property captured is lawful prize, is, briefly, because the captors are members of that country, and because it is answerable to all other states for what they do in war. 2 Ruth. Inst. 594.

2. The interference of the American courts will be a manifest violation of the 17th article of the treaty with France. The terms of the treaty are clear and explicit, that the validity of prizes shall not be questioned; and that they may come into, and go out of, the American ports, at pleasure. To decide, in opposition to a compact so unequivocal and unambiguous,
*12] *would endanger the national tranquillity, by giving a just and honorable cause of war to the French Republic.

For the *appellants*, in reply.—The arguments of the opposite counsel present three objects for investigation: 1st. Whether the treaty between France and the United States prevents any arrest of the vessel and cargo, under the authority of our government? 2d. Whether the district court is a prize court; and 3d. Whether, even if it be a prize court, the remedy, in the present case, ought not to be sought through the executive, instead of the judicial, department?

I. The 17th article of the treaty expressly extends only to "ships and goods taken by France from her enemies;" and being in the affirmative, as to enemies, it affords a strong implication of a negative as to neutrals and Americans. If, indeed, the citizens of France may keep a neutral, as a prize taken from their enemies, they may likewise, anywhere abroad, seize American property and American citizens in vessels, and our government cannot interfere, even in our own ports, to prevent their being carried away; since, according to the opposite construction, the article prevents any interference in any case. The words, however, are directly against that construction; and even were it otherwise, the absurdity and injustice of the consequences which flow from it, would demand a different construction. Vatt. p. 369; Grot. § 22, p. 365; Puff. 544, § 19; Vatt. § 282, p. 380, 381. The sense must be limited, as the subject of the compact requires; and when a case arises, in which it would be too prejudicial to take a law according to the rigor of the terms, a restrictive interpretation should be used. Vatt. § 292, p. 391; Grot. § 27, p. 361; Vatt. § 295, p. 392.

II. It is admitted, that the constitution gives to congress, the power of vesting a prize jurisdiction in the federal courts; but it is urged, that this power has not been exercised, because "all civil causes of admiralty and maritime jurisdiction," which are the terms of the investment, do not include prize causes. In examining the judicial act, however, to discover the intention of the legislature, it is plain, that civil is used, upon this occasion, in contradistinction to criminal. In other parts of the act, the word "civil"

is dropped (§§ 12, 13, 19, 21), and in the 30th section, a provision is made expressly for a case of capture. The truth is, *admiralty* is the *genus*, *instance* and *prize* courts are the *species*, comprehended in the grant of admiralty jurisdiction. Doug. 580, 579, 582, 583, 594; 1 Sid. 367; 3 T. R. 323; 1 Dall. 105–6. Lord MANSFIELD does, indeed, say, that prize is not a civil and maritime cause (Doug, 592) ; but he also says, that it is a cause of admiralty jurisdiction. It is urged, that prizes can only be made in time *of war ; but it is sufficient to observe, in answer, that however just the abstract proposition may be, it is equally clear, that prize-courts [*13 may proceed, in time of peace, for what was done in time of war. Doug. 583; Carth. 474; 4 Inst. 154; Bulst. 13; 1 Lev. 243; Hume's Hist. of Eng vol. 7, p. 431; 2 Saund. 259; 2 Lev. 25. It is further urged, that the power of declaring war, and making rules respecting captures, is vested in congress ; and that congress has made no such rules ; but surely, whether the rules were made or not (and they are proper to be established for a division of captures), the property of an enemy, in case of a war, would be lawful prize. Those rules can have nothing to do with creating a jurisdiction. Nor is it available to say, that this question results from war, and therefore, is not of civil jurisdiction : for, taking the word *civil* as opposed to the word *criminal*, the consequence does not follow ; and the distinction appears in 4 Inst., where the property was libelled *civiliter*, after an ineffectual attempt *criminaliter*.

III. In Europe, the executive is almost synonymous with the sovereign power of a state ; and generally, includes legislative and judicial authority. When, therefore, writers speak of the sovereign, it is not necessarily in exclusion of the judiciary; and it will often be found, that when the executive affords a remedy for any wrong, it is nothing more than by an exercise of its judicial authority. Such is the condition of power in that quarter of the world, where it is too commonly acquired by force or fraud, or both, and seldom by compact. In America, however, the case is widely different. Our government is founded upon compact. Sovereignty was, and is, in the people. It was intrusted by them, so far as was necessary for the purpose of forming a good government, to the federal convention; and the convention executed their trust, by effectually separating the legislative, judicial and executive powers ; which, in the contemplation of our constitution, are each a branch of the sovereignty. The well-being of the whole depends upon keeping each department within its limits. In the state government, several instances have occurred where a legislative act has been rendered inoperative, by a judicial decision that it was unconstitutional ; and even under the federal government, the judges, for the same reason, have refused to execute an act of congress.(*a*) When, in short, either branch of the government usurps that part of the sovereignty which the constitution assigns to another branch, liberty ends and tyranny commences. The constitution designates the portion of sovereignty to be exercised by the judicial department ; *and, among other attributes, devolves upon it the cognisance of "all cases of admiralty and maritime jurisdiction ;" and renders it [*14 sovereign, as to determinations upon property, whenever the property is within its reach. Those determinations must be co-extensive with the ob-

(*a*) See Hayburn's Case, 2 Dall. 409.

jects of judicial sovereignty; which, according to the nature of the objects, will be regulated by common law, by statute law, and by the law of nature and nations. It is competent to execute its decrees; and can, if necessary, raise the *posse civitatis*. To the judicial, and not to the executive, department, the citizen or subject naturally looks for determinations upon his property; and that, agreeable to known rules and settled forms, to which no other security is equal. Why, then, recur to the executive, when the property, in the present instance, is on the spot, and in the hands of the judicial officers? By what rules is the executive to judge? What forms shall it adopt? And to what tribunal, shall we appeal from an erroneous sentence. Will it not be *novi judicii, nova forma?* As in Milo's case, the eye of the lawyer will, in vain, look for *veterum consuetudinem fori, et pristinum morem judiciorum.* But can the executive give complete redress, by assessing damages; or accomplish equal and final justice, by ascertaining the rights of different claimants? Will the injured have its assistance, of course and of right, or as it may please the officers of the state? And shall even American citizens be detained prisoners in our own harbors, depending for their liberty upon the will of a secretary of state? It will not be pretended, as the foundation for such a doctrine, that the executive is more independent, and less liable to corruption, than the judicial power. And where shall be the boundary to executive interferences in questions of property, if it is admitted in the present case, which is merely a question of that description?

If the property were to be removed from, or if it had never been brought within, the reach of the judicial authority, and it should be divested by an unjust sentence abroad, then the citizen must, of necessity, avail himself of the executive authority, through the medium of negotiation, or reprisal. 1 Bl. Com. 258; 2 Ruth. Inst. 513, 15; Lee 46, 6; Sir T. Raym. 473. But when the property is here, it is incumbent on the opposite party to show, that the general jurisdiction of courts, which applies, *primâ facie*, to everything within their reach, does not apply in the particular case of the property of one neutral power captured, and brought into the ports of another neutral power. In the cases cited from Lee 204; Coll. Jur. 135, 137, 153, there had been regular proceedings in England, which the king of Prussia attempted to undo, by erecting a court of his own to revise them. Lee 238–9. And the obligations of the treaties that *have been referred to, can only affect the parties; as they are matter of positive agreement.

*15]

But even in England, the judicial power possesses the jurisdiction which is asserted to belong to the judicial power of the United States. The question is restitution or no restitution, involving the question of prize or no prize, brought forward by the captured, and not by the captor. The question of prize or no prize, is emphatically of admiralty jurisdiction, exclusively of the common law; and must be determined agreeable to the law of nations: Doug. 580, 584–5, 592, 594; Carth. 32, 474; 1 Sid. 320; 3 T. R. 344; 4 Ibid. 394–5; Skin. 59; Raym. 473. The admiralty being once properly possessed of a cause, takes cognisance of everything appertaining to it, as incident: 3 Bl. Com. 108; 6 Vin. Abr. 515; 1 Raym. 446; 2 Ruth. Inst. 594. Besides, all these cases clearly establish a distinction between a want of jurisdiction, and a dismissal of the libel for good cause. The case in 4 Inst. 154, and that of 2 Co. 3, demonstrate, that where it is proved, 1st. That the sovereign of the complainant is in amity with our sov

ereign; and 2d. That his sovereign was in amity with the sovereign of the captor; the party may sue for restitution. The admiralty of England will decide, though a foreign power issued the captor's commission: 3 Bulst. 27–9; 2 Vern. 592; Sir L. Jenk. 755.

The act of bringing the vessel into an American port, must be regarded as a voluntary election to give a jurisdiction, which they might otherwise have avoided. If the American courts have no jurisdiction, the captors avoid all jurisdiction, as they avoid that of their own country; for, the attempt by a French consul to take cognisance in our ports, can never be countenanced. But shall they keep the vessel and cargo here *ad libitum*, and Americans, as well as neutrals, wait their motions? for, it is urged, that reprisals cannot issue, until the courts of the captors have refused justice; and those courts cannot inquire into the merits, until the vessel is brought within the jurisdiction of France.

The Court, having kept the cause under advisement for several days, informed the counsel, that besides the question of jurisdiction as to the district court, another question fairly arose upon the record—whether any foreign nation had a right, without the positive stipulations of a treaty, to establish in this country, an admiralty jurisdiction for taking cognisance of prizes captured on the high seas, by its subjects or citizens, from its enemies? Though this question had not been agitated, The Court deemed it of great public importance to be decided; and meaning to decide it, they declared a desire to hear it discussed. *Du Ponceau*, however, observed, that the parties to the appeal did not conceive themselves interested in *the point; [*16
and that the French minister had given no instructions for arguing it. Upon which, Jay, Chief Justice, proceeded to deliver the following unanimous opinion:

By the Court.—The judges being decidedly of opinion, that every district court in the United States possesses all the powers of a court of admiralty, whether considered as an instance or as a prize court, and that the plea of the aforesaid appellee, Pierre Arcade Johannene, to the jurisdiction of the district court of Maryland, is insufficient: therefore, it is considered by the supreme court aforesaid, and now finally decreed and adjudged by the same, that the said plea be, and the same is hereby overruled and dismissed, and that the decree of the said district court of Maryland, founded thereon, be and the same is hereby revoked, reversed and annulled.

And the said supreme court being further clearly of opinion, that the district court of Maryland aforesaid has jurisdiction competent to inquire and to decide, whether, in the present case, restitution ought to be made to the claimants, or either of them, in whole or in part (that is, whether such restitution can be made consistently with the laws of nations and the treaties and laws of the United States); therefore, it is ordered and adjudged, that the said district court of Maryland do proceed to determine upon the libel of the said Alexander S. Glass and others, agreeable to law and right, the said plea to the jurisdiction of the said court notwithstanding.

And the said supreme court being further of opinion, that no foreign power can, of right, institute or erect any court of judicature of any kind, within the jurisdiction of the United States, but such only as may be warranted by, and be in pursuance of treaties, it is, therefore, decreed and

adjudged, that the admiralty jurisdiction which has been exercised in the United States by the consuls of France, not being so warranted, is not of right.

It is further ordered by the said supreme court, that this cause be, and it is hereby, remanded to the district court for the Maryland district, for a final decision, and that the several parties to the same do each pay their own costs.

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*17] *FEBRUARY TERM, 1795.

UNITED STATES *v.* HAMILTON.

Bail.

A defendant committed on a charge of treason is bailable.

THE prisoner had been committed upon the warrant of the district judge of Pennsylvania, charging him with high treason; and being now brought into court upon a *habeas corpus*, *Lewis* alleged, that there was not the slightest ground for the accusation brought against the prisoner, who had been committed, without ever having been heard, and without knowing the name of any witness that had been examined, or the scope of any deposition that had been taken, against him: and he moved, that the prisoner should either be discharged absolutely, or, at least, upon reasonable bail.

Rawle (the attorney of the district) admitted, that in the single case of the prisoner, there had not been a hearing before the district judge, previously to the commitment; but when the state of the country is recollected, the number of delinquents, and the urgency of the season, he presumed, that this circumstance (independently of the established character of the judge) would not be ascribed to a want of vigilance, or a spirit of oppression. He insisted, however, that the discretion vested in certain judges, relative to a commitment for crimes, by the 33d section of the judicial act (1 U. S. Stat. 91), having been exercised by the district judge, on such depositions as satisfied him, this court, having merely a concurrent authority, can only revise his decision in one of two cases: 1st. The occurrence of new matter; or 2d. A charge of misconduct—neither of which is pretended. But after stating the general character of the insurrection, he read several affidavits, with a view to establish the prisoner's agency in it; and concluded with urging, that, if the prisoner was released at all, it should be on giving satisfactory bail to take his trial in the circuit court. 4 Bl. Com. 296; 2 Hawk. 176 (*n*).

Lewis examined the affidavits produced against the prisoner, to show,
*18] that although he attended at several meetings of the *insurgents, his deportment, upon those occasions, was calculated to restore order and submission to the laws; and he added the affidavits of several of the most respectable inhabitants of the western counties, in testimony of the propriety of the prisoner's conduct throughout the insurrection.

THE COURT, after holding the subject for some days under advisement,

directed the prisoner to be admitted to bail, himself in the sum of $4000, and two sureties, each in the sum of $2000.

WILSON, Justice.—The recognisance must be taken for the defendant's appearance at the next stated circuit court. The motion for appointing a special circuit court to try offences of this description, at a place nearer to the scene in which they occurred, has not escaped our attention; and with a wish, if possible, to grant it, we have viewed the subject in every light; but hitherto the difficulties are apparently insurmountable. We will, however, state the principal ones, that the counsel may, if they please, endeavor to remove them.

1. The next circuit court is so near, that it will not be possible to commence and finish the business of the trials for treason, at a special court to be previously held; and it is very questionable, whether we can appoint a special circuit court, at a distant period, to overleap the session of the stated court. The impropriety of such an interference is the more striking, when it is recollected, that the circuit court itself, as well as the supreme court, has a power to appoint a special sessions for the trial of criminal causes. (1 U. S. Stat. 75, § 5).

2. But even if a special court were to be appointed to be held at a distant period, overleaping the stated circuit court, could an indictment found at the latter, be prosecuted and tried at the former? There is a provision, "that all business depending for trial at any special court, shall, at the close thereof, be considered as of course removed to the next stated term of the circuit court" (1 U. S. Stat. 334, § 3); but there is no power given to remit to a special court, the business depending for trial, before the said circuit court.

3. And suppose, a special circuit court were to be appointed previously to the stated court, could both be in session at the same time? Or could two grand juries be impanelled at the same time, for the same district, and both be qualified to present all the offences (including of course, the offences of treason) committed within their jurisdiction? (*a*)

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*BINGHAM, Plaintiff in error, *v.* CABOT *et al.* [*19

Evidence.—Bill of exceptions.—Divided court.

In a suit by the owner of a privateer, against a public agent of the government, to recover the proceeds of property captured, but not condemned, which went into the defendant's hands, documentary evidence, showing in what character he received the property, is admissible.

A bill of exceptions is conclusive, as to the evidence that was before the court below.

If the judgment below be reversed on the merits, but the court is divided on the question of jurisdiction, a *venire de novo* will not be awarded.

THIS was a writ of error to remove the proceedings from the Circuit Court for the district of Massachusetts; and on the return of the record, it appeared, that the defendants in error, being joint-owners of the armed ship called the Pilgrim, formerly commanded by Hugh Hill, had instituted an

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(*a*) *Lewis* and *M. Levy* (as I am informed) attempted to obviate the obstacles above suggested; but it appears, without effect, as a special circuit court was not appointed on this occasion. See the trials for treason, 2 Dall. 335–57.

action on the case against the plaintiff in error, in the circuit court for the district of Massachusetts, of June term 1794, in which a declaration was filed, containing the following counts:

1st Count. That the plaintiff in error, at St. Pierre, on the 8th of May 1779, was indebted to the defendants in error in the sum of $16,969.69, for goods sold and delivered, according to the account annexed; which account was in these words:

"William Bingham, Esq., to the owners of the privateer ship Pilgrim, commanded in the late war by Hugh Hill, on her first cruise, Dr.

1779, 8th May.	To 1000 barrels of flour he received at Martinique, or from on board the privateer Hope, Ole Heilm, master, captured by the ship Pilgrim, and carried into Martinique, previous to 8th May 1779, at 140 livres currency per barrel, livres 140,000, which sum in the currency of the United States, is	16,969	69
	Interest to 9th January 1793,	13,915	84
	Dolls.	30,885	53."

2d Count. *Quantum valebat* for 1000 barrels of flour, with an averment that they are worth $16,969.69. 3d Count. Money had and received by the plaintiff in error, to the use of the defendant in error. 4th Count. That the plaintiff in error was bailiff of the same flour, to sell and account for it to the defendants in error; with an averment that the flour had been long sold, but never accounted for. 5th Count. *Quantum valebat* for 500 barrels of the like flour, with an averment that it was worth $10,000. 6th Count. *Quantum valebat* for one undivided moiety of 1000 barrels of flour, with an averment that it was worth $10,000.

The plea of *non assumpsit* was entered to this declaration; and thereupon, issue was joined.

The material facts attached to the cause were of the following import:

*20] The Pilgrim, being on a cruise off the Rock *of Lisbon, on the 19th of November 1778, captured a brig called the Hope, Ole Heilm, commander, and put on board William Carlton, as a prize-master, who carried the supposed prize, on the 15th January 1779, into Martinique, where the plaintiff in error resided, as a public agent of the United States. On examination, it appeared, that the prize was Danish property, and that her cargo belonged to Portuguese merchants; both those nations being at peace with France and America; but there being no courts of admiralty established at that time in Martinique, competent to decide on the validity of captures as prize, made by American vessels, and the neutral master, after a long detention, on account of repairs, being solicitous to depart, the Marquis de Bouille, governor of the island (to whom authority was delegated by the constitution of the French government, to supply the deficient parts of the civil polity), made the following order, dated the 2d October 1779, which was registered in the admiralty office of the borough of St. Pierre.

"Francis Claude Amour, Marquis de Bouille, Marshal de Camp of the King's armies, commander general of the French troops, militia, fortifications and artillery, of the French windward islands; and governor and lieutenant-general of the islands of Martinique and Dominique: We do certify, that the American privateer, named the Pilgrim, having conducted into the

island of Martinique a Danish brigantine, loaded on account of the subjects of his Most Faithful Majesty, so far as appeared to us, and not on account of the subjects of the King of England, we have ordered, that the said cargo in litigation should be sold, and the freight paid to the captain of the Danish brig, out of the cargo under the care and direction of William Bingham, agent of congress: and the net proceeds of said cargo, deduction made of all other charges, should remain in the hands of said Bingham, to deliver it to whomsoever it may appertain, agreeable to the judgment and orders of congress. (Signed) BOUILLE, &c."

Before, however, the Marquis de Bouille's orders were issued, Mr. Bingham had taken the cargo of the Hope into his custody; and on the 2d of February 1779, addressed a letter to the commercial committee of congress, in which, after mentioning the capture and arrival of the prize, he states, "that upon receipt of the papers (of which he then transmitted copies) found on board, he laid them before the judge of the court of admiralty, at Martinique, who was of opinion, that neither the vessel nor cargo could, with any propriety, be molested on the high seas, by either American or French armed vessels. But (Mr. Bingham adds) that as this vessel is incapable of proceeding *on a European voyage, without great repairs, [*21
which will naturally subject her to a considerable detention; and as her cargo consists of a perishable commodity, he shall dispose of it, at Martinique, pay the master his freight, what damages he may be entitled to, and shall give him permission to take his departure. Indeed, the General insists that the cargo should be disposed of, as the island is in great want of flour; and as the sales will be more advantageous to the owners here, it may make the misfortune less heavy on the concerned. The proceeds, after paying the necessary expenses of the vessel, shall be placed (continues Mr. Bingham) to the credit of the commercial committee of congress, to assist in paying the advances which he had made at Martinique, on the public account: and he is the more inclined to convert it to this use, as he is persuaded, that congress will not have to reimburse it, until the claim of the real owner in Europe is made clear and manifest. It appeared, by an account of sales, signed by Mr. Bingham, on the 8th of May 1779, that the flour had been sold, at different periods, from the 21st of January to the 8th of May 1779, and that the net proceeds, which he placed "to the credit of the owners of prize flour," amounted to livres 107,621. 14. 6.

The owners of the Pilgrim being dissatisfied with the proceedings that had taken place in relation to the cargo of the Hope, instituted in the common pleas of Suffolk county, Massachusetts, an action of trover for the 1000 barrels of flour, in the name of William Carlton, the prize-master, against Mr. Bingham; and attached Mr. Bingham's property, in the hands of Mr. Thomas Russell, of Boston, to answer the judgment of the court. To this action (which was brought to October term 1779) the defendant pleaded not guilty, issue was thereupon joined, and judgment was rendered for the defendant. An appeal was brought to the supreme judicial court of Massachusetts, at February term 1781, by William Carlton; it was tried on the 17th February 1784; a verdict was given for Mr. Bingham, the defendant; and judgment was entered accordingly. When this action at law was commenced, Mr. Bingham, by a letter, dated at Martiniqne, the 6th of October

1779, and addressed to the commercial committee of congress, remonstrated against the proceeding, as he had acted *bonâ fide*, in his official character; and congress passed the following resolutions upon the subject:—

"November 30, 1779.

"Resolved, That Mr. Bingham's letter of the 6th of October last, with the papers inclosed therein, and marked No. 1, 2, 3, 4, together with a certified copy of his appointment to the place of continental agent, be transmitted by the president to the *legislature of the state of Massachusetts Bay, with the following letter:

*22]

"'Gentlemen—I am directed by congress to transmit to you the inclosed papers from Mr. Bingham. They contain an account of his proceedings relative to a vessel, said to be Danish property, captured by the sloop Pilgrim, and carried into Martinique, about which, as he says, a suit is now commenced against him in your superior court. Upon a full examination of the papers, you will judge of the measures which ought to be adopted, to prevent, on the one hand, injustice to individuals, and on the other, the embarrassment of agents, who are obliged to conform to the will of the ruling powers, at the place of their residence. As courts are now instituted at Martinique, for the trial of such causes, congress submit to you whether it would not be advisable to stop the suit already commenced, till judgment is obtained upon the principal question; after which, it will be in Mr. Bingham's power to discharge himself, by delivering to the true owners, the property placed in his hands for their use. If you should be of a contrary opinion, they request you to furnish Mr. Bingham's agent with the inclosed papers. I am, &c.'"

The legislature of Massachusetts taking no order on this application, congress again entered upon the subject, and on the 20th June 1780:

"Resolved, That the General of Martinique, in ordering the cargo of the brig Hope to be sold, and the money to be deposited in the hands of Mr. W. Bingham, till the legality of the capture could be proved (no courts being at that time instituted for the determining of such captures in that island), showed the strictest attention to the rights of the claimants, and the highest respect to the opinion of congress: That Mr. W. Bingham, in receiving the same, only acted in obedience to the commands of the General of Martinique, and in conformity with his duty as agent for the United States.

"Resolved, That congress will defray all the expenses that Mr. William Bingham may be put to, by reason of the suits now depending, or which may hereafter be brought against him in the state of Massachusetts Bay, on account of the brig Hope or her cargo, claimed as prize by the owners, master and mariners of the private ship of war called the Pilgrim.

"And whereas, the goods of the said William Bingham, to a very considerable amount, are attached in the said suits now depending in the hands of the factors of the said W. Bingham, to his great injury. *Resolved, that the general court of the state Massachusetts Bay, be requested to discharge the property of the said W. Bingham from the said attachment: Congress hereby pledging themselves to pay all such sums of momey, with costs of suit, as may be recovered against the said W. Bingham, in either or both the above actions. Resolved, That the navy council at Boston, be directed to give such security, in the

*23]

name of the United States, as the court may require, and to direct the counsel now employed by Mr. Bingham, in the defence of the said actions.

Such were the circumstances of the cause now under consideration, when it came to trial in the circuit court, before Justice CUSHING, an associate judge of the supreme court, alone.(*a*). Mr. Bingham's counsel offered to give the following documents in evidence to the jury: 1. Office copies, certified under the hand and seal of the secretary of state, of the papers found on board the Hope, of depositions relating to the capture, taken officially before Mr. Bingham, as a public agent; of Mr. Bingham's letter of the 2d of February 1779, and other subsequent correspondence and depositions in relation to the capture, addressed to the commercial committee of congress; and of the Marquis de Bouille's order. These documents were stitched together, and were included in one certificate from the secretary of state. 2. The account-sales of the flour at Martinique, dated the 8th of May 1779, and the account-sales of the property which had been attached in the action of trover, brought by *Carlton* v. *Bingham*. 3. The record in the inferior and superior courts of Massachusetts, in the case of *Carlton* v. *Bingham*. 4. The resolutions of congress, passed respectively on the 3d Nov. 1779, and the 20th June 1780. But the court rejected all the evidence (though it would seem from the record, that a part of it must have been admitted in the course of the plaintiff's proofs); and a bill of exceptions was tendered and allowed, in the following words:

"And the said William Bingham, being now here in court, by James Sullivan and Christopher Gore, esquires, his attorneys, the issue joined in the same case, and a jury on the same duly and legally impannelled, prays leave to file a bill of exceptions to the determination of the said court here had on the evidence, which by the said Bingham is offered in this case, and by which determination the said evidence is excluded, and the said Bingham is denied the advantage of giving the same to the jury in the same case, viz.: The several copies, attested by Thomas *Jefferson, and which are hereunto annexed, and numbered from one to [*24
eighteen inclusively; and also three other papers, numbered 23, 24, 25; all which papers had a tendency to prove, that no interest ought to be allowed by the jury, on the sum for which the plaintiffs declare, in their third count, or damages for the detention of the money therein mentioned and declared on; and by the exclusion whereof, the said Bingham does sustain manifest injury and wrong, as he conceives. And the said Bingham further files his exception to the determination of the same court, by which the papers numbered from 27 to 36, inclusively, were excluded; and which papers contain a complete record of the supreme judicial court of the commonwealth of Massachusetts, wherein William Carlton, who had been, as the said Bingham avers, and as appears by the evidence in the case, in possession of the same flour declared on in the said third count in the plaintiff's declaration, had sued in an action of trover for the same; and by which record it appears, that such proceedings were had in the same court, as

(*a*) In the caption, indeed, of the record, Justice LOWELL, the district judge, is named as present; but it is contradicted by a special entry in the margin, in these words:— "N. B. Judge Lowell did not sit in this cause."

would fully show, as the said Bingham conceives, that the said plaintiffs had no legal right to change the same action, after the judgment in the same record specified, into an action of *assumpsit*, or as principals to implead the said Bingham again, after the cause of action had been tried, adjudged and determined, in an action of trover, wherein the special bailiffs of the plaintiffs, as the said Bingham avers, in this suit had so impleaded the said Bingham to verdict and judgment in the same cause, and for the same cause of action in. And that the determination to reject the same papers is wrong—because that if the same papers are admitted to be given to the jury, the evidence therein contained will have a legal tendency to lessen the damages, if not wholly defeat the action of the plaintiffs. And the said Bingham further files in this his bill of exceptions, that the court did reject and refuse to have read to the jury in the trial, as evidence, a resolution of the congress of the United States of America, of the thirteenth of November 1779; also another resolution of the same congress, of the twentieth of June 1780, both which were concerning the subject-matter of the suit. Wherefore, that justice, by due process of law, may be done, in this case, the said Bingham, by the undersigned his counsel, prays the court here, that this his bill of exceptions may be filed and certified as the law directs.

JA. SULLIVAN,
C. GORE.

"June 16, 1794. Allowed to be filed, per
WM. CUSHING,
Judge of said circuit court."

*25] *A verdict was then given for the defendant in error, upon the third count, for money had and received, damages, $29,780.16, and for the plaintiff in error, on all the other counts: and thereupon, judgment was rendered for damages and costs.

A motion was made on behalf of the plaintiff in error, for a new trial, on two grounds: 1. Excessive damages: and 2. A misdirection in the judge's charge to the jury; the judge having directed the jury, "that the law was such, that on the evidence offered in the cause, the plaintiffs ought to recover; whereas, the evidence given was such as clearly proved, that the flour mentioned in the third count, was the joint property of the plaintiffs below, as they were owners of the ship Pilgrim, and of the masters, mariners and company on board the same ship; to wit, of the plaintiffs below, and Hugh Hill and others, jointly: by which evidence, if any contract was proved in the case, it was a contract between the said Bingham with the plaintiffs and divers other persons jointly, who are not plaintiffs, or mentioned in the writ, and who are now alive within the United States." But a new trial was refused.

On the return of the record (to which were annexed several depositions and papers produced in the court below, as well as the papers referred to in the bill of exceptions), the following errors were assigned; the defendant in error pleaded *in nullo est erratum*, and issue was thereupon joined.

1. That judgment had been given for the plaintiff, instead of the defendant below, on the 3d count.

2. That the circuit court, proceeding as a court of common law, in an action on the case, for money had and received, &c., had no jurisdiction of

the cause; the question, as it appears on the record, being a question of prize or no prize, or wholly dependent thereon; and as such, it was exclusively of admiralty jurisdiction.

3. That the evidence referred to in the bill of exceptions, ought not to have been rejected on the trial of the cause."

The argument (which commenced on the 15th of February 1795) was conducted by *Bradford* (Attorney-General of the United States) and *Lewis*, for the plaintiff in error; and by *Ingersoll*, *Dexter* and *E. Tilghman*, for the defendant in error.

THE COURT desiring the counsel, in the first instance, to discuss the question of jurisdiction, the case presents itself under the following general heads. 1. Exceptions to the jurisdiction. 2. Exceptions to the record.

I. The exceptions to the jurisdiction. For the *plaintiff* in error.—The subject-matter of the action is prize or no prize; and it is, with all its consequences, exclusively of admiralty jurisdiction. The action is not trespass, *for a tort in taking the goods; but it is an action of *assumpsit;* and the plaintiffs below cannot make out a right to recover from the defendant, [*26 who is charged as receiver and agent, unless they first prove the vessel to be a prize. They must show to whom the property belonged; and if the court adjudge, that the proceeds of the sales was money had and received to the use of the plaintiff; it is, in effect, pronouncing a sentence, that the vessel (which has not even yet been condemned) was a prize. Carth. 474; Doug. 596 n.; 3 T. R. 344; 4 Ibid. 382, 394; 1 Dall. 221; 2 Ibid.

For the *defendant* in error.—It is true, as a general proposition, that all prize causes and their incidents are of admiralty jurisdiction; but there are some limitations to the operation of the rule. In the present case, there is, in fact, no question of prize; but even in cases where that question is naturally involved, the courts of common law have, incidentally, tried and decided it; as in cases upon policies of insurance and ransom. 3 Burr. 1734; Doug. 579, 580; 2 Lev. 25; 1 Vent. 173; 4 Inst. 138; 1 Raym. 271; 3 Woodes. 450, 3; 2 Saund. 259; 2 Burr. 683, 693; 1 Wils. 229; Doug. 310–14; 4 T. R. 393; 1 H. Bl. 522. In a variety of cases, likewise, the subject may be traced to an original question of prize, and yet the admiralty can take no cognisance of it. Suppose, for instance, a captor sells his prize; he may, surely, bring an action at common law for the purchase-money: or, if a tailor should detain a man's coat, it will be no answer to an action of trover, that the cloth was taken in a prize. Indeed, it may be stated, generally, that whenever the question of prize is at rest, the admiralty jurisdiction ceases. 4 T. R. 432; 2 Dall. 174; 1 Wils. 211; 4 T. R. 393, arg.; 3 T. R. 342, 348; 1 Burr. 8, 526; Doug. 572, 91. The exclusive jurisdiction of the admiralty does not, then, depend on the property having been originally taken as prize; but on the nature of the controversy arising on the high seas, affecting, usually, the rights and interests of different states; and consequently, depending on principles which ought to be decided by the law of nations, and not by the municipal law of either country. It is not contended, however, that in every cause which appears to be between

citizen and citizen, the courts of common law are always to decide; for if the general nature of the controversy may involve foreign subjects, and foreign rights, the admiralty is the regular and appropriate tribunal. The position extends no further, than to those cases, which commonly occur on land, between citizen and citizen (though originating in a capture at sea) and *27] with respect to which the admiralty has not any, much less an *exclusive, jurisdiction. Such is the cause now litigated. It is a transaction on land, between the captors of the vessel, and their agent. The original owners are not, and could not be, parties to the suit; and their rights cannot be set up, to justify the plaintiff in error, who does not claim under them, nor act by their authority. Then, it is to be observed, that there is nothing upon the record, to show that the controversy grew out of a prize cause. Though the declaration states the plaintiffs to be owners of the privateer, it does not state that the property in dispute was captured by her; and the verdict is only upon the third count in the declaration (the count for money had and received), and all the other counts, which refer to the capture, are put, by the finding of the jury, entirely out of the case.(a) The third count does not refer to the account

(a) Wilson, Justice.—The bill of exceptions states the evidence offered and rejected; and it forms a part of the record. Besides, this is a question of jurisdiction: and was not jurisdiction as much exercised in relation to the counts which were disposed of, in favor of the defendant below, as in relation to the count which was disposed of in favor of the plaintiffs?

Paterson, Justice.—Is it contended, that the account annexed to the declaration does not support the third count, on which the verdict is given; and that we cannot take notice of it?

Dexter, for the defendant in error.—The bill of exceptions does not include all the interpolated evidence, and refers to evidence not transmitted: it does not state what was given in evidence, but only what was rejected. With respect to the account annexed, it is only considered as making a part of the record, in relation to those counts of the declaration which refer to it; and all those counts are put out of the case by the finding of the jury. The third count does not refer to it; and, indeed, if there had only been a single count for money had and received, the account would not have been annexed, agreeable to the practice in the courts of Massachusetts.

Paterson, Justice.—What is to be regarded as the record, seems to be a preliminary point, material to be settled; and we must either adopt the peculiar practice of Massachusetts, or pursue the general practice of the common law.

Dexter.—It is the practice in Massachusetts, to accompany an exemplification, with all the written evidence and papers; but the doings of the parties, and of the court, are alone to be taken as constituting the record. The oral testimony cannot be transmitted; and yet that may be more essential to the issue, than what appears in writing.

Bradford, for the plaintiff in error.—The facts must be considered as they appear upon the whole record; and by the exhibit of the plaintiffs themselves, annexed to the declaration, it appears to be a question of prize.

Cushing, Justice.—There was other evidence (some of it parol) given on the trial, besides what now appears on the record. If, then, we suppose that contradictory evidence may be given to the jury, and that they have a right to believe the testimony of one witness, and to reject the testimony of another, I am at a loss to conceive, how the court could, under such circumstances, state what was proved on the trial. But with respect to the record, the practice of Massachusetts is plain and obvious. The declaration and pleadings in every suit, are entered in a book; and all the papers and exhibits

*annexed to the declaration ; and therefore, that account cannot be taken into view, to show that the question depends on a capture as prize. The depositions and papers arbitrarily connected with the record by the clerk below (and which do not comprise all the evidence given on the trial), are not legally a part of the record ; they cannot be resorted to, in order to ascertain the nature of the controversy ; but must be rejected as surplusage : and this court cannot look at the statement in the bill of exceptions, to discover the complexion of the cause ; for the only point to be decided in that respect, is—whether the court below was, or was not, right, in rejecting the evidence that was offered. Bull. N. P. 315 ; 3 Burr. 1745. Besides, this court cannot reverse the judgment for error in fact (1 U. S. Stat. 84, § 22) ; and therefore, they cannot, in the present case, any more than in the case of a special verdict, infer a fact, or take notice of any fact resulting from the depositions and papers annexed to the record, which the jury has not expressly found.(a) 3 Bl. Com. 407. The proof on the third count, may have been of money received to the plaintiff's use, independent of the account annexed, or of any question relating to the prize ; and as the court will presume everything that they reasonably and lawfully can, in support of a verdict and judgment, the sum given in damages will be taken to reach the justice of the case. 1 Wils. 1255 ; 3 Burr. 1786 ; 1 Str. 608 ; 9 Vin. Abr. 598 ; 10 Ibid. 1, pl. 1. But surely, it is now too late, to make the exception to the jurisdiction. 4 Burr. 2037. The defendant below ought to have brought the question forward, by way of plea ; or, at least, if it appeared on the evidence, he should have required the opinion of the court, in the charge to the jury ; but whenever evidence is allowed to go to a jury, without exception, the verdict is conclusive ; and the evidence can never afterwards be examined on a writ of error. 2 Lutw. 1566 ; Holt 301. So, what is pleadable in abatement, is not assignable as error. 4 Burr. 2037. Taking, therefore, a full and candid view of the case, as it appears upon what may legally be denominated the record, it is not a case of prize, but a case of principal and factor. The plaintiff in error obtained possession of the flour, under the authority, and as the agent, of the defendants in error : he cannot dispute that authority ; the flour, in his possession, belonged to his principal ; and when it was sold, the money was the money of his principal. This doctrine does not exclude the idea of an investigation of the lawfulness of the capture, at a proper time, between proper parties, and before *a proper tribunal. If a competent court of admiralty had been established at Martinique, an immediate proceeding there, [*29 would have obviated every difficulty ; and it ought not to be urged by the plaintiff in error, that the captors have never since proceeded to condemn the vessel, as it was by his act they were deprived of the ship's papers and other means for doing so. But even an American court of admiralty may take cognisance of the question of prize ; and in the hands of the captors, the money would always be liable to the claims of the captured. To maintain the present action, however, a special property is sufficient ; and the

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are filed in the clerk's office. The book is alone deemed the record; and the papers and exhibits are only referred to, for the purpose of ascertaining what writ issued, or what depositions have been taken.

(a) Paterson, Justice.—The court cannot infer a fact from a fact; but if the fact is on the record, we may infer the law.

captors have a special property before the condemnation. There are, indeed, many instances of prizes being brought into court and sold, before they were condemned; upon the general principle, that the property is vested in the captor, whenever the original owner has lost the *spes recuperandi.* But when the plaintiff in error sold the prize goods, without and adjudication, at a place where no court of admiralty existed, the defendants in error had no remedy against him, but at common law. It does not even appear on the record, that the plaintiff in error took possession of the goods by order of the Marquis de Bouille; but at all events, it is clear, that the Marquis had no right to examine the validity of the prize; while, on the other hand, the prize-master had a right, under the 17th article of the treaty with France, to bring the prize from Martinique to America.

For the *plaintiff* in error, in reply.—There is no magic in the word "record," to preclude the court from exercising their senses and judgment, upon the inspection and construction of an instrument, which the judge and clerk of the circuit court have officially certified to be an exemplification of all the proceedings in the cause. With what justice, can it be said, that the papers forming a part of this exemplification, have no relation to the controversy? Are the commission of the privateer, the account-sales of the prize goods, and the order of the Marquis de Bouille, entirely unconnected with the demand of the plaintiffs, and the answer of the defendant? The great, the only point in controversy, was—whether, under every circumstance of the case, Mr. Bingham was responsible to the owners of the privateer, for certain goods, which the privateer had captured as prize? The declaration, in every count, claims the same sum that appears in the account-sales, as the proceeds of the prize-goods; and the reasons urged on the motion for a new trial show, that the object of the third count, on which the verdict had been given, was the same as the object of the other counts, to which alone, it has been said, the account-sales apply. But it is also contended, that the court can infer nothing from all these documents; since they "are to be considered, *30] not as facts, but only *as the evidence of facts, proper for a jury, exclusively, to decide upon." The truth, however, is, that it is the peculiar province of the court to construe deeds and papers, and to declare their legal operation. It is, surely, extravagant, to assert, that the court are incompetent to determine the meaning and effect of the privateer's commission, or the Marquis de Bouille's order. If it satisfactorily appears, that all the proceedings and facts which belong to the cause, have been returned, whether the return is according to the technical precision of Westminster Hall, or the informal practice of the courts of Massachusetts, being judicially here, it must be noticed, in all its parts, by the court. The only general question, therefore, upon the point of jurisdiction, is—whether from all the facts, spread throughout the proceedings of the circuit court, the cause of action sufficiently appears?

And a summary of the evidence on the record will demonstrate that it is a prize cause. 1. The plaintiffs sue as owners of the privateer Pilgrim. This raises a legal presumption that their whole demand is in that character; and that it must relate to some transaction of the privateer. 2. The account annexed to the declaration corroborates and confirms that presumption. It states expressly, that the suit is brought to recover the proceeds of flour

captured by the Pilgrim; and whether it is usual, or not, to annex such an account to an action simply for money had and received, in the present instance, it was manifestly intended to exhibit the whole of the plaintiff's claim. 3. The commission of this privateer, and the papers taken on board the prize, are the very exhibits to be produced on a libel for condemnation; and prove, unequivocally, that the cause is of admiralty jurisdiction. 4. The order of the Marquis de Bouille, which was registered in the admiralty of Martinique, shows the tenure by which Mr. Bingham held the property; that is, as a deposit of the proceeds of goods taken as prize, on the high seas. Hence, from the commencement to the close of the transaction, as it appears on the return to the writ of error, nothing is to be traced as the cause of action, but a capture as prize, and its consequences. (*a*)

But in order to escape from the pressure of this proof, the most extraordinary subterfuges are employed; and the principle, that the question of prize belongs exclusively to the admiralty jurisdiction, is so refined upon, as to be rendered *insensible and illusory. Sometimes, it is urged, that the plaintiff in error has tortiously possessed himself of the property of the defendants; sometimes, in direct contradiction to that idea, he is considered as their agent or factor; and finally, pursuing a distinct course from either, it has been said, that there are neutrals concerned, who alone are entitled to dispute the validity of the prize with the defendants in error. The ground taken by the plaintiff in error is, on the other hand, clear, consistent and simple—it is merely this, that the defendant below received the property from the Marquis de Bouille, as his agent, in the first instance, in trust, "to be delivered to whomsoever it may appertain, agreeable to the judgment of congress." The trust, therefore, constituted Mr. Bingham the eventual agent of those persons only to whom the property really belonged —of the defendants in error, it they could show it was lawful prize; but if not, the legal promise resulted to the original owners. As far as the Marquis de Bouille could, he had determined the property to be neutral; and everything that is now said by the defendants in error, might be said with, at least, equal force, by the neutral claimants, to render Mr. Bingham responsible to them. Until, therefore, the validity of the prize is established, the object of his trust cannot be ascertained; and the validity of the prize can only be established in a court of admiralty. [*31

Thus, the fallacy of the opposite argument is exposed, the moment it is considered, that there was no express promise of the plaintiff in error to account to the defendants; for if such a promise had been made, the question of prize would be merged in the *assumpsit;* and it is conceded, that an action at common law might have been maintained (as in *Henderson* v. *Clarkson*, 2 Dall. 174), unless a neutral claimant interposed, and forbade the payment. The case of *Wemys* v. *Linzee*, Doug. 310, has been considerably shaken by the case of *Home* v. *Camden*, 1 H. Bl. 476, where a court of

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(*a*) PATERSON, Justice.—Does it appear from anything, besides the Marquis de Bouille's order, that the cargo was converted into cash?

Bradford.—The deposition of Stephen Webb states, that on behalf of the defendants in error, he made a demand on Mr. Bingham for the money, as the proceeds of the flour captured by the Pilgrim; to which that gentleman answered, "that he had taken the property for the use of the government of the United States."

admiralty was finally considered as the proper jurisdiction for effectuating an admiralty sentence ; but even the former case, properly taken, affords no support to the opposite doctrine ; for it proceeded entirely upon a construction of the prize statute of England. 1 H. Bl. 522. The prize-agent is created under that statute; he is not compellable to make distribution, until the prize has been condemned (when there is a vested right in the captors, 1 Wils. 211), and all the circumstances show, that there has been a condemnation, before the action was brought, though the fact is not mentioned in the report. On a writ of error, in the case of *Home* v. *Camden*, 4 T. R. 382, the judgment was reversed ; because the prize act did not necessarily take away
*32] the jurisdiction of the admiralty, while it was the foundation *of all the common-law jurisdiction upon the subject. In arguing that writ of error, the counsel urged, that "in no instance can any adverse action be maintained at law, for the proceeds of prize, until the demand has been liquidated by the sentence of the proper court of jurisdiction :" 4 T. R. 385. And Judge Shippen, in a late important decision (*Ross et al.* v. *Rittenhouse*, 2 Dall. 160), reasons upon, and affirms the same proposition. Nor is it material, whether neutrals and foreigners are concerned, or not ; for it is the nature of the question, a question of prize, and not the character of the parties to the controversy, that establishes the admiralty jurisdiction. But even on this point, it is unfortunate for the opposite position, that all the cases cited (*Le Caux* v. *Eden*, *Lindo* v. *Rodney*, *Rous* v. *Hassard*) are cases between subjects of the same sovereign. Doug. 587. But it has been likewise urged, that it is now too late to except to the jurisdiction of the circuit court : to which, it is answered, that the question could not be made, on the count for money had and received, until the nature and evidence of the demand were exhibited, nor was it necessary to require the opinion of the judge in his charge to the jury ; since, a defect of jurisdiction must always be noticed, whenever it appears in the proceedings.(*a*)

On the 27th of February, the court delivered their opinion to the following effect :

Paterson, Justice.—Considering, as I do, that all the papers transmitted from the circuit court, upon a return to the writ of error, form a part of the record in this cause, I am clearly of opinion, that the subject-matter of the controversy is fully and exclusively of admiralty jurisdiction.

Iredell, Justice.—I find it difficult, to form an opinion on the question of jurisdiction, at this stage of the cause. I concur in thinking, however, that all the papers, which accompany the record, should be considered as a

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(*a*) Cushing, Justice.—Could not a defect of jurisdiction be taken advantage of, on the general issue?

Bradford.—Yes: but should the party choose to avoid taking advantage of it on the trial, the court is bound to take notice of it, if, at any time, it appears on the record.

Paterson, Justice.—That is, certainly, the law, if the defect of jurisdiction is apparent on the record. We are now inquiring whether it does so appear.[1]

[1] The federal courts being courts of limited, not of general, jurisdiction, if the absence, of jurisdiction in the court below appears, in any way, upon the record, the supreme court is bound to reverse, and direct a dismissal of the cause. Scott *v.* Sandford, 19 How. 393: and see United States *v.* Huckabee, 16 Wall. 414.

part of it; and in relation to the original suit, it appears to me, that on the evidence exhibited by Mr. Bingham, to show that he acted under the orders of the Marquis de Bouille, the judge should have charged, and the jury should have found, that he was not responsible to the plaintiffs.

But still, I am not ready, at this moment, to decide, that *the circuit court had no jurisdiction. Suppose, the plaintiffs below had [*33 expressly stated in their declaration, that their cause of action was a capture as prize; the court would, probably, have directed a nonsuit; and yet, if the plaintiffs had persisted in answering, when called, the jury must have given a verdict. Suppose, again, that the controversy had appeared, from the defendant's evidence, to turn entirely upon the question of prize, the court could not, I conceive (though I speak here with great diffidence), direct the plaintiffs to be nonsuited, merely on the defendant's evidence; and unless a juror had been withdrawn by consent, a verdict must also have been given in this event. It will not be sufficient to remark, that the court might charge the jury to find for the defendant; because, though the jury will generally respect the sentiments of the court on points of law, they are not bound to deliver a verdict conformable to them.[1] From these, and other considerations, I do not find myself at liberty to decide against the jurisdiction of the circuit court; though, I repeat, that the jury ought to have been let in to give a verdict in favor of the defendant.

Wilson, Justice.—From the proceedings laid before the court, it appears clearly to my mind, that the question on which the cause must be decided, is exclusively of admiralty jurisdiction.

Cushing, Justice.—It does not appear to me, from any part of the record, that the circuit court had not jurisdiction on the third count in the declaration. The papers and depositions that have been transmitted, were, no doubt, produced upon the trial; and I agree, that they ought to be regarded as a part of the record. But we are not bound to receive for truth, everything which they allege; nor, indeed, can we give any of their statements the validity and force of a fact; since they only amount to evidence; and it is the peculiar and exclusive province of the jury to infer facts from the evidence. That the court had not jurisdiction on those counts, which seem to refer to a question of prize, is no reason for excluding a jurisdiction upon the count, which has no such reference. The contract might be of a different nature; and the parol testimony (which does not appear, in any shape, on the record) might have supported it.

The Court, being thus equally divided in their opinions, on the exception to the jurisdiction, directed the counsel to proceed to the discussion of—

II. The exceptions to the record. For the *plaintiff* in error.—The exceptions to the record may be classed in the following manner: 1st. That there was *not a court competent to try the cause, and render judgment [*34 therein. It appears by the memorandum in the margin of the record, that only one judge sat on the trial and decision, though the district judge was actually present; whereas, the act of congress requires two judges to constitute a circuit court (1 U. S. Stat. 74, § 4; Ibid. 333, § 1), except in

[1] See note to the case of Georgia *v.* Brailsford, *ante*, p. 4.

certain specific cases, where the latter act empowers one judge of the supreme court to hold the circuit court alone. But as the general constitution of the court requires two judges, and two judges were actually present, the reason for one only sitting on the cause, should appear on the record to be such as the law allows.

2d. That the action is brought for money had and received, &c.; and if any such action would lie, all who are interested must join in bringing it; whereas, there were several other joint owners of the privateer's prizes (the captors) who are not parties to the suit. Journ. of Cong. vol. 2, p. 107. In trespass, this exception must be pleaded in abatement;[1] but in *assumpsit*, it may be taken advantage of at the trial. Bull. N. P. 34, 152; 2 Str. 820; Gilb. L. Ev. 106. In the present case, the plaintiffs waived all tort; and whatever promise the law raised, was a promise to all interested in the property or its proceeds; which included the mariners, as well as the owners of the privateer. But even if the action could be maintained by the owners of the privateer only; yet, the third count does not state the promise to be to all the owners. A person now dead was a joint owner; but the promise is stated to be made to John Cabot, the surviving partner, and not to J. & A. Cabot, in the lifetime of A., &c.

3d. That a variety of papers and depositions offered in evidence by the plaintiff in error (and some of which had actually been given in evidence in behalf of the defendant in error), together with certain resolutions of congress, and the exemplification of the record in the former suit of *Carlton* v. *Bingham*, had been rejected; and if any one of them was improperly rejected, the judgment below must be reversed. The objection to admit those documents must rest either upon the form of authentication or upon the nature of their contents. Those which had been officially deposited in the secretary of state's office were certified in the form prescribed by the act of congress (1 U. S. Stat. 122); the record of the action of *Carlton* v. *Bingham* was an exemplification under the seal of the proper court; the resolutions of congress were formally extracted and certified from the journals; and the whole evidently related to the subject in controversy. Mr. Bingham was a mere stakeholder; and an indemnity, at least, should have been tendered, before the property was taken from him. But whenever the
*35] question of damages arose, it was material to show that he *had acted throughout the business with fidelity, as a public agent, with the approbation of congress, and in conformity to the trust reposed in him by the Marquis de Bouille, which did not allow him to pay over the money until a right to it was established by deciding the question of prize.(*a*) He could only, therefore, defend himself, by showing all the correspondence and

(*a*) The question might, perhaps, have been tried by a monition issuing to Mr. Bingham, from the admiralty of Martinique, on which a decree would be binding upon all the world. See the argument of Sir William Scott, in 3 T. R. 329; and Judge Buller's opinion, p. 346. Besides, it appears, that the *arret* of the French government, authorizing the French courts of admiralty to try and determine captures made by Americans, was promulged immediately after the prize had been consigned to Mr. Bingham's care. Journ. Cong. vol. 5, p. 449–450.

[1] Deal *v.* Bogue, 20 Penn. St. 228; Backenstoss *v.* Stahler, 33 Id. 251. It is otherwise, in replevin. Reinheimer *v.* Hemingway, 35 Id. 432.

proceedings as they occurred. In all mercantile cases, indeed, the correspondence of an agent is admitted to show the real complexion of the transaction; and this is, certainly, the first instance, in which a court has refused to allow the acts or ordinances of congress to be read in evidence. With respect to the record of *Carlton* v. *Bingham*, it might not, perhaps, be regular to give it in evidence, as a bar to the subsequent action, unless it was pleaded: but on the present occasion, it was only offered to show that other persons had sued for the same thing; that Mr. Bingham was, in fact, a mere stakeholder; and that, therefore, he ought not to deliver the property to any one, until the legal ownership was established, nor be compelled to pay damages or interest for the detention, whoever might be the owner. A verdict in another cause may be given in evidence, though the parties are not the same, if the defendant was bailiff or agent of the party now suing. Gilb. 35. So, a common carrier may maintain trover for the principal or owner of the goods; and a verdict in that action may be given in evidence, as conclusive against the principal, in an action brought by him against the carrier. 2 Espinasse, 335; Bull. N. P. 33.

For the *defendants* in error.—It must be premised, that the bill of exceptions is not fairly drawn, since it omits to state the evidence on behalf of the plaintiffs below, and therefore, does not bring the points in the cause fully before the court. On a writ of error, however, facts are not to be considered (3 Bl. Com. 407); and from the statement in a bill of exceptions, the court will infer nothing. Bull. N. P. 316; 2 T. R. 55, 125. But to proceed to the exceptions in their order.

1st Exception. The court was constituted agreeable to the provisions of the acts of congress. It is stated on the record, that the district judge did not sit in the cause; whether he was interested or not is a fact; and from his not sitting, the court will presume that he was interested. 1 Str. 129.

*By the Court.—This exception need not be further answered. We are perfectly clear in the opinion, that although the district judge was on the bench, yet, if he did not sit in the cause, he was absent, in contemplation of law; and that the case otherwise comes within the provisions of the acts of congress. [*36

2d Exception. It cannot be made a question on this record, that all the proper plaintiffs were not joined in the action; since the jury have found the *assumpsit* as it was laid in the declaration. Besides, there is nothing to show, that there were any other parties; the owners and captors might have been the same; or the owners, by a contract with their mariners (which could not be affected by the prize resolutions of congress), might have entitled themselves to the whole of the prizes. The statement of the fact, on the motion for a new trial, is merely the allegation of the interested party, contradicted by the verdict, and the rejection of the motion.

3d Exception. The court below was right in rejecting the evidence offered by the plaintiff in error. That the papers were offered *en masse*, was his fault; and even if some of them should be deemed good evidence, all must be admitted, or none. But Mr. Bingham's own letters to congress, and the correspondence with his counsel, could not be evidence, for he was a party. The Marquis de Bouille's certificate, which has been called an

order, is nothing more than a certificate that he had previously given the order to which it refers, and it had been given in evidence by the plaintiffs. But there is no proof that even this certificate is the act of the Marquis de Bouille; for the secretary of state only certifies, that the original of the office-copy is on his files; and there is no evidence that the original was signed by the Marquis. Being, however, merely the statement of a pre-existing fact, and not the exemplification of a record, certified by a regular officer, it should be proved, like every other fact, in the course of a judicial inquiry, by the oath of a competent witness: the bare certificate of the Marquis de Bouille cannot be allowed as proof of a fact, any more than the certificate of any other respectable individual. Yet, admitting that the Marquis signed the certificate, and that the certificate is competent evidence of the fact, it was enough, to justify the rejection, that it could have no legal effect to prevent the plaintiffs below from recovering; for the Marquis de Bouille's order merely authorized a sale of the prize-goods, which the plaintiffs never impeached; but on the contrary, presuming the sale to be lawful, they brought an action of *assumpsit*, instead of an action of trespass or trover. Though he might order a sale, the Marquis could have no power
*37] *to adjudge who should enjoy the benefit, nor to compel Mr. Bingham to retain the money from its real owners. Besides, it does not appear, that the property came into Mr. Bingham's hands, in consequence of the act of the Marquis de Bouille, nor that the Marquis ever had possession of it. The Marquis directs the proceeds to be retained, liable to the order of congress: but this could give no jurisdiction to congress upon the subject; and congress had, of itself, no right to decide to whom payment should be made. The act of the Marquis is, therefore, merely void; and leaves the question, as to Mr. Bingham, precisely where it stood, before the order was written.

The resolutions of congress were also an improper kind of evidence to be admitted on the issue between the parties; particularly, after congress had become interested, by promising indemnification. They were not in the nature of a law, or rule of conduct, commanding any particular act to be done by Mr. Bingham; they were framed subsequently to his act; and though they appeared, *ex post facto*, as to the sale of the prize-goods, they neither commanded that sale, nor ordered or approved the detention of the proceeds, which alone constitutes the ground of the present demand.(*a*) But even if congress had undertaken to issue such orders, their authority to do so might reasonably be questioned. That body had power to control the operations of war; and as an incident of war, might lawfully decide, conformable to its appellate jurisdiction, the question of prize or no prize. But here was no original suit, no process pending, no parties before congress, in relation to that point; and in relation to the private controversy between

(*a*) PATERSON, Justice.—Does not the subsequent approbation of congress amount to the same thing as if they had issued a precedent order?

Dexter.—In some cases, that principle operates. But congress had not competent authority to protect Mr. Bingham, in the present instance, either by issuing a previous order, or by expressing a subsequent approbation. If an act, originally wrong, gave a party the right to recover damages, no resolution of congress could, retrospectively, affect that right.

the captors and their agent, congress possessed no authority either to legislate or adjudicate. Supposing, however, for a moment, that they had authority to decide, they have not exercised it; they have barely expressed an opinion; and can the opinion of any man, or assemblage of men, be given in evidence? The court had a right to judge, not only whether the evidence comes from a proper source, but also whether it applied to the fact in issue: for even a deed is not evidence, unless it has some relation to the matter in dispute.[1] And if the resolutions of congress were only offered in mitigation of damages, the objection remained. If not proper on the main question, they were not *proper on any question in the cause; and on the merits, it may be remarked, that although no interest should be charged, where money is retained by a party, upon any legal compulsion, or with the consent of the claimants, there was no restraint imposed upon Mr. Bingham by the Marquis de Bouille's order, nor is any consent pretended. [*38

As to the record of the action of trover, *Carlton* v. *Bingham*, it was not pleaded: and therefore, could not be a bar to the present suit. Neither could it be evidence; for a verdict in *trover* is not evidence in *assumpsit*. This appears from the very nature of the actions; the former depending on the proof of a wrongful act, and the latter upon a contract, express or implied. The action of trover failed, because the sale of the goods was not proved to be unlawful or tortious. 4 Bac. Abr. 60–1; 3 Mod. 166; Vin. Abr. tit. Evidence, 68; 4 Ibid. 23, pl. 31.

For the *plaintiff* in error, in reply.—I. It is objected, that the bill of exceptions does not state the evidence given on the trial for the plaintiffs below. But it does not appear, that they gave any evidence more than what the record exhibits. The statute says, that the party aggrieved shall propose his exceptions to the opinion of the court; but there is, surely, no occasion to insert any part of the evidence, which is not material to the point of exception. 2 Inst. 427.

By the Court.—It is exceedingly clear, that the bill of exceptions is conclusive upon this court. We cannot presume or suspect that any material part of the evidence is omitted. On this objection, therefore, nothing now need be added.(*a*)

2. It is objected, that the papers from the office of the secretary of state were not proper evidence; and that though some were good, they could not be received, as the whole were offered *en masse*. The act of congress, however (15th Sept. 1789), makes copies under the official seal of the secretary as valid in proof as the originals; and it is no reason for rejecting the papers, when offered by the defendant, that they, or a part of them, had been previously given in evidence by the plaintiffs. The court, too, might have separated those that were evidence from the rest. As to the contents of the

(*a*) Cushing, Justice, did not seem to coincide in this opinion, but the other three judges were decided.

[1] See Faulkner *v.* Eddy, 1 Binn. 188; Peters *v.* Condron, 2 S. & R. 80; Healy *v.* Moul, 5 Id. 181; Hook *v.* Long, 10 Id. 9; Kennedy *v.* Speer, 3 Watts 95; Murphy *v.* Lloyd, 3 Whart. 538; Meals *v.* Brandon, 16 Penn. St. 220; Schrack *v.* Zubler, 34 Id. 38.

papers: the letters of Mr. Bingham were material to show that he acted as the public agent of congress; that, as such, he had taken depositions and transmitted the ship's papers, and that he had accounted to congress for the property. The correspondence with his counsel merely shows that his
*39] effects had been attached *on account of this demand; and under particular circumstances, the party's own acts are evidence in his favor. 12 Vin. Abr. 24, p. 34, 35; 2 Eq. Abr. 409. The Marquis de Bouille's order, given in evidence by the plaintiffs, was only a translation, while the French original, offered by the defendant, was rejected. The certificate of a chief executive magistrate, is good evidence, without an oath. 3 Bl. Com. 333. The certificate would prove, that the cause was entirely of admiralty jurisdiction; and whether the certificate was *ex post facto*, or not, the jury ought to decide. The 17th article of the French treaty relates to captures from enemies; but this was a capture from a neutral; so the governor had a right to interfere. The resolutions of congress are stated in the bill of exceptions to be concerning the subject-matter of the cause; and it must be presumed, that the resolutions were sufficiently proved. The record of *Carlton* v. *Bingham* (when Carlton sued as bailiff to the owners) ought certainly to have been admitted in mitigation of damages, as it shows that Mr. Bingham could not have paid the money, with safety, to the present claimants, until the question of prize was determined. 4 Co. 94 *b*.

The judges, after some advisement, delivered their opinions, *seriatim*.

Paterson, Justice.—I am clearly of opinion, that the certificate of the Marquis de Bouille, registered in the Admiralty of Martinique, ought to have been admitted as evidence, upon the trial of this cause. He was governor of the island, possessing a high executive and superintending control; and we must presume, that he acted, on this occasion, with legitimate authority.

Those letters which were written to congress by Mr. Bingham, at the time of the transaction, should, likewise, in my opinion, have been submitted to the jury. On the arrival of the captured vessel, the governor might have awarded absolute restitution: but choosing to adopt a middle course, he directed the cargo to be sold, and the proceeds to remain in the hands of Mr. Bingham, as the agent of congress, until congress should instruct him how to act. In the character of a public agent, therefore, Mr. Bingham received the property; and his contemporaneous correspondence on the subject, in that character, with the American government, was, certainly, proper evidence, to show the original nature and complexion of the facts in controversy. I have more doubts on the admissibility of the other letters referred to in the bill of exceptions; but in relation to them, it is unnecessary to give a decided opinion.

With respect to the resolutions of congress, two questions may be proposed, in order to determine, whether they ought to have been admitted as
*40] evidence: I. Had congress authority *to pass such resolutions? and 2. Did the resolutions relate to the subject of the controversy? I have lately had occasion, in the case of *Doane* v. *Penhallow*,(*a*) to express

(*a*) See the case referred to, *post*, p. 54. I have not thought it material to preserve the order of time, in which the cases occurred, any further than by designating the respective terms.

my sentiments at large on the authority of congress (of which, in its application to the present object, I do not entertain the slightest doubt); and no man of common candor can hesitate, for a moment, to pronounce, that the resolutions have an immediate and necessary connection with the merits of the cause. They ought, then, to have been admitted; but what should be their force and operation, is another point, not, at present, before the court.

I am also of opinion, that it was improper to reject the depositions which Mr. Bingham had taken, in his public, official character, to ascertain the circumstances of the capture, and the property of the vessel and cargo, at the time the supposed prize was carried into Martinique.

IREDELL, Justice.—It appears satisfactorily to me, that many of the documents offered in evidence have been improperly rejected. From an inspection of all the papers which are attached to the record the nature of the dispute may be easily ascertained. The plaintiffs allege that Mr. Bingham received, on their account, as their agent, property which had been captured by them as prize; and that, whether the capture was lawful or not, he was bound to account to them, though they might be responsible to the original owners, if any wrong had been committed. To this charge, Mr. Bingham answers, that he never was the agent of the plaintiffs, but a public agent; and that he did not receive the property from them, on their account, but from the Marquis de Bouille on account of their true owners. Admitting either of these positions, a direct and certain consequence will ensue. If the plaintiffs are right, the consequence is, that Mr. Bingham ought to surrender the prize property, or account for its proceeds to them; and though they, as captors, may be sued by the neutral claimants, the existence of a neutral claim will not justify his refusal so to surrender or account. But, if the defendant is right, the consequence is, that he ought not to deliver up the property to the plaintiffs, until it has been ascertained that the capture was lawful, which must be done through the medium of a prize court, not by a judgment in a court of common law. From this view of the controversy, therefore, it must be of great moment, that Mr. Bingham should have an opportunity to show that he had acted throughout the business as the public agent of the United *States, and that his communications to congress were open, fair and faithful. If, indeed, he had given parol [*41 testimony on these points, his opponents might have called for the records of the appointment and correspondence, as affording higher proof. I am, therefore, of opinion, that Mr. Bingham's official letters (some of which were written before any dispute existed, or could reasonably be anticipated), ought not to have been rejected.

The resolutions of congress likewise were proper evidence—not, indeed, to prove that the plaintiffs were not entitled to the money in question, but to prove that the defendant was recognized in the transaction as the agent of congress. The resolutions are not to be considered as the mere expression of a congressional opinion, but as an acknowledgment that Mr. Bingham was a public agent, and that the public, as his principal, was accountable for the money.

The certificate of the Marquis de Bouille, whether regarded as an original order, or as the evidence of a parol order, previously given, ought to have

been laid before the jury. The Marquis acted officially, as governor and commander in chief; and we must presume, that he exercised a lawful authority in a lawful manner.

Under these circumstances, it only remains to consider, what course should be pursued by the court, in order to give the defendant the benefit of a trial, upon a full view of his legal proofs. I think, for that purpose, that a *venire facias de novo* ought to issue. For although a court of common law has no jurisdiction of the question of prize, yet, whether it is necessary in the present case to determine that question, must depend upon the facts, which are established at the trial. On a count for money had and received, &c., the court below has *primâ facie* jurisdiction; and if the jury shall think Mr. Bingham was merely the agent of the plaintiffs, the validity of the capture, as prize, can form no ingredient in deciding the issue. If, on the contrary, the jury shall think Mr. Bingham acted as a public agent, their verdict must be in his favor; as he was bound to keep the property for the real owners; and the captors can never show that they are the real owners, until the vessel and cargo have been condemned as prize by a competent tribunal. The captors may then proceed against Mr. Bingham, in a court of admiralty, whose decree of condemnation, operating against all the world, would entitle the captors to receive the money, and justify Mr. Bingham or congress in paying it.

Wilson, Justice.—In several instances, I concur in the sentiments that have been delivered by the judges who have preceded me; but I think it is
*42] unnecessary to specify the particulars *or to amplify the reasons, since I continue clearly in my opinion, on the point which was separately argued, that this cause is exclusively of admiralty jurisdiction. On that ground, I choose entirely to rest the judgment that I give; but it leads inevitably also to another conclusion, that the court, not having jurisdiction, a *venire facias de novo* (which, in effect, directs the exercise of jurisdiction) ought not to issue. I am, therefore, for pronouncing simply a judgment of reversal.

Paterson, Justice.—I cannot agree to send a *venire facias de novo* to a court which, in my opinion, has no jurisdiction to try or to decide the cause.

Cushing, Justice.—I shall give no opinion upon the question of affirming or reversing the judgment of the court below. My brethren think there is error in the proceedings; and they are right, to rectify it. On the question, however, of awarding a *venire facias de novo*, I agree with Judge Iredell; but as the court are equally divided, the writ cannot issue.

Judgment reversed; but no writ of *venire facias de novo* was awarded.

UNITED STATES *v.* JUDGE LAWRENCE.

Mandamus.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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The rule discharged.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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*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.

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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?

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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.

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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

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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.

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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*.

and her cargo: That on or about the ——— day of ——— last, the said schooner sailed from the island of St. Thomas, to the city of St. Domingo, in the island of Hispaniola; commanded by a certain Walter Burke, and laden with about one hundred and forty-two barrels of flour, six puncheons of rum, and other merchandise, of the value of two thousand dollars, the said vessel and cargo amounting in all to ten thousand dollars, lawful money of the United States of America, all regularly cleared out, from the said island of St. Thomas, and furnished with all documents, *usual, necessary and proper, and being on a voyage to the said port of St. Domingo, on the [*122 twentieth day of May, in the year of our Lord one thousand seven hundred and ninety-five, the said schooner William Lindsey, was forcibly, violently, tortiously, and contrary to the laws and usages of nations, attacked and taken by a certain armed vessel called the Cassius, commanded by a certain Samuel Davis, pretending an authority from the French republic, but then, and now, a citizen of the United States of America; and being so taken, was, by the said Samuel Davis, forcibly, violently, tortiously, and contrary to the laws of nations, carried into Port de Paix, where the said schooner William Lindsey, with her cargo, tackle, apparel and furniture, still are, forcibly, tortiously and illegally, detained: And your libellant does not admit, that the vessel called the Cassius, was authorized, by the French Republic, to capture vessels belonging to the United States, who were, at that time, and still are, at peace with the said French Republic: That the vessel called the Cassius, was originally equipped and fitted for war, in the port of Philadelphia, in Pennsylvania, one of the United States of America, contrary to the laws of the said United States, and the laws and usages of nations: That your libellant has never received compensation for the damages he has suffered, and has not been able to retrieve the said vessel, with her tackle, apparel and furniture: That the said vessel called the Cassius, and the said Samuel Davis, are now in the port of Philadelphia, and within the jurisdiction of this court: In order, therefore, that your libellant may be compensated for the damages he has incurred by the aforesaid illegal and tortious taking and detention of the said schooner William Lindsey, with her cargo, tackle, apparel and furniture; and that all may be done touching the premises, which to your honor may seem just and right, may it please your honor, to cause to be issued process for seizing the said vessel, called the Cassius, with her tackle, apparel and furniture; and for arresting the body of the said Samuel Davis, so that he be and appear, &c."

The suggestion, on which the motion for a prohibition was founded, set forth—"That on the 21st day of August, in the year of our Lord, one thousand seven hundred and ninety-five, before the honorable John Rutledge, Esquire, chief justice, and his associate justices of the supreme court of the United States, at Philadelphia, comes Samuel B. Davis, by Benjamin R. Morgan, his attorney, and gives this honorable court, now here, to understand and be informed, that whereas, by the laws of nations, and the treaties subsisting between the United States and the Republic of France, the trial of prizes taken *on the high seas, without the territorial limits and [*123 jurisdiction of the United States, and brought within the dominions and jurisdiction of the said republic, for legal adjudication, by vessels of war belonging to the sovereignty of the said republic, acting under the authority

of the same, and of all questions incidental thereto, does, of right, and exclusively, belong to the tribunals and judiciary establishments of the said republic, and to no other tribunal or tribunals, court or courts whatsoever: And whereas, by the said laws of nations and treaties aforesaid, the vessels of war belonging to the said French Republic, and the officers commanding the same, cannot, and ought not, to be arrested, seized, attached or detained, in the ports of the United States, by process of law, at the suit or instance of individuals, to answer for any capture or captures, seizure or seizures, made on the high seas, and brought for legal adjudication into the ports of the French Republic, by the said vessels of war, while belonging to, and acting under the authority and in the immediate service of the said republic. And whereas, by the laws and treaties aforesaid, the district courts of the United States, have not and ought not to entertain jurisdiction, or hold plea of such captures made as aforesaid, under the above circumstances. And whereas, by the laws of nations, the vessels of war of belligerent powers, duly by them authorized to cruise against their enemies, and to make prize of their ships and goods, may, in time of war, arrest and seize the vessels belonging to the subjects or citizens of neutral nations, and bring them into the ports of the sovereign under whose commission and authority they act, there to answer for any breaches of the laws of nations, concerning the navigation of neutral vessels in time of war; and the said vessels of war, their commanders, officers and crews, are not amenable before the tribunals of neutral powers for their conduct therein, but are only answerable to the sovereign in whose immediate service they were, and from whom they derived their authority. And whereas, on and before the twentieth day of May, now last past, the said Samuel B. Davis, was and now is a lieutenant of ships in the navy of the said French republic, and commander of a certain corvette or vessel of war, called the Cassius, then and now the property of the said republic, and in her immediate service, and on the said twentieth day of May, was duly commissioned by, and under the authority of, the said republic, to cruise against her enemies, and make prize of their ships and goods (as by his commission, and the certificate of the minister plenipotentiary of the said republic, to the United States, to the court now here shown, fully appears): Nevertheless, a certain James Yard, of the city of
*124] Philadelphia, merchant, not ignorant of the premises, but contriving *and intending to disturb the peace and harmony subsisting between the United States and the French Republic, and him the said Samuel B. Davis, wrongfully to aggrieve and oppress, and draw to another proof, him the said Samuel B. Davis, and the said corvette or vessel of war of the French Republic, the Cassius, in the port of Philadelphia, under the protection of the laws of nations and of the faith of treaties, has, by process out of the district court of the United States in and for the district of Pennsylvania, attached and arrested him, the said Samuel B. Davis, and the said corvette or vessel of war, the Cassius, and before the judge of the said district court, contrary to the said law of nations and treaties, and against the form of the laws of the United States, hath unjustly drawn in plea, to answer to a certain libel, by him, the said James Yard, against him the said Samuel B. Davis, and the said corvette or vessel of war, the Cassius, her tackle, apparel and furniture, exhibited and promoted, craftily and subtly there alleging, articulating and objecting, that on the said twentieth day of May, now last

past, the said Samuel B. Davis, then commanding the said corvette or vessel, the Cassius, did forcibly, violently and tortiously take, on the high seas, a certain schooner or vessel, belonging to the said James Yard, called the William Lindsey, and brought her into Port de Paix (in the dominions of the French Republic), where she still remains, and also alleging and articulating, that the said corvette or vessel, called the Cassius, was originally equipped and fitted for war, in the port of Philadelphia, in the United States, and that the said Samuel B. Davis was, at the time of the said capture, and now is, a citizen of the United States, without this, however, and the said James Yard, not in any manner alleging or articulating, that the said capture was made within the territory, rivers or bays of the United States, or within a marine league of the coast thereof, or that the said corvette or vessel, the Cassius, was so fitted or equipped for war, in the United States, by the said French Republic, her agent or agents, with their knowledge, or by their means or procurement, or by the said Samuel B. Davis, or that at the time of her being so equipped, or fitted for war in the United States (if ever, there, she was so, in any manner fitted or equipped), she was the property of the said French Republic, or that the said Samuel B. Davis was, in any manner, in the said equipment or fitting for war, concerned; and without this also, and the said James Yard, not in any manner alleging, that the said Samuel B. Davis was retained, or engaged in the service of the French Republic, within the territory or jurisdiction of the United States: And the said James Yard, him, the said Samuel B. Davis, and the said corvette or vessel of war, called the Cassius, by force of the process aforesaid, [*125 out *of the said district court, had and obtained as aforesaid, still wrongfully detains, and the said Samuel B. Davis, and the French Republic, owner of the said corvette or vessel of war, thereupon, in the said district court, to answer, and in the premises, cause to be condemned, with all his power endeavors, and daily contrives, in contempt of the government of the United States, against the laws of nations, the treaties subsisting between the United States and the French Republic, and against the laws and customs of the United States; to the manifest violation of the said laws of nations and treaties, and to the manifest disturbance of the peace and harmony, happily subsisting between the United States and the said French Republic; and this he is ready to verify. Wherefore, the said Samuel B. Davis, the aid of this honorable court, most respectfully requesting, prays remedy, by a writ of prohibition, to be issued out of this honorable court, to the said judge of the district court of the United States, in and for the district of Pennsylvania, to be directed, to prohibit him from holding the plea aforesaid, the premises aforesaid anywise concerning, further before him.

MORGAN.

Samuel B. Davis, being duly sworn, on his oath, doth say, that all and singular the facts by him in this suggestion stated, are true.

Sworn in open court, August 22d, 1795. } S. B. DAVIS.

I. WAGNER, D. C., Sup. Ct. U. S."

The motion for the prohibition was supported by *Ingersoll*, *Du Ponceau* and *Dallas*, and opposed by *Tilghman* and *Lewis:* And the controversy turned principally upon this point—whether the district court could sustain

a libel for damages, in the case of a capture as prize, made by a belligerent power, on the high seas, when the vessel captured was not brought within the jurisdiction of the United States, but carried for adjudication, *infra præsidia* of the captors?

Dallas, in opening the argument for the prohibition, contended: 1st. That a prohibition will lie in this case: 2d. That on the face of the libel, it was evident, that the district court had no jurisdiction: 3d. That on the facts disclosed in the suggestion, the district court ought not to be allowed to take jurisdiction. 4th. That the allegations of the libel itself would not support the proceedings below.

I. A prohibition will lie in this case. The three great objects of the judicial power are an authority—1st, to administer justice; 2d, to compel the unwilling or negligent magistrate to perform his duty; and 3d, to restrain the ministers of justice *within the regular boundaries of their respective jurisdictions. The judicial power is, therefore, either abstract or relative; in the former character, the court, for itself, declares the law and distributes justice; in the latter, it superintends and controls the conduct of other tribunals, by a prohibitory or mandatory interposition. This superintending authority has been deposited in the supreme court, by the federal constitution; and it becomes a duty to exercise it upon every proper occasion. The writ of prohibition is said, indeed, by the English books, to be grantable *ex debito justiciæ*, 1 T. Raym. 3, 4; and it is certain, that the constitution and laws of the Union fix no limitation to the exercise of the power of this court upon the subject, but, by way of implication, that it shall be warranted by the principles and usages of law. Judicial Act, § 13. The principles and usages of law warrant, that a prohibition shall issue: 1st, where the cause does not originally belong to the inferior court; and 2d, where the collateral matter arising from the cause is not within the jurisdiction of the inferior court. Nor does the writ issue merely to forbid proceeding in such cases as belong to the common-law courts; for it equally issues to forbid proceeding in cases that do not belong to the inferior court, though the courts at common law can give no remedy. Wood's Inst. 570; F. N. B. 106; 1 Woodes. 142. There is, however, some diversity, whether a prohibition will issue to an admiralty court, until sentence; but this clearly arises on cases originally within the jurisdiction of the court; for, in admiralty, as well as in ecclesiastical courts, if it appears on the face of the proceedings, that there is no jurisdiction, the court will not permit an attempt to exercise one. 3 Burr. 1922.

*126]

II. On the face of the libel, it is evident, that the district court has no jurisdiction.[1] The prominent facts are, that the vessel was taken as prize, carried *infra præsidia* of the captor, and, at this time, actually remains there. There is no trespass stated, distinct from the capture as prize; and this is not a question of restitution, since the vessel is not within our jurisdiction. Besides, from the very nature of things, the question of damages must be determined by the same tribunal that determines the question of prize: it is an incident, and whoever takes cognisance of the principal

[1] The right to a writ of prohibition depends upon the facts stated upon the record; the court cannot consider matters *dehors*, though set forth in the petition. Ex parte Easton, 95 U. S. 68.

question, must likewise take cognisance of that. In the French court of admiralty, the captor and the captured will stand on a fair and equal footing—the one, to show the grounds of condemnation, or, at least, of justifiable suspicion for searching and seizing a neutral vessel—the other, to repel the allegation, to obtain restitution and to recover damages. By the law of nations, the right of judging is vested in the courts of the captor; the principles *of justice enforce the rule in the present instance; for all the witnesses and documents are with the prize. If, then, the courts of [*127 the captor have a right to decide the question of prize, and their decision is binding on all the world, can damages be obtained here, when condemnation has been, or may be, decreed there? In the *Silesia case*, the British lawyers remonstrated against the appointment of a Prussian court of commissioners, to re-examine and rejudge the sentences of their admiralty. Collect. Jurid. Let the facts be as they may, the sentence of the French court must be conclusive. Thus, where an Englishman's vessel was taken by a French privateer, England and France being at peace, and condemned as Dutch property, the court would not examine into the sentence. Sir T. Raym. 473; 1 Dall. 78. The very statement in the libel establishes the presumption that the vessel captured was carried into Port de Paix, for legal adjudication; and if justice requires, she will not only be restored, but damages will be there awarded. Where the cause of prohibition appears on the face of the libel, it need not be pleaded below. 2 Salk. 551.

III. On the facts disclosed in the suggestion, the district court ought not to be allowed to take jurisdiction. The constitution of the United States might have rendered the individual states, nay, the Union itself, amenable as defendants, at the suit of individuals; but it could not, in that way, bind other sovereign nations, not parties to the compact. Even, indeed, with respect to the states, the language of the proposed amendment, is, that "the judicial power of the United States shall not be construed to extend to any suit, &c.," by individuals against a state; which furnishes, at least, a legislative opinion of the exemption of sovereigns from such process. But the law of nations is express on the subject (Vatt.); and Pennsylvania has heretofore judicially recognised the doctrine. (1 Dall.) The Cassius being then the property of a sovereign and independent nation, cannot be attached for any supposed delinquency of her commander, committed on the high seas: it would be making public property responsible for private wrongs. What would be the consequence of an acquiescence in the jurisdiction now set up? Every privateer, every national vessel of war, would be liable to seizure, at the instance of every individual, who pretended he was injured. Could the American citizens, who have suffered by spoliation, seize the British frigates or privateers, upon their entrance into our port? Could Captain Bliss, whose pilot boat was seized, and rifled of the public papers of the French minister, within the waters of the United States, attach the Africa, or arrest Captain Holme, who had perpetrated *the outrage. [*128 The abuse of a public trust is cause of complaint to the government of the offending party; but to retaliate by seizure, without first demanding redress, is contrary to the general rights and laws of nations, as well as contrary to the existing treaty between the United States and France.

IV. The allegations of the libel itself cannot support the proceeding. 1st. It is alleged, that the captured vessel was neutral property: but this

is a fact to be proved in the French admiralty; for the neutral vessel might be carrying contraband articles to an enemy of the captor; she might be sailing to a blockaded port; she might have defective papers; or she might act in a suspicious and ambiguous manner. In any of these cases, the right of search, and carrying into port for further examination, may be exercised by a belligerent power: they are subjects for the consideration of the court of the captor, but they give no jurisdiction here. 2d. It is alleged, that the captain of the corvette was, in fact, an American citizen; but it is answered, that there is no proof of the allegation; and even, if proved, a citizen of the United States may expatriate himself; and afterwards, in a foreign country, enter into a foreign service. It is true, that some of our treaties abandon him to be punished as a traitor; and that the fact might be examined here, with a view to punish him personally, for any infraction of our laws; but it is not a matter that can give jurisdiction to our courts, on the question of prize or no prize. 3d. It is alleged, that the Cassius was illegally fitted out in the United States: but it is answered, that there is no allegation, either that she was illegally fitted out by the captain, or after she had become the property of the French Republic. An illegal outfit is a positive offence, highly penal; every man will be presumed innocent of it, until the contrary is proved. In ordinary cases, where there is a sale in *market overt*, no man is entitled to restitution, until conviction; nor can there sooner be a forfeiture of an illegally outfitted vessel. But it is conclusive, that the libel filed in this case, is not for the forfeiture, under the act of congress of June 1794; but for damages, in consequence of the capture as prize, which can only be given by the court having cognisance of that question. Any other interpretation of the law would be attended with intolerable inconveniences. Every owner, freighter, master or seaman of a vessel taken as prize, might sue the captor in every court of every country. No precedent of such a proceeding exists; and the universal silence on this subject, amounts to a denial of its legality.

The adverse counsel stopped *Dallas*, and mentioned, that they had just received, but had not had time to examine, some French papers from Port de Paix, which, they believed, would show, that the court of admiralty
*129] there had actually *taken cognisance of, and decided upon the case; and they said, that if such was the fact, they would voluntarily withdraw the libel. An adjournment until the evening took place, in order to afford an opportunity for examining the papers referred to; but the translations not being complete, at the meeting of the court, and the judges declaring their intention to break up, *sine die*, the next morning, a desultory argument ensued, in the course of which, the motion for the prohibition was opposed on three grounds: 1st. That the district court had jurisdiction: 2d. That even if that point were doubtful, the prohibition ought not to issue, until after sentence: 3d. That on a plea to the jurisdiction, the party injured by the sentence might have an adequate remedy on appeal. In support of these positions, were cited, 1 Sid. 320; T. Raym.; Vent. 173; Carth.; Hard. 406; Skin. 20; Holt.

The judges intimated, that they would again adjourn, in order to give a further opportunity to consider the expediency of withdrawing the libel;

but no compromise having taken place, on the 24th of August, the Chief Justice delivered their opinion :

By the Court.—We have consulted together on this motion ; and though a difference of sentiment exists, a majority of the court are clearly of opinion, that the motion ought to be granted. Therefore—

Let a prohibition issue.

The prohibition issued, accordingly, in the following form :

" *United States*, ss.

The President of the United States to the honorable Richard Peters, Esquire, judge of the district court of the United States, in and for the Pennsylvania district : It is shown to the judges of the supreme court of the United States, by Samuel B. Davis, that whereas, by the laws of nations, and the treaties subsisting between the United States and the Republic of France, the trial of prizes taken on the high seas, without the territorial limits and jurisdiction of the United States, and brought within the dominions and jurisdiction of the said republic, for legal adjudication, by vessels of war belonging to the sovereignty of the said republic, acting under the same, and of all questions incidental thereto, does, of right, and exclusively, belong to the tribunals and judiciary establishments of the said republic, and to no other tribunal or tribunals, court or courts whatsoever : And whereas, by the said law of nations, and treaties aforesaid, the vessels of war belonging to the said French Republic, and the officers commanding the same, cannot, and ought not, to be arrested, *seized, attached or detained in the ports of the United States, by process of law, at the suit or instance [*130 of individuals, to answer for any capture or captures, seizure or seizures, made on the high seas, and brought for legal adjudication into the ports of the French Republic, by the said vessels of war, while belonging to, and acting under the authority and in the immediate service of the said republic : And whereas, by the laws and treaties aforesaid, the district courts of the United States have not, and ought not, to entertain jurisdiction or hold plea of such captures, made as aforesaid, under the above circumstances : And whereas, by the laws of nations, the vessels of war of belligerent powers, duly by them authorized to cruise against their enemies, and to make prize of their ships and goods, may, in time of war, arrest and seize the vessels belonging to the subjects or citizens of neutral nations, and bring them into the ports of the sovereign under whose commission and authority they act, there to answer for any breaches of the laws of nations, concerning the navigation of neutral ships, in time of war ; and the said vessels of war, their commanders, officers and crews are not amenable before the tribunals of neutral powers for their conduct therein, but are only answerable to the sovereign in whose immediate service they were, and from whom they derived their authority : And whereas, on or before the twentieth day of May, now last past, the said Samuel B. Davis was, and now is, a lieutenant of ships in the navy of the said French Republic, and commander of a corvette or vessel of war, called the Cassius, then and now the property of the said republic, and in her immediate service ; and on the said twentieth day of May, was duly commissioned, by and under the authority of the said republic, to cruise against her enemies, and make prize of their ships (as by his commission and the certificate of the minister plenipotentiary of the said republic to the

United States, to the court shown more fully appears) : Nevertheless, a certain James Yard, of the city of Philadelphia, merchant, not ignorant of the premises, but contriving and intending to disturb the peace and harmony subsisting between the United States and the French Republic, and him, the said Samuel B. Davis, wrongfully to aggrieve and oppress, and draw to another proof, him, the said Samuel B. Davis, and the said corvette or vessel of war, of the French Republic, the Cassius, in the port of Philadelphia, under the protection of the laws of nations, and of the faith of treaties, has, by process out of the district court of the United States in and for the district of Pennsylvania, attached and arrested him, the said Samuel B. Davis, and the said corvette or vessel of war, the Cassius, before the judge of the said district court, contrary to the said law of nations, and treaties, and *131] *against the due form of the laws of the United States, hath unjustly drawn in plea, to answer to a certain libel, by him, the said James Yard, against him, the said Samuel B. Davis, and against the said corvette or vessel of war, the Cassius, her tackle, apparel and furniture, exhibited and promoted, craftily and subtly therein alleging, articulating and objecting, that on the said twentieth day of May, now last past, the said Samuel B. Davis, then commander of the said corvette or vessel, the Cassius, did, forcibly, violently and tortiously, take on the high seas, a certain schooner or vessel belonging to the said James Yard, called the William Lindsey, and brought her into Port de Paix (in the dominion of the French republic), where she still remains ; and also alleging and articulating, that the said corvette or vessel called the Cassius, was originally equipped and fitted for war, in the port of Philadelphia, in the United States, and that the said Samuel B. Davis was, at the time of the said capture, and now is, a citizen of the United States : Without this, however, and the said James Yard not in any manner alleging or articulating, that the said capture was made, within the territory, rivers or bays of the United States, or within a marine league of the coast thereof, or that the said corvette or vessel, the Cassius, was so fitted or equipped for war in the United States, by the said French Republic, her agent or agents, with their knowledge, or by the means or procurement, or by the said Samuel B. Davis, or that at the time of her being so equipped or fitted for war, in the United States (if ever there she was so in any manner fitted or equipped), she was the property of the said French Republic, or that the said Samuel B. Davis was, in any manner, in the said equipment or fitting for war, concerned ; and without this also, and the said James Yard not in any manner alleging, that the said Samuel B. Davis was retained or engaged, in the service of the French Republic, within the territory or jurisdiction of the United States : And that the said James Yard, him, the said Samuel B. Davis, and the said corvette or vessel of war, called the Cassius, by force of the process aforesaid, out of the said district court, had and obtained as aforesaid, still wrongfully detains, and the said Samuel B. Davis, and the French Republic, owner of the said corvette or vessel of war, thereupon, in the said district court to answer, and in the premises, cause to be condemned, with all his power, endeavors and daily contrives, in contempt of the government of the United States, against the laws of nations, and the treaties subsisting between the United States and the French Republic, and against the laws and customs of the United States; to the manifest violation of the law of nations and treaties, and to the manifest

disturbance of the peace and harmony happily subsisting between the *United States and the French Republic: Wherefore, the said Samuel [*132
B. Davis, the aid of the said supreme court most respectfully requesting, hath prayed remedy by a writ of prohibition, to be issued out of the said supreme court, to you to be directed, to prohibit you from holding the plea aforesaid, the premises aforesaid any wise concerning, further before you: You, therefore, are hereby prohibited, that you no further hold the plea aforesaid, the premises aforesaid in any wise touching, before you, nor anything in the said district court attempt, nor procure to be done, which may be in any wise to the prejudice of the said Samuel B. Davis, or the said corvette or vessel of war, called the Cassius; or in contempt of the laws of the United States: And also, that from all proceedings thereon, you do, without delay, release the said Samuel B. Davis, and the said corvette or vessel of war, called the Cassius, at your peril. Witness the honorable John Rutledge, Esquire, chief justice of the said supreme court, at Philadelphia, this 24th day of August, in the year of our Lord, one thousand, seven hundred and ninety-five, and of the Independence of the United States, the twentieth. I. Wagner, D. C., Sup. Ct. U. S.(*a*)

Talbot, appellant, *v.* Jansen, appellee. [*133

Expatriation.—Prize.—Restitution.

If the right of expatriation exist, under our laws, not only a renunciation of citizenship, but an actual removal, for a lawful purpose, and the acquisition of a foreign domicil are necessary.[1]

The capture of a vessel of a friendly nation, by a privateer fitted out in one of our ports, and commanded by an American citizen, under a commission from a foreign belligerent power, is illegal; and if the captured vessel be brought within our jurisdiction, the district court may decree restitution and damages.

The granting of a commission to serve as a privateer, against the commerce of a nation at peace with the United States, by an officer of a foreign belligerent power, within our jurisdiction, is a flagrant violation of the sovereignty of the United States. Paterson, J.

War can alone be entered into by national authority; no hostilities of any kind, except in necessary self-defence, can lawfully be practised by an individual of a nation, against an individual of another nation, at enmity with it, but by virtue of some public authority.

Jansen *v.* The Vrow Christina Magdalena, Bee 11, affirmed.

This was a writ of error, in the nature of an appeal from the Circuit Court for the district of South Carolina; and the following circumstances appeared upon the pleadings:

(*a*) The proceedings on the libel for damages in the district court, were accordingly superseded; but an information, Ketland, *qui tam*, &c., was immediately afterwards filed in the circuit court, against the corvette, for the illegal outfit in violation of the act of congress, and the vessel being thereupon attached, an application was made to Judge Peters, to discharge her, on giving security, but the judge was of opinion, that he had no power, as district judge, to make such an order in a cause depending in the circuit court. The French minister then, deeming (as I have been informed), this prosecution to be a violation of the rights and property of the republic, delivered a remonstrance to our government; and converting the judicial inquiry into a matter of state, abandoned the corvette, and discharged the officers and crew. See Ketland *qui tam*, *v.* The Cassius, 2 Dall. 365.

[1] The right of expatriation is by no means a settled question in this country. It has been

Talbot v. Jansen.

A libel was filed against Edward Ballard, captain of an armed vessel, *L'Ami de la Liberte*, on the admiralty side of the district court of South Carolina, in June 1794, by Joost Jansen, late master of the brigantine Magdalena (then lying at Charleston, within the jurisdiction of the court), in which it was set forth, that the brigantine and her cargo were the property of citizens of the United Netherlands, a nation at peace, and in treaty with the United States of America; that the brigantine sailed from Curaçoa, on a voyage to Amsterdam; but, on the 16th of May 1794, being about fifteen miles N. W. of the Havana, on the west side of Cuba, she was taken possession of by *L'Ami de la Liberte;* that on the next day, the libellant met another armed schooner, called *L'Ami de la Point-a-Pitre*, commanded by Captain William Talbot, on board of which the mate and four of the crew of the brigantine Magdalena were placed; and that the two schooners, together with the brigantine, sailed for Charleston, where the last arrived on the 25th of May 1794. The libellant proceeded to aver, that Edward Ballard was a native of Virginia, a citizen and inhabitant of the United States, and a branch-pilot of the Chesapeake and Port Hampton; that *L'Ami de la Liberte* is an American built vessel, owned by citizens of the United States (particularly by John Sinclair, Solomon Wilson, &c.), and was armed and equipped in Chesapeake Bay and Charleston, by Edward Ballard and others, contrary to the president's proclamation, as well as the general law of neutrality, and the law of nations; that Edward Ballard had not, and could not legally have, any commission to capture Dutch vessels, or property; that the capture was in direct violation of the 13th and 19th articles of the treaty between *America and Holland; and that a capture without a commission, or with a void commission, or as pirates, could not divest the property of the original *bonâ fide* owners, in whose favor, therefore, a decree of restitution was prayed.

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On the 27th of June 1794, William Talbot filed a claim in this cause; and thereupon set forth, that he was admitted a citizen of the French Republic, on the 28th December 1793, by the municipality of Point-a-Pitre, at Guadaloupe; and on the 2d of January following, received a commission from the governor of that island, as captain of the schooner *L'Ami de la Point-a-Pitre*, which was owned by Samuel Redick, a French citizen, resident at Point-a-Pitre, since the 31st December 1793, and had been armed

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held, that an American citizen cannot dissolve the compact between himself and his country, without the consent or default of the community. United States *v.* Williams, 4 Hall's L. J. 461; s. c. 2 Cr. 82 n.; Shanks *v.* Dupont, 3 Pet. 246; United States *v.* Gillies, Peters' C. C. 159. Though the government may, undoubtedly, relieve a citizen from his allegiance. Inglis *v.* Sailors' Snug Harbor, 3 Pet. 101. But, on the other hand, expatriation is said to be a fundamental right; and it was held, that a naturalized American citizen, by emigrating to a foreign country, and entering into its military service, completely renounced his American citizenship, and was no longer held to its obligations. Stoughton *v.* Taylor, 2 Paine 652. So, a citizen domiciled in a foreign country, who takes an oath of allegiance to the foreign sovereign, is not under the protection of the United States. Murray *v.* The Charming Betsey, 2 Cr. 64. It is, however, agreed on all hands, that to effect a transfer of a citizen's allegiance, there must be a *bonâ fide* change of domicil, under circumstances of good faith; it can never be set up as a cover for fraud, or as a justification for the commission of a crime against the country, or for a violation of its laws, where this appears to be the intention of the act. The Santissima Trinidad, 7 Wheat. 348, Story, J.; s. c. 1 Brock. 478; Stoughton *v.* Taylor, 2 Paine 661. See notes to Sharswood's Blackstone, p. 370.

and equipped at that place, as a privateer, under the authority of the French republic. That the claimant, being on a cruise, boarded and took the brigantine, being the property of subjects of the United Netherlands, with whom the Republic of France was at war; and that although he found a party from *L'Ami de la Liberte* on board the brigantine, yet as they produced no commission, or authority for taking possession of her, the claimant sent her as his prize into Charleston, having put on board several of his crew to take charge of her, and particularly John Remsen, in the character of prize-master, to whom he gave a copy of his commission. The claimant, therefore, prayed that the libel should be dismissed with costs.

On the 3d of July 1794, the libellant filed a replication, in which he set forth, that William Talbot, the claimant, was an American citizen, a native and inhabitant of Virginia; that his vessel (formerly called the Fairplay) was American built, was armed and equipped in Virginia, and was owned in part, or in whole, by John Sinclair and Solomon Wilson, American citizens, and Samuel Redick, also an American citizen, though fraudulently removed to Point-a-Pitre, for the purpose of privateering. That J. Sinclair had received large sums as his share of prizes, and Captain Talbot had remitted to the other owners, their respective shares. That there was a collusion between Captains Talbot and Ballard, whose vessels were owned by the same persons, and sailed in company from Charleston, on the 5th of May 1794.

On the 5th July 1794, William Talbot added a duplicate to his claim, in which he protested against the jurisdiction of the court; insisted, that even if there had been a collusion between him and Capt. Ballard, it was lawful, as a stratagem of war; and averred, that John Sinclair was not the owner of the privateer, that Samuel Redick was sole owner, and that he never had paid any prize-money to John Sinclair.

On the 6th of August 1794, the district court decided in favor of its jurisdiction, dismissed the claim of Captain *Talbot, and decreed res- [*135
titution of the brigantine and her cargo to the libellant for the use of the Dutch owners. An appeal was instituted, but in October term 1794, the circuit court affirmed the decree of the district court; and allowed two guineas *per diem* for damages, and seven per cent. on the proceeds of the cargo (which had been sold under an order of the court), from the 6th of August 1794, with $82 costs. Upon this affirmance of the decree of the district court, the present writ of error was founded. It may be proper to add, that Captain Ballard had been indicted, in the district of Charleston, on a charge of piracy; but was acquitted, agreeable to the directions given to the jury by Mr. Justice Wilson, who presided at the trial.

From the material facts, which appeared upon the depositions and exhibits accompanying the record, the following circumstances were ascertained:

1st. In relation to the citizenship of Captain Talbot, and the property of the vessel which he commanded, it appeared, that he was a native of Virginia, that he sailed from America, in the close of November 1793, and arrived soon afterwards at Point-a-Pitre, in the island of Guadaloupe; that having taken an oath of allegiance to the French republic, he was there naturalized by the municipality, as a French citizen, on the 28th of December 1793; and that on the 2d of January 1794, authority was given by the governor of Guadaloupe to Samuel Redick, to fit out the schooner, *L'Ami*

de la Point-a-Pitre, under Captain Talbot's command, Redick having entered into the usual security, as owner of the privateer. This schooner was built in America, called the "Fairplay," and had been owned by John Sinclair and Solomon Wilson, American citizens; but she was carried to Point-a-Pitre, by Captain Talbot, and there, on the 31st December 1793, by virtue of a power of attorney from Sinclair & Wilson, dated the 24th of November 1793, he sold her for 26,400 livres, as the bill of sale set forth, to S. Redick, who was a native of the United States, but had also been naturalized (after an occasional residence for some time) as a citizen of the French republic, on the same 28th of December 1793. The bill of sale also stated, that certain cannon and ammunition on board the vessel were included in the sale. The schooner, commanded by Captain Talbot, sailed immediately after this transaction, on a cruise, and had taken several prizes, previously to the capture of the Magdalena. There was some slight evidence also, to sanction an allegation, that of these prizes, taken subsequent to the sale of the vessel to Redick, a part of the proceeds had been paid by Talbot to the original owners, Sinclair & Wilson.

*136] 2d. In relation to the citizenship of Captain Ballard, and the *property of the vessel which he commanded, it appeared, that he was a native of Virginia; but that in the court of Isle of Wight county, of April term 1794, he had renounced, upon record, his allegiance to that state, and to the United States, agreeable to the provisions of a law of Virginia;(*a*) though, previously to the capture of the Magdalena, he had not been naturalized in (nor, indeed, had he visited) any other country. *L'Ami de la Liberte* had been employed, but not armed, by the French Admiral, Vanstable, then lying with a fleet in the Chesapeake; and on the 13th Germinal 1794, he had given Sinclair a general commission to command her, as an advice, or packet-boat. This commission, however, was assigned by indorsement, from Sinclair to Capt. Ballard, the assignment was recognised by the French Consul, at Charleston, on the 11th of Floreal following; and a copy of it had been certified and delivered by Capt. Ballard to the prize-master of one of his prizes. There was full proof that *L'Ami de la Liberte* had received some guns from *L'Ami de la Point-a-Pitre*, when they first met, by appointment, in Savannah river, and that she had been supplied with ammunition, &c., within the jurisdiction of the United States. It did not appear, that she had gone into any other than an American port, though she had made repeated cruises, before the capture of the Magdalena; and there were strong circumstances to show, that she was still owned by Sinclair, though she had been employed by Admiral Vanstable.

3d. In relation to the concert of the two schooners, and the capture of the Magdalena, it appeared, that before Capt. Ballard's vessel was fit for

(*a*) The words of the law are these: "Whensoever any citizen of this commonwealth shall, by deed in writing, under his hand and seal, executed in the presence of, and subscribed by, three witnesses, and by them, or two of them, proved in the general court, any district court, or the court of the county or corporation where he resides, or by open verbal declaration made in either of the said courts, to be by them entered of record, declare that he relinquishes the character of a citizen, and shall depart out of this commonwealth, such person shall, from the time of his departure, be considered as having exercised his right of expatriation, and shall thenceforth be deemed no citizen. Passed 23d Dec. 1792.

sea, it had been generally reported and believed, and there was some evidence that Sinclair had declared, that she was destined, as a consort, to cruise with Capt. Talbot; that Capt. Talbot had received a letter from Sinclair, directing him to proceed to Savannah river, and there wait for Capt. Ballard, in whose vessel, Sinclair meant to sail; that, accordingly, some days afterwards, Capt. Ballard's vessel hove in sight off Savannah, when Capt. Talbot said, "there is our owner, let us give him three cheers;" that both vessels went *to Tybee Bar, and sailed more than a mile above the light-house, where four cannon and some swivels were [*137 taken from on board of Capt. Talbot's vessel, and mounted on board *L'Ami de la Liberte;* that Sinclair left the vessels in the river, and they soon after sailed together, as consorts, upon a cruise; and that, accordingly, before the capture of the Magdalena, they had jointly taken several prizes, and particularly, the Greenock, which was taken by them on the 15th of May, only two days before the capture of the Magdalena, and the Fortune der Zee, which was taken the very day after her capture. It appeared, that the Magdalena was first taken possession of by Capt. Ballard, who left a part of his crew on board of her; but Capt. Talbot was then in sight, and coming up in about an hour afterwards, he also took possession of the brigantine, and placed a prize-master and some of his men on board. The two privateers continued together for several days, making signals occasionally to each other; and finally, Capt. Ballard alone accompanied the prize into Charleston.

The cause was argued by *Ingersoll*, *Dallas* and *Du Ponceau*, for the appellant; and by *E. Tilghman*, *Lewis* and *Reed* (of South Carolina), for the appellee.

On the facts, the controversy was—whether the two schooners were, or were not, owned by American citizens? and were, or were not, illegally outfitted in the United States? The question of ownership turned upon the fairness and reality of the sale of *L'Ami de la Point-a-Pitre* to Samuel Redick; and the truth of the allegation, that *L'Ami de la Liberte* had been purchased and commissioned by Admiral Vanstable for the service of the French republic: and the question of illegal outfit being conceded, as to Captain Ballard's vessel, depended, as to Captain Talbot's vessel, upon the circumstances which have been recapitulated. On the law, the following positions were taken in favor of the appellant. (*a*)

(*a*) Before the principal argument commenced, the two following points occurred: 1. The counsel for the appellee offered to give in evidence a certificate of the collector of the customs of the port of Charleston, stating, that it appeared by his official books, that the duties on the cargo of the Magdalena had been paid by the appellee. But it was objected, for the appellant, that the collector's certificate could not be admitted to prove the fact; the entry itself, from the record, must be exemplified. Besides, the collector is not an officer appointed to certify a record; and as a witness, the opposite party should have had an opportunity to cross-examine him. Independently, therefore, of any question, whether new evidence can be received, on an appeal in this court, the certificate is inadmissible.

The Court rejected the certificate, on the general ground; and Wilson, Justice, added, that he thought, at all events, it was premature to offer the evidence in this stage

*I. That the courts of the United States have no jurisdiction of the cause, because the capture of the Magdalena as prize, and carrying her in for adjudication, were acts performed under the authority of the French republic; the subject of the capture is the property of an enemy of the French republic; and upon general principles, as well as by positive compact, the captor had a right to bring the prize into an American port.[1] The commission of Captain Talbot is granted by a regular organ of the government of France, and if France recognises him as a citizen (though America may have a right, in the abstract, to controvert with France, as a matter of state, the act of expatriation), no neutral power can contradict the fact, for the purpose of trying the validity of the prizes of the republic, by a test which is strictly municipal in every country, in substance, form and operation. 1 Com. Dig. 269. The courts of a neutral country may undertake to determine questions of piracy; or questions of restitution, where (as in the case of *Glass* v. *The Betsey*, ante, p. 6) the property of its own citizens, or of the citizens of another neutral nation, has been wrongfully seized and brought within its jurisdiction; or questions arising from a violation of the neutral jurisdiction of the country, as in the case of *The Grange*, which was captured in the bay of Delaware; but no neutral power can determine a question of prize, upon a capture on the high seas, by a belligerent power, from his enemy. 4 Inst. 154; 2 R. 3, fol. 2; Bynk. Q. J. p. l. 1, 17; 2 Wood. 454; Lee 211; Sir L. Jenk. 714. Thus, there is no *ius postliminium* in a neutral port; Vatt. lib. 3, c. 14, § 208, p. 84; and America, as a neutral power, cannot award restitution in this case, unless two things are established: 1st, that the plaintiff is in amity with America, and 2d, that France is in amity with Holland. 4 Inst. 154. Besides, France, by the 17th article of the treaty, has a right to bring into, and carry from, an American port, all the prizes that she takes from her enemies. That the Dutch owners of the vessel were enemies of France is notorious; but still,
*139] the vessel must *be a prize, according to the law of nations, excluding captures within a neutral boundary, &c. That question, however, when the capture is made on the high seas, by a belligerent power, of the property of his enemy, can only be decided by the courts of the country of the captors; and to examine the right of the French republic to issue a com-

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of the cause. The motion was renewed, after the court had affirmed the decree of the court below, but with no greater success.

2. It was objected by *Dallas*, for the appellant, that the record was not transmitted agreeable to the directions of the judicial act, the 19th section providing, that "it shall be the duty of circuit courts, in causes in equity and of admiralty and maritime jurisdiction, to cause the facts on which they found their sentence or decree, fully to appear upon the record, &c.;" which had not been done. It is true, that the pleadings exhibits, and sentences are certified by the clerk, not by the judges; and there may have been oral testimony in the inferior courts. *Reed* answered, that everything that had appeared below, now appeared here, under the seal of the circuit court. After some discussion, however, the desire of the parties to obtain a decision on the merits prevailed, and the objection was waived. The point has been since argued and decided in the case of Wiscart *v.* D'Auchy, *post*, p. 321.

[1] The exemption of foreign public ships, coming into our waters, under an express or implied license, from the local jurisdiction, does not extend to those prize-ships or goods, captured in violation of our neutrality. The Santissima Trinidad, 7 Wheat. 283.

mission, within her own dominions, to a person recognised and claimed by her as a citizen, is a direct attack upon the sovereignty and independence of France. It is urged, however, that Capt. Talbot's vessel was, in fact, an American privateer, illegally fitted out in an American port; the facts do not support either branch of the allegation; but even in that point of view, if there was a commission from the French republic, the capture cannot be deemed piracy: and since passing the act of the 5th of June 1794 (1 U. S. Stat. 381), there is a provision for punishing illegal outfits; but not for restitution of their prizes, taken under a foreign commission, by foreign subjects. Upon a capture, under a commission to a French citizen, indeed, whether he is a native citizen or naturalized, the thing must be the same in effect, to foreign neutral powers. Every writer supports this opinion, where the prize is carried *infra præsidia;* and the American ports are *infra præsidia* (a place of asylum and safety) for French prizes, by virtue of the treaty. But even if the commission had been given to an American citizen, it would have been consistent with the usage of nations—every nation (for instance, Russia and England) employing foreign officers and seamen in their privateers and ships of war; and America herself, it will be remembered, employed La Fayette, and a train of French officers, previous to her alliance with France. See 13 *Geo. II., c.* 3, § 1; 17 vol. Stat. at Large 358; Lex Mer. 318. Citizenship *de facto* is enough for the object contemplated; and England provides that she herself may navigate her privateers with three-fourths foreign seamen. 13 *Geo. II., c.* 3.

II. That Samuel Redick and Captain Talbot had expatriated themselves, and become French citizens; so that the former might lawfully own, and the latter might lawfully command, a French privateer, for the purpose of making prize of ships belonging to the enemies of France. The right of expatriation is antecedent and superior to the law of society. It is implied, likewise, in the nature and object of the social compact, which was formed to shield the weakness, and to supply the wants of individuals—to protect the acquisitions of human industry, and to promote the means of human happiness. Whenever these purposes fail, either the whole society is dissolved, or the suffering individuals are permitted to withdraw from it. There are two memorable instances of the expatriation of entire nations (independent of the general course of the patriarchal, or *pastoral life), the one in ancient, and the other in modern story. When the Persians ap- [*140 proached Athens, the whole Athenian nation embarked in the fleet of Themistocles, and left Attica, for a time, in possession of the Persians. Plut. in vit. Themist.; Trav. of Anachar. 1 vol. p. 268. In the year 1771, a whole nation of Tartars, called "Tourgouths," making 50,000 families, or 300,000 souls, emigrated from the banks of the Wolga, in Russia, and after a progress of inconceivable difficulty, settled in the dominions of the Emperor of China, who hospitably received them, and erected a monument on the spot, to commemorate the event. Col. Mag. for Feb. 1788. But the abstract right of individuals to withdraw from the society of which they are members, is recognised by an uncommon coincidence of opinion—by every writer, ancient and modern; by the civilian, as well as by the common-law lawyer; by the philosopher, as well as the poet: It is the law of nature and of nature's God, pointing to "the wide world before us, where to choose our place of rest, and Providence our guide." 2 Bynk. 125; Wickefort lib. 1, c.

2, p. 116 ; Grot. lib. 2, 5, § 24, par. 2, 3 ; Dig. de cap. et post. Law 12, § 9 ; Wick. lib. 1, § 11, p. 244 ; Puff. lib. 8, 1, c. 11, § 3, p. 862 ; 1 Fred. Code, 34–5, 2 vol. 10 ; 1 Gill. Hist. Greece. With this law, however, human institutions have often been at variance ; and no institutions more than the feudal system, which made the tyranny of arms, the basis of society; chained men to the soil on which they were born ; and converted the bulk of mankind into the villeins, or slaves of a lord, or superior. From the feudal system, sprung the law of allegiance ; which, pursuing the nature of its origin, rests on lands ; for when lands were all held of the crown, then the oath of allegiance became appropriate : It was the tenure of the tenant, or vassal. 1 Black. Com. 366. The oath of fealty, and the ancient oath of allegiance, were almost the same ; both resting on lands ; both designating the person to whom service should be rendered ; though the one makes an exception as to the superior lord, while the other is an obligation of fidelity against all men. 2 Bl. Com. 53; Palm. 140. Service, therefore, was also an inseparable comcomitant of fealty, as well as of allegiance. The oath of fealty could not be violated, without loss of lands ; and as all lands were held mediately or immediately of the sovereign, a violation of the oath of allegiance was, in fact, a voluntary submission to a state of outlawry. Hence arose the doctrine of perpetual and universal allegiance. When, however, the light of reason was shed upon the human mind, the intercourse of man became more general and more liberal ; the military was gradually changed for the commercial state ; and the laws were found a better protection for per-
*141] sons and property than arms. But *even while the practical administration of government was thus reformed, some portions of the ancient theory was preserved ; and, among other things, the doctrine of perpetual allegiance remained, with the fictitious tenure of all lands from the crown to support it. Yet, it is to be remembered, that whether in its real origin, or in its artificial state, allegiance, as well as fealty, rests upon lands, and it is due to persons. Not so, with respect to citizenship, which has arisen from the dissolution of the feudal system ; and is a substitute for allegiance, corresponding with the new order of things. Allegiance and citizenship differ, indeed, in almost every characteristic. Citizenship is the effect of compact ; allegiance is the offspring of power and necessity: citizenship is a political tie ; allegiance is a territorial tenure : citizenship is the charter of equality; allegiance is a badge of inferiority: citizenship is constitutional ; allegiance is personal : citizenship is freedom ; allegiance is servitude : citizenship is communicable ; allegiance is repulsive : citizenship may be relinquished ; allegiance is perpetnal. With such essential differences, the doctrine of allegiance is inapplicable to a system of citizenship; which it can neither serve to control nor to elucidate. And yet, even among the nations in which the law of allegiance is the most firmly established, the most pertinaciously enforced, there are striking deviations that demonstrate the invincible power of truth, and the homage which, under every modification of government, must be paid to the inherent rights of man. In Russia, the volunteers who supply the fleet with officers, or literary institutions with professors, are naturalized. In Poland, an American citizen has been made chancellor to the crown. In France, Mr. Colbert, who was minister of marine, and Mr. Necker, who was minister of finance, were adopted, not native subjects. In England, two years' service in the navy, *ipso facto* endows an alien with

all the rights of a native. These are tacit acknowledgments of the right of expatriation, vested in the individuals; for though they are instances of adopting, not of discharging subjects; yet, if Great Britain would (*ex gratia*) protect a Russian, naturalized by service in her fleet, it is obvious, that she cannot do so, without recognising his right of expatriation to be superior to the Empress's right of allegiance. But it is not only in a negative way, that these deviations in support of the general right appear. The doctrine is, that allegiance cannot be due to two sovereigns; and taking an oath of allegiance to a new, is the strongest evidence of withdrawing allegiance from a previous sovereign. Thus, Louis XIV. received his own *quondam* subjects, the two Fidlers, as ambassadors. Dr. Story, an Englishman, was sent to England, as the minister of Spain. And in many nations, the conditions *on which an expatriation may be affected (such as paying a tax, or leaving a portion of property behind) are actually prescribed. Independently, however, of these instances, in countries bound by the law of allegiance, it is to be considered, what are the rights of *citizenship* on the subject; and like every other question of citizenship, it depends on the terms and spirit of our social compact. The American confederation is a complex machine and *sui generis*. It creates joint federal powers; but it recognises separate state powers: it is confederate, to some purposes; but consolidated, to other purposes. The formation of every social compact is presumed, however, by elementary writers, to be a surrender of so much, and no more, of private rights, as are necessary to the preservation and operation of the government; but this principle is not left with us to mere implication; it is formally declared in many state constitutions, in favor of the people; and in the federal constitution, it is declared in favor of the states, as well as of the people. With respect, then, to the right of emigration, it has been under the consideration of the people and government of the Union, from the moment of their birth as an independent nation; insomuch that the refusal to pass laws for the encouragement of emigration to America, is charged as a proof of tyranny and oppression, in the enumeration of the grievances, which produced and justified the revolution. The articles of confederation contain not any clauses, expressly granting or restraining the power and right of naturalization and emigration; but they contain an express reservation of all powers in favor of the states individually, which are not, in terms, transferred to the Union. An inspection of the several state constitutions will prove, that in some form or other, the principle has been recognised by every member of the confederation; and the constitution of Pennsylvania explicitly provides, that no law shall be passed prohibiting emigration from the state. This is, perhaps, the only direct expression of the public sentiment on the subject; but the very silence that prevails, strengthens the argument. The power of naturalizing has been vested in several of the state governments, and it now exists in the general government; but the power to restrain or regulate the right of emigration, is nowhere surrendered by the people; and it must be repeated, that what has not been given, ought not to be assumed.

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It may be said, however, that such a power is necessary to the government, and that it is implied in the authority to regulate the business of naturalization. In considering these positions, it must be admitted, that although an individual has a right to expatriate himself, he has not a right

to seduce others from their country. Hence, those who forcibly or seduc-
*143] tively take away a citizen, commit an act which *forms a fair object of municipal police; and a conspiracy or combination to leave a country, might likewise be properly guarded against. Such laws would not be an infraction of the natural right of individuals; for the natural rights of man are personal; he has no right to will for others, and he does so, in effect, whenever he moves the mind of another to his purpose, by fear, by fraud or by persuasion. The English law and the law of Pennsylvania, therefore, punish kidnapping, and transporting or seducing artists to settle abroad, as crimes. 4 Bl. Com. 219, 160; 2 Dall. Laws. But this is all the power on the subject, which a government ought to possess for its preservation. The depopulation of a country by the spontaneous co-operating will of numbers, proves nothing more than that a bad government exists, or a bad soil is inhabited. Such an event, however, is too remote a possibility, to be anywhere a subject of apprehension; and with respect to America, it is visionary indeed! If then, the power of restraining emigration is not necessary to the existence of government, much may be urged to show that it is a power of too delicate a nature to be trusted by the people to the integrity of any government; since, by legislative regulations, the exercise of the right might be rendered so difficult, that the right itself would be put in everlasting abeyance. Nor is there any essential coincidence in a power to regulate naturalization, and in a power to regulate emigration; so that the grant of the former shall be deemed to include the latter. The idea of admitting, and the idea of excluding, are not analogous. As to the point of policy, if a man wishes to leave a country, he is not likely to remain in it, by force, beneficially to the state. The character of the migrating individual can have no influence on the right; his private motives of interest, or of pleasure, do not affect the community; and it is of no importance to what country he goes. The moment he has expatriated himself, the state is no longer interested, no longer responsible for his conduct; the ligature, which bound them, is severed, and can never again be united, without their mutual consent: the emigrant has become an alien. But in the act of naturalization, every community has a right totally to reject applications for admission; or to prescribe the terms; and then the character of the applicant, the motives of emigration from his old country, and the evidences of attachment to his new one, are all to be considered.

Let it, however, be supposed, for a moment, that the grant of the naturalization power embraces a power of regulating emigration, the question still remains, has the power of regulating emigration been exercised by congress? And if it has not been exercised by the department of government, to which alone, even by implication, it is granted, what authority has the
*144] *court to interfere upon the subject? That the power has not been exercised by congress is conceded; and if the court interferes, it will be a legislative, not a judicial act; for although it is contended, that the law of nations furnishes rules to supply the silence of the legislature, there is scarcely a subject to which the jurisdiction of congress extends, that might not, on the same doctrine, be regulated, without the interposition of that body. Thus, congress has power to define and punish piracies, felonies committed on the high seas, and offences against the law of nations; and yet, without the exercise of that power, the law of nations would supply rules as

applicable to those cases as to the case of expatriation. But naturalization and expatriation are matters of internal police; and must depend upon the municipal law, though they may be illustrated and explained by the principles of general jurisprudence. It is true, that the judicial power extends to a variety of objects; but the supreme court is only a branch of that power; and depends on congress for what portion it shall have, except in the cases of ambassadors, &c., particularly designated in the constitution.[1] The power of declaring whether a citizen shall be entitled in any form to expatriate himself, or, if entitled, to prescribe the form, is not given to the supreme court; and yet that power will be exercised by the court, if they shall decide against the expatriation of Captain Talbot. Let it not, after all, be understood, that the natural, locomotive right of a free citizen, is independent of every social obligation. In time of war, it would be treason to migrate to an enemy's country and join his forces, under the pretext of expatriation (1 Dall. 53); and, even in time of peace, it would be reprehensible (say the writers on the law of nature and nations) to desert a country laboring under great calamities. So, if a man acting under the obligations of an oath of office, withdraws to elude his responsibility, he changes his habitation, but not his citizenship. It is not, however, private relations, but public relations; not private responsibility, but public responsibility, that can affect the right: for where the reason of the law ceases, the law itself must also cease. There is not a private relation, for which a man is not as liable by local, as by natural, allegiance—after, as well as before his expatriation: he must take care of his family, he must pay his debts, wherever he resides; and there is no security in restraining emigration, as to those objects, since, with respect to them, withdrawing is as effectual as expatriating.

Nor is it enough to impair the right of expatriation, that other nations are at war; it must be the country of the emigrant. No nation has a right to interfere in the interior police of another: the rights and duties of citizenship to be conferred or released, are matter of interior police; and yet, if a foreign war could affect *the question, every time that a fresh power entered into a war, a new restraint would be imposed upon the natural rights of the citizens of a neutral country; which, considering the constant warfare that afflicts the world, would amount to a perpetual control. But the true distinction appears to be this: The citizens of the neutral country may still exercise the right of expatriation, but the belligerent power is entitled to say, "the act of joining our enemies, *flagrante bello*, shall not be a valid act of expatriation." By this construction, the duty a nation owes to itself, the sacred rights of the citizen, the law of nations, and the faith of treaties, will harmonize, though moving in distinct and separate courses. [*145

To pursue the subject one step further: A man cannot owe allegiance to two sovereigns (1 Bl. Com. 370); he cannot be citizen of two republics.

[1] The appellate power of the supreme court is conferred by the constitution, and not derived from acts of congress. Ex parte McCardle, 7 Wall. 506; Ex parte Yerger, 8 Id. 85; Smith *v.* Allyn, 1 Paine 453. But when congress enacts, that it shall have appellate jurisdiction, in certain cases; this is a negation of jurisdiction, in others. Id. And congress cannot confer original jurisdiction on the supreme court, in cases other than those mentioned in the constitution. Marbury *v.* Madison, 1 Cr. 137. Affirmative words in the constitution, declaring in what cases the supreme court shall have original jurisdiction, must be construed negatively as to all other cases. Ex parte Vallandigham, 1 Wall 252.

If a man has a right to expatriate, and another nation has a right and disposition to adopt him, it is a compact between the two parties, consummated by the oath of allegiance. A man's last will, as to his citizenship, may be likened to his last will, as to his estate; it supersedes every former disposition; and when either takes effect, the party, in one case, is naturally dead, in the other, he is civilly dead—but in both cases, as good christians and good republicans, it must be presumed, that he rises to another, if not to a better, life and country.

An act of expatriation, likewise, is susceptible of various kinds of proof. The Virginia law has selected one, when the state permits her citizens to depart; but it is not, perhaps, either the most authentic, or the most conclusive that the case admits. It may be done obscurely in a distant county court; and even after the emigrant is released from Virginia, to what nation does he belong? He may have entered no other country, nor incurred any obligation to any other sovereign. Not being a citizen of Virginia, he cannot be deemed a citizen of the United States. Shall he be called a citizen of the world; a human balloon, detached and buoyant in the political atmosphere, gazed at wherever he passes, and settled wherever he touches? But on the other hand, the act of swearing allegiance to another sovereign, is unequivocal and conclusive; extinguishing, at once, the claims of the deserted, and creating the right of the adopted, country. Sir William Blackstone, therefore, considers it as the strongest, though an ineffectual, effort to emancipate a British subject from his natural allegiance; and the existing constitution of France declares it expressly to be a criterion of expatriation. The same principle operates, when the naturalization law of the United States provides, that the whole ceremony of initiation shall be performed in the American courts; and if it is here considered as the proof of adoption, shall it not be considered also as the test of expatriation? If
*146] America *makes citizens in that way, shall we not allow to other nations, the privilege of the same process? In short, to admit that Frenchmen may be made citizens by an oath of allegiance to America, is virtually to admit, that Americans may be expatriated by an oath of allegiance to France.

After this discussion of principles, forming a necessary basis for the facts in this case, it is insisted: 1st. That Talbot was a naturalized citizen of the French republic, at the time of receiving a commission to command the privateer, and of capturing the Magdalena. He left this country with the design to emigrate; and the act of expatriation must be presumed to be regular, according to the laws of France, since it is certified by the municipality of Point-a-Pitre, by the French consul, and by the governor of Guadaloupe. 2d. That Redick was also a naturalized citizen of the French republic, when he purchased the vessel, and received a commission to employ her as a privateer. 3d. That Ballard's expatriation and commission, however doubtful, cannot affect Talbot and Redick. But still, it is objected, that these acts of expatriation, these commissions, are all fraudulent and void. In private contracts, in subjects of municipal regulation, in matters of *meum et tuum*, the rule is clear, that fraud vitiates everything, and the fraud may be collected from circumstances. But is fraud to be presumed, in a conflict of national rights? It is said, that a nation cannot be considered in the light of pirates; 1 Wood.; so, a nation cannot commit frauds. Let the matter be

turned as it may, it will rest on this ground—had France any authority to naturalize, or to commission, Talbot and Redick? America is deeply interested, at least, in withholding a concession, that any other nation but France can decide that question. The validity of her own naturalizations, the authenticity of her own commissions, and the claims of her impressed seamen are all involved. France, then, is exclusively to judge; she granted the authority, she can rescind it; she can punish any abuse of it; and to her government must be the appeal, if America, or any other nation, has sustained an injury by it. If, indeed, on the pretext of fraud in the persons who obtain a French commission, our courts may annul them, where will the inquisitorial censorship terminate? British patents of denization, as well as French acts of naturalization; and every commission of the officers of a public ship of war, as well as of a privateer, will be alike subject to our supreme control.

But even the allegation of fraud is unsupported by any reasonable degree of evidence. The first circumstance relied on is, that the acts of naturalization, bill of sale, and commission to cruise, were in the custody of Capt. Talbot, on board the privateer, and not held by Redick, at Point-a-Pitre. But, surely, every privateer must be always ready to prove her ownership and authority, *to rescue her from the imputation of piracy, and to entitle her to sell her prizes. Again, it is said, that Redick had no agent in America. But it is sufficient to answer, that the captain of a [*147 privateer is the natural agent for the owner; that it is idle to expect that the owner of a cruising vessel shall have an agent in every port, at which she may touch; and that, in fact, Redick had several agents in Charleston. It is added, as circumstances for suspicion, that Talbot had not proved that his vessel was not fitted out in the United States, whereas, the proof of the affirmative lay with the appellee; the articles on board Talbot's vessel, if not put on board at Guadaloupe, might have been for trade; and Redick, a *bonâ fide* purchaser, ought not to be affected by an illegal outfit: 2 Esp. 282; 3 Wood. 213; 1 Bl. Com. 262; 1 T. R. 260; 3 Ibid. 437; 2 Wood. 412; 431; Hard. 349; Cowp. 341; 2 T. R. 750. That proof is not made of notice of the sale to Redick, whereas, it appears, that Sinclair and Wilson were actually informed of the transaction; and that Sinclair and Wilson have not been produced as witnesses by the appellant, whereas, it was the duty of the appellee, if he thought their testimony material, to examine them, and he had the same means to compel their attendance.

III. That the capture being made by Captain Talbot, notwithstanding the participation of Captain Ballard, the vessel is a lawful prize. If, indeed, Talbot and Redick were regularly naturalized by France, if the vessel was regularly sold to Redick, and commissioned by the French government, it is obvious, that the validity of the capture can only be impeached, by the circumstance of Capt. Talbot's consorting with Capt. Ballard. That point may be considered in two ways: 1st. Considering Capt. Ballard as acting under color of a commission: 2d. Considering Captain Ballard as acting without any authority at all.

1. The commission which Ballard held, was, at least, sufficiently colorable, to justify Talbot, the commander of a French privateer, in associating with him against the enemies of France. A general order, indeed, is a sufficient commission, where there is evidence a person intended to act under it.

2 Vatt. §§ 224, 5, 6. But he not only held a commission, but he was employed by the French government itself, sailed under French colors, and in the character of a French vessel, had been permitted freely to leave and enter the American ports. It is true, that it is eventually discovered that he had clandestinely fitted out his vessel, in violation of the laws of the United States: but Talbot had no right to question the validity of the commission, nor the legality of the outfit; and even supposing Talbot did assist in the outfit of Ballard's vessel, that, as a substantive offence, might render him amenable to punishment in our courts, but it could not vacate his French commission, nor render him, as a French citizen, a pirate throughout the world. *The validity of the commission and the legality of the outfit are questioned, however, by a Dutch subject, before an American tribunal; and yet, such a plea would not be sustained in France, and could not be allowed even in Holland. With respect to America herself, whatever punishment she denounces, for a violation of her neutrality, she may inflict; but on principles of justice, she cannot convert one crime into another, an illegal outfit into piracy; she cannot punish for holding a commission, recognised by the authority that issued it; she cannot make an innocent man (for instance, Redick, the owner of the privateer), responsible for a guilty one; she cannot impair the right, or confiscate the property, of a man acting under a due authority, in order to punish a man acting without due authority; and she cannot punish a man for associating, out of her jurisdiction, with another, contrary to her laws, but consistently with the laws of the country to which he belongs.

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But what more did Talbot do, than is justifiable, on the principle of stratagem, by the laws of war? It is illegal, to fit out a vessel of war within the United States, under color of a French commission; and yet, after the vessel is outfitted, and on the high seas, may not an officer of France, without vacating his commission, employ her? Foreigners are often retained as spies, and sometimes pressed into the service of a belligerent power. Vatt. p. 593, 557; Grot.; Puff.; Heinec. 170. Why may they not be employed as consorts in cruising? A colorable commission was deemed sufficient to rescue Captain Ballard from a conviction for piracy; and if for that purpose, it ought surely to be sufficient to save Talbot, or rather, indeed, Redick, the party really interested, from a charge of piracy, the forfeiture of his commission, and the loss of the prize. Where there is a commission, there can be no piracy (2 Woodes. 425; 2 Sir L. Jenk. 754; Moll. 64); and capture by deputation, under color of a commission, is no piracy, though the ship is carried into the port of a friend. 2 Woodes. 426; Moll. lib. 1, c. 4, § 19, p. 65. The case in 2 Vern. 592, quoted for the appellee, is the case of Englishmen, acting as such, though under a Savoy commission, against friends of England; whereas, the present case is that of an American, having lawfully expatriated himself, and after becoming a French citizen, receiving as such a commission, and making prize, in a French vessel, of the property of the enemies of France. But even on the point of the commission, it is said in the case, that the prize might inure as a *droit* of admiralty, on the principle of capture from an enemy, by an uncommissioned vessel. 2 Woodes. 433. And there are some authorities that go the length of saying, that capture by a neutral, where there is a commission, is good. Lex Merc. 227; Com. Dig. 269.

*2d. But let it be supposed, in the second place, that Captain Ballard had no authority at all, this will not destroy Captain Talbot's right of capture. A piratical capture does not, it is agreed, alter the property (2 Wood. 428–31); and as Ballard, in that case, had no right to seize the vessel, it till remained the property of the Dutch owners, liable to be seized anywhere by the French, their public enemies. Vatt.; Burl. 219, 222, 225; Lee on Capt. 206; 2 Val. 261. If, indeed, a friend's property is retaken from a pirate, the friend shall only pay salvage; but if an enemy's property is so retaken, the right becomes entire and absolute in the recaptor. It would be war, in a neutral country, say the authorities, to secure, within her territory, the spoils of one of the belligerent parties; and is it not a greater partiality, a more striking aggression, to attempt to do so on the high seas? It can only be by an extension of her neutral jurisdiction, that the United States can pretend to invalidate the capture, because the property was in the possession of Ballard, an American citizen; and surely, the unlawful act of her own citizen can give no right or authority to the United States, at the expense of the right and authority of a foreign nation. If, upon the whole, Ballard had a colorable commission, it justified Talbot; if he had no commission, his misconduct on the high seas, cannot add to the safety of the property of the Dutch, nor enlarge the jurisdiction and power of the United States; and even if Talbot had consorted with Ballard, an avowed pirate, the prize would be good as a *droit* of the French admiralty, though, perhaps, neither of the captors acquired a property in it. Lex Merc. 246; Moll. lib. 1, § 10.

The facts, then, are briefly, that the two cruisers were in company, when they first saw the Magdalena; that, for their mutual interest, they afterwards separated, to pursue separate vessels, that both were again in sight, however, when the prize was captured, that both took possession of her, and that both were in possession, on her arrival in the port of Charleston. The force of one joint cruiser is the force of both; and, like joint-tenants, the possession of one is the possession of both. It cannot be said, that she was first captured by Ballard; for, when two ships are in sight, both are considered as captors; both entitled to share in the prize (2 Wood. 447; Moll. lib. 1, c. 2, § 22; 2 Leon. 182; Doug. 324, 328); and therefore, on that footing, if Ballard was not entitled, either the whole prize vested in Talbot, or Ballard's share was a *droit* of the admiralty of France; but America could have no pretence to hold or release any part of it. 2 Wood. 432–3, 441, 456; 2 Vern. 592.

The counsel for the *appellees* insisted upon the following points: 1st. That the capturing vessels were American property. *2d. That even if the vessels were French property, the instruments or agents used [*150 to effect the capture, were American citizens. 3d. That both vessels were of American outfit, and therefore, the capture was illegal. 4th. That, at all events, Ballard acquired no right by the capture, and that Talbot, coming in under him, could have no higher pretensions than Ballard himself. From this view, it will be perceived, that the course of their argument led principally to an investigation of the facts; whence, concluding that the whole transaction was collusive and fraudulent, on the part of the owners and captains of the vessels, they cited authorities to show, that fraud vitiates every

act, and that although fraud cannot be presumed, it may be proved by circumstances. 3 Chan. Cas. 85, 114; Wils. 230; 3 Co. 778, 81; 1 Burr. 391, 396; 4 T. R. 39.

On the points of law, the counsel for the appellee, held the following doctrines: 1. That Ballard and Talbot were Americans by birth, and had done nothing which could work a lawful expatriation. It is conceded, that birth gives no property in the man; but on the principles of the American government, he may leave his country when he pleases, provided it is done *bonâ fide*, with good cause, and under the regulations prescribed by law; 1 Vatt. lib. 1, c. 19, §§ 220, 221, 223, 224; Grot. lib. 2, c. 5, § 24; Puff. lib. 8, c. 11, p. 872; and provided also, that he goes to another country, and takes up his residence there, under an open and avowed declaration of his intention. Thus, the rule is fairly laid down in 2 Heinec. lib. 2, c. 10, § 230, p. 220; requiring from the emigrant not only an act of departure, with the design to expatriate, but the act of joining himself to another state. But a man may be entitled to the right of citizenship in two countries; and proving that he is received by a new country, is not sufficient to prove that his own country has surrendered him. If, indeed, it is lawful for one individual, any number of individuals may exercise the right of expatriation, under the circumstances contended for; and then, we might behold a political monster, all the citizens of a country at war, though the country itself is at peace. There must, therefore, from the nature of the case, be some restraint on this locomotive right: and it is a reasonable restraint, recognised by the best writers, that it shall not be exercised, either in contravention of a national compact, such as the American treaty with Holland, which declares that the citizens of either party shall not take commissions as privateers against the other (art. 19), or to the injury of the emigrant's country. Vatt. lib, 2, c. 6, § 71–6. Privateering by the subjects of a neutral nation, is considered as an infamous practice (Ibid. lib. 3, c. 15, § 229); and if an act *committed by a citizen is approved and ratified by his country, they adopt the offence as their own. Ibid. lib. 2, c. 6, § 74. The power of regulating emigration is an incident to the power of regulating naturalization. It is vested exclusively in congress; and the Virginia act, under which Ballard pretends to have renounced his allegiance, can have no effect on the political rights of the Union. With respect to Talbot, his pretended expatriation was in itself an offence, and therefore, cannot be a justification: he sailed from America in an armed vessel, illegally fitted out, with the design of becoming a privateer against a nation in peace and treaty with the United States; and the sale of his vessel to Redick, was merely a color to the general scheme of plunder and depredation, in which Redick was a partaker. If, then, Talbot is to be still considered as an American citizen, acting under a French commission, in capturing a Dutch prize, restitution must be awarded, upon the principle of the decision in 2 Vern. 592; Holland being at peace with America, though she is at war with France.

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2. That even supposing Talbot's expatriation, and the ownership of his vessel, to be sufficient to authorize his own privateering, the circumstances of consorting with Ballard, knowing the American character of Ballard and his vessel, were sufficient to invalidate the capture. Can it be reasonable or just, that a French privateer should associate with a pirate, or avail himself of the power of America, to seize the property of her allies, bring that prop-

erty into an American port, and yet, that an American court of justice should be incompetent to redress the grievance? But the actual capture was made by Ballard, whose right of capture is abandoned. The tortious act had been completed, before Talbot was admitted, by a fraudulent concert, into a share of the possession of the vessel; and even when admitted, he does not pretend to defeat the previous occupancy, or to controvert Ballard's claim of prize. Ballard (possessed by assignment of a commission, which did not authorize capture, and which was not, in its nature, assignable) had wrongfully seized the vessel of an American friend; and surely, if at the time of such seizure, and before Talbot boarded the vessel, the Dutch owners had a right to demand justice from the United States, as against Ballard, that right could not be destroyed by any immediate consequence of the wrong on which it was founded; such as Talbot's being admitted by the aggressor to a joint possession. Besides, Talbot assisted in arming Ballard's vessel, within the neutral jurisdiction of the United States; and this, together with the concert in capturing the Magdalena, amounted to a relinquishment or forfeiture of his commission.

3. That neither the law of nations, nor the treaty between *America and France, prevents the interference of the judicial authority of the [*152 United States, in this case; and it has already been adjudged, that the district court has admiralty jurisdiction, both as a prize and instance court. *Ante*, p. 6. It is enough to repel the argument founded on the law of nations, to state, that the question is not, whether the court will take cognisance of a capture, made on the high seas, by the citizens of France, of the property of the enemies of that republic, which is a question that can only be decided by the courts of the captor: but the gist of the controversy is—whether American citizens shall be permitted, under the color of a foreign commission, to make prize of the property of the friends of America, either by their own independent act, or in collusion and concert with a real French privateer? As to the 17th article of the treaty with France, giving it a fair and rational exposition, it cannot include prizes taken by privateers unlawfully equipped in the American ports: and the vessels taken as prize, must not only belong to the enemies of France, but be such as are taken *bonâ fide* by the citizens of France; which was not the fact in the present instance.

On the 22d of August 1795, the Judges delivered their opinions *seriatim*.

Paterson, Justice.—The libel in this cause was exhibited by Joost Jansen, master of the Vrouw Christiana Magdalena, a Dutch brigantine, owned by citizens of the United Netherlands; and its prayer is, that Edward Ballard, and all others having claim, may be compelled to make restitution. The district court directed restitution; the circuit court affirmed the decree; and the cause is now before this court for revision. The Magdalena was captured by Ballard, or by Ballard and Talbot, and brought into Charleston. The general question is, whether the decree of restitution was well awarded. In discussing the question, it will be necessary to consider the capture as made—1. By Ballard. 2. By Ballard and Talbot.

I. By Ballard. This ground not being tenable, has been almost abandoned in argument. It is, indeed, impossible to suggest any reason in favor of the capture on the part of Ballard. Who is he? A citizen of the United

States: for although he had renounced his allegiance to Virginia, or declared an intention of expatriation, and admitting the same to have been constitutionally done, and legally proved, yet he had not emigrated to, and become the subject or citizen of any foreign kingdom or republic. He was domiciliated within the United States, from whence he had not removed and joined himself to any other country, settling there his fortune and family. *153] *From Virginia, he passed into South Carolina, where he sailed on board the armed vessel called the *Ami de la Liberte.* He sailed from, and returned to, the United States, without so much as touching at any foreign port, during his absence. In short, it was a temporary absence, and not an entire departure from the United States; an absence with intention to return, as has been verified by his conduct and the event, and not a departure with intention to leave this country, and settle in another. Ballard was, and still is, a citizen of the United States; unless, perchance, he should be a citizen of the world. The latter is a creature of the imagination, and far too refined for any republic of ancient or modern times.[1] If however, he be a citizen of the world, the character bespeaks universal benevolence, and breathes peace on earth and good will to man; it forbids roving on the ocean in quest of plunder, and implies amenability to every tribunal. But what is conclusive on this head is, that Ballard sailed from this country with an iniquitous purpose, *cum dolo et culpa*, in the capacity of a cruiser against friendly powers. The thing itself was a crime. Now, it is an obvious principle, that an act of illegality can never be construed into an act of emigration or expatriation. At that rate, treason and emigration, or treason and expatriation, would, in certain cases, be synonymous terms. The cause of removal must be lawful; otherwise, the emigrant acts contrary to his duty, and is justly charged with a crime. Can that emigration be legal and justifiable, which commits or endangers the neutrality, peace or safety of the nation of which the emigrant is a member?

As we have no statute of the United States, on the subject of emigration, I have taken up the doctrine respecting it, as it stands on the broad basis of the law of nations, and have argued accordingly. That law is in no wise applicable to the present case; for, Ballard, at the time of his taking the command of the *Ami de la Liberte*, and of his capturing the Magdalena, was a citizen of the United States; he was domiciliated within the same, and not elsewhere; and besides, his cause of departure, supposing it to have been a total departure from and abandonment of his country, was unwarrantable, as he went from the United States, in the character of an illegal cruiser. The act of the legislature of Virginia does not apply. Ballard was a citizen of Virginia, and also of the United States. If the legislature of Virginia pass an act specifying the causes of expatriation, and prescribing the manner in which it is to be effected by the citizens of that state, what can be its operation on the citizens of the United States? If the act of Virginia affects Ballard's citizenship, so far as respects that state, can it touch his citizenship, so far as it regards the United States? Allegiance to a particular state is one thing; *allegiance to the United States is another. *154] Will it be said, that the renunciation of allegiance to the former, im-

[1] See Rabaud *v.* D'Wolf, 1 Paine 580; s. c. 1 Pet. 485.

plies or draws after it a renunciation of allegiance to the latter? The sovereignties are different; the allegiance is different; the right, too, may be different. Our situation being new, unavoidably creates new and intricate questions. We have sovereignties moving within a sovereignty. Of course, there is complexity and difficulty in the system, which requires a penetrating eye fully to explore, and steady and masterly hands to keep in unison and order. A slight collision may disturb the harmony of the parts, and endanger the machinery of the whole. A statute of the United States, relative to expatriation, is much wanted; especially, as the common law of England is, by the constitution of some of the states, expressly recognised and adopted. Besides, ascertaining by positive law the manner in which expatriation may be effected, would obviate doubts, render the subject notorious and easy of apprehension, and furnish the rule of civil conduct on a very interesting point.

But there is another ground, which renders the capture on the part of Ballard altogether unjustifiable. The *Ami de la Liberte* was built in Virginia, and is owned by citizens of that state; she was fitted out as an armed sloop of war, in, and as such, sailed from, the United States, under the command of Ballard, and cruised against and captured vessels belonging to the subjects of European powers, at peace with the said states. Such was her predicament, when she took the Magdalena. It is idle to talk of Ballard's commission; if he had any, it was not a commission to cruise as a privateer, and if so, it was of no validity, because granted to an American citizen, by a foreign officer, within the jurisdiction of the United States. We are not, however, to presume, that the French admiral or consul would have issued a commission of the latter kind, because it would have been a flagrant violation of the sovereignty of the United States; and of course, incompatible with his official duty. Therefore, it was not, and indeed, could not, have been a war commission. It is not necessary, at present, to determine, whether acting under color such a commission would be a piratical of offence. Every illegal act or transgression, committed on the high seas, will not amount to piracy. A capture, although not piratical, may be illegal, and of such a nature as to induce the court to award restitution.[1]

It has been urged in argument, that the *Ami de la Liberte* is the property of the French republic. The assertion is not warranted by the evidence; and if it was, would not, perhaps, be of any avail, so as to prevent restitution by the competent authority. The proof is clear and satisfactory, that she was an American vessel, owned by citizens of the United States, and *still continues to be so. The evidence in support of her being French property is extremely weak and futile; it makes no impression; it [*155 merits no attention. But if the *Ami de la Liberte* be the property of the French republic, it might admit of a doubt, whether it would be available, so as to legalize her captures and prevent restoration; because she was, after the sale (if any took place) to the republic, and before her departure from, and while she remained in, the United States, fitted out as an armed vessel of war; from whence, in such capacity, and commanded by Ballard, an Amer-

[1] So, a seizure as prize, is no trespass, though it may be wrongful; the authority and intention with which it is done, deprive the act of the character which would otherwise be impressed upon it; the tort is merged in the capture as prize. Stoughton *v.* Taylor, 2 Paine 655.

ican citizen, she set sail, and made capture of vessels belonging to citizens of the United Netherlands. The United States would, perhaps, be bound, both by the law of nations and an express stipulation in their treaty with the Dutch, to restore such captured vessels, when brought within their jurisdiction, especially, if they had not been proceeded upon to condemnation, in the admiralty of France. On this, however, I give no opinion. The United States are neutral in the present war; they take no part in it; they remain common friends to all the belligerent powers, not favoring the arms of one, to the detriment of the others. An exact impartiality must mark their conduct towards the parties at war; for if they favor one to the injury of the other, it would be a departure from pacific principles, and indicative of an hostile disposition. It would be a fraudulent neutrality. To this rule, there is no exception, but what arises from the obligation of antecedent treaties, which ought to be religiously observed. If, therefore, the capture of the Magdalena was effected by Ballard alone, it must be pronounced to be illegal, and of course, the decree of restitution is just and proper. This leads us—

II. To consider the capture as having been made by Ballard and Talbot. Talbot commanded the privateer *L'Ami de la Point-a-Pitre.* The question is, as the Magdalena struck to and was made prize of by Ballard, and as Talbot, who knew his situation, aided in his equipment, and acted in confederacy with him, afterwards had a sort of joint possession, whether Talbot can detain her as prize, by virtue of his French commission? To support the validity of Talbot's claim, it is contended, that Ballard had no commission, or an inadequate one, and therefore, his capture was illegal: that it was lawful for Talbot to take possession of the ship so captured, being a Dutch bottom, as the United Netherlands were at open war and enmity with the French republic, and Talbot was a naturalized French citizen, acting under a regular commission from the governor of Guadaloupe. It has been already observed, that Ballard was a citizen of the United States; that the *Ami de la Liberte*, of which he had the command, was fitted out and armed as a vessel of war in the United States; that as such she sailed from the United
*156] States, and cruised against *nations at peace and in amity with the said states. These acts were direct and daring violations of the principles of neutrality, and highly criminal by the law of nations. In effecting this state of things, how far was Talbot instrumental and active? What was his knowledge, his agency, his participation, his conduct in the business? It appears in evidence, that Talbot expected Ballard at Tybee; that he waited for him there several days; that he set sail without him, and in a short time, returned to his former station. This indicates contrivance and a previous communication of designs. At length, Ballard appeared; on his arrival, Talbot put on board the *Ami de la Liberte*, in Savannah river, and confessedly within the jurisdiction of the United States, four cannon, which he had brought for the purpose. Were these guns furnished by order of the French consul? The insinuation is equally unfounded and dishonorable. They also fired a salute, and hailed Sinclair, a citizen of the United States, as an owner: an incident of this kind, at such a moment, has the effect of illumination. Talbot knew Ballard's situation, and in particular, aided in fitting out the *Ami de la Liberte*, by furnishing her with guns. Without this assistance, she would not have been in a state for war.

An essential part of the outfit, therefore, was provided by Talbot. The equipment being thus completed, the two privateers went to sea. When on the ocean, they acted in concert; they cruised together, they fought together, they captured together. Talbot knew that Ballard had no commission; he so states it in his claim: the facts confirm the statement; for, about an hour after Ballard had captured the Magdalena, he came up, and took a joint possession, hoping to cover the capture by his commission, and thus to legalize Ballard's spoliation. How silly and contemptible is cunning—how vile and debasing is fraud! In furnishing Ballard with guns, in aiding him to arm and outfit, in co-operating with him on the high seas, and using him as the instrument and means of capturing vessels, Talbot assumed a new character, and instead of pursuing his commission, acting in opposition to it. If he was a French citizen, duly naturalized, and if, as such, he had a commission, fairly obtained, he was authorized to capture ships belonging to the enemies of the French republic, but not warranted in seducing the citizens of neutral nations from their duty, and assisting them in committing depredations upon friendly powers. His commission did not authorize him to abet the predatory schemes of an illegal cruiser on the high seas; and if he undertook to do so, he unquestionably deviated from the path of duty. Talbot was an original trespasser, for he was concerned in the illegal outfit of the *Ami de la Liberte.* Shall he then reap any benefit from her captures, when brought within *the United States? Besides, it is in evidence, that Ballard took possession first of the Magdalena, and put on board of her a prize-master [*157 and some hands; Talbot, in about an hour after, came up, and also put on board a prize-master, and other men. The possession in the first instance was Ballard's; he was not ousted of it; the prey was not taken from him; indeed, it was never intended to deprive him of it. So far from it, that it was an artifice to cover the booty. Talbot's possession was gained by a fraudulent co-operation with Ballard, a citizen of the United States, and was a mere fetch or contrivance, in order to secure the capture. Ballard still continued in possession. The Magdalena, thus taken and possessed, was carried into Charleston. Can there be a doubt with respect to restoration? Stating the case, answers the question. It has been said, that Ballard had a commission, and acted under it. The point has already been considered, and indeed is not worth debating; the commission, if any, was illegal, and of course, the seizures were so. But then, what effect has this upon Talbot? Does it make his case better or worse? The truth is, that Talbot knew that Ballard had no commission, and he also knew the precise case and situation of the *Ami de la Liberte;* to whom she belonged, where fitted out, and for what purpose. Talbot gave Ballard guns, within the jurisdiction of the United States, and thus aided in making him an illegal cruiser; he consorted and acted with him, and was a participant in the iniquity and fraud. In short, Ballard took the Magdalena, had the possession of her, and kept it; Talbot was in, under Ballard, by connivance and fraud, not with a view to oust him of the prize, but to cover and secure it; not with a view to bring him into judgment as a transgressor against the law of nations, but to intercept the stroke of justice and prevent his being punished. If Talbot procured possession of the Magdalena, through the medium of Ballard, a citizen of the United States, and then brought her within the jurisdiction of the said states, would it not be the duty of the competent authority, to

order her to be restored? The principle deducible from the law of nations is plain—you shall not make use of our neutral arm, to capture vessels of your enemies, but of our friends. If you do, and bring the captured vessels within our jurisdiction, restitution will be awarded. Both the powers, in the present instance, though enemies to each other, are friends of the United States; whose citizens ought to preserve a neutral attitude; and should not assist either party in their hostile operations. But if, as is agreed on all hands, Ballard first took possession of the Magdalena, and if he continued in possession, and brought her within the jurisdiction of the United States, which I take to be the case, then no question can arise with respect to the
*158] legality *of restitution. It is an act of justice, resulting from the law of nations, to restore to the friendly power the possession of his vessel, which a citizen of the United States illegally obtained, and to place Joost Jansen, the master of the Magdalena, in his former state, from whence he had been removed by the improper interference, and hostile demeanor of Ballard. Besides, it is right to conduct all cases of this kind, in such a manner, as that the persons guilty of fraud, should not gain by it. Hence, the efficacy of the legal principle, that no man shall set up his own fraud or iniquity as a ground of action or defence. This maxim applies forcibly to the present case, which, in my apprehension, is a fraud upon the principles of neutrality, a fraud upon the law of nations, and an insult, as well as a fraud, against the United States, and the republic of France.

I am, therefore, of opinion, that the decree of the circuit court ought to be affirmed. Being clear on the preceding points, it supersedes the necessity of deciding upon other great questions in the cause; such as, whether Redick and Talbot were French citizens; whether the bill of sale was colorable and fraudulent; whether Redick, if a French citizen, did not lend his name as a cover; and whether the property did not continue in Sinclair and Wilson, citizens of the United States.

Iredell, Justice.—In delivered my opinion on the great points arising in this case, I shall divide the consideration of it, under the following heads: 1. Whether the district court had jurisdiction *primâ facie* upon the subject-matter of the libel, taking for granted that the allegations in it were true. 2. Admitting that the court had jurisdiction *primâ facie*, whether William Talbot had stated and supported a case sufficient to entitle him to hold the property as prize, exempt from the jurisdiction and control of the district court.

I. The first inquiry is—whether the district court had jurisdiction *primâ facie*, upon the subject-matter of the libel, taking for granted that the allegations in it were true. These allegations in substance are: That the ship was taken on the high seas, by a schooner called *L'Ami de la Liberte*, commanded by Edward Ballard, who had no lawful commission to take her as the property of an enemy of the French republic, under whose authority the capture was alleged to be made. That William Talbot, who came up, after the surrender, and put some men on board, when the prize was in possession of Ballard, had also no lawful commission for the purpose of such a capture, being an American citizen, and his owners American citizens likewise.
*159] *That there was fraud and collusion between Talbot and Ballard, both vessels being, in fact, the property of the same owners, Wilson

and Sinclair, who were American citizens. Such, substantially, are the allegations of the libel, and admitting them to be true, nothing is more clear than that the capture was unlawful.

But it is objected, that this is a question of prize or no prize, and whether the ship was lawfully a prize or not, is for some court of the French republic alone to determine, under whose authority Ballard and Talbot allege they acted; and it is contended, that the capture in question being of a Dutch ship, and not an American, the United States have no right to decide a dispute between the Dutch and the French, in regard to a capture on the high seas, claimed as lawful by one party, and denied to be such by the other, since such an interposition would be equally a violation of the law of nations, and of the 17th article of the treaty with France. To this objection, the following answers appear to me to be satisfactory:

1. That it is true, both by the law of nations, and the treaty with France, if a French privateer brings an enemy's ship into our ports, which she has taken as prize on the high seas, the United States, as a nation, have no right to detain her, or make any inquiry into the circumstances of the capture. But this exemption from inquiry, by our courts of justice, in this respect, only belongs to a French privateer, lawfully commissioned, and therefore, if a vessel claims that exemption, but does not appear to be duly entitled to it, it is the express duty of the court, upon application, to make inquiry, whether she is the vessel she pretends to be, since her title to such exemption depends on that very fact. Otherwise, any vessel whatever, under a color of that kind, might capture, with impunity, and defy all inquiry, if she kept out of a French port, equally in violation of the law of nations, and insulting to the French republic, which, from a regard to its own honor and a principle of justice, would undoubtedly disdain all piratical assistance. She might say, now, I trust, with as much truth as dignity, *non tali auxilio, nec defensoribus istis, tempus eget.*

2. That such an inquiry being thus proper to be made, if upon the inquiry it shall appear, that the vessel pretending to be a lawful privateer, is really not such, but uses a colorable commission, for the purposes of plunder, she is to be considered by the law of nations, so far at least as a transfer of property is concerned, or a title to hold it insisted upon, in the same light as having no commission at all.

3. That *primâ facie* all piracies and trespasses committed *against the general law of nations, are inquirable, and may be proceeded against, in any nation where no special exemption can be maintained, either by the general law of nations, or by some treaty which forbids or restrains it. It is expressly held, in an authority quoted 1 Lex Mercatoria 252, "That if a Spaniard robs a Frenchman on the high seas, their princes being both then in amity with the crown of England, and the ship is brought into a port in England, the Frenchman may proceed *criminaliter* against the Spaniard, to punish him, and *civiliter*, to have restitution of his vessel." The authorities referred to are, Selden, Mare Claus. lib. 1, c. 27; Grotius de Jure Belli ac Pacis, lib. 3, c. 9, § 16, both books of very high authority. [*160

What is called robbery on the land, is piracy, if committed at sea. 3 Inst. 113; 1 Com. Dig. 269. And as every robbery on land includes a trespass, so does every piracy at sea. 1 Com. Dig. 268. Consequently, if there be an unlawful taking, it may be piracy or trespass, according to the circum-

stances of the case, both being equally unlawful, though one a higher species of offence than the other, which cannot alter the intrinsic illegality of the fact common to both, but only occasion a greater or less degree of punishment, proportioned to the nature of the offence. It is, therefore, no answer to say, in bar of restitution, that no piracy has been committed, and therefore, no restitution is to follow, since, if a trespass has been committed, though not a piracy, restitution is equally proper, as if the offence had amounted to piracy itself.

4. That by a due consideration of the law of nations, whatever opinions may have prevailed formerly to the contrary, no hostilities of any kind, except in necessary self-defence, can lawfully be practised by one individual of a nation, against an individual of any other nation at enmity with it, but in virtue of some public authority. War can alone be entered into by national authority; it is instituted for national purposes, and directed to national objects; and each individual on both sides is engaged in it as a member of the society to which he belongs, not from motives of personal malignity and ill-will. He is not to fly like a tiger upon his prey, the moment he sees an individual of his enemy before him. Such savage notions, I believe, obtained formerly. Thank God! more rational ones have succeeded, and a liberal man can frequently see great integrity and honor on both sides, though different and irreconcilable views of national interest or principles may unfortunately engage two nations in hostility. Even in the case of one enemy against another enemy, therefore, there is no color of justification for
*161] any offensive hostile act, unless it be authorized *by some act of the government, giving the public constitutional sanction to it.

5. That, notwithstanding an apparent contrariety of opinions on the subject, it would be easy to show, upon principle, if not by authority, that such hostility, committed without public authority, on the high seas, is not merely an offence against the nation of the individual committing the injury, but also against the law of nations, and of course, cognisable in other countries: but that is not material in the present stage of the inquiry, which affects only the conduct of our own citizens, in our own vessels, attacking and taking, under color of a foreign commission, on the high seas, goods of our friends. This is so palpable a violation of our own law (I mean the common law, of which the law of nations is a part, as it subsisted either before the act of congress on the subject, or since that has provided a particular manner of enforcing it) as well as of the law of nations generally; that I cannot entertain the slightest doubt, but that, upon the case of the libel, *primâ facie*, the district court had jurisdiction.

The next inquiry is—whether William Talbot has stated and supported a case sufficient to entitle him to hold the property as prize, exempt from the jurisdiction of the district court. This claim is grounded as follows: 1. That at the time of his receiving the commission, and at the time of the capture, he was a real French citizen, and his vessel was French property. viz., the property of Samuel Redick, a French citizen at Point-a-Pitre, in Guadaloupe. 2. That he had a lawful commission to cruise from the French republic. 3. That whether Ballard had a lawful commission or not, he himself was lawfully entitled: 1st. To part, if Ballard had a lawful commission, as having been in fight at the time of the capture, and therefore, contributing to intimidate the enemy into a surrender, upon the common

principle: 2d. If Ballard had no lawful commission, and is to be considered as a pirate, his capture did not change the property; of course, it remained Dutch, and he, as captain of a French privateer, had a right to seize and retain it.

The first point to be considered is—whether Talbot, at the time of his receiving the commission, and at the time of the capture, was a French citizen. This involves the great question as to the right of expatriation, upon which so much has been said in this cause. Perhaps, it is not necessary it should be explicitly decided on this occasion; but I shall freely express my sentiments on the subject.

*That a man ought not to be a slave; that he should not be confined against his will to a particular spot, because he happened to [*162 draw his first breath upon it; that he should not be compelled to continue in a society to which he is accidentally attached, when he can better his situation elsewhere, much less when he must starve in one country, and may live comfortably in another; are positions which I hold as strongly as any man, and they are such as most nations in the world appear clearly to recognise.

The only difference of opinion is, as to the proper manner of executing this right. Some hold, that it is a natural, inalienable right in each individual; that it is a right upon which no act of legislation can lawfully be exercised, inasmuch as a legislature might impose dangerous restraints upon it; and of course, it must be left to every man's will and pleasure, to go off, when, and in what manner, he pleases. This opinion is deserving of more deference, because it appears to have the sanction of the constitution of this state, if not of some other states in the Union. I must, however, presume to differ from it, for the following reasons:

1. It is not the exercise of a natural right, in which the individual is to be considered as alone concerned. As every man is entitled to claim rights in society, which it is the duty of the society to protect; he, in his turn, is under a solemn obligation to discharge all those duties faithfully, which he owes, as a citizen, to the society of which he is a member, and as a man, to the several members of the society, individually, with whom he is associated. Therefore, if he has been in the exercise of any public trust, for which he has not fully accounted, he ought not to leave the society, until he has accounted for it. If he owes money, he ought not to quit the country, and carry all his property with him, without leave of his creditors. Many other cases might be put, showing the importance of the public having some hold of him, until he has fairly performed all those duties which remain unperformed, before he can honestly abandon the society for ever. But it is said, his ceasing to be a citizen, does not deprive the public, or any individual of it, of remedies in these respects: yet the right of emigration is said to carry with it the right of removing his family and effects. What hold have they of him afterwards?

2. Some writers on the subject of expatriation say, a man shall not expatriate in a time of war, so as to do a prejudice to his country. But if it be a natural, inalienable right, upon the footing of mere private will, who can say, this shall not be exercised in time of war, as well as in time of peace, since the *individual, upon that principle, is to think of himself only? [*163 I, therefore, think, with one of the gentlemen for the defendant, that

the principle goes to a state of war, as well as peace, and it must involve a time of the greatest public calamity, as well as the profoundest tranquillity.

3. The very statement of an exception in time of war, shows that the writers on the law of nations, upon the subject, in general, plainly mean, not that it is a right to be always exercised, without the least restraint of his own will and pleasure, but that it is a reasonable and moral right, which every man ought to be allowed to exercise, with no other limitation than such as the public safety or interest requires, to which all private rights ought and must for ever give way. And if, in any government, principles of patriotism and public good ought to predominate over mere private inclination, surely, they ought to do so, in a republic founded on the very basis of equal rights, to be perfectly enjoyed, in every instance, where the public good does not require a restraint.

4. In some instances, even in time of war, expatriation may fairly be permitted. It ought not then to be restrained. But who is to permit it? The legislature, surely; the constant guardian of the public interest, where a new law is to be made, or an old one dispensed with. If they may take cognisance in one instance (as for example, in time of war), because the public safety may require it, why not in any other instance, where the public safety, for some unknown cause, may equally require it? Upon the eve of a war, it may be still more important to exercise it, as we often see in case of embargoes.

5. The supposition, that the power may be abused, is of no importance, if the public good requires its exercise. This feverish jealousy is a passion that can never be satisfied. No man denies the propriety of the legislature having a taxative power. Suppose, it should be seriously objected to, because the legislature might tax to the amount of 19*s.* in the pound? They have the power, but does any man fear the exercise of it? A legislature must possess every power necessary to the making of laws. When constructed as ours is, there is no danger of any material abuse. But a legislature must be weak to the extremest verge of folly, to wish to retain any man as a citizen, whose heart and affections are fixed on a foreign country, in preference to his own. They would naturally wish to get rid of him as soon as they could, and therefore, perhaps, the proper precaution would be, to restrain acts of banishment (if such could be at all permitted), rather than to limit the legislative control over expatriation. But is there no danger of abuse on the other side? Have not all the contentions about expatriation in the courts, arisen from a want of the exercise *of this very authority? *164] For, if the legislature had prescribed a mode, every one would know, whether it had or had not been pursued, and all rights, private as well as public, would be equally guarded; but upon the present doctrine, no rights are secured, but those of the expatriator himself. I, therefore, have no doubt, that when the question is in regard to a citizen of any country, whose constitution has not prohibited the exercise of the legislative power in this instance, it not only is a proper instance in which it may be exercised, but it is the duty of the legislature to make such provision, and for my part, I have always thought the Virginia assembly showed a very judicious foresight in this particular.

Whether the Virginia act of expatriation be now in force, is a question so important, that I would not wish unnecessarily to decide it. If it be, I have no doubt, that a citizen of that state cannot expatriate himself in any

other manner. It seems most probable (but I think not certain), from this record, that Talbot was a citizen of Virginia. We are, however, undoubtedly, to consider him as a citizen of the United States. Admitting, he had a right to expatriate himself, without any law prescribing the method of his doing so, we surely must have some evidence that he had done it. There is none, but that he went to the West Indies, and took an oath to the French republic, and became a citizen there. I do not think that merely taking such an oath, and being admitted a citizen there, in itself, is evidence of a *bonâ fide* expatriation, or completely discharges the obligations he owes to his own country. Had there been any restrictions, by our own law, on his quitting this country, could any act of a foreign country, operate as a repeal of these? Certainly not. When he goes there, they know nothing of him, perhaps, but from his own representation. He becomes a citizen of the new country, at his peril. The act is complete, if he has legally quitted his own: if not, it is subordinate to the allegiance he originally owed. By allegiance, I mean, that tie by which a citizen of the United States is bound as a member of the society. Did any man suppose, when the rights of citizenship were so freely and honorably bestowed on the unfortunate Marquis de la Fayette, that that absolved him, as a subject or citizen of his own country? It had only this effect, that whenever he came into this country, and chose to reside here, he was *ipso facto* to be deemed a citizen, without anything further. The same consequence, I think, would follow in respect to rights of citizenship, conferred by the French republic, upon some illustrious characters, in our own, and other countries. If merely intended, as ingeniously suggested at the bar, that upon going to France, and performing the usual requisites, they should be then French citizens, where is the *honor of it? Since [*165
any man may avail himself of an indiscriminate indulgence granted by law. Some disagreeable dilemmas may be occasioned by this double citizenship, but the principles, as I have stated them, appear to me to be warranted by law and reason, and if any difficulties arise, they show more strongly the importance of a law regulating the exercise of the right in question.

His going to the West Indies, and taking an oath of allegiance there, considering it in itself, is an equivocal act. It might be done, with a view to relinquish his own country for ever. It might be done, with a view to relinquish it for a time, in order to gain some temporary benefit by it. If the former, and this was clearly proved, it possibly might have the effect contended for. If the latter, it would show, that he voluntarily submitted to the embarrassments of two distinct allegiances: he must make them as consistent as he can. By our treaty with Holland, an American citizen, cruising upon Dutch subjects, as commander of a privateer, under a foreign commission, is to be deemed a pirate. If he left America, for the very purpose of doing this, and became a French citizen, that he might have a color for doing so, then his taking a French commission could not absolve him from a crime which he was committing in the very act of taking it, and of which the French government might not be aware, as they are not bound to take notice of any other treaties but their own. If he went, intending to reside there for a time, and to act under a commission, which he believed would, for the present, justify him, though this might excuse him from the guilt of piracy, it would not make such a contract lawful, because, in this case, even his intention was not to expatriate himself for ever; and consequently, he

still remained an American citizen, and had no authority to take a commission at all. It, surely, is impossible for us to say, he meant a real expatriation, when his conduct, *primâ facie*, as much indicates a crime, as anything else. If he had such an intention, before he left this country, why not mention it? If a citizen of Virginia, and their act of expatriation was not in force, yet surely, it prescribed as good a method of effecting it as any other, and his not pursuing this method (if he really meant an expatriation), can be accounted for in no other manner, but that he was conscious, the vessel he was fitting out was for the purpose of cruising, and would have been stopped by the government, had his design of expatriation so plainly evinced it. I, therefore, must say, there is no evidence to satisfy me, that he ceased to be an American citizen, so as to be absolved from the duties he owed to his own country; and among others, that duty of not cruising against the Dutch, in violation of the law of nations, generally, and of the treaty with Holland, in particular.

*166] * My observations, as to Talbot, will, in a great measure, apply to Redick, who appears to have been a citizen of Virginia. There is no evidence to satisfy me, that he ceased to be an American citizen, and became a French citizen, absolved from the duty he owed, as a citizen, to his own country. There is nothing to show this, but a residence, of no long duration, in a French island, his taking an oath to the French republic, and being admitted a French citizen, which, for the reasons I have given, I do not think sufficient.

In addition to my other observations, I may add, how is it possible, upon this principle, for the public to know in what situation they stand, as to any one of these persons? It is not impossible (I believe instances, indeed, have already happened of it), that an American citizen may go to some of the dominions of the French, become a French citizen for a time, enjoy all the benefits of such, and afterwards return to his own country, and claim and enjoy all the privileges of a citizen there, without the least possibility of the public knowing, otherwise than from accident, whether he has become a citizen of another government or not. Suppose, one of them was to insist on holding an estate in land, devised to him after his new citizenship, how could it be proved, he was an alien?

Whether, therefore, the property of the privateer was in Redick, or in Wilson and Sinclair, I think it was equally American property, though I confess, the weight of the evidence, impresses me strongly with the belief, that the property was Wilson and Sinclair's. And in regard to the objection, that nothing they could say or do, or Talbot either, could affect Redick, I think, as Talbot appears as the agent of Redick, of whom we know nothing but through him, his declarations are to be regarded as Redick's own, and any declarations of Wilson or Sinclair, in his presence, and any of the conduct of either of them, sanctioned by him, must have the same effect, as if the declarations had been made in the presence of Redick, and such conduct sanctioned by himself.

I consider the proof of the commission sufficient, but deny its operation, as I consider the vessel to have been an American vessel, owned by an American or Americans, and with an American captain on board.

I now proceed to inquire into the consequences of Ballard's capture, and

Talbot's co-operation with him, though, perhaps, upon my principles, it is not absolutely necessary.

1. Ballard's capture, I think, is clearly unsupportable. Admitting him to have been expatriated (which, if the Virginia law was in force, I think he was), he did not become a French citizen at all. Only one of the crew was a Frenchman. I think, all the rest were proved to be Americans or English. She *was fitted out in the United States; the commission, if good at all, was of a temporary and secret nature, and seems to have been [*167 confined to a special purpose, to be executed within the United States. She certainly had no authority to cruise, that being specified in every commission of that nature. Whoever were her owners, she does not appear to have been French property; on the contrary, there is the highest possibility, that Talbot's and Ballard's vessels had the same owners. So conscious was he of the illegality of his conduct, that he even preferred no claim for the captured property.

2. Talbot (considering himself as master of a lawful privateer) claims upon two grounds: 1. Upon supposition of Ballard's being a lawful commission, he claims, as being in sight at the time of the capture: to this it is sufficient to say, that it was not a lawful commission. 2. If Ballard had no lawful commission, he claims upon his independent right, alleging, that if Ballard had no lawful commission, the property was not changed to Ballard, and therefore, he had a right to take.

This claim (if Talbot's was a lawful privateer) would undoubtedly be good, if he was not a confederate with Ballard. But it is clear that he was, that he cruised before and after, in company with him, that he put guns on board of his vessel; and there is the strongest reason to believe, that they both belonged to the same owners. It is true, if Talbot had come up, ignorant of Ballard's authority, and inadvertently put men on board the prize, in conjunction with Ballard, supposing he had a lawful commission, when in reality he had not, it might with some reason be contended, that Talbot should hold the prize. But wilful ignorance is never excusable; when there is time to inquire, inquiry ought to be made. There is not, however, the least reason for supposing any ignorance in the case. He abetted Ballard's authority, such as it was; he acted in support of it, not in opposition to it. It does not appear, that he ever questioned it, until after his arrival in Charleston. It was, therefore, a mere after-thought. A man having a commission, is authorized, but not compelled, to exercise it; his will must concur to make a capture under it. It does not appear, that he relied, at sea, upon his own force, but upon Ballard's; at least, in this instance, upon his own and Ballard's in conjunction. A man having a lawful commission, is authorized to cruise himself, and to cruise in company with others, having lawful authority. It does not authorize him to associate with pirates, or any unlawful depredators, on the high seas. If he does so, he departs from his commission, assumes a new character which that does not authorize, and risks all the consequences of it. It is impossible, that Ballard can be guilty of *a crime, and Talbot, who associated with him in the wilful commission of it, can be wholly innocent of it. A man can be guilty of no [*168 crime, in obeying a lawful commission. He, therefore, in this instance, if guilty of a crime, must be considered altogether detached from a rightful authority, which he abandoned, in search of the profit of an illegal adven-

ture. If, at sea, he acted in support of Ballard's claim, how can he claim now, on the principle of that being unsupportable? At sea, was the place for him to make his option: he has no right, after the prize is brought into port, to say—"I made a bad option there: I supported Ballard's claim, whereas, I ought to have opposed it, and stood upon my own. I will now take this Dutch ship as a prize, by my own authority." For such, in effect, I take to be the substance of any claim, suggested after his arrival in port.

I, therefore, think, upon this ground, even admitting that Talbot's was a rightful privateer, his claim is unsupportable.

Wilson, Justice.—As I decided this cause in the circuit court, it gives me pleasure to be relieved from the necessity of giving any opinion on the appeal, by the unanimity of sentiment that prevails among the judges.

Cushing, Justice.—The facts in this case, so far as they appear to me to be essential for forming an opinion, may be reduced to a very narrow compass. Ballard, the commander of a vessel, which was illegally fitted out in the United States, cruises in company with Talbot, who alleges that he is a French citizen, and produces a French commission. Ballard captures the Magdalena, a Dutch prize; then Talbot joins him; and both, having put prize-masters on board, bring the prize into the harbor of Charleston. The questions arising on this statement are, simply, whether the capture, under such circumstances, is a violation of our treaty with Holland? And whether it is such a case of prize, as the courts of the United States can take cognisance of, consistently with the treaty between America and France? Now, the whole transaction at Guadaloupe, as well as here, presents itself to my mind as fraudulent and collusive. But even supposing that Talbot was, *bonâ fide*, a French citizen, the other circumstances of the case are sufficient to render the capture void. It was, in truth, a capture by Ballard, who had no authority, or color of authority, for his conduct. He was an American citizen; he had never left the United States; his vessel was owned by American citizens; and the commission, which he held by assignment, was granted by a French admiral, within the United States, to another person, for a particular purpose, but not for the purpose of capture. Then, shall not the property, which he has thus taken from a nation at peace with the
*169] United States, and *brought within our jurisdiction, be restored to its owners? Every principle of justice, law and policy unite in decreeing the affirmative; and there is no positive compact with any power to prevent it.

On the important right of expatriation, I do not think it necessary to give an opinion; but the doctrine mentioned by Heineccius, seems to furnish a reasonable and satisfactory rule. The act of expatriation should be *bonâ fide*, and manifested, at least, by the emigrant's actual removal, with his family and effects, into another country. This, however, forms no part of the ground on which I think the decree of the circuit court ought to be affirmed.

Rutledge, Chief Justice.—The merits of the cause are so obvious, that I do not conceive there is much difficulty in pronouncing a fair and prompt decision, for affirming the decree of the circuit court.

The doctrine of expatriation is certainly of great magnitude; but it is

not necessary to give an opinion upon it, in the present cause, there being no proof, that Captain Talbot's admission as a citizen of the French republic, was with a view to relinquish his native country; and a man may, at the same time, enjoy the rights of citizenship under two governments.

It appears, upon the whole, that Ballard's vessel was illegally fitted out in the United States; and the weight of evidence satisfies my mind, that Talbot's vessel, which was originally American property, continued so, at the time of the capture, notwithstanding all the fraudulent attempts to give it a different complexion. The capture, therefore, was a violation of the law of nations, and of the treaty with Holland. The court has a clear jurisdiction of the cause, upon the express authority of *Pelaches's Case*, 4 Inst. And every motive of good faith and justice must induce us to concur with the circuit court, in awarding restitution.

The decree of the circuit court affirmed.

The counsel for the *appellees*, then moved the court to assess additional damages, which was opposed by *Dallas*, for the appellant; and after argument, the following order was made:

By the Court.—Ordered, that the decree of the circuit court of South Carolina district, pronounced on the 5th day of November, in the year of our Lord, one thousand seven hundred and ninety-four, affirming the decree of the district court of the same district, pronounced on the sixth day of August, in the year of our Lord, one thousand seven hundred and ninety-four, be in all its parts established and affirmed. And it is further considered, ordered, adjudged and decreed, that the said William Talbot, the plaintiff in error, do pay to the said Joost *Jansen, the defendant in error, in addition to the sum of $1755.53, for demurrage [*170 and interest, and $82 for costs, in the decree of the said circuit court mentioned, demurrage for the detention and delay of the said brigantine Vrouw Christina Magdalena, at the rate of $9.33, lawful money of the United States, *per diem*, to be accounted from the fifth day of November last past, till the sixth day of June last, the day of the actual sale of the said brigantine, under the interlocutory order of this court, of the third day of March last past, to wit, for two hundred and thirteen days, a sum of $1987.29; and also interest at the rate of seven *per centum per annum*, for two hundred and ninety days, on the sum of $51,845, being the amount of the sales of the cargo of the said brigantine heretofore sold, by order and permission of the said district court, and making a sum of $2883.42; and also a like sum of seven *per centum per annum* on the amount of sales of the said brigantine Vrouw Christina Magdalena, under the order of this court, that is to say, interest for seventy-seven days, on the sum of $1820, from the said sixth day of June last, making the sum of $26.87, the whole of which interest to be accounted to this day, and making together the sum of $2910.29, lawful money of the United States; and which said interest and demurrage, make together the sum of $4897.58, in addition to and exclusive of the demurrage, interest and costs adjudged in the said circuit court of the United States, for South Carolina district; also $91.93, for his costs and charges: and that the said Joost Jansen have execution of this judgment and decree, by special mandate to the said circuit court, and process agreeable to the act of the congress of the United States, in that case made and provided.

*FEBRUARY TERM, 1796.

On the 4th of February, a commission, bearing date the 27th of January 1796, was read, appointing Samuel Chase, one of the justices of the supreme court.

On the 8th of March, a commission, bearing date the 4th of March 1796, was read, appointing Oliver Ellsworth, Chief Justice.

Hylton, Plaintiff in error, *v.* The United States.

Direct taxes.

A tax on carriages is not a direct tax, such as is required by the constitution to be laid according to the census.

An annual tax on carriages may be considered as within the powers granted to congress to lay duties. Chase, J.

"I am inclined to think, that the direct taxes contemplated by the constitution, are only two, to wit, a capitation or poll tax, and a tax on land." Chase, J.

Whether direct taxes, in the sense of the Constitution, comprehend any other tax than a capitation tax, and tax on land, is a questionable point. Paterson and Iredell, JJ.[1]

This was a writ of error directed to the Circuit Court for the district of Virginia; and upon the return of the record, the following proceedings appeared: An action of debt had been instituted to May term 1795, by the attorney of the district, in the name of the United States, against Daniel Hylton, to recover the penalty imposed by the act of congress of the 5th of June 1794 (1 U. S. Stat. 373), for not entering, and paying the duty on, a number of carriages for the conveyance of persons, which he kept for his own use. The defendant pleaded *nil debet*, whereupon, issue was joined. But the parties, waiving the right of trial by jury, mutually submitted the controversy to the court on a case, which stated "that the defendant, on the 5th of June 1794, and therefrom to the last day of September following, owned, possessed and kept one hundred and twenty-five chariots, for the conveyance of persons, and no more; that the chariots were kept exclusively for the defendant's own private use, and not to let out to hire, or *172] for the conveyance of persons for *hire; and that the defendant had notice according to the act of congress, entitled 'An act laying duties upon carriages for the conveyance of persons,' but that he omitted and refused to make an entry of the said chariots, and to pay the duties thereupon, as in and by the said recited law is required, alleging that the said law was unconstitutional and void. If the court adjudged the defend-

[1] This question was finally put at rest by the case of Springer *v.* United States, 102 U. S. 586, where it was formally decided, Judge Swayne delivering the opinion of the court, that direct taxes, within the meaning of the constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate. And accordingly, it has been held, that an income tax is not a direct tax within the meaning of the constitution. Pacific Ins. Co. *v.* Soule, 7 Wall. 433; Springer *v.* United States *ut supra*. Nor a succession tax: Scholey *v.* Rew, 23 Wall. 331. Nor a tax upon the circulation of the state banks: Veazie Bank *v.* Fenno, 8 Ibid. 533. And of the same opinion are all the text-writers on constitutional law. Rawle 30; Sergeant 305; Kent, vol. 1, p. 257; Pomeroy 157; Cooley, Taxation, p. 5, note 2; 1 Sharswood's Blackstone 308 n.

ant to be liable to pay the tax and fine for not doing so, and for not entering the carriages, then judgment shall be entered for the plaintiff for $2000, to be discharged by the payment of sixteen dollars, the amount of the duty and penalty; otherwise, that judgment be entered for the defendant."[1] After argument, the court (consisting of WILSON and ———, Justices,) delivered their opinions; but being equally divided, the defendant, by agreement of the parties, confessed judgment, as a foundation for the present writ of error, which (as well as the original proceeding) was brought merely to try the constitutionality of the tax.

The cause was argued at this term by *Lee*, the attorney-general of the United States, and *Hamilton*, the late secretary of the treasury, in support of the tax; and by *Campbell*, the attorney of the Virginia district, and *Ingersoll*, the attorney-general of Pennsylvania, in opposition to it. The argument turned entirely upon this point, whether the tax on carriages for the conveyance of persons, kept for private use, was a direct tax? For, if it was not a direct tax, it was admitted to be rightly laid, within the first clause of the 8th section of the 1st article of the constitution, which declares "that all duties, imposts and excises, shall be uniform throughout the United States." But it was contended, that if it was a direct tax, it was unconstitutionally laid, as another clause of the same section provides, "that no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration of the inhabitants of the United States."

The court delivered their opinions *seriatim*, in the following terms: (*a*)

CHASE, Justice.—By the case stated, only one question is submitted to the opinion of this court—whether the law of congress of the 5th of June 1794, entitled, "An act to lay duties upon carriages for the conveyance of persons," is unconstitutional and void?

The principles laid down, to prove the above law void, are these: that a tax on carriages is a direct tax, and, therefore, by the constitution, must be laid according to the census, directed *by the constitution to be taken, to ascertain the number of representatives from each state. [*173 And that the tax in question on carriages is not laid by that rule of apportionment, but by the rule of uniformity, prescribed by the constitution in the case of duties, imposts and excises; and a tax on carriages is not within either of those descriptions.

By the 2d section of the 1st article of the constitution, it is provided, that direct taxes shall be apportioned among the several states, according to their numbers, to be determined by the rule prescribed.

By the 9th section of the same article, it is further provided, that no capitation, or other direct tax, shall be laid, unless in proportion to the census or enumeration before directed.

By the 8th section of the same article, it was declared, that congress shall have power to lay and collect taxes, duties, imposts and excises; but

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(*a*) The Chief Justice, ELLSWORTH, was sworn into office in the morning; but not having heard the whole of the argument, he declined taking any part in the decision of this cause.

[1] This appears to have been a fictitious case, gotten up for the purpose of obtaining a decision of this court, as sixteen dollars was the tax and penalty for one chariot.

all duties, imposts and excises shall be uniform throughout the United States.

As it was incumbent on the plaintiff's counsel in error, so they took great pains to prove that the tax on carriages was a direct tax; but they did not satisfy my mind. I think, at least, it may be doubted; and if I only doubted, I should affirm the judgment of the circuit court. The deliberate decision of the national legislature (who did not consider a tax on carriages a direct tax, but thought it was within the description of a duty), would determine me, if the case was doubtful, to receive the construction of the legislature; but I am inclined to think, that a tax on carriages is not a direct tax, within the letter or meaning of the constitution.

The great object of the constitution was, to give congress a power to lay taxes adequate to the exigencies of government; but they were to observe two rules in imposing them, namely, the rule of uniformity, when they laid duties, imposts or excises; and the rule of apportionment, according to the *census*, when they laid any direct tax.

If there are any other species of taxes that are not direct, and not included within the words duties, imposts or excises, they may be laid by the rule of uniformity or not; as congress shall think proper and reasonable. If the framers of the constitution did not contemplate other taxes than direct taxes, and duties, imposts and excises, there is great inaccuracy in their language. If these four species of taxes were all that were meditated, the general power to lay taxes was unnecessary. If it was intended, that congress should have authority to lay only one of the four above enumerated, to wit, direct taxes, by the rule of apportionment, and the other three by the rule of uniformity, the expressions would have run thus: "Congress shall have power to lay and collect direct taxes, and duties, imposts *and excises; the first shall be laid according to the *census;* and the last three shall be uniform throughout the United States." The power, in the 8th section of the 1st article, to lay and collect taxes, included a power to lay direct taxes (whether capitation or any other), and also duties, imposts and excises; and every other species or kind of tax whatsoever, and called by any other name. Duties, imposts and excises were enumerated, after the general term taxes, only for the purpose of declaring, that they were to be laid by the rule of uniformity. I consider the constitution to stand in this manner. A general power is given to congress, to lay and collect taxes, of every kind or nature, without any restraint, except only on exports; but two rules are prescribed for their government, namely, uniformity and apportionment: Three kinds of taxes, to wit, duties, imposts and excises by the first rule, and capitation or other direct taxes, by the second rule.

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I believe some taxes may be both direct and indirect, at the same time. If so, would congress be prohibited from laying such a tax, because it is partly a direct tax? The constitution evidently contemplated no taxes as direct taxes, but only such as congress could lay in proportion to the *census*. The rule of apportionment is only to be adopted in such cases, where it can reasonably apply; and the subject taxed, must ever determine the application of the rule. If it is proposed to tax any specific article by the rule of apportionment, and it would evidently create great inequality and injustice,

it is unreasonable to say, that the constitution intended such tax should be laid by that rule.

It appears to me, that a tax on carriages cannot be laid by the rule of apportionment, without very great inequality and injustice. For example: suppose, two states, equal in census, to pay $80,000 each, by a tax on carriages, of eight dollars on every carriage; and in one state, there are 100 carriages, and in the other 1000. The owners of carriages in one state, would pay ten times the tax of owners in the other. A. in one state, would pay for his carriage eight dollars, but B. in the other state, would pay for his carriage, eighty dollars.

It was argued, that a tax on carriages was a direct tax, and might be laid according to the rule of apportionment, and (as I understood) in this manner: Congress, after determining on the gross sum to be raised, was to apportion it, according to the *census*, and then lay it in one state on carriages, in another on horses, in a third on tobacco, in a fourth on rice; and so on. I admit, that this mode might be adopted, to raise a certain sum in each state, according to the *census*, but it would not be a tax on carriages, but on a number of specific articles; and it seems to me, that it would be liable to the same objection of *abuse and oppression, as a selection [*175
of any one article in all the states.

I think, an annual tax on carriages for the conveyance of persons, may be considered as within the power granted to congress to lay duties. The term *duty*, is the most comprehensive, next to the generial term *tax;* and practically, in Great Britain (whence we take our general ideas of taxes, duties, imposts, excises, customs, &c.), embraces taxes on stamps, tolls for passage, &c., and is not confined to taxes on importation only. It seems to me, that a tax on expense is an indirect tax; and I think, an annual tax on a carriage for the conveyance of persons, is of that kind; because a carriage is a consumable commodity; and such annual tax on it, is on the expense of the owner.

I am inclined to think, but of this I do not give a judicial opinion, that the direct taxes contemplated by the constitution, are only two, to wit, a capitation or poll tax, simply, without regard to property, profession or any other circumstance; and a tax on land. I doubt, whether a tax, by a general assessment of personal property, within the United States, is included within the term direct tax.

As I do not think the tax on carriages is a direct tax, it is unnecessary, at this time, for me to determine, whether this court, constitutionally possesses the power to declare an act of congress void, on the ground of its being made contrary to, and in violation of, the constitution; but if the court have such power, I am free to declare, that I will never exercise it, but in a very clear case. I am for affirming the judgment of the circuit court.

Paterson, Justice.—By the second section of the first article of the constitution of the United States, it is ordained, that representatives and direct taxes shall be apportioned among the states, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and including Indians not taxed, three-fifths of all other persons. The eighth section of the said article, declares, that congress shall have power to lay and collect

taxes, duties, imposts and excises; but all duties, imposts and excises shall be uniform throughout the United States. The ninth section of the same article provides, that no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration before directed to be taken.

Congress passed a law, on the 5th of June 1794, entitled, "An act laying duties upon carriages for the conveyance of persons." *Daniel Law-
*176] rence Hilton, on the 5th of June 1794, and therefrom to the last day of September next following, owned, possessed and kept one hundred and twenty-five chariots for the conveyance of persons, but exclusively for his own separate use, and not to let out to hire, or for the conveyance of persons for hire.

The question is, whether a tax upon carriages be a direct tax? If it be a direct tax, it is unconstitutional, because it has been laid pursuant to the rule of uniformity, and not to the rule of apportionment. In behalf of the plaintiff in error, it has been urged, that a tax on carriages does not come within the description of a duty, impost or excise, and therefore, is a direct tax. It has, on the other hand, been contended, that as a tax on carriages is not a direct tax, it must fall within one of the classifications just enumerated, and particularly, must be a duty or excise. The argument on both sides turns in a circle; it is not a duty, impost or excise, and therefore, must be a direct tax; it is not tax, and therefore, must be a duty or excise. What is the natural and common, or technical and appropriate, meaning of the words, duty and excise, it is not easy to ascertain; they present no clear and precise idea to the mind; different persons will annex different significations to the terms. It was, however, obviously the intention of the framers of the constitution, that congress should possess full power over every species of taxable property, except exports. The term taxes, is generical, and was made use of, to vest in congress plenary authority in all cases of taxation. The general division of taxes is into direct and indirect; although the latter term is not to be found in the constitution, yet the former necessarily implies it; indirect stands opposed to direct. There may, perhaps, be an indirect tax on a particular article, that cannot be comprehended within the description of duties, or imposts or excises; in such case, it will be comprised under the general denomination of taxes. For the term tax is the *genus*, and includes: 1. Direct taxes. 2. Duties, imposts and excises. 3. All other classes of an indirect kind, and not within any of the classifications enumerated under the preceding heads.

The question occurs, how is such tax to be laid, uniformly or apportionately? The rule of uniformity will apply, because it is an indirect tax, and direct taxes only are to be apportioned. What are direct taxes, within the meaning of the constitution? The constitution declares, that a capitation tax is a direct tax; and both in theory and practice, a tax on land is deemed to be a direct tax. In this way, the terms direct taxes, and capitation and other direct tax, are satisfied. It is not necessary *to determine,
*177] whether a tax on the product of land be a direct or indirect tax. Perhaps, the immediate product of land, in its original and crude state, ought to be considered as the land itself; it makes part of it; or else the provision made against taxing exports would be easily eluded. Land, independently of its produce, is of no value. When the produce is converted into a manufacture, it assumes a new shape; its nature is altered; its original state is changed;

it becomes quite another subject, and will be differently considered. Whether direct taxes, in the sense of the constitution, comprehend any other tax than a capitation tax, and tax on land, is a questionable point. If congress, for instance, should tax, in the aggregate or mass, things that generally pervade all the states in the Union, then, perhaps, the rule of apportionment would be the most proper, especially, if an assessment was to intervene. This appears by the practice of some of the states, to have been considered as a direct tax. Whether it be so, under the constitution of the United States, is a matter of some difficulty; but as it is not before the court, it would be improper to give any decisive opinion upon it. I never entertained a doubt, that the principal, I will not say, the only, objects, that the framers of the constitution contemplated, as falling within the rule of apportionment, were a capitation tax and a tax on land. Local considerations, and the particular circumstances, and relative situation of the states, naturally lead to this view of the subject. The provision was made in favor of the southern states; they possessed a large number of slaves; they had extensive tracts of territory, thinly settled, and not very productive. A majority of the states had but few slaves, and several of them a limited territory, well settled, and in a high state of cultivation. The southern states, if no provision had been introduced in the constitution, would have been wholly at the mercy of the other states. Congress in such case, might tax slaves, at discretion or arbitrarily, and land in every part of the Union, after the same rate or measure: so much a head, in the first instance, and so much an acre, in the second. To guard them against imposition, in these particulars, was the reason of introducing the clause in the constitution, which directs that representatives and direct taxes shall be apportioned among the states, according to their respective numbers.

On the part of the plaintiff in error, it has been contended, that the rule of apportionment is to be favored, rather than the rule of uniformity; and, of course, that the instrument is to receive such a construction, as will extend the former, and restrict the latter. I am not of that opinion. The constitution has been considered as an accommodating system; it was the *effect [*178
of mutual sacrifices and concessions; it was the work of compromise. The rule of apportionment is of this nature; it is radically wrong; it cannot be supported by any solid reasoning. Why should slaves, who are a species of property, be represented more than any other property? The rule, therefore, ought not to be extended by construction.

Again, numbers do not afford a just estimate or rule of wealth. It is, indeed, a very uncertain and incompetent sign of opulence. This is another reason against the extension of the principle laid down in the constitution.

The counsel on the part of the plaintiff in error, have further urged, that an equal participation of the expense or burden by the several states in the Union, was the primary object, which the framers of the constitution had in view; and that this object will be effected by the principle of apportionment, which is an operation upon states, and not on individuals; for each state will be debited for the amount of its *quota* of the tax, and credited for its payments. This brings it to the old system of requisitions. An equal rule is doubtless the best: but how is this to be applied to states or to individuals? The latter are the objects of taxation, without reference to states,

except in the case of direct taxes. The fiscal power is exerted certainly, equally, and effectually on individuals ; it cannot be exerted on states. The history of the United Netherlands, and of our own country, will evince the truth of this position. The government of the United States could not go on, under the confederation, because congress were obliged to proceed in the line of requisition. Congress could not, under the old confederation, raise money by taxes, be the public exigencies ever so pressing and great ; they had no coercive authority—if they had, it must have been exercised against the delinquent states, which would be ineffectual, or terminate in a separation. Requisitions were a dead letter, unless the state legislatures could be brought into action ; and when they were, the sums raised were very disproportional. Unequal contributions or payments engendered discontent, and fomented state jealousy. Whenever it shall be thought necessary or expedient to lay a direct tax on land, where the object is one and the same, it is to be apprehended, that it will be a fund not much more productive than that of requisition under the former government. Let us put the case. A given sum is to be raised from the landed property in the United States. It is easy to apportion this sum, or to assign to each state its *quota*. The constitution gives the rule. Suppose the proportion of North Carolina to be $80,000. This sum is to be laid on the landed property in the state, but by what rule,
*179 and by whom? Shall every acre pay *the same sum, without regard to its quality, value, situation or productiveness? This would be manifestly unjust. Do the laws of the different states furnish sufficient *data* for the purpose of forming one common rule, comprehending the quality, situation and value of the lands? In some of the states, there has been no land-tax for several years, and where there has been, the mode of laying the tax is so various, and the diversity in the land is so great, that no common principle can be deduced, and carried into practice. Do the laws of each state furnish *data* from whence to extract a rule, whose operation shall be equal and certain in the same state? Even this is doubtful. Besides, sub-divisions will be necessary ; the apportionment of the state, and perhaps, of a particular part of the state, is again to be apportioned among counties, townships, parishes or districts. If the lands be classed, then a specific value must be annexed to each class. And there a question arises, how often are classifications and assessments to be made? Annually, triennally, septennially? The oftener they are made, the greater will be the expense ; and the seldomer they are made, the greater will be the inequality and injustice. In the process of the operation, a number of persons will be necessary to class, to value and assess the land ; and after all the guards and provisions that can be devised, we must ultimately rely upon the discretion of the officers in the exercise of their functions. Tribunals of appeal must also be instituted, to hear and decide upon unjust valuations, or the assessors will act *ad libitum*, without check or control. The work, it is to be feared, will be operose and unproductive, and full of inequality, injustice and oppression. Let us, however, hope, that a system of land taxation may be so corrected and matured by practice, as to become easy and equal in its operation, and productive and beneficial in its effects.

But to return. A tax on carriages, if apportioned, would be oppressive and pernicious. How would it work? In some states, there are many carriages, and in others, but few. Shall the whole sum fall on one or two individuals in a state, who may happen to own and possess carriages? The thing would

be absurd and inequitable. In answer to this objection, it has been observed, that the sum, and not the tax is to be apportioned; and that congress may select, in the different states, different articles or objects from whence to raise the apportioned sum. The idea is novel. What? shall land be taxed in one state, slaves in another, carriages in a third, and horses in a fourth? or shall several of these be thrown together, in order to levy and make the quotated sum? The scheme is fanciful. It would not work well, and perhaps is utterly impracticable. It is easy to discern, that great, and perhaps insurmountable, obstacles must arise in forming the subordinate *arrangements necessary to carry the system into effect; when formed, the [*180 operation would be slow and expensive, unequal and unjust. If a tax upon land, where the object is simple and uniform throughout the states, is scarcely practicable, what shall we say of a tax attempted to be apportioned among, and raised and collected from, a number of dissimilar objects. The difficulty will increase with the number and variety of the things proposed for taxation. We shall be obliged to resort to intricate and endless valuations and assessments, in which everything will be arbitrary, and nothing certain. There will be no rule to walk by. The rule of uniformity, on the contrary, implies certainty, and leaves nothing to the will and pleasure of the assessor. In such case, the object and the sum coincide, the rule and the thing unite, and, of course, there can be no imposition. The truth is, that the articles taxed in one state should be taxed in another; in this way, the spirit of jealousy is appeased, and tranquillity preserved; in this way, the pressure on industry will be equal in the several states, and the relation between the different objects of taxation duly preserved. Apportionment is an operation on states, and involves valuations and assessments, which are arbitrary, and should not be resorted to but in case of necessity. Uniformity is an instant operation on individuals, without the intervention of assessments, or any regard to states, and is at once easy, certain and efficacious. All taxes on expenses or consumption are indirect taxes; a tax on carriages is of this kind, and of course, is not a direct tax. Indirect taxes are circuitous modes of reaching the revenue of individuals, who generally live according to their income. In many cases of this nature, the individual may be said to tax himself. I shall close the discourse, with reading a passage or two from Smith's Wealth of Nations.

"The impossibility of taxing people in proportion to their revenue, by any capitation, seems to have given occasion to the invention of taxes upon consumable commodities; the state, not knowing how to tax directly and proportionably the revenue of its subjects, endeavors to tax it indirectly, by taxing their expense, which it is supposed, in most cases, will be nearly in proportion to their revenue. Their expense is taxed, by taxing the consumable commodities upon which it is laid out. 3 Vol. page 331.

"Consumable commodities, whether necessaries or luxuries, may be taxed in two different ways; the consumer may either pay an annual sum, on account of his using or consuming goods of a certain kind, or the goods may be taxed, while they remain in the hands of the dealer, and before they are delivered to the consumer. The consumable goods, which *last a [*181 considerable time before they are consumed altogether, are most properly taxed the in one way; those of which the consumption is immediate, or more speedy, in the other: the coach-tax and plate-tax are examples of the

former method of imposing; the greater part of the other duties of excise and customs of the latter." 3 Vol. page 341.

I am, therefore, of opinion, that the judgment rendered in the circuit court of Virginia ought to be affirmed.

IREDELL, Justice.—I agree in opinion with my brothers, who have already expressed theirs, that the tax in question is agreeable to the constitution; and the reasons which have satisfied me, can be delivered in a very few words, since I think the constitution itself affords a clear guide to decide the controversy.

The congress possess the power of taxing all taxable objects, without limitation, with the particular exception of a duty on exports. There are two restrictions only on the exercise of this authority. 1. All direct taxes must be apportioned. 2. All duties, imposts and excises must be uniform.

If the carriage-tax be a direct tax, within the meaning of the constitution, it must be apportioned. If it be a duty, impost or excise, within the meaning of the constitution, it must be uniform.

If it can be considered as a tax, neither direct, within the meaning of the constitution, nor comprehended within the term duty, impost or excise; there is no provision in the constitution, one way or another, and then it must be left to such an operation of the power, as if the authority to lay taxes had been given generally, in all instances, without saying whether they should be apportioned or uniform; and in that case, I should presume, the tax ought to be uniform; because the present constitution was particularly intended to affect individuals, and not states, except in particular cases specified: and this is the leading distinction between the articles of confederation and the present constitution.

As all direct taxes must be apportioned, it is evident, that the constitution contemplated none as direct, but such as could be apportioned. If this cannot be apportioned, it is, therefore, not a direct tax in the sense of the constitution.

That this tax cannot be apportioned, is evident. Suppose, ten dollars contemplated as a tax on each chariot, or post-chaise, in the United States, and the number of both in all the United States be computed at 105, the number of representatives in congress.

*182] *This would produce in the whole, - - $1050 00
The share of Virginia being $\frac{19}{105}$ parts, would be $190 00
The share of Connecticut being $\frac{7}{105}$ parts, would be - 70 00
Then suppose Virginia had 50 carriages, Connecticut 2,
The share of Virginia being $190, this must, of course, be collected from the owners of carriages, and there would, therefore, be collected from each carriage, 3 80
The share of Connecticut being $70, each carriage would pay - - - - - - - - - - 35 00

If any state had no carriages, there could be no apportionment at all. This mode is too manifestly absurd to be supported, and has not even been attempted in debate.

But two expedients have been proposed, of a very extraordinary nature, to evade the difficulty.

I. To raise the money a tax on carriages would produce, not by laying a tax on each carriage uniformly, but by selecting different articles in different states, so that the amount paid in each state may be equal to the sum due on a principle of apportionment. One state might pay by a tax on carriages, another, by a tax on slaves, &c. I should have thought this merely an exercise of ingenuity, if it had not been pressed with some earnestness; and as this was done by gentlemen of high respectability in their profession, it deserves a serious answer, though it is very difficult to give such a one.

1. This is not an apportionment of a tax on carriages, but of the money a tax on carriages might be supposed to produce, which is quite a different thing.

2. It admits, that congress cannot lay an uniform tax on all carriages in the Union, in any mode, but that they may on carriages in one or more states. They may, therefore, lay a tax on carriages in 14 states, but not in the 15th.

3. If congress, according to this new decree, may select carriages as a proper object, in one or more states, but omit them in others, I presume, they may omit them in all and select other articles.

Suppose, then, a tax on carriages would produce $100,000, and a tax on horses a like sum of $100,000, and $100,000 were to be apportioned according to that mode. Gentlemen might amuse themselves with calling this a tax on carriages, or a tax on horses, while not a *single carriage, nor a single horse, was taxed throughout the Union. [*183

4. Such an arbitrary method of taxing different states differently, is a suggestion altogether new, and would lead, if practised, to such dangerous consequences, that it will require very powerful arguments to show, that that method of taxing would be in any manner compatible with the constitution, with which, at present, I deem it utterly irreconcilable, it being altogether destructive of the notion of a common interest, upon which the very principles of the constitution are founded, so far as the condition of the United States will admit.

II. The second expedient proposed was, that of taxing carriages, among other things, in a general assessment. This amounts to saying, that congress may lay a tax on carriages, but that they may not do it, unless they blend it with other subjects of taxation. For this, no reason or authority has been given, and in addition to other suggestions offered by the counsel on that side, affords an irrefragable proof, that when positions, plainly so untenable, are offered to counteract the principle contended for by the opposite counsel, the principle itself is a right one; for no one can doubt, that if better reasons could have been offered, they would not have escaped the sagacity and learning of the gentlemen who offered them.

There is no necessity or propriety, in determining what is or is not, a direct or indirect tax, in all cases. Some difficulties may occur, which we do not at present foresee. Perhaps, a direct tax, in the sense of the constitution, can mean nothing but a tax on something inseparably annexed to the soil: something capable of apportionment, under all such circumstances. A land or a poll tax may be considered of this description. The latter is to be considered so particularly, under the present constitution, on account of the slaves in the southern states, who give a *ratio* in the representation in the proportion of 3 to 5. Either of these is capable of apportionment. In

regard to other articles, there may possibly be considerable doubt. It is sufficient, on the present occasion, for the court to be satisfied, that this is not a direct tax contemplated by the constitution, in order to affirm the present judgment; since, if it cannot be apportioned, it must necessarily be uniform.

I am clearly of opinion, this is not a direct tax in the sense of the constitution, and therefore, that the judgment ought to be affirmed.

Wilson, Justice.—As there were only four judges, including myself, who attended the argument of this cause, I *should have thought it proper to join in the decision, though I had before expressed a judicial opinion on the subject, in the circuit court of Virginia, did not the unanimity of the other three judges relieve me from the necessity. I shall now, however, only add, that my sentiments, in favor of the constitutionality of the tax in question, have not been changed.

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Cushing, Justice.—As I have been prevented, by indisposition, from attending to the argument, it would be improper to give an opinion on the merits of the cause.

By the Court.—Let the judgment of the circuit court be affirmed.

Hills *et al.*, Plaintiffs in error, *v.* Ross.

Appeal in admiralty.

It is no ground for reversing a decree in admiralty, that the facts do not appear of record.

This was a writ of error directed to the Circuit Court for the district of Georgia. On the return of the record, several errors were assigned; but the only one now relied on stated "that the facts on which the circuit court had founded their decree, did not appear fully upon the record, either from the pleadings and decree itself, or a state of the case agreed to by the parties, or their counsel, or by a stating of the case by the court," as required by the 19th section of the judiciary act.

On examining this record, it was found, that no statement of facts had been made, either by the court or the parties, nor did it appear from the pleadings and decree, upon what facts the decree of the circuit court had been founded. But it appeared, that a nnmber of witnesses had been produced and sworn (the record did not say *examined*), at the hearing before the circuit court, whose testimony had not been committed to writing; while, on the other hand, the depositions of the witnesses who had been examined before the district court, were annexed to the proceedings returned. It was acknowledged by the counsel for the defendants in error, that the testimony of the witnesses produced in the circuit court, had been taken *vivâ voce*, according to the 30th section of the judiciary act, and that their depositions had not been committed to writing. It was conceded by the counsel on both sides, that without other aids than such as were to be derived from this imperfect *record, it would be impossible to obtain a fair view of the proceedings of the circuit court in this cause. But *Cox* and *Du Ponceau*, for the plaintiffs in error, contended for a reversal of the decree. *Reed* (of South Carolina), *E. Tilghman* and *Lewis*, for the defen lants, in-

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sisted, on the other hand, that the decree ought to be affirmed, unless it was shown to be erroneous; that the omission on which the plaintiffs relied, could not be assigned as an error, and did not vitiate the proceedings; that it was to be ascribed to the neglect of the plaintiffs themselves, who ought, in the first instance, to have applied to the adverse counsel to state a case, and if they refused, or disagreed in their statement, then to the court itself; that the defendants being satisfied with the decree and not intending to appeal therefrom, it was not their business to assist the plaintiffs in perfecting their record, so as to enable them to bring it properly before an appellate court. Upon the whole, they prayed that the decree be affirmed.

For the *plaintiffs* in error, it was insisted, that the omission of a statement of the case, vitiated the whole record. The judiciary act of the United States had greatly innovated upon the old system of admiralty and chancery proceedings, the forms and principles of the common law were interwoven with, and in many cases, entirely substituted to those of the Roman jurisprudence. The 30th section of that act required, that the testimony of witnesses should be taken *vivâ voce*, instead of written depositions, both in the district and the circuit court. In the former of these tribunals, indeed, when either of the parties expressed an intention of appealing to the other, the depositions of the witnesses were to be committed to writing, but this case was an exception to the general rule. In the circuit court, where new evidence was admitted, no provision had been made for committing the testimony to writing, except in the case of absent, aged, infirm or departing witnesses, whose evidence might be taken *de bene esse*, precisely as in the common-law courts. The whole testimony, therefore, could not, without the consent of parties, come before the supreme court of the United States, in any case where new witnesses were heard, or the same witnesses who were examined below, were produced *de novo* before the circuit court.

It was clear, that the intention of congress was to vest the power of trying matters of fact, in admiralty and equity cases, in the district and circuit courts exclusively. Like the verdict of a jury, the decision of the latter tribunal was final and conclusive, as to fact. The supreme court were only empowered to correct their decrees in matters of law. Therefore, an appeal did not lie to them, but only a writ of error, as at common law.[1] And by the 22d section of the judiciary act, it was *provided, that no decree of the circuit courts should be reversed for any error in fact. [*186

But still the civil law pleadings, as by bill or libel, answer, &c., were retained in the courts below. Those not being carried on with the logical closeness and accuracy, for which the system of common-law pleadings is so much and so justly admired, the facts which grounded the decree would seldom, if ever, appear from the pleadings and decree itself. Amidst the heap of matter with which libels and answers are generally crowded, and the variety of facts, often immaterial to the real points in contest, asserted

[1] Remedied by act 3d March 1803, § 2 (2 U. S. Stat. 244), which provided for an appeal in such cases, instead of a writ of error. Since the passage of this act, all the evidence goes up to the supreme court with the appeal, and it must, accordingly, be in writing. The Boston, 1 Sumn. 328. If parol testimony was heard in the court below, it must be reduced to writing and appear on the record. Conn *v.* Penn, 5 Wheat. 424. A statement of facts is not sufficient. New Orleans *v.* United States, 5 Pet. 449: and see R. S. §§ 632, 698.

and denied by the respective parties, it would be often difficult even to know what was the true object of the controversy. The law, therefore, wisely ordered that the facts on which the decree was founded, where they did not appear from the pleadings and decree itself, should be shown by a statement, which, like a special verdict, should enable the court to determine whether the inferences of law, drawn from those facts by the inferior court, were just or erroneous.

To cause such a statement to be made, or to make it themselves, was a duty which the law enjoined upon the circuit courts, and which they were bound to perform. The words of the act of congress were express and imperative. "It shall be the duty of the circuit courts, in causes in equity and of admiralty and maritime jurisdiction, to cause the facts on which they found their sentence or decree, fully to appear upon the record, either from the pleadings and decree itself, or a state of the case, agreed by the parties or their counsel, or if they disagree, by a stating of the case by the court." The court were, therefore, bound to see that the facts appeared upon the record, in some one or other of these modes; neither party could compel the adverse counsel or the court to state a case; and the courts, by omitting this indispensable requisite, had it in their power, whenever they pleased, to make their decrees final and conclusive, in law as well as in fact, and effectually to deprive the unsuccessful party of the benefit of a revision, which the law had expressly provided in his favor. It being then the default of the court, it might be well assigned for error. 8 Co. 59; Cro. Eliz. 84, 107. And the act of congress, being introductory of a new law, was to be strictly pursued. 4 Bac. Abr. 641; 2 Str. 971.

The counsel further illustrated the subject by several analogies drawn from the civil and the common law. It was, they said, a principle which appeared to pervade those two systems, that where the superior court were judges of law and fact, the inferior tribunal was bound to return to them the whole evidence; when judges of law only, then they were bound to make the facts appear upon which the judgment or decree was founded.

*187] Orders of the courts of quarter sessions are only to *be quashed for errors in law, therefore, it is only necessary that the facts on which they were founded should appear upon the record; but in the case of convictions by justices upon penal statutes, the facts are to be re-examined, and therefore, they are bound to set forth the whole evidence. 2 Str. 997. At common law, where the trial is by jury, still the facts on which the judgment is founded, must appear on the face of the whole record, and where the verdict did not find precisely the matter in issue, as where it found that "by non-performance of the promise, the plaintiff had sustained 50*l.* damages," without expressly finding that the defendant had promised, the judgment for the plaintiff was reversed (21 Vin. Abr. 441); because the superior judges could not determine whether the law had been properly inferred from the facts, unless the facts themselves were clearly and expressly stated. This rule obtained at civil law for the very same reasons. On a bill of review in chancery, where the law alone was to be re-examined, it had been often resolved, that the facts proved, and allowed by the court as proved, should be so mentioned in the sentence, otherwise, on a bill of review, those facts should be taken as not proved, for else a decree could never be reversed by a bill of review, but all erroneous decrees must be reversed on appeals only. 1 Vern. 166, 214, 216; 1 Chan. Cas. 54, 55.

The Mary Ford.

The counsel for the *defendant* in error insisted, that although the want of a statement of facts was a technical defect in the record before the court, which they were willing to supply as much as lay in their power, from their notes of the evidence which had been taken before the circuit court; yet the court could not, without great injustice, reverse the decree on that account. They were bound, by the 24th section of the judiciary law, on the reversal of a decree of the court, to pass such a decree as the circuit court should have passed. How could they do it in this instance? Were they, for an omission of the court, which they could not help any more than the defendants, to put it out of their power to obtain justice? and how could they say, that the circuit court should have rendered a different decree, since they were not possessed of the merits of the cause?

The Court were unanimously of opinion, that the error assigned, was not a sufficient ground for reversing the decree, and recommended to the parties to come to some agreement, which might bring the matters in controversy fairly before them.

After some conversation, an agreement took place between the counsel on both sides, that the cause should be continued to the next term; and that, in the meantime, new evidence *might be taken on both sides, and the whole matter of fact, as well as the law, brought before the supreme court of the United States, as upon an appeal. (*a*) [*188

The Mary Ford.

McDonough *v.* Dannery and The Ship Mary Ford.

Prize.—Jurisdiction.—Salvage.

The courts of a neutral nation have no right to decide upon the lawfulness or unlawfulness of a capture taken by one belligerent from another.[1]

When a court takes cognisance of any original matter, it naturally draws to its jurisdiction every incidental or necessary question; therefore, a court of admiralty having jurisdiction of a libel for salvage, of a vessel captured by one belligerent from another, and abandoned at sea, by the captors, may also adjudicate upon the conflicting claims of the captors and former owners to the surplus.

The rights vested in a belligerent, by capture, cannot be destroyed, by a neutral taking possession of the captured vessel, after being abandoned at sea by the captors.[2]

Where a vessel was found abandoned at sea, by another, bound on a foreign voyage, with a valuable cargo, and without supernumerary hands, and carried into port, with great risk and exertion on the part of the salvors, one-third part of the gross value was allowed for salvage.

This was a writ of error to remove the proceedings and decree from the Circuit Court, for the district of Massachusetts; and the record being returned, exhibited the following facts:

On the 4th of November 1794, the owners and crew of the ship George,

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(*a*) See same case, *post*, p. 231.

[1] Stoughton *v.* Taylor, 2 Paine 653; Castello *v.* Boutielle, Bee 29; The William, 1 Pet. Adm. 12; The Fanny, 2 The Friendship, Id. 40; Id. 309.

[2] S. P. Booth *v.* L'Esperanza, Bee 92.

filed a libel in the district court of Massachusetts, in which they set forth, that the said ship George was an American vessel, owned and navigated by American citizens, loaded with a very valuable cargo, principally on freight, and bound from Virginia for Rotterdam; and that on the second day of October last, on the high seas, in latitude 44° N. and longitude 40° W., they fell in with the ship Mary Ford, which they found utterly deserted and abandoned, without any person on board, and in a most perilous state: That the captain and crew of the said ship George, took possession of the Mary Ford, and with the intention of saving the said ship and her cargo, the mate and three of the said crew entered on board the Mary Ford, and at great peril of their lives, and suffering great hardship, with the assistance of two men from a fishing vessel, whom they hired, brought her into the port of Boston; whereupon, they prayed that the said ship and cargo might be adjudged to them.

On the 5th of November 1794, Thomas McDonough, Esq., consul of his Britannic Majesty, for the states of Massachusetts, Rhode Island, Connecticut and New Hampshire, filed a claim in the district court of Massachusetts, and suggested, that the ship Mary Ford and her cargo, at the time she was taken possession of by the crew of the ship George, was, and now is, owned by certain merchants, subjects of his said Britannic majesty, and prayed that the same might be delivered to him, in behalf of said owners, on the *189] payment of a reasonable salvage, *or, if sold, that the proceeds thereof might be delivered to him, behalf of said owners, deducting therefrom such salvage with costs and charges.

On the 2d of December 1794, J. B. Thomas Dannery, citizen and consul of the French republic, resident at Boston, in behalf of said republic, and citizens thereof immediately concerned, likewise filed a claim for the said ship Mary Ford and her cargo; and suggested, that the said ship and her cargo, on the 28th day of September last, were the property of some of the subjects of the king of Great Britain; and afterwards, on the same day, between two and three o'clock in the afternoon, on the high seas, were attacked, subdued and taken by a squadron of ships, to wit, the Filaburtier, Charant, Postilion, Semiellante, Jean Bart and Ranger, all in the public service of and belonging to the French republic, commanded by Commodore Vil Maudarine; and that the French republic, and all the citizens thereof, were then, and still are, at open war with the king of Great Britain and all his subjects; and that some of the seamen of said squadron, entered on board the said ship Mary Ford, took complete and entire possession of her, and took and brought away the British captain and seamen of said ship, and still hold them prisoners of war; and that they took and brought away the papers belonging to her; by all which, and the laws of nations, the said ship Mary Ford and her cargo became the property of the French republic and the captors, by the rights of war. The said last-mentioned claimant further suggested, that afterwards, on the 29th day of the same September, about three o'clock in the afternoon, the said ship and her cargo, by order of the commodore of said squadron, from an apprehension of weakening his force, were left at sea, from necessity. The said consul prayed a restoration of the said ship and cargo to be adjudged to him, to the use of the French republic, on his paying reasonable salvage, with costs and charges, or that the said ship and cargo might be decreed to be sold to the use of the French

republic and her citizens concerned, after paying such salvage, costs and charges.

The facts which appeared in evidence in this case were, that the Mary Ford and her cargo were, before the 28th day of September, the property of certain British subjects; that she was bound on a voyage from the West Indies to London; that, on that day, she was attacked on the high seas, by the squadron mentioned in the claim of the consul of the French Republic, or one of the ships belonging to the same, to which she struck; that an officer and some of the crew of one or more of the ships of said squadron entered on board, took out her master and all her crew, and the greatest part of the ship's papers, and that she *sailed some time, probably more [*190
than twenty-four hours, with said French crew on board her, in company with said squadron, and was then left by order of the commander of said squadron, who directed her to be burnt; that some attempts were made unsuccessfully to effect this purpose; that several British vessels had been captured and manned by said squadron, and many of the people of the squadron were sick, and incapable from that cause to do duty; that from an apprehension of weakening his force, the said commander had given the said orders; that the said ship George met with the said Mary Ford at the time and place mentioned in the libel, and brought her and her cargo into the harbor of Boston, under the circumstances set forth in the libel. The ship Mary Ford and her cargo had been sold by order of the court, and with the consent of all parties.

After argument, Lowel, Judge of the District, delivered the opinion of the court, first recapitulating the facts above stated.

"By the Court.—The libellants have prayed, that the whole of the ship and cargo should be decreed to their use. There have been times in the history of nations, in which vessels and goods, left by necessity on the high seas, have been decreed the property of the finders; and where wrecks on the shore have been withheld from the original proprietors by the sovereigns of the country, or some great man on whose lands they have happened to be cast; but in very early times, they have, in both cases, been considered as the property of the original owner. Several of the Roman emperors made their edicts and decrees for the preservation of such property, and the restoration of it; and for a long time, the law of nations has been settled on principles consonant to justice and humanity, in favor of the unfortunate proprietors; and the persons who have found and saved the property, have been compensated by such part thereof, or such pecuniary satisfaction, as the laws of particular states have specially provided, or, in want of such provision (as the writers on the law of nations agree), by such reward as in the opinion of those who, by the municipal laws of the country, are to judge, is equitable and right. In our country, no special rule being established, this court is to determine what, in such case, is equitable and right. The rule in estimation, which ought, in my opinion, to be adopted, would be to give, if possible to ascertain it, such compensation or reward as would be sufficient inducement to engage reasonable persons, to encounter the peril and expense of the undertaking; what this may be, must, in almost every case, depend on the estimation which the judge, who is to decide, may make of the expense, the labor, the peril, and the *actual suffering of those, [*191

by whose exertions the property is saved. And as several of the most important of these are really mental, to which no measure of weight or capacity can be actually applied, it is probable, different persons would vary considerably in their estimation of them. It may, therefore, be a thing to be wished, that every nation would make, at least, some general rules for determining such cases; but as there are none established in this country, I am bound to exercise my own judgment, in determining what is a just and equitable compensation.[1]

"Admiralty courts, having the thing saved under their control, may either adjudge a portion of such thing to the persons who have saved it, or a sum of money to be paid by the proprietor, or from the produce of the thing sold. And in either case, the same principle ought to operate, and such parts of the thing saved, or sum of money, be decreed to those who save it, as may fully compensate them, and will encourage others to like efforts. In this case, the Mary Ford, when found, was at the mercy of the seas, her sails and rigging partly taken away or lost; very little or no provisions on board her; the George was bound on a foreign voyage, with a valuable cargo, and it does not appear that she had any supernumerary hands; those who undertook to carry her into port, found her greatly disabled and difficult to manage; the risk of their lives must have been considerable, and their exertions great. I think, few cases will happen, when the compensation ought to be higher.

"Under all circumstances, therefore, I am of opinion, that one-third part of the gross proceeds of the value, ought to be paid to the owners and crew of the ship George, for salvage of the said ship Mary Ford and her cargo, and in full compensation of their services, peril and expenses, in the following proportions, which have been since settled by three merchants, named by them, and appointed by the court, viz.: to the owners of the George, $9580.28, being two-third parts of the sum decreed for the owners of the George and her crew, after deducting $370.42 for the owners, for expenses incurred and paid by them, on the joint account of the owners and the crew—and the remaining one-third, viz., $4790.14, to the master and crew of the George, in the following proportions, viz.: to the master, $1156.20; Lemuel Foster, $825.90; John Classin, $495.54; five seamen, $330.36, each; one other, $289.07; the cook, $247.77; *and the boy, $123.86.

*192]

"The next question is, to whom shall the residue be decreed? To settle this question, passages have been read from many books written on the law of nations, and others in which the municipal regulations and decisions of several nations have been reported or commented on; and which have been supposed to be applicable to this case. The gentlemen who have been of counsel for the parties, have ingeniously supported their respective

[1] When not fixed by statute, the amount of salvage necessarily rests on an enlarged discretion, according to the circumstances of each case. Post *v.* Jones, 19 How. 150; Tyson *v.* Prior, 1 Gall. 133; The Emulous, 1 Sumn. 207; The Cora, 2 W. C. C. 80; s. c. 2 Pet. Adm. 361; Two Hundred and Ten Barrels of Oil, 1 Spr. 91. It must be reasonable, in reference to the peril relieved against, and the danger incurred. Talbot *v.* Seaman, 1 Cr. 1; The Huntress, 2 Wall. Jr. C. C. 59; The William Penn, 1 Am. L. Reg. 584; The Bowen, 5 Ben. 296; The Georgiana, 1 Low. 91; The Lovett Peacock, Id. 143. As a general rule, the rate of salvage, in the case of a vessel found deserted at sea, is a moiety of her value; and this, except in very special cases, is the extreme limit. The John E. Clayton, 4 Bl. C. C. 372.

claims; I have, I trust, carefully perused their authorities and attended to their arguments; very few of their authorities appear to me to apply; their arguments have been pertinent. I lay out of the case, the whole doctrine of *postliminy*, as applied to recaptures, which I consider as depending on the municipal regulations of states, which every sovereign has a right to make, so far, at least, as their own citizens only are concerned, in such manner as may appear to them best. Under this head, though blended by some writers with the law of nations, are to be placed the regulations made, variously however, by the European nations, and the late congress of the United States, by which the property is divested from the former owners, by capture, after twenty-four hours possession by the enemy; and all other arbitrary rules, made to settle questions of like nature; also all questions about total and partial losses on policies of insurance.

"I embrace as sound doctrine, the principle, that neutral nations ought not to decide respecting the lawfulness or unlawfulness of capture, if it appears that the captor, and the nation from whom the property is taken, are at war with each other, and the captors, or their vendees, are in possession of the property, save where the territorial rights of the neutral, or the rights of their citizens, are involved in the question; and that neutrals are always to take the existing state of things as right; so that if either of the powers at war, or those to whom they have transferred it, are in possession of a thing taken from their enemy in war, neutral powers are to suppose them lawfully possessed, and ought not to inquire how long, or under what circumstances, they have possessed them. To interfere and decide in such cases, must necessarily imply a partiality, contrary to the idea of neutrality; for they must either give greater firmness to the capture, by deciding it to be lawful, or weaken and render it less secure, by determining it to be unlawful. Neither are neutral powers to give aid to either party, by conducting their prizes for them, when they are too weak to protect and conduct them.

"These principles, I think, will serve as a guide to a decision in this case. Neither of the belligerent powers was in possession *of this property when found; the British claimants say, it has been theirs; this is [*193 admitted by the French claimants; and we have evidence of this fact by the construction of the ship which is in our sight, by the cargo on board, and divers ship's papers which were found with her. The French claimants say, we took her in open war, we firmly possessed her, and she ought to be restored to us. The reply in behalf of the British claimants is, you did not complete your capture; you did not firmly possess her; you were too weak, consistent with other views you held more important, to retain her. Is it necessary that we should decide these questions between them? Shall we try the legality of the capture, and decide the firmness of the possession? Will it not be, to aid, to make the capture and possession firm and legal, which is said to be incomplete? The French claimants say, we were under apprehension of weakening our force, and so left her from necessity. The vessel had been British, of this, there is no question; did she, by capture and firm possession, according to the law of nations, become French? Of this, there is at least a doubt.

On considering the whole matter, I do adjudge, order and decree, that one third-part of the money, arising from the sales of the ship Mary Ford and her cargo, be paid to the persons who saved them, in the proportions

before mentioned. And that the duties and all other costs and charges be first deducted from the other two-third parts, and the residue remain in court for the use of the British owners of said ship and cargo, or such other persons, who may derive right thereto from them, when the same shall be ascertained in court.

From the decree of the district judge, so far only as it respects the British owners, the French consul appealed, and the appeal being argued before the circuit court, the following decree was there pronounced: (Judge LOWELL declining, however, to give any opinion).

"CUSHING, Justice.—The court having fully heard the parties on the appeal in this case, by their counsel, it appears, that the said ship Mary Ford and her cargo, being the property of some British subjects, were, on or about the 28th day of September, A. D. 1794, captured on the high seas, by a French squadron of ships, under the command of Commodore Vil Maudarine, and were taken into actual and quiet possession of said fleet, and so held for above twenty-four hours, and were then left on the high seas, without any hands aboard, after some unsuccessful attempts, by his order, to burn her, which was in consequence of many of the people of his squadron being sick, and incapable of doing duty, and from an apprehension of weakening his force in parting with any of his people, to keep on board and to conduct the said ship Mary Ford.

*194] * "That the said ship George, met with the said ship Mary Ford, and brought her and her cargo into the harbor of Boston, as set forth in the libel; not with intent to aid either party, in the war subsisting between the French republic and the British nation, but to save the property from absolute loss, or in expectation of proper compensation for the trouble. On which case, the operation of the law of nations appears to the court to be, that by the said capture, the property became immediately the captor's. The questions about firm possesssion, appearing to relate chiefly, if not only, to cases of *postliminy* or recapture, or to that of a neutral vendee; things which it is apprehended have no place in this cause; and about which the municipal laws and regulations of different countries are very different.

"The property then, in this case, becoming the captor's, immediately, by conquest and the right of war, must so continue, until divested by recapture, or by some legal means or act to that effect. And it is not conceived, that the abandoning the ship, from the occasion stated in the evidence, could amount to a recapture, so far as to invest the property in the original owners, or prevent the captors from reclaiming the possession, when opportunity offered, at any time previous to a recapture. It is therefore, considered and decreed by the court, that the decree made in the district court, so far only as it decrees, that the said residue of the said two-third parts of the money arising from the sales of the said ship Mary Ford and her cargo, remain in court for the use of the British owners of the same ship and cargo, or such other persons who may derive right thereto from them, when the same should be ascertained in court, be and hereby is reversed. And it is now further adjudged and decreed by this court, that the same residue of the said two-third parts of said money, remain in court for the use of the French republic, and those concerned in said capture."

From this decree of the circuit court, the British consul appealed; but the appeal being disallowed, the proceedings were removed into the supreme court by writ of error; and the plaintiff assigned for error the decree in favor of the French claimants, and also the disallowance of his appeal; the defendant pleaded *in nullo est erratum*, and thereupon, issue was joined.

The cause was argued, on the 4th and 5th of February 1796, by *E. Tilghman*, for the plaintiff in error, and by *Ingersoll* and *Du Ponceau*, for the defendant in error.

For the *plaintiff* in error, two points were made: 1st. That the courts of the United States had no jurisdiction in this case: and 2d. That the property of the British owners of *the Mary Ford, was not so divested as to give a perfect right to the captors. [*195

1st Point. The court cannot determine on the validity of the capture between the belligerent powers. In cases where there have been illegal outfits, within the jurisdiction of the United States; or where their territorial neutrality and sovereignty have been invaded; or where their municipal laws have been violated; the judicial power of the Union will interpose. But the present is barely a question of prize; unconnected with any incidental or collateral circumstances, which justify a neutral nation in taking cognisance of the cause. Lee on Capt. 77.

2d Point. The property in a prize is not so divested by capture, as to give the captor a full right, until the vessel is brought into a place of safety. The Mary Ford was not in a place of safety; there was ground to entertain a reasonable hope of recapture; and there must be a condemnation, in a court of competent jurisdiction, before the property is conclusively transferred from the original owner to the captor. Until that is done, any length of possession will not, of itself, furnish a title to the prize. Grot. 582, lib. 3, c. 6, § 3; Puff. 845, lib. 8, c. 6, § 20; 2 Heinec. lib. 2, c. 9, § 202, p. 197; Marten, L. N., lib. 8, c. 3, § 11, p. 197; Vatt. lib. 3, § 196, p. 571; Lee on Capt. 72. It is true, however, that a right of possession, and an inchoate right of property, were acquired by the capture; but the right of possession being abandoned, it reverted to the original proprietor.

For the *defendant* in error, it was answered: 1st. That the court has jurisdiction: 2d. That the court must restore the ship to the possession of the captor, whether the capture was legal or illegal; for they must consider every capture made in a war, in form, as valid.

1st Point. It is remarkable, that the person who claims the exercise of the authority of the court, should except to its jurisdiction; but even by him it is conceded, that the court may exercise a jurisdiction on the subject-matter. This court has jurisdiction, if any court of the United States can take cognisance of the controversy; and if this court cannot hold plea of the dispute, it will not be pretended, that any other court may. It is, then, an universal rule, without exception, that whoever pleads to the jurisdiction of a court, must show another competent jurisdiction. Doct. Plac. 234. The only book read in support of the exception (Lee on Capt. 77), repels the appellant's claim; for it is the principle, and not the mode, of adjudication, which forms the subject of the chapter referred to. Lee on Capt. 72. The original proprietor claims; the vendee says, that he purchased from the captor; and the inference is, *that the judges cannot decide upon the legality [*196

of the prize, but must consider each belligerent party the proprietor of what he has taken. The general principle is best exemplified in the justificatory memorial on the *Silesia* loan: the court of the captor is the proper court to decide the question of prize, or no prize; 1 Magens, p. 487, 490, 496, 505; but still the reason of the law must show its extent. Not only the reason of the rule restricts its operations to the cases, where the question can be decided by the appropriate court of the captors; but the theoretical writers, as well as uniform practice, demonstrate the existence of such a restriction. If, likewise, the capture be made within neutral limits, an exception to the general rule arises. 2 Wood. 443, Act of Congress of June 1794. The regulations established by the executive department, and the adjudications of this court, concur in the position. Another exception arises, where neutral property of another nation, or of our own citizens, has been captured at sea, and is brought within our ports. *Glass* v. *The Betsey* (*ante*, p. 6); 2 Wood. 439; Bynk. Q. J., lib. 1, c. 17. But if the sovereign will protect his citizen from injury, he must also compel him to do justice. Now, therefore, as no subject of a neutral state can take from the captors the prizes which they have made, without violating their right of possession (2 Wood. 455; 2 Burr. 693); it follows, that when such a case happens within our jurisdiction, the courts of the United States must decide between our citizens and the foreign captors; nor can the relief to the captors be refused, by the interposition of a claim on the part of the captured, as original proprietors. The order in which the claims of captor and captured have been filed, cannot vary the jurisdiction of the court; for, if the captured property is brought into port by our citizens, forcibly or charitably, the jurisdiction must be the same, and the question of prize will be equally involved.

2d Point. But taking cognisance of the present case does not lead to a decision of the question of prize or no prize; for the court must consider the capture to be lawful. No neutral power can doubt the validity of a capture made in a public war. Vatt. lib. 3, c. 14, § 208; 1 Wood. 125; Vatt. lib. 3, c. 3, § 40, § 190, § 209, § 212, § 229; Grot. lib. 3, c. 6, § 2; Burlem. c. 7, § 12, 14; 2 Wood. 441. An inchoate right, therefore, a right to the possession, a special property, is enough for the captor. Of his possession, however slight, a neutral power cannot deprive him: if his enemy were still in pursuit; if he would have been recaptured the next moment; the neutral power cannot interfere with the possession, nor, interfering, must restore it. 2 Burr. 696; 2 Inst. of Just. tit. 1, § 17; Dig. lib. 41, tit. 1, law 5, § 7; *197] 2 Ruth. 594, lib. 2, c. 9; *Collect. Jurid. 134, 135. In the present instance, the interference was charitable, yet, if the vessel had been detained, after payment or tender of a reasonable salvage, the detainer would be deemed a trespasser; and the rule and remedy must be the same, as if he had been a trespasser *ab initio*. If the captors had abandoned their property, let all the legal consequences follow; but that is a question which the captors have a right to controvert with those who saved the property: the British claimants can certainly advance no title, by finding it. The distinction between perfect rights and inchoate rights, can only occur between a recaptor and the original owner, or between a vendee and the original owner: the authorities that have been cited on the opposite side, are all of that description; Marten 291; Emerig. 494; Grot. 582; Puff. 845; 2 Heinec. 197, 199; and the subject is so explained by the latest English writers.

2 Wood. 455–6. The distinction, indeed, arises entirely out of the *jus postliminium;* and the very definition of that right shows its inapplicability to the present case. "The right of *postliminium* (says Vatt. lib. 3, c. 14, § 204) is, that in virtue of which persons and things taken by the enemy, are restored to their former state, when coming again under the power of the nation to which they belonged: but it can have no operation with regard to foreign or neutral nations." 2 Wood. 443; Vatt. lib. 3, c. 14, § 208.

Then, wherever a court takes cognisance of any original matter, it naturally draws to its jurisdiction, every incidental or necessary, question. 3 Bl. Com. 106, 107, 108. Though, where the admiralty, or, as we contend, any foreign court, had not original jurisdiction, it shall not, by the incidental occurrence of a question properly cognisable there, defeat the jurisdiction of the common law, or as we contend, the neutral court. It has been said, that in cases of prize between two other nations, the court of prize has jurisdiction; 3 Bl. Com. 108; where 2 Show. 232; Comb. 474, are cited; but the citation is incorrect; for the authority merely recognises the general principle, that where the admiralty has jurisdiction of the original matter, it may, incidentally, try a question, not otherwise triable there; Comb. 462; and the case in Show. 232, is the celebrated case of *Hughes* v. *Cornelius*, which merely says, that a foreign sentence is conclusive; s. c. Raym. 473. *Quod inconveniens est, non licitum est*, is a good maxim applied to new undecided points. Doug. 388. Where the question of prize comes in collaterally, even a common-law court may decide it, not operating as a sentence to bind the property of the goods (2 Wood. 453, 454; 10 Mod. 77; 2 Str. 1250; 2 Burr. 683, 1198, 1734); for it is essential to the court that it may examine the question so far as is necessary for their purpose, though, generally considered, the question may be reserved *for exclusive jurisdictions. [*198
Doug. 588, *per* BULLER, J.; Harg. L. T. 452; 1 Lev. pl. 2; Roll. Abr. 584; 21 Vin. Abr. 43. But after all, the question of abandonment, is the only proper subject of controversy; and if a right of possession ever attached, the abandonment of the prize can have no other effect, than if the captors had set fire to one of their own ships and abandoned her. The abandonment, if not done by choice, but from necessity, leaves the right unimpaired; and the vessel being brought into port by a friend, ought to be restored, on paying a reasonable salvage; Lee on Capt. 256, 257; Molloy 82; for it will not interfere with the jurisdiction of any foreign court, as to the question of prize, that our courts should, in this case, assert a jurisdiction to make restitution to the captor.

BY THE COURT.—We are unanimously of opinion, that the district court had jurisdiction upon the subject of salvage; and that, consequently, they must have a power of determining, to whom the residue of the property ought to be delivered.

In determining the question of property, we think, that immediately on the capture, the captors acquired such a right, as no neutral nation could justly impugn or destroy; and consequently, we cannot say, that the abandonment of the Mary Ford, under the circumstances of this case, revived and restored the interest of the original British proprietors.

Some doubts have been entertained by the court, whether, on the princi-

ples of an abandonment by the French possessors, the whole property ought not to have been decreed to the American libellants, or, at least, a greater portion of it, by way of salvage; but as they have not appealed from the decision of the inferior court, we cannot now take notice of their interest in the cause. Upon the whole, let the decree be affirmed.

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*199] *WARE, administrator of JONES, Plaintiff in error, *v.* HYLTON *et al.*

Confiscation of debts of alien enemies.

The treaty of peace concluded between the United States and Great Britain, in 1783, enabled British creditors to recover debts previously owing to them by American citizens, notwithstanding a payment into a state treasury, under a state law of sequestration.[1]

An individual citizen of one state cannot set up the violation of a public treaty, by the other contracting party, to avoid an obligation arising under such treaty; the power to declare a treaty void, for such cause, rests solely with the government, which may, or may not, exercise its option in the premises. IREDELL, J., in the court below.

ERROR from the Circuit Court for the district of Virginia. The action was brought by William Jones (but as he died, *pendente lite*, his administator was duly substituted as plaintiff in the cause), surviving partner of Farrel & Jones, subjects of the king of Great Britain, against Daniel Hylton & Co., and Francis Eppes, citizens of Virginia, on a bond, for the penal sum of 2976*l.* 11*s.* 6*d.* sterling, dated the 7th July 1774.

The defendants pleaded: 1st, Payment; and also, by leave of the court, the following additional pleas in bar of the action.

2d. That the plaintiff ought not to have and maintain his action aforesaid, against them, for $3111. 1-9, equal to 933*l.* 14*s.*, part of the debt in the declaration mentioned, because they say that, on the fourth day of July, in the year 1776, they, the said defendants, became citizens of the state of Virginia, and have ever since remained citizens thereof and residents therein; and that the plaintiff, on the said fourth day of July, in the year 1776, and the said Joseph Farrel, were, and from the time of their nativity ever had been, and always since have been, and the plaintiff still is, a British subject, owing, yielding and paying allegiance to the king of Great Britain; which said king of Great Britain, and all his subjects, as well the plaintiff as others, were, on the said fourth day of July, in the year 1776, and so continued until the 3d of September, in the year 1783, enemies of, and at open war with, the state of Virginia, and the United States of America; and that being so enemies, and at open war as aforesaid, the legislature of the state of Virginia did, at their session begun and held in the city of Williamsburgh, on Monday, the 20th day of October, in the year 1777, pass an act, entitled "an act for se-

*200] questering British property, enabling those indebted *to British subjects to pay off such debts, and directing the proceedings in suits where such subjects are parties," whereby it was enacted, "that it may and shall be law-

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[1] Hamilton *v.* Eaton, Mart. (N. C.) 1; s. c. 1 Hughes 249; Jones *v.* Walker, 2 Paine 688. The plea of alien enemy only goes in abatement of the suit; Bell *v.* Chapman, 10 Johns. 183; if put in, after issue joined, as it may be, *puis darrein continuance* (Smith *v.* McConnel, 11 Id. 424), the plaintiff may reply a subsequent restoration of peace (Russel *v.* Skipwith, 1 S. & R. 310), whereby the disability is removed Hamersly *v.* Lambert, 2 Johns. Ch. 508.

ful for any citizen of this commonwealth, owing money to a subject of Great Britain, to pay the same, or any part thereof, from time to time, as he shall think fit, into the said loan-office, taking thereout a certificate for the same, in the name of the creditor, with an indorsement under the hand of the commissioner of the said office, expressing the name of the payer, and shall deliver such certificate to the governor and council, whose receipt shall discharge him from so much of the said debt." And the defendants say, that the said Daniel L. Hylton & Co. did, on the 26th day of April, in the year 1780, in the county of Henrico, and in the state of Virginia, while the said recited act continued in full force, in pursuance thereof, pay into the loan-office of this commonwealth, on account of the debt in the declaration mentioned, the sum of $3111.1-9, equal to 933*l.* 14*s.*, and did take out a certificate for the same, in the name of Farrel & Jones, in the declaration mentioned, as creditors, with an indorsement under the hand of the commissioner of the said office, expressing the name of the payer, which certificate they, the defendants, then delivered to the governor and council, who gave a receipt therefor, in conformity to the directions of the said act, in the words and figures following, to wit:

"Received into the council's office, a certificate bearing date the twenty-sixth day of April 1780, under the hand of the treasurer, that Daniel L. Hylton & Co. have paid to him thirty-one hundred, eleven and one-ninth dollars, to be applied to the credit of their accounts with Farrel & Jones, British subjects. Given under my hand, at Richmond, this 30th May 1780.

T. JEFFERSON."

Whereby the defendants, by virtue of the said act of assembly, are discharged from so much of the debt in the declaration mentioned, as the said receipt specifies and amounts to, and this they are ready to verify. Wherefore, they pray the judgment of the court, whether the said plaintiff ought to have or maintain his action aforesaid against them, for the 933*l.* 14*s.* part of the debt in the declaration mentioned.

3d. That the plaintiff ought not to have or maintain his action aforesaid against them, because they say that, on the 4th day of July, in the year 1776, the said defendants became citizens of the state of Virginia, and have ever since remained citizens thereof, and residents therein, and that the said plaintiff, and the said Joseph Farrel, on the said fourth day of July, in the year 1776, and from the time of their nativity, had ever been, and always since have been, British subjects, *and the plaintiff still is a British subject, yielding and paying allegiance to the king of Great Britain, which said king [*201
of Great Britain, and all his subjects, as well the plaintiff and the said Joseph Farrel, as others, were, on the said 4th day of July 1776, and so continued until the 3d day of September, in the year 1783, enemies of, and at open war with, the state of Virginia, and the United States of America; and that being so enemies and at open war as aforesaid, the legislature of the state of Virginia did, at their session commenced and held in the city of Williamsburg, on the 3d day of May, in the year 1779, pass an act entitled "an act concerning escheats and forfeitures from British subjects," whereby it was, among other things, enacted, "that all the property real and personal, within this commonwealth, belonging at this time to any British subject, or which did belong to any British subject, at the time when such escheat or forfeiture may have taken place, shall be deemed to be vested in the com-

monwealth; the lands, slaves and other real estate, by way of escheat, and the personal estate, by forfeiture." And the legislature of the state of Virginia did, in their session begun and held in the town of Richmond, on Monday, the 6th day of May, in the year 1782, pass an act, entitled "an act to repeal so much of a former act, as suspends the issuing of executions upon certain judgments, until December 1783," whereby it is enacted, that no demand whatsoever, originally due to a subject of Great Britain, shall be recoverable in any court in this commonwealth, although the same may be transferred to a citizen of this state, or to any other person capable of maintaining such an action, unless the assignment hath been, or may be, made for a valuable consideration, *bonâ fide*, paid before the first day May 1777; which said acts are unrepealed, and still in force. And the defendants in fact say, that the debt in the declaration mentioned was personal property within this commonwealth, belonging to a British subject, at the time of the passing of the said act, entitled "an act concerning escheats and forfeitures from British subjects;" and the defendants in fact also say, that the debt in the declaration mentioned is a demand originally due to a subject of the king of Great Britain, not transferred to any person whatsoever. And these things they are ready to verify: wherefore, they pray the judgment of the court, whether the said plaintiff ought to have or maintain his action aforesaid against them.

4th. That the plaintiff, his action aforesaid against them, ought not to have or maintain, because they say, that a definitive treaty of peace between the United States of America and his Britannic majesty, was done at Paris, on the 3d day of September, in the year 1783, and that, by a part of the *202] 7th *article of the said treaty, it was expressly agreed, on the part of his Britannic majesty, with the United States, among other things, "That his said Britannic majesty should, with all convenient speed, and without causing any destruction, or carrying away any negroes or other property of the American inhabitants, withdraw all his armies, garrisons and fleets, from the said United States, and from every port, place and harbor within the same," which may more fully appear, reference being had to the said treaty: And the said defendants aver, that on the said 3d day of September 1783, and from their birth to this day, they have been citizens of these United States, and of the state of Virginia, and that the plaintiff has ever been a British subject, and that the plaintiff ought not to maintain an action, because his Britannic majesty hath wilfully broken and violated the said treaty in this, that his Britannic majesty hath, from the day of the said treaty and ever since, continued to carry off the negroes in his possession, the property of the American inhabitants of the United States, and hath and still doth refuse to deliver them, or permit the owners of the said negroes to take them. And the defendants aver, that his Britannic majesty hath refused, and still doth refuse, to withdraw his armies and garrisons from every port and harbor within the United States, which his said Britannic majesty was bound to do by the said treaty: and the defendants aver, that from the day of the treaty, his Britannic majesty, by force and violence, and with his army, retains possession of the forts Detroit and Niagara, and a large territory adjoining the said forts, and within the bounds and limits of the United States of America: and the defendants say, that in further violation of the said treaty of peace, concluded as aforesaid, certain

nations or tribes of Indians, known by the names of Shawanese, Tawas, Twightees, Powtawatemies, Quiapoees, Wiandots, Mingoes, Piankaskaws and Naiadonepes, and others, being at open, public and known war with the inhabitants of the United States, and living within the limits thereof, and for the purpose of aiding the said Indians in such war and hostility, at certain posts, forts and garrisons, held and kept by the troops and garrisons of his Britannic majesty, to wit, at Detroit, Michelimachinac and Niagara, within the limits of the said United States, on the 4th day of September 1783, and at divers times after the said 4th day of September 1783, up to the institution of this suit, by orders and directions of his Britannic majesty, and his officers commanding his said troops and armies, at the said garrisons of Detroit, Michelimachinac and Niagara, and at other forts and places held by the said troops and armies, within the limits of the United States, are supplied and furnished with arms, ammunition and weapons of war, to wit, with guns and gunpowder, lead *and leaden bullets, tomahawks and scalping-knives, for the purpose of enabling them to prosecute the war [*203 against the citizens of these United States, and also giving and paying to the said Indians money, goods, wares and merchandise, for booty and plunder taken in such war, and for persons, citizens of these United States, made prisoners by the said Indians, in such their warfare against the United States; and so the king of Great Britain is an enemy to these United States: and this they are ready to verify. Wherefore, they pray judgment of the court, whether the plaintiff, his action aforesaid, against them ought to have or maintain.

5th. That the debt in the declaration mentioned, was contracted before the 4th day of July, in the year 1776, to wit, on the 7th day of July, in the year 1774, and that when the said debt was contracted, and from thence to the said 4th day of July 1776, and on that day, and until this day, the said plaintiff was and is a subject to the king of Great Britain, residing in Virginia, until the said 4th day of July, in the year 1776, on which day the people of North America, among whom were these defendants, who had theretofore been the subjects of the king of Great Britain, dissolved the until then subsisting government, whereby the right of the plaintiff to the debt in the declaration mentioned, was totally annulled: and this they are ready to verify. Wherefore, they pray the judgment of the court, whether the plaintiff ought to have or maintain his action aforesaid against them.

The plaintiff replied: 1st. *Non solverunt*, to the plea of payment; on which issue was joined. And to the 2d plea in bar, he replied—

2d. That he, by reason of anything in the said plea alleged, ought not to be barred from having or maintaining his said action against the said defendants, because, protesting that that plea, and the matters therein contained, are not sufficient in law to bar the said plaintiff from having or maintaining his said action in this behalf, against the said defendants, to which the said plaintiff hath no reason, nor is he bound by the law of the land to answer; yet, for replication in this behalf, he, the said plaintiff, saith, that after the debt in the said declaration mentioned was contracted, and after the said 4th day of July 1776, in the said plea of the said defendants mentioned, and also after the said 20th day of October 1777, and the passing the act of general assembly, in the said plea also mentioned, and also after the day in which the said receipt in the plea stated, is said to have

been granted, to wit, on the 3d day of September, in the year of our Lord 1783, it was by the definitive treaty of peace between the United States of
*204] America and his Britannic majesty, made and done in the *city of Paris, that is to say, in the commonwealth, now district of Virginia, and now within the jurisdiction of this honorable court, stipulated and agreed, among other things, "that the creditors of either side should meet with no lawful impediment to the recovery of the full value in sterling money, of all *bonâ fide* debts theretofore contracted;" and the said plaintiff in fact saith, that he, on the said 3d day of September, in the year 1783, and for a long time before (as well as the said Joseph Farrel, in his lifetime, were), then was, and ever since hath been, and still is, a subject of his Britannic majesty, and a creditor within the intent and meaning of the 4th article of the definitive treaty; and that the debt in the declaration mentioned, was contracted before the said 3d day of September 1783, that is to say, in the county and commonwealth aforesaid, now the district of Virginia, and now within the jurisdiction of this honorable court; and then was and still is owing and unpaid. And the said plaintiff, for further replication, saith, that after contracting the debt in the declaration mentioned by the said defendants, and also after the 4th day of July, in the year of our Lord 1776, and after the said 20th day of October, in the year of our Lord 1777, and also after the said 3d day of September, in the year of our Lord 1783, that is to say, on the —— day of —— 1787, in the then commonwealth, now the district of Virginia, and now within the jurisdiction of this honorable court, it was by the constitution of the United States of America, among other things, expressly declared, that treaties which were then made, or should thereafter be made, under the authority of the United States, should be the supreme law of the land, anything in the said constitution, or of the laws of any state, to the contrary notwithstanding; and the said plaintiff doth in fact aver, that the said constitution of the United States was made and accepted, subsequent to and after the ratification of the said definitive treaty of peace between the said United States of America and his Britannic majesty, whose subject the said plaintiff then was, and still is, and after the said 4th day of July, in the year 1776, and also after the said 20th day of October, in the year 1777: Wherefore, without that the debt in the declaration mentioned, was *bonâ fide* contracted before the making of the said definitive treaty of peace, and before the making of the said constitution of the United States, that he, the said plaintiff, is entitled to demand, have and recover of the said defendants, the aforesaid debt in the declaration mentioned, without that the governor and council did give a receipt for a certificate of the payment into the loan-office
*205] of the sum of $1311.1-9, in the name of Farrel & Jones, *and in conformity to the direction of the act of general assembly, entitled "An act for sequestering British property, enabling those indebted to British subjects, to pay off such debts, and directing the proceedings in suits where such subjects are parties;" whilst the said act was in force, as in the said plea of the said defendants is alleged: and this he is ready to verify. Wherefore, the said plaintiff, as before, prays judgment of the court, and his debt aforesaid, and damages for detention of the debt to be adjudged to him. To the 3d, 4th and 5th pleas in bar, the plaintiff demurred generally.

The defendants, to the plaintiff's second replication, rejoined, that the

said plaintiff, for anything in the said replication contained, ought not to have or maintain his said action against them, because they, by way of rejoinder, in this behalf, say, that in the same definitive treaty of peace between the United States of America and his Britannic majesty, by the said plaintiff in his replication mentioned, and which is now to the court shown, it was among other things stipulated and contracted as follows: "There shall be a firm and perpetual peace between his Britannic majesty and the said United States, and between the subjects of the one and the citizens of the other; wherefore, all hostilities both by sea and land shall from henceforth cease, all prisoners on both sides shall be set at liberty, and his Britannic majesty shall, with all convenient speed, and without causing any destruction or carrying away any negroes, or other property of the American inhabitants, withdraw all his armies, garrisons and fleets, from the said United States, and from every port, place and harbor, within the same:" And the defendants in fact say, that his said Britannic majesty hath not performed those things which, by the said treaty of peace, he was bound to perform, but hath altogether failed to do so, and hath broken the said treaty in this: that on the 4th day of September, in the year 1783, and on the 3d day of June 1790, and at divers times between the said 4th day of September 1783, and the said 3d day of June, in the year 1790, his Britannic majesty, at Detroit, and other parts within the boundaries of the United States, to wit, within the commonwealth of Virginia, the jurisdiction of this honorable court, in open violation of the said treaty, and the articles thereof, excited, persuaded and stirred up the Shawanesse, and divers other tribes of Indians, to make war upon the said United States of America, and the commonwealth of Virginia; and gave them, the said Indians, aid in the prosecution of the said war, and furnished them with arms and ammunition, for the purpose of enabling them to prosecute the same. And his said Britannic *majesty hath not, with all convenient speed, and without causing any destruction or carrying away any negroes, or other [*206 property of the American inhabitants, withdrawn all his armies, garrisons and fleets, from the said United States, and from every port and place within the same—but hath carried away five thousand negroes, the property of American inhabitants, on the 4th day of September, in the year 1783, from New York, to wit, in the commonwealth of Virginia, and within the jurisdiction of the court; and hath refused to withdraw with all convenient speed, his armies and garrisons from the United States, and from every post and place within the same—but hath, with force and violence, and in open violation of the said treaty of peace, on the said 3d day of September, in the year 1783, and since, maintained his armies and garrisons in the forts of Niagara and Detroit, which are posts and places within the United States, and still doth maintain his armies and garrisons within the said forts; and the defendants further say, that the debt in the declaration mentioned, or so much thereof, as is equal to the sum of 933*l.* 14*s.*, was not a *bonâ fide* debt due and owing to the plaintiff, on the said 3d day of September 1783, because the defendant had, on the ——— day of ——— 1780, in Virginia as aforesaid, paid in part thereof, the sum of $3111.1-9, and afterwards obtained a certificate therefor, according to the act of the general assembly, entitled "An act for sequestering British property, enabling those indebted to British subjects, to pay off such debts, and directing the proceedings in suits, where such subjects are parties," which payment was made while the said act continued in full force;

without that the said treaty of peace, and the constitution of the United States, entitle the said plaintiff to maintain his said action against the said defendants, for so much of the said debt in the declaration mentioned, as is equal to 933*l.*, 14*s.*, and this they are ready to verify. Wherefore, they pray the judgment of the court, whether the plaintiff ought to have or maintain his action aforesaid against them, for so much of the debt in the declaration mentioned, as is equal to the said sum of 933*l.* 14*s.*

The defendants joined issue on the demurrer to the 3d, 4th and 5th pleas in bar: and the plaintiff having demurred to the defendants' rejoinder to the 2d replication, issue was thereupon likewise joined.

On the demurrer to the defendant's rejoinder to the plaintiff's replication to the second plea, judgment was given by the circuit court, for the defendants, and that as to so much of the debt in the declaration mentioned, as is in the said second plea set forth, the plaintiff take nothing by his bill; on *207] which judgment, the present writ of error was brought: but on *demurrer to the 3d, 4th and 5th pleas, judgment was given for the plaintiff; a *venire* was awarded to try the issue in fact on the first plea of payment; and on the trial, a verdict and judgment were given for the plaintiff for $596, with interest at five per cent. from the 7th of July 1782, and costs.

On the return of the record, the error assigned was, that judgment had been given for the defendants, instead of being given for the plaintiff, upon his demurrer to their rejoinder to the replication to the second plea. *In nullo est erratum* was pleaded, and thereupon, issue was joined.

The general question was—whether by paying a debt due before the war, from an American citizen to British subjects, into the loan-office of Virginia, in pursuance of the law of that state, the debtor was discharged from his creditor? And the argument took the following general course.(*a*)

E. Tilghman, for the plaintiff in error.—It is conceded, that a debt was due from the defendants to the plaintiff, at the commencement of the revolutionary war; and it has been decided, in the case of *Georgia* v. *Brailsford* (*ante*, p. 1), that although the state had a power to suspend the payment of such a debt, during the continuance of hostilities, yet, that the creditor's right to recover it revived, as an incident and consequence of the peace. There is, indeed, no controverting the general right of a belligerent power to confiscate the property of its enemy, in ordinary cases; though the modern policy of nations abstains from the exercise of that right, in respect to debts. Vatt. lib. 3, § 77, p. 484. But the relative situation of Great Britain and her colonies was of a peculiar nature, widely different from the situation of the Grecian or Roman colonies; and therefore, requiring a new and appropriate rule of action. At the time of the revolution, the creditor and debtor were members of the same society; subjects of the same empire. Had they belonged, originally, to distinct, independent states, both would have anti-

(*a*) As I was not present during the argument, I was in hopes to have obtained the briefs of the counsels themselves, for a more full display of their learning and ingenuity in this cause; but being disappointed in that respect, I have been aided by the notes of Mr. *W. Tilghman*, to whose kindness, it is just, on the present occasion, to acknowledge, I have been frequently indebted for similar communications, in the course of the compilation for these reports.

cipated, in the case of a war, an exercise of the power of confiscation; but the event of a civil contest could not be reasonably contemplated nor provided for. We find, therefore, upon the law of positive authority, as well as upon a principle of natural justice, that even the declaration of independence was deemed to have no obligatory operation upon any inhabitant of the United States, who did not choose, voluntarily, to remain in the country, or to take an *oath of allegiance to some member of the confederation. [*208
1 Dall. 53. On the declaration of independence, the American debtor might choose his political party, but he could not dissolve his obligation to his British creditor; and if he had no power to dissolve it himself, it follows, that he could not communicate such a power to the society of which he became a member. Vatt. Pr. Dis. § 5, 11. Besides, there are, certainly, a variety of cases, to which the rigorous power of confiscation cannot and ought not to extend. Suppose, a contract is formed in a neutral country, between subjects of two belligerent powers, the debt thus incurred could hardly be the object of confiscation. An action, it has been adjudged, may be maintained on a ransom bill, even during the continuance of the war. Doug. 19. And, in general, it may be stated, that capitulations, made in time of war, though they embrace the security of debts, as well as other property, must be held sacred. Vatt. lib. 3, § 263, 264, p. 612, 613.

But supposing Virginia had the right of confiscation in the present instance, two grounds for judicial inquiry will still remain to be explored: 1st. Whether an act of the legislature of that state has been passed, and so acted upon, as ever to have created an impediment to the plaintiff's recovering the debt in controversy? And 2d. Whether such impediment, if it ever existed, has been lawfully removed?

1st. It does not appear, from the enacting clauses of the law of Virginia, which has been pleaded, that the state had any intention to confiscate the British debts paid into her treasury; and the preamble (which, though it cannot control, may be advantageously employed to expound the enacting clauses) is manifestly inconsistent with such an intention. The money, when paid by the debtor into the treasury, was, simply, to remain there, subject to the directions of the legislature; and as the debtor was not bound so to pay it, the provisions of the act could not amount to a confiscation; but were merely an invitation to pay, with an implied promise, that whoever accepted the terms of the invitation, should be indemnified by the state. Nor was the invitation indiscriminately given to all debtors, but only to those who were sued; from which the inference is irresistible, that whatever responsibility the state meant herself to assume, there was no intention to extinguish the responsibility of the Virginia debtor to the British creditor. The act of the Virginia legislature, passed the 3d of May 1779, is *in pari materiâ*, and throws light on the construction of the former act; for there, when the legislature meant to interpose a bar to the recovery, they have in express terms declared it. Several other acts have passed on the subject, to which it is merely necessary to refer: The act of the 1st of *May 1780, [*209
repeals the act of the 20th of October 1777, so far as regards the authority to pay debts into the treasury. The acts of the 6th of May 1782, and 20th of October 1783, revive the authority of making such payments in relation to British debts; and prevents the recovery by British creditors. The act of the 3d of January 1788, fixes the amount for which the state will

be liable on account of payments into the treasury; to wit, for the value of the money at the time it was so paid, with interest.

2d. But if any impediment ever existed to the recovery of the debt, it is removed by the operation of the treaty between the United States and Great Britain, congress having a power to repeal all the acts of the several states, in order to obtain peace; and the treaty made for that purpose being the supreme law of the land. The fourth article declares, that creditors on either side shall meet with no lawful impediment to the recovery of debts heretofore contracted; and unless this provision applies to cases like the present, it will be useless and nugatory. An interpretation which would render a clause in the treaty of no effect, ought not to be admitted. Vatt. lib. 2, § 283. The 5th article expressly stipulates, that congress shall recommend the restoration of some parts of confiscated property, and a composition as to other parts; but that "all persons who have any interest in confiscated lands, either by debts, marriage settlements, or otherwise, shall meet with no lawful impediment in the prosecution of their just rights." Both parties to the treaty seemed to think that there had been no confiscation of debts;(*a*) and debts were the great object which the British commissioners wished to secure. Whatever tends to produce equality in national compacts, ought to be favored; Vatt. lib. 2, § 301; and as the British government had thrown no impediment in the way of recovering debts, the American should be presumed to have acted on the same liberal principle, if any doubt arises upon the construction of the public acts. When a statute is repealed, mesne acts are valid; but it is not so, when a subsequent act declares a former one to be void. Jenk. 233, pl. 6. Had the treaty meant to obviate only a part of the impediments, the meaning would have been expressed in qualified terms. But as it could not be supposed, that, after the peace, laws would be passed creating impediments to the recovery of British debts; the treaty cannot be construed merely to intend to prevent the passing future laws, but to annihilate the operation of such as were previously enacted. There is no such clause
*210] in the treaties which England *made at the same period with France, Spain and Holland, and for this obvious reason, that those countries had passed no law to impede the recovery of British debts. A change of circumstances, a recognition, *ex post facto*, will often impose an obligation, which may not, originally, be binding on the party: The debt contracted by an infant is obligatory on him, if he promises to pay it, when of age. The assumption of a certificated bankrupt, to satisfy a debt, which the certificate would, otherwise, have discharged, affords a new cause of action. And the bare acknowledgment of a debt, barred by the statute of limitations, is sufficient to maintain an action against the debtor. So, in the present case, the treaty, operating as a national compact, is a promise to remove every pre-existing bar to the recovery of British debts; and whatever may have been the previous state of things, this is a paramount engagement, entered into by a competent authority, upon an adequate consideration.

Marshall (of Virginia), for the defendant in error.—The case resolves itself into two general propositions: 1st. That the act of assembly of Virginia

(*a*) IREDELL, Justice.—The state of North Carolina did actually pass a confiscation law.

is a bar to the recovery of the debt, independently of the treaty. 2d. That the treaty does not remove the bar.

I. That the act of assembly of Virginia is a bar to the recovery of the debt, introduces two subjects for consideration: 1st. Whether the legislature had power to extinguish the debt? 2d. Whether the legislature had exercised that power.

1st. It has been conceded, that independent nations have, in general, the right of confiscation; and that Virginia, at the time of passing her law, was an independent nation. But it is contended, that from the peculiar circumstances of the war, the citizens of each of the contending nations having been members of the same government, the general right of confiscation did not apply, and ought not to be exercised. It is not, however, necessary for the defendant in error to show a parallel case in history; since, it is incumbent on those who wish to impair the sovereignty of Virginia, to establish, on principle or precedent, the justice of their exception. That state, being engaged in a war, necessarily possessed the powers of war; and confiscation is one of those powers, weakening the party against whom it is employed, and strengthening the party that employs it. War, indeed, is a state of force; and no tribunal can decide between the belligerent powers. But did not Virginia hazard as much by the war, as if she had never been a member of the British empire? Did she not hazard more, from the very circumstance of its being a civil war? It will be allowed, that nations have equal powers; and that America, in her own tribunals, at least, must, from the 4th of July 1776, be *considered as independent a nation as Great Britain: then, what would have been the situation of American property, had Great [*211
Britain been triumphant in the conflict? Sequestration, confiscation and proscription would have followed in the train of that event; and why should the confiscation of British property be deemed less just, in the event of the American triumph? The rights of war clearly exist between members of the same empire, engaged in a civil war. Vatt. lib. 3, § 292, 295. But, suppose a suit had been brought, during the war, by a British subject, against an American citizen, it could not have been supported; and if there was a power to suspend the recovery, there must have been a power to extinguish the debt: they are, indeed, portions of the same power, emanating from the same source. The legislative authority of any country can only be restrained by its own municipal constitution: this is a principle that springs from the very nature of society; and the judicial authority can have no right to question the validity of a law, unless such a jurisdiction is expressly given by the constitution. It is not necessary to inquire, how the judicial authority should act, if the legislature were evidently to violate any of the laws of God; but property is the creature of civil society, and subject, in all respects, to the disposition and control of civil institutions. There is no weight in the argument, founded on what is supposed to be the understanding of the parties, at the place and time of contracting debts; for the right of confiscation does not arise from the understanding of individuals, in private transactions, but from the nature and operation of government. Nor does it follow, that because an individual has not the power of extinguishing his debts, the community to which he belongs, may not, upon principles of public policy, prevent his creditors from recovering them. It must be repeated, that the law of property, in its origin and operation, is the off-

spring of the social state; not the incident of a state of nature. But the revolution did not reduce the inhabitants of America to a state of nature; and if it did, the plaintiff's claim would be at an end. Other objections to the doctrine are started: it is said, that a debt which arises from a contract formed between the subjects of two belligerent powers, in a neutral country, cannot be confiscated; but the society has a right to apply to its own use, the property of its enemy, wherever the right of property accrued, and wherever the property itself can be found. Suppose, a debt had been contracted between two Americans, and one of them had joined England, would not the right of confiscation extend to such a debt? As to the case of the ransom-bill, if the right of confiscation does not extend to it (which is, by no means, admitted), it must be, on account of the peculiar nature of the con-
*212] tract, implying a waiver of the rights of *war. And the validity of capitulations depends on the same principle. But, let it be supposed, that a government should infringe the provisions of a capitulation, by imprisoning soldiers who had stipulated for a free return to their home, could an action of trespass be maintained against the jailer? No, the act of the government, though disgraceful, would be obligatory on the judiciary department.

2d. But it is now to be considered, whether, if the legislature of Virginia had the power of confiscation, they have exercised it? The third section of the act of assembly discharges the debtor; and on the plain import of the term, it may be asked, if he is discharged, how can he remain charged? The expression is, he shall be discharged from the debt; and yet, it is contended, he shall remain liable to the debt. Suppose, the law had said, that the debtor should be discharged from the commonwealth, but not from his creditor, would not the legislature have betrayed the extremest folly in such a proposition? and what man in his senses would have paid a farthing into the treasury, under such a law? Yet, in violation of the expressions of the act, this is the construction which is now attempted. It is likewise contended, that the act of assembly does not amount to a confiscation of the debts paid into the treasury; and that the legislature had no power, as between creditors and debtors, to make a substitution or commutation in the mode of payment. But what is a confiscation? The substance, and not the form, is to be regarded. The state had a right either to make the confiscation absolute, or to modify it as she pleased. If she had ordered the debtor to pay the money into the treasury, to be applied to public uses; would it not have been, in the eye of reason, a perfect confiscation? She has thought proper, however, only to authorize the payment, to exonerate the debtor from his creditor, and to retain the money in the treasury, subject to her own discretion, as to its future appropriation. So far as the arrangement has been made, it is confiscatory in its nature, and must be binding on the parties; though in the exercise of her discretion, the state might choose to restore the whole or any part of the money to the original creditor. Nor is it sufficient to say, that the payment was voluntary, in order to defeat the confiscation. A law is an expression of the public will; which, when expressed, is not the less obligatory, because it imposes no penalty. Banks, canal companies, and numerous associations of a similar description, are formed on the principle of voluntary subscription. The nation is desirous that such institutions should exist; individuals are invited to subscribe, on

the terms of the law; and, when they have subscribed, they are entitled to all the benefits, and are subject to all the inconveniences of the association, *although no penalties are imposed. So, when the government of [*213
Virginia wished to possess itself of the debts previously owing to British subjects, the debtors were invited to make the payment into the treasury; and having done so, there is no reason or justice, in contending that the law is not obligatory on all the world, in relation to the benefit which it promised as an inducement to the payment. If, subsequently to the act of 1777, a law had been passed confiscating British debts, for the use of the state, with orders that the attorney-general should sue all British debtors, could he have sued the defendants in error, as British debtors, after this payment of the debt into the treasury? Common sense and common honesty revolt at the idea; and yet, if the British creditor retained any right or interest in the debt, the state would be entitled, on principles of law, to recover the amount.

II. Having thus, then, established, that at the time of entering into the treaty of 1783, the defendant owed nothing to the plaintiff; it is next to be inquired, whether that treaty revived the debt in favor of plaintiff, and removed the bar to a recovery, which the law of Virginia had interposed? The words of the fourth article of the treaty are "that creditors, on either side, shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all *bonâ fide* debts heretofore contracted." Now, it may be asked, who are creditors? There cannot be a creditor, where there is not a debt; and British debts were extinguished by the act of confiscation. The article, therefore, must be construed with reference to those creditors, who had *bonâ fide* debts subsisting, in legal force, at the time of making the treaty; and the word *recovery* can have no effect to create a debt, where none previously existed. Without discussing the power of congress to take away a vested right by treaty, the fair and rational construction of the instrument itself is sufficient for the defendant's cause. The words ought, surely, to be very plain, that shall work so evident a hardship, as to compel a man to pay a debt which he had before extinguished. The treaty itself does not point out any particular description of persons, who were to be deemed debtors; and it must be expounded in relation to the existing state of things. It is not true, that the fourth article can have no meaning, unless it applies to cases like the present. For instance, there was a law of Virginia, which prohibited the recovery of British debts that had not been paid into the treasury: these were *bonâ fide* subsisting debts; and the prohibition was a legal impediment to the recovery, which the treaty was intended to remove. So, likewise, in several other states, laws had been passed, authorizing a discharge of British debts in paper money, or by a tender of property *at a valuation, and the treaty was calculated to [*214
guard against such impediments to the recovery of the sterling value of those debts. It appears, therefore, at the time of making the treaty, the state of things was such, that Virginia had exercised her sovereign right of confiscation, and had actually received the money from the British debtors. If debts thus paid were within the scope of the fourth article, those who framed the article knew of the payment; and upon every principle of equity and law, it ought to be presumed, that the recovery which they contemplated, was intended against the receiving state, not against the paying debtor. Virginia

possessing the right of compelling a payment for her own use, the payment to her, upon her requisition, ought to be considered as a payment to the attorney or agent of the British creditor. Nor is such a substitution a novelty in legal proceedings: a foreign attachment is founded on the same principle. Suppose, judgment had been obtained against the defendants in error, as garnishees in a foreign attachment brought against the plaintiff in error, and the money had been paid, accordingly, to the plaintiff in the attachment; but it afterwards appeared that the plaintiff in the attachment had, in fact, no cause of action, having been paid his debt, before he commenced the suit: if the treaty had been made in such a state of things, which would be the debtor contemplated by the fourth article—the defendants in error, who had complied with a legal judgment against them, or the plaintiff in the attachment, who had received the money? This act of Virginia must have been known to the American and British commissioners; and therefore, cannot be repealed, without plain and explicit expressions directed to that object. Besides, the public faith ought to be preserved. The public faith was plighted by the act of Virginia; and as a revival of the debt in question would be a shameful violation of the faith of the state to her own citizens, the treaty should receive any possible interpretation to avoid so dishonorable and so pernicious a consequence. It is evident, that the power of the government, to take away a vested right, was questionable in the minds of the American commissioners, since they would not exercise that power, in restoring confiscated real estate; and confiscated debts or other personal estate must come within the same rule. If congress had the power of divesting a vested right, it must have arisen from the necessity of the case; and if the necessity had existed, the American commissioners, explicitly avowing it, would have justified their acquiescence to the nation. But the commissioners could have no motive to form a treaty such as the opposite construction supposes; for if the stipulation was indispensable to the attainment of peace, the object was national, and so should be the
*215] *payment of the equivalent: the commissioners, in such case, would have agreed, at once, that the public should pay the British debts; since, the public must, on every principle of equity, be answerable to the Virginia debtor, who is now said to be the victim. The case cited from Jenkins, does not apply; as there is no article of the treaty, that declares the law of Virginia void. See Old Law of Evidence, 196.

Campbell, of Virginia, on the same side.—The questions to be discussed are these: 1st. Did the act of assembly of Virginia discharge the debtor? 2d. Did any subsequent act, or law, of the government recharge him?

I. The right of confiscation, in a time of war, is incontrovertibly established (Vatt. lib. 3, c. 5, § 77); and nothing but the conventional or customary law of nations can restrain the exercise of that general right. But the conventional or customary law of nations is only obligatory on those nations by whom it is adopted. Vatt. Pref. Disc. § 24, 25, 17; Vatt. lib. 3, c. 28, § 287, 292. Even in the English courts, indeed, the confiscation law of Georgia has been adjudged to be valid. If, therefore, the right of confiscation might be exercised by an individual state, nothing can more emphatically prove its exercise than the language of the act of Virginia. The act is a discharge, in express terms, saying, that "the receipt of the proper

officer shall *discharge* the payer from so much of his debt, as is paid into the treasury,"—whereas, a confiscation of the debt would only work a discharge by legal inference. To restrict the meaning of the discharge to a discharge from the state, is absurd; for the state never had a charge against the debtor; or, if the state had a right to charge him, another consequence, equally fatal to the plaintiff's cause, would ensue, that the right of the British creditor to charge him was extinguished; since the debtor clearly could not be responsible to both.

II. In considering whether anything has been done by the government to revive the charge, in favor of the British creditor, it is to be premised, that the state of things, at the time of making the treaty, is to be held legitimate; and whatever tends to change that state, is odious in the eye of the law. Vatt. lib. 4, c. 2, § 21; Ibid. lib. 2, c. 17, § 305. As, therefore, by the law of nations, a payment under a confiscation discharges a debtor, though if there had been no payment, the debt would have revived at the peace (Bynk. c. 8, p. 177, de Reb. Bell.); nothing short of an express and explicit declaration of the treaty should be allowed so to alter the state of things, as to revive a debt, that had been lawfully extinguished. If, then, the treaty had been intended to alter the state of things, reason, equity and law concur in supposing, that it would have been by a provision, *calling on Virginia, who had received the money, to refund it in satisfaction of the claim of the British creditor. [*216 Adverting to the words of the 4th article of the treaty, and thence deducing a fair, legal and consistent meaning, the claim of the plaintiff cannot be supported. It may not be improper, to apply the word *creditors* to British subjects; but it is contended, that the Virginia act interposes a lawful impediment (not an impediment in fact, such as payment to the creditor himself) to the recovery of the debt, which impediment the treaty intended to remove. The answer, however, is conclusive, that this was not a debt, at the time of making the treaty; and therefore, the expression, whatever may be its general import, cannot be applied to the case. It is urged likewise, that the words debts *heretofore contracted*, are peculiarly descriptive of debts of the present class: but the words "heretofore contracted," cannot alter the nature and import of the word *debt;* and those words were necessary to be inserted; because they ascertained the debts which were, at all events, to be paid in sterling money —debts contracted afterwards being left to the *lex loci*, and liable to the tender laws, which the different states had made or might think proper to make. If, indeed, the opposite construction prevails, then all debts, previously contracted, in whatever manner they may have been extinguished, are revived by the treaty. But, surely, obscure words ought not to be construed so as to alter the existing state of things between the two nations, and involve thousands of individual citizens in ruin. It is not now contended, that debts do not revive by the peace; though the commissioners who formed the treaty might entertain doubts on the subject; and therefore, provided specially for the case. Grotius, lib. 3, c. 9, § 9, says (though his commentator dissents), that debts are not, of course, revived by a peace; and there are many instances of conventions between nations, stipulating for the revival. Bynk. de Reb. Bell. c. 8, p. 177. The treaty extends to British, as well as to American, debtors; and as Britain had passed no act of confiscation, the article was meant solely as a convention, that debts not

paid to the public, should be recoverable of the original creditor. To elucidate the subject, it is necessary to inquire into the power of the commissioners; for it is not to be presumed, that they were ignorant of their power, or that they meant to exceed it; and if one construction will produce an effect, to which they were competent, while the other construction will amount to a mere usurpation, the former ought certainly to be adopted. Thus, congress never was considered as a legislative body, except in relation to those subjects expressly assigned to the federal jurisdiction; and could, at no time, nor in any manner, repeal the laws of the several states, or *217] sacrifice the rights of individuals. The power of abrogating, *is as eminent as the power of making laws (Vatt. lib. 1, c. 3, § 34, 47); and even the powers of war and peace may be limited by the fundamental law of the society. Vatt. lib. 4, c. 2, § 10. The fundamental law of the Union was declared in the articles of confederation; and those articles, as well as the written constitutions of the several states, must have been known to the commissioners on both sides, as the boundaries of the authority of the American government itself, and of course, of all authority derived from that government. But the right of sacrificing individuals, even on the ground of public necessity, belongs only to that power in a state, which is vested with the eminent domain, a domain inseparable from empire. Vatt. lib. 4, § 12; Ibid. lib. 1, c. 20, § 244, 245. On the revolution, the eminent domain was vested in the people of America, in their respective state legislatures; and it could not be divested and transferred, without an express grant by the same authority. The debates that arose in the British parliament on the subject of the treaty, show, likewise, that the British commissioners were sensible, that the power of the American commissioners did not extend to the repeal of any state law. On the faith of the Virginia law, many citizens collected their estates from other hands, and paid them into the treasury; and therefore, even if the treaty requires a payment of those debts, the responsibility ought only to attach upon the state. If the Virginia law had made a direct and unqualified confiscation, there would be no doubt of its validity; but it discharges the debtor as much as if it had been a confiscation, and being discharged, it can be no reason to revive the debt, that the discharge was procured by a voluntary payment. Upon the whole, the act of assembly amounts, substantially, to a confiscation; which means nothing more, than a bringing into the public treasury the confiscated property; and the state may, if she pleases, restore it, in that case, as well as in the case of a discretion expressly reserved, or in the case of a forfeiture for treason or felony.

Wilcocks, for the plaintiff in error.—It is necessary, 1st, to ascertain the meaning of the acts of the legislature of Virginia; and 2d, the operation of the treaty of peace, in relation to those acts.

I. That the legislature of Virginia did not mean to confiscate debts, is evident from the declaration contained in the preamble, that such a confiscation is not agreeable to the custom of nations; and where the enacting clause is doubtful, the preamble will furnish a key to the construction. After droviding, therefore, for the sequestration of real estate, the law proceeds merely to permit the payment of British debts into the public

treasury. There is nothing compulsory on the debtor; *all* *debtors are not enjoined to pay; and no debtor is restrained from remitting to his British creditor. Even, indeed, if a bare sequestration had been intended, there never could be terms more defective. The legislature only says, if a debtor chooses to pay his debt into the treasury, he shall be indemnified; and in a subsequent act, when the state declares the amount for which she will be responsible (the value of the money paid, with interest), she does not determine, whether the payment by the American debtors was a discharge from the British creditors. To pay the British creditor in that way, would be manifestly unjust; but if the American debtor is reimbursed the value of what he paid, with interest, he has no right to complain.

II. In examining the effect of the treaty, if it be conceded, that the Virginia act extinguished the debt, it may be assumed, that the commissioners had power to enter into the treaty. That instrument, therefore, is the supreme law of the land: and, upon the whole, it is highly favorable to America. Treaties ought to be construed liberally; but it would be illiberal to construe this treaty, so as to prevent the recovery of *bonâ fide* debts. The British commissioners gave up a great deal; but they were particularly anxious on two points, the property of the loyalists, and the security of the British debts. It is objected, that the treaty does not make any express mention of the repeal of state laws: but the laws interfering with the object of the fourth article were so numerous, that, probably, the commissioners did not know them all; and it was safest to resort to general expressions. The words "heretofore contracted," mean debts contracted before the revolution; and include not only existing debts, at the time of forming the treaty, but all debts contracted before that memorable epoch, though extinguished by the acts of state legislatures, without the consent or co-operation of the British creditors. The words that "creditors shall meet with no lawful impediment in the recovery of all such debts," mean, that when the creditors apply to a court of justice, no law shall be pleaded in bar to a judgment for their debts. What else, indeed, could reasonably be the object of the British minister, who was bound to protect the commercial interests of his nation, and who insisted on the insertion of the fourth article? Could he mean to relinquish all debts paid into the public treasury of the different states? Then, if all had been so paid, the article was nugatory. But the impediments referred to must have been the existing impediments, and not impediments to be afterwards created; and the enforcement of the former would be, on general principles, as unjust to the British creditor, as the introduction of the latter. Besides, if the former description of impediments was not contemplated, British creditors were in a worse predicament *than loyalists, owners of confiscated real estate, in whose favor, it was stipulated, that a congressional recommendation should be made. [*219

Lewis, for the plaintiff in error.—The individuals of different nations enter into contracts with each other, upon a presumption, that, in case of a war, debts will not be confiscated. The presumption is founded upon the uniform practice of the monarchies of Europe; and the national character of the American republic is interested that a more rigorous policy should not

be introduced. Congress, indeed, never attempted the seizure of debts; and very few of the states have passed confiscating laws. It is now, then, to be inquired, 1st. Had the legislature of Virginia a competent authority to extinguish the debt? 2d. If the legislature had such an authority, has it been exercised? And 3d. If the authority was lawfully exercised, what is the effect of the treaty of peace?

1st. If the power to confiscate debts existed, it existed in the United States, and not in the individual states. It has been admitted, that congress possessed the power of war and peace; and that the right of confiscation emanates from that source. All America was concerned in the war, and it seems naturally to follow, that all America (not the constituent parts, respectively) was entitled to the emoluments of confiscation. It is true, that when a civil war breaks out, each party is entitled to the rights of war, as between independent nations; and it is not denied, that Virginia was vested, at the revolution, with all the eminent domain attached to empire, which was not delegated to congress, as the head of the confederation. Such was the peculiar state of things, that although Virginia might, in any future war, have acted as she pleased, in the war then subsisting, she had no election; all the powers of war and peace were vested in congress, not in the legislatures of the several states. When it is said, that even the British courts recognise the validity of a state confiscation; it should be remembered, that the case alluded to, arose from a law of treason, and the forfeiture for treason, properly belonged to the state of Georgia. 1 H. Bl. 148–9. So, when it is said, that the act of Virginia was passed, prior to the completion of the articles of confederation, it is sufficient to answer, that the same objection has already been overruled in *Penhallow* v. *Doane* (*ante*, p. 54). It is absurd to suppose, that congress and Virginia could, at the same time, possess the powers of war and peace. The war was waged against all America, as one nation or community; and the peace was concluded on the same principles. Before the revolution, the power of confiscation was vested in the king, not in the parliament. When the revolution commenced, conventions, committees of safety, and other popular associations *were formed, *220] even while the legislatures of the several states were in session. The people assumed, themselves, in the first instance, the powers of war and peace, but quickly and wisely vested them in congress. At what period, then, could the state legislatures assert that they possessed those powers? All the property of the enemy, likewise, of whatever kind, was booty of war, and belonged to the Union. The authorities say, that one belligerent power may confiscate debts due from its subjects, to the subjects of the other belligerent power; but it is nowhere said, that a member of any belligerent power, a constituent part of the nation, possesses such authority. The eminent domain of Virginia must, therefore, be confined to internal affairs; and it is not sufficient to object, that the property of the debt in question, was within the limits of her territory, and therefore, was subject to her laws. The inference would be false, even if the premises were true; but the premises are unfounded; for a debt is always due, where the creditor resides, except in the case of an obligation, which is due where the instrument is kept. 1 Roll. Abr. 908, pl. 1, 4; Ibid. 909, pl. 1, 7; Salk. 37; 4 Bur. Ecc. L. 157.

2d and 3d. On the second and third points, there can be but little added

to the arguments already advanced. If laws change according to the manners of times, as reason and authority inculcate (1 Ld. Raym. 882), the act of Virginia should be so expounded as to conform to the modern law of nations, which is adverse to the confiscation of debts. The right of sequestration may exist (and that is all the case in the Old Law of Evidence can prove), but Bynkershoeck says expressly, that a debt not exacted, revives upon the peace; and in the present instance the payment was surely voluntary, without force of any kind.

The Court, after great consideration, delivered their opinions, *seriatim*, as follows:

Chase, Justice.—The defendants in error, on the 7th day of July 1774, passed their penal bond to Farrel & Jones, for the payment of 2976*l.* 11*s.* 6*d.* of good British money; but the condition of the bond, of the time of payment, does not appear on the record. On the 20th October 1777, the legislature of the commonwealth of Virginia passed a law to sequester British property. In the 3d section of the law, it was enacted, "that it should be lawful for any citizen of Virginia, owing money to a subject of Great Britain, to pay the same, or any part thereof, from time to time, as he should think fit, into the loan-office, taking thereout a certificate for the same, in the name of the creditor, with an indorsement, under the hand of the commissioner of the said office, expressing the name of the payer; and *shall deliver such certificate to the governor and the council, whose receipt [*221 shall discharge him from so much of the debt. And the governor and the council shall, in like manner, lay before the general assembly, once in every year, an account of these certificates, specifying the names of the persons by, and for whom they were paid; and shall see to the safe-keeping of the same; subject to the future directions of the legislature: provided, that the governor and the council may make such allowance, as they shall think reasonable, out of the interest of the money so paid into the loan-office, to the wives and children, residing in the state, of such creditor. On the 26th of April 1780, the defendants in error paid into the loan-office of Virginia, part of their debt, to wit, $3,111\frac{1}{9}$, equal to 933*l.* 14*s.* 0*d.* Virginia currency; and obtained a certificate from the commissioners of the loan-office, and a receipt from the governor and the council of Virginia, agreeable to the above in part recited law.

The defendants in error being sued on the above bond, in the circuit court of Virginia, pleaded the above law, and the payment above stated, in bar of so much of the plaintiff's debt. The plaintiff, to avoid this bar, replied the fourth article of the definitive treaty of peace between Great Britain and the United States, of the 3d of September 1783. To this replication, there was a general demurrer and joinder. The circuit court allowed the demurrer, and the plaintiff brought the present writ of error.

The case is of very great importance, not only from the property that depends on the decision, but because the effect and operation of the treaty are necessarily involved. I wished to decline sitting in the cause, as I had been counsel, some years ago, in a suit in Maryland, in favor of American debtors; and I consulted with my brethren, who unanimously advised me not to withdraw from the bench. I have endeavored to divest myself of all former prejudices, and to form an opinion with impartiality. I have dili-

gently attended to the arguments of the learned counsel, who debated the several questions that were made in the cause, with great legal ability, ingenuity and skill. I have given the subject, since the argument, my deliberate investigation, and shall (as briefly as the case will permit) deliver the result of it, with great diffidence, and the highest respect for those who entertain a different opinion. I solicit, and I hope I shall meet with, a candid allowance for the many imperfections which may be discovered in observations hastily drawn up, in the intervals of attendance in court, and the consideration of other very important cases.

The first point raised by the counsel for the plaintiff in error was, "that
*222] the legislature of Virginia had no right to make *the law of the 20th October 1777, above in part recited. If this objection is established, the judgment of the circuit court must be reversed; because it destroys the defendant's plea in bar, and leaves him without defence to the plaintiff's action.

This objection was maintained, on different grounds, by the plaintiff's counsel. One of them (Mr. Tilghman) contended, that the legislature of Virginia had no right to confiscate any British property, because Virginia was part of the dismembered empire of Great Britain, and the plaintiff and defendants were, all of them, members of the British nation, when the debt was contracted, and therefore, that the laws of independent nations do not apply to the case; and if applicable, that the legislature of Virginia was not justified by the modern law and practice of European nations, in confiscating private debts. In support of this opinion, he cited Vattel, lib. 3, c. 5, § 77, who expresses himself thus: "The sovereign has naturally the same right over what his subjects may be indebted to enemies. Therefore, he may confiscate debts of this nature, if the term of payment happen in the time of war. But at present, in regard to the advantage and safety of commerce, all the sovereigns of Europe have departed from this rigor; and as this custom has been generally received, he who should act contrary to it, would injure the public faith; for strangers trusted his subjects, only from a firm persuasion, that the general custom would be observed." The other counsel for the plaintiff in error (Mr. Lewis) denied any power in the Virginia legislature to confiscate any British property, because all such power belonged exclusively to congress; and he contended, that if Virginia had a power of confiscation, yet, it did not extend to the confiscation of debts, by the modern law and practice of nations.

I would premise, that this objection against the right of the Virginia legislature to confiscate British property (and especially debts) is made on the part of British subjects, and after the treaty of peace, and not by the government of the United States. I would also remark, that the law of Virginia was made after the declaration of independence by Virginia, and also by congress; and several years before the confederation of the United States, which, although agreed to by congress on the 15th of November 1777, and assented to by ten states, in 1778, was only finally completed and ratified on the 1st of March 1781.

I am of opinion, that the exclusive right of confiscating, during the war, all and every species of British property, within the territorial limits of Virginia, resided only in the legislature of that commonwealth. I shall hereafter consider, whether the law of the 20th of October 1777, operated

to confiscate or extinguish *British debts, contracted before the war. It is worthy of remembrance, that delegates and representatives were elected by the people of the several counties and corporations of Virginia, to meet in general convention, for the purpose of framing a new government, by the authority of the people only; and that the said convention met on the 6th of May, and continued in session until the 5th of July 1776; and in virtue of their delegated power, established a constitution, or form of government, to regulate and determine by whom, and in what manner, the authority of the people of Virginia was thereafter to be executed. As the people of that country were the genuine source and fountain of all power that could be rightfully exercised within its limits, they had, therefore, an unquestionable right to grant it to whom they pleased, and under what restrictions or limitations they thought proper. The people of Virginia, by their constitution or fundamental law, granted and delegated all their supreme civil power to a legislature, an executive and a judiciary; the first to make; the second to execute; and the last to declare or expound, the laws of the commonwealth. This abolition of the old government, and this establishment of a new one, was the highest act of power that any people can exercise. From the moment the people of Virginia exercised this power, all dependence on, and connection with Great Britain absolutely and for ever ceased; and no formal declaration of independence was necessary, although a decent respect for the opinions of mankind required a declaration of the causes which impelled the separation; and was proper, to give notice of the event to the nations of Europe. I hold it as unquestionable, that the legislature of Virginia, established, as I have stated, by the authority of the people, was for ever thereafter invested with the supreme and sovereign power of the state, and with the authority to make any laws in their discretion, to affect the lives, liberties and property of all the citizens of that commonwealth, with this exception only, that such laws should not be repugnant to the constitution or fundamental law, which could be subject only to the control of the body of the nation, in cases not to be defined, and which will always provide for themselves. The legislative power of every nation can only be restrained by its own constitution: and it is the duty of its courts of justice not to question the validity of any law made in pursuance of the constitution. There is no question but the act of the Virginia legislature (of the 20th of October 1777) was within the authority granted to them by the people of that country; and this being admitted, it is a necessary result, that the law is obligatory on the courts of Virginia, and in my opinion, on the courts of the United States. If Virginia, as a sovereign state, violated the ancient or modern *law of nations, in making the law of the 20th of October 1777, she was unanswerable, in her political capacity, to the British [*224
nation, whose subjects have been injured in consequence of that law. Suppose, a general right to confiscate British property, is admitted to be in congress, and congress had confiscated all British property within the United States, including private debts, would it be permitted, to contend, in any court of the United States, that congress had no power to confiscate such debts, by the modern law of nations? If the right is conceded to be in congress, it necessarily follows, that she is the judge of the exercise of the right, as to the extent, mode and manner. The same reasoning is strictly applicable to Virginia, if considered a sovereign nation; provided, she had

not delegated such power to congress, before the making of the law of October 1777, which I will hereafter consider.

In June 1776, the convention of Virginia formally declared, that Virginia was a free, sovereign and independent state; and on the 4th of July 1776, following, the United States, in congress assembled, declared the thirteen united colonies free and independent states; and that, as such, they had full power to levy war, conclude peace, &c. I consider this as a declaration, not that the united colonies jointly, in a collective capacity, were independent states, &c., but that each of them was a sovereign and independent state, that is, that each of them had a right to govern itself by its own authority and its own laws, without any control from any other power upon earth.

Before these solemn acts of separation from the crown of Great Britain, the war between Great Britain and the united colonies, jointly and separately, was a civil war; but instantly, on that great and ever memorable event, the war changed its nature, and became a public war between independent governments; and immediately thereupon, all the rights of public war (and all the other rights of an independent nation) attached to the government of Virginia; and all the former political connection between Great Britain and Virginia, and also between their respective subjects, were totally dissolved; and not only the two nations, but all the subjects of each, were in a state of war; precisely as in the present war between Great Britain and France. Vatt. lib. 3, c. 18, § 292–95; lib. 3, c. 5, § 70, 72, 73.

From the 4th of July 1776, the American states were *de facto*, as well as *de jure*, in the possession and actual exercise of all the rights of independent governments. On the 6th of February 1778, the king of France entered into a treaty of alliance with the United States; and on the 8th of October 1782, a treaty of amity and commerce was concluded between the United States and the states-general of the United Provinces. I have ever
*225] *considered it as the established doctrine of the United States, that their independence originated from, and commenced with, the declaration of congress, on the 4th of July 1776; and that no other period can be fixed on for its commencement; and that all laws made by the legislatures of the several states, after the declaration of independence, were the laws of sovereign and independent governments.

That Virginia was part of the dismembered British empire, can, in my judgment, make no difference in the case. No such distinction is taken by Vattel (or any other writer); but Vattel, when considering the rights of war between two parties absolutely independent, and no longer acknowledging a common superior (precisely the case in question), thus expresses himself (lib. 3, c. 18, § 295): "In such case, the state is dissolved, and the war between the two parties, in every respect, is the same with that of a public war between two different nations." And Vattel denies, that subjects can acquire property in things taken during a civil war.

That the creditor and debtor were members of the same empire, when the debt was contracted, cannot (in my opinion) distinguish the case, for the same reasons. A most arbitrary claim was made by the parliament of Great Britain, to make laws to bind the people of America, in all cases whatsoever, and the king of Great Britain, with the approbation of parliament, employed not only the national forces, but hired foreign mercenaries

to compel submission to this absurd claim of omnipotent power. The resistance against this claim was just, and independence became necessary; and the people of the United States announced to the people of Great Britain, "that they would hold them, as the rest of mankind, enemies in war, in peace, friends." On the declaration of independence, it was in the option of any subject of Great Britain, to join their brethren in America, or to remain subjects of Great Britain. Those who joined us were entitled to all the benefits of our freedom and independence; but those who elected to continue subjects of Great Britain, exposed themselves to any loss that might arise therefrom. By their adhering to the enemies of the United States, they voluntarily became parties to the injustice and oppression of the British government; and they also contributed to carry on the war, and to enslave their former fellow-citizens. As members of the British government, from their own choice, they became personally answerable for the conduct of that government, of which they remained a part; and their property, wherever found (on land or water), became liable to confiscation. On this ground, congress, on the 24th of July 1776, confiscated any British property taken on the seas. See 2 Ruth. Inst. lib. 2, c. 9, § 13, p. 531, 559; Vatt. *lib. 2, c. 7, § 81, and c. 18, § 344; lib. 3, c. 5, § 74; and c. 9, § 161, [*226 193. The British creditor, by the conduct of his sovereign, became an enemy to the commonwealth of Virginia; and thereby his debt was forfeitable to that government, as a compensation for the damages of an unjust war.

It appears to me, that every nation at war with another is justifiable, by the general and strict law of nations, to seize and confiscate all movable property of its enemy (of any kind or nature whatsoever), wherever found, whether within its territory, or not. Bynkershoeck, Q. J. P. *de rebus bellicis*, lib. 1, c. 7, p. 175, thus delivers his opinion: "*Cum ea sit belli conditio ut hostes sint, omni jure, spoliati proscriptique, rationis est, quascunque res hostium, apud hostes inventas, dominum mutare, et fisco cedere.*" "Since it is a condition of war, that enemies, by every right, may be plundered and seized upon, it is reasonable, that whatever effects of the enemy are found with us who are his enemy, should change their master, and be confiscated, or go into the treasury." s. p. Lee on Capt. c. 8, p. 111; 2 Burl. p. 209, § 12, p. 219, § 2, p. 221, § 11. Bynkershoeck; the same book and chapter, page 177, thus expresses himself: "*Quod dixi de actionibus recte publicandis ita demum obtinet. Si quod subditi nostri hostibus nostris debent, princeps a subditis suis, revera exegerit: Si exegerit recte solutum est, si non exegerit, pace facta, reviviscit jus pristinum creditoris; quia occupatio, quæ bello sit, magis in facto, quam in potestate juris consistit. Nomina igitur, non exacta, tempore belli quodammodo intermori videntur, sed per pacem, genere quodam postliminii, ad priorem dominum reverti. Secundum hæc, inter gentes fere convenit ut nominibus bello publicatis, pace deinde facta, exacta censeantur periisse, et maneant extincta; non autem exacta reviviscant, et restituantur veris creditoribus.*"

"What I have said of things in action being rightfully confiscated, holds thus: If the prince truly exacts from his subjects, what they owed to the enemy; if he shall have exacted it, it is rightfully paid; if he shall not have exacted it, peace being made, the former right of the creditor revives; because the seizure, which is made during war, consists more in fact than in

right. Debts, therefore, not exacted, seem as it were to be forgotten in time of war, but upon peace, by a kind of *postliminy*, return to their former proprietor. Accordingly, it is for the most part agreed among nations, that things in action, being confiscated in war, the peace being made, those which were paid are deemed to have perished, and remain extinct; but those not paid revive, and are restored to their true creditors." Vatt. lib. 4, § 22; s. p. Lee on Capt. c. 8, p. 118.

*227] *That this is the law of nations, as held in Great Britain, appears from Sir Thomas Parker's Rep. p. 267 (11 William III.), in which it was determined, that choses in action belonging to an alien enemy are forfeitable to the crown of Great Britain; but there must be a commission and inquisition to entitle the crown; and if peace is concluded, before inquisition taken, it discharges the cause of forfeiture.

The right to confiscate the property of enemies, during war, is derived from a state of war, and is called the rights of war. This right originates from self-preservation, and is adopted as one of the means to weaken an enemy, and to strengthen ourselves. Justice also is another pillar on which it may rest; to wit, a right to reimburse the expense of an unjust war. Vatt. lib. 3, c. 8, § 138, and c. 9, § 161.

But it is said, if Virginia had a right to confiscate British property, yet by the modern law and practice of European nations, she was not justified in confiscating debts due from her citizens to subjects of Great Britain; that is, private debts. Vattel is the only author relied on (or that can be found) to maintain the distinction between confiscating private debts, and other property of an enemy. He admits the right to confiscate such debts, if the term of payment happen in the time of war; but this limitation on the right is nowhere else to be found. His opinion alone will not be sufficient to restrict the right to that case only. It does not appear in the present case, whether the time of payment happened before, or during the war. If this restriction is just, the plaintiff ought to have shown the fact. Vattel adds, "at present, in regard to the advantages and safety of commerce, all the sovereigns of Europe have departed from this rigor; and this custom has been generally received, and he who should act contrary to it (the custom) would injure the public faith." From these expressions it may be fairly inferred, that by the rigor of the law of nations, private debts to enemies might be confiscated, as well as any other of their property; but that a general custom had prevailed in Europe to the contrary; founded on commercial reasons.

The law of nations may be considered of three kinds, to wit, general, conventional or customary. The first is universal, or established by the general consent of mankind, and binds all nations. The second is founded on express consent, and is not universal, and only binds those nations that have assented to it. The third is founded on tacit consent; and is only obligatory on those nations who have adopted it. The relaxation or departure from the strict rights of war to confiscate private debts, by the commercial nations of Europe, was not binding on the state of Virginia, because founded on custom only; and she was at liberty to reject or adopt the

*228] custom, as she pleased. *The conduct of nations at war is generally governed and limited by their exigencies and necessities. Great Britain could not claim from the United States, or any of them, any relaxation of the general law of nations, during the late war, because she did not

consider it as a civil war, and much less as a public war, but she gave it the odious name of rebellion; and she refused to the citizens of the United States the strict rights of ordinary war.

It cannot be forgotten, that the parliament of Great Britain, by statute (16 *Geo. III.*, *c.* 5, in 1776), declared, that the vessels and cargoes belonging to the people of Virginia, and the twelve other colonies, found and taken on the high seas, should be liable to seizure and confiscation, as the property of open enemies; and that the mariners and crews should be taken and considered as having voluntarily entered into the service of the king of Great Britain; and that the killing and destroying the persons and property of the Americans, before the passing this act, was just and lawful: and it is well known that, in consequence of this statute, very considerable property of the citizens of Virginia was seized on the high seas, and confiscated; and that other considerable property, found within that commonwealth, was seized and applied to the use of the British army or navy. Vattel, lib. 3, c. 12, § 191, says, and reason confirms his opinion, "That whatever is lawful for one nation to do, in time of war, is lawful for the other." The law of nations is part of the municipal law of Great Britain, and by her laws, all movable property of enemies, found within the kingdom, is considered as forfeited to the crown, as the head of the nation; but if no inquisition is taken to ascertain the owners to be alien enemies, before peace takes place, the cause of forfeiture is discharged by the peace, *ipso facto*. Sir Thomas Parker's Rep. p. 267. This doctrine agrees with Bynk. lib. 1, c. 7, p. 177, and Lee on Capt. c. 8, p. 118, that debts not confiscated and paid, revive on peace. Lee says, "debts, therefore, which are not taken hold of, seem, as it were, suspended and forgotten in time of war; but, by a peace, return to their former proprietor, by a kind of *postliminy*." Mr. Lee, who wrote since Vattel, differs from him in opinion, that private debts are not confiscable, p. 114. He thus delivers himself: "By the law of nations, rights and credits are not less in our power than other goods; why, therefore, should we regard the rights of war in regard to one, and not as to the other? And when nothing occurs which gives room for a proper distinction, the general law of nations ought to prevail." He gives many examples of confiscating debts, and concludes (p. 119), "All which prove, that not only actions, but all *other things whatsoever, are forfeited in time of war, and are often exacted." [*229

Great Britain does not consider herself bound to depart from the rigor of the general law of nations, because the commercial powers of Europe wish to adopt a more liberal practice. It may be recollected, that it is an established principle of the law of nations, "that the goods of a friend are free in an enemy's vessel; and an enemy's goods lawful prize in the vessel of a friend." This may be called the general law of nations. In 1780, the Empress of Russia proposed a relaxation of this rigor of the laws of nations, "That all the effects belonging to the subjects of the belligerent powers shall be free on board neutral vessels, except only contraband articles." This proposal was acceded to by the neutral powers of Sweden, Denmark, the States-General of the United Provinces, Prussia and Portugal; France and Spain, two of the powers at war, did not oppose the principle, and Great Britain only declined to adopt it, and she still adheres to the rigorous principle of the law of nations. Can this conduct of Great Britain be ob-

jected to her, as an uncivilized and barbarous practice? The confiscating private debts by Virginia has been branded with those terms of reproach, and very improperly, in my opinion.

It is admitted, that Virginia could not confiscate private debts, without a violation of the modern law of nations, yet if, in fact, she has so done, the law is obligatory on all the citizens of Virginia, and on her courts of justice; and in my opinion, on all the courts of the United States. If Virginia, by such conduct, violated the law of nations, she was answerable to Great Britain, and such injury could only be redressed in the treaty of peace. Before the establishment of the national government, British debts could only be sued for in the state court. This, alone, proves that the several states possessed a power over debts. If the crown of Great Britain had, according to the mode of proceeding in that country, confiscated, or forfeited American debts, would it have been permitted, in any of the courts of Westminster Hall, to have denied the right of the crown, and that its power was restrained by the modern law of nations? Would it not have been answered, that the British nation was to justify her own conduct; but that her courts were to obey her laws.

It appears to me, that there is another and conclusive ground, which effectually precluded any objection, since the peace, on the part of Great Britain, as a nation, or on the part of any of her subjects, against the right of Virginia to confiscate British debts, or any other British property, during the war; even on the admission that such confiscation was in violation of the ancient or modern law of nations.

*230] *If the legislature of Virginia confiscated or extinguished the debt in question, by the law of the 20th of October 1777, as the defendants in error contend, this confiscation or extinguishment took place in 1777, *flagrante bello;* and the definitive treaty of peace was ratified in 1783. What effects flow from a treaty of peace, even if the confiscation or extinguishment of the debt was contrary to the law of nations, and the stipulation in the fourth article of the treaty does not provide for the recovery of the debt in question?

I apprehend, that the treaty of peace abolishes the subject of the war, and that after peace is concluded, neither the matter in dispute, nor the conduct of either party, during the war, can ever be revived, or brought into contest again. All violences, injuries or damages sustained by the government or people of either, during the war, are buried in oblivion; and all those things are implied by the very treaty of peace; and therefore, not necessary to be expressed. Hence, it follows, that the restitution of, or compensation for, British property confiscated or extinguished, during the war, by any of the United States, could only be provided for by the treaty of peace; and if there had been no provision respecting these subjects, in the treaty, they could not be agitated after the treaty, by the British government, much less by her subjects in courts of justice. If a nation, during a war, conducts herself contrary to the law of nations, and no notice is taken of such conduct in the treaty of peace, it is thereby so far considered lawful, as never afterwards to be revived, or to be a subject of complaint.

Vattel, lib. 4, § 21. p. 121, says, "The state of things at the instant of the treaty, is held to be legitimate, and any change to be made in it requires an express specification in the treaty; consequently, all things not mentioned

in the treaty, are to remain as they were at the conclusion of it. All the damages caused during the war are likewise buried in oblivion ; and no plea is allowable for those, the reparation of which is not mentioned in the treaty : they are looked on as if they had never happened." The same principle applies to injuries done by one nation to another, on occasion of, and during the war. See Grotius, lib. 3, c. 8, § 4. The Baron De Wolfius, 1222, says, "*De quibis nihil dictum, ea manent quo sunt loco.*" Things of which nothing is said, remain in the state in which they are.

It is the opinion of the celebrated and judicious Doctor Rutherforth, that a nation in a just war may seize upon any movable goods of an enemy (and he makes no distinction as to private debts), but that whilst the wa continues, the nation has, of right, nothing but the custody of the goods taken ; and *if the nation has granted to private captors (as privateers) the property of goods taken by them, and on peace, restitution is agreed on, that the nation is obliged to make restitution, and not the private captors ; and if, on peace, no restitution is stipulated, that the full property of movable goods, taken from the enemy during the war, passes, by tacit consent, to the nation that takes them. This I collect as the substance of his opinion, in lib. 2, c. 9, from p. 558 to 573. [*231

I shall conclude my observations on the rights of Virginia to confiscate any British property, by remarking, that the validity of such a law would not be questioned in the court of chancery of Great Britain ; and I confess the doctrine seemed strange to me in an American court of justice. In the case of *Wright* v. *Nutt*, Lord Chancellor Thurlow declared, that he considered an act of the state of Georgia, passed in 1782, for the confiscation of the real and personal estate of Sir James Wright, and also his debts, as a law of an independent country ; and concluded with the following observation, that the law of every country must be equally regarded in the courts of justice of Great Britain, whether the law was a barbarous or civilized institutions, or wise or foolish. H. Black. 149. In the case of *Folliot* v. *Ogden*, Lord Loughborough, chief justice of the court of common pleas, in delivering the judgment of the court, declared, "that the act of the state of New York, passed in 1779, for attainting, forfeiting and confiscating the real and personal estate of Folliot, the plaintiff, was certainly of as full validity, as the act of any independent state. H. Black. 135. On a writ of error, Lord Kenyon, chief justice of the court of king's bench, and Judge Grose, delivered direct contrary sentiments ; but Judges Ashurst and Buller were silent. 3 Term Rep. 726.

From these observations, and the authority of Bynkershoek, Lee, Burlamaque and Rutherforth, I conclude, that Virginia had a right, as a sovereign and independent nation, to confiscate any British property within its territory, unless she had before delegated that power to congress, which Mr. Lewis contended she had done. The proof of the allegation that Virginia had transferred this authority to congress, lies on those who make it ; because if she had parted with such power, it must be conceded, that she once rightfully possessed it.

It has been inquired, what powers congress possessed from the first meeting in September 1774, until the ratification of the articles of confederation, on the 1st of March 1781 ? It appears to me, that the powers of congress, during that whole period, were derived from the people they represented,

expressly given, through the medium of their state conventions, or state
*232] legislatures; or that after they were exercised, they were *impliedly ratified by the acquiescence and obedience of the people. After the confederacy was completed, the powers of congress rested on the authority of the state legislatures, and the implied ratifications of the people; and was a government over governments. The powers of congress originated from necessity, and arose out of, and were only limited by events; or, in other words, they were revolutionary in their very nature. Their extent depended on the exigences and necessities of public affairs. It was absolutely and indispensably necessary that congress should possess the power of conducting the war against Great Britain, and therefore, if not expressly given by all (as it was by some of the states), I do not hesitate to say, that congress did rightfully possess such power. The authority to make war, of necessity, implies the power to make peace; or the war must be perpetual. I entertain this general idea, that the several states retained all internal sovereignty; and that congress properly possessed the great rights of external sovereignty: among other, the right to make treaties of commerce and alliance; as with France, on the 6th of February 1778. In deciding on the powers of congress, and of the several states, before the confideration, I see but one safe rule, namely, that all the powers actually exercised by congress, before that period, were rightfully exercised, on the presumption not to be controverted, that they were so authorized by the people they represented, by an express or implied grant; and that all the powers exercised by the state conventions or state legislatures were also rightfully exercised, on the same presumption of authority from the people. That congress did not possess all the powers of war is self-evident, from this consideration alone, that she never attempted to lay any kind of tax on the people of the United States, but relied altogether on the state legislatures to impose taxes, to raise money to carry on the war, and to sink the emissions of all the paper money issued by congress. It was expressly provided, in the 8th article of the confederation, that "all charges of war (and all other expenses for the common defence and general welfare), and allowed by congress, shall be defrayed out of a common treasury, to be supplied by the several states in proportion to the value of the land in each state; and the taxes for paying the said proportion, shall be levied by the legislatures of the several states." In every free country, the power of laying taxes is considered a legislative power over the property and persons of the citizens; and this power the people of the United States granted to their state legislatures, and they neither could, nor did, transfer it to congress; but on the contrary, they expressly stipulated that it should remain with them. It is an incontro-
233*] vertible fact, that congress never attempted to confiscate *any kind of British property, within the United States (except what their army or vessels of war captured), and thence I conclude that congress did not conceive the power was vested in them. Some of the states did exercise this power, and thence, I infer, they possessed it. On the 23d of March, 3d of April, and 24th of July 1776, congress confiscated British property taken on the high seas. (a)

(a) See the ordinance of the 30th of November 1781. See also, the resolution of the 23d of November 1781, in which congress recommended to the states, to pass laws to punish infractions of the law of nations.

The second point made by the counsel for the plaintiff in error was, "if the legislature of Virginia had a right to confiscate British debts, yet she did not exercise that right by the act of the 20th October 1777." If this objection is well founded, the plaintiff in error must have judgment for the money covered by the plea of that law, and the payment under it. The preamble recites, that the public faith, and the law and the usage of nations require, that debts incurred, during the connection with Great Britain, should not be confiscated. No language can possibly be stronger to express the opinion of the legislature of Virginia, that British debts ought not to be confiscated, and if the words, or effect and operation, of the enacting clause are ambiguous or doubtful, such construction should be made as not to extend the provisions in the enacting clause, beyond the intention of the legislature, so clearly expressed in the preamble; but if the words in the enacting clause, in their nature, import and common understanding, are not ambiguous, but plain and clear, and their operation and effect certain, there is no room for construction. It is not an uncommon case, for a legislature, in a preamble, to declare their intention to provide for certain cases, or to punish certain offences, and in enacting clauses to include other cases, and other offences. But I believe very few instances can be found, in which the legislature declared, that a thing ought not to be done, and afterwards did the very thing they reprobated. There can be no doubt, that strong words in the enacting part of a law may extend beyond the preamble. If the preamble is contradicted by the enacting clause, as to the intention of the legislature, it must prevail, on the principle, that the legislature changed their intention.

I am of opinion, that the law of the 20th of October 1777, and the payment in virtue thereof, amounts either to a confiscation or extinguishment of so much of the debt as was paid into the loan-office of Virginia. 1st. The law makes it lawful for a citizen of Virginia, indebted to a subject of Great Britain, *to pay the whole, or any part of his debt, into the loan-office of that commonwealth. 2d. It directs the debtor to take a certificate of his [234 payment, and to deliver it to the governor and the council; and it declares that the receipt of the governor and the council for the certificate shall discharge him (the debtor) from so much of the debt as he paid into the loan-office. 3d. It enacts that the certificate shall be subject to the future direction of the legislature. And 4th, it provides, that the governor and council may make such allowance, as they shall think reasonable, out of the interest of the money paid, to the wives and children, residing within the state, of such creditor. The payment by the debtor into the loan-office is made a lawful act. The public receive the money, and they discharge the debtor, and they make the certificate (which is the evidence of the payment) subject to their direction; and they benevolently appropriate part of the money paid, to wit, the interest of the debt, to such of the family of the creditor as may live within the state. All these acts are plainly a legislative interposition between the creditor and debtor; which annilates the right of the creditor; and is an exercise of the right of ownership over the money; for the giving part to the family of the creditor, under the restriction of being residents of the state, or to a stranger, can make no difference. The government of Virginia had precisely the same right to dispose of the whole as of part of the debt. Whether all these acts amount to a confiscation of the debt, or not, may

be disputed, according to the different ideas entertained of the proper meaning of the word confiscation. I am inclined to think, that all these acts, collectively considered, are substantially a confiscation of the debt. The verb confiscate is derived from the Latin *con*, with, and *fiscus*, a basket, or hamper, in which the emperor's treasure was formerly kept. The meaning of the word to confiscate is, to transfer property from private to public use; or to forfeit property to the prince or state. In the language of Mr. Lee (page 118), the debt was taken hold of; and this he considers as confiscation. But if, strictly speaking, the debt was not confiscated, yet it certainly was extinguished, as between the creditor and debtor; the debt was legally paid, and of consequence extinguished. The state interfered and received the debt, and discharged the debtor from his creditor; and not from the state, as suggested. The debtor owed nothing to the state of Virginia, but she had a right to take the debt, or not, at her pleasure. To say, that the discharge was from the state, and not from the debtor, implies that the debtor was under some obligation or duty to pay the state what he owed his British creditor. If the debtor was to remain charged to his creditor, notwithstanding his payment; not one farthing would have been *paid into the loan-office. Such a construction, therefore, is too violent, and not to be admitted. If Virginia had confiscated British debts, and received the debt in question, and said nothing more, the debtor would have been discharged by the operation of the law. In the present case, there is an express discharge, on payment, certificate and receipt.

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It appears to me, that the plea, by the defendant, of the act of assembly, and the payment agreeable to its provisions, which is admitted, is a bar to the plaintiff's action, for so much of his debt as he paid into the loan-office; unless the plea is avoided or destroyed, by the plaintiff's replication of the fourth article of the definitive treaty of peace between Great Britain and the United States, on the 3d of September 1783.

The question then may be stated thus: whether the 4th article of the said treaty nullifies the law of Virginia, passed on the 20th of October 1777; destroys the payment made under it; and revives the debt, and gives a right of recovery thereof, against the original debtor?

It was doubted by one of the counsel for the defendants in error (Mr. Marshall), whether congress had a power to make a treaty, that could operate to annul a legislative act of any of the states, and to destroy rights acquired by, or vested in individuals, in virtue of such acts. Another of the defendant's counsel (Mr. Campbell) expressly, and with great zeal, denied that congress possessed such power. But a few remarks will be necessary to show the inadmissibility of this objection to the power of congress.

1st. The legislatures of all the states have often exercised the power of taking the property of its citizens for the use of the public, but they uniformly compensated the proprietors. The principle to maintain this right is for the public good, and to that the interest of individuals must yield. The instances are many; and among them are lands taken for forts, magazines or arsenals; or for public roads or canals; or to erect towns.

2d. The legislatures of all the states have often exercised the power of divesting rights vested; and even of impairing, and in some instances, of almost annihilating the obligation of contracts, as by tender laws, which

made an offer to pay, and a refusal to receive, paper money, for a specie debt, an extinguishment, to the amount tendered.

3d. If the legislature of Virginia could, by a law, annul any former law; I apprehend, that the effect would be to destroy all rights acquired under the law so nullified.

4th. If the legislature of Virginia could not, by ordinary acts of legislation, do these things, yet, possessing the supreme sovereign power of the state, she certainly could do them, by a treaty of peace; if she had not parted with the power of making *such treaty. If Virginia had such power, before she delegated it to congress, it follows, that afterwards, that body possessed it. Whether Virginia parted with the power of making treaties of peace, will be seen by a perusal of the 9th article of the confederation (ratified by all the states, on the first of March 1781), in which it was declared, "that the United States in congress assembled, shall have the sole and exclusive right and power of determining on peace or war, except in the two cases mentioned in the 6th article; and of entering into treaties and alliances, with a proviso, when made, respecting commerce." This grant has no restriction, nor is there any limitation on the power in any part of the confederation. A right to make peace, necessarily includes the power of determining on what terms peace shall be made. A power to make treaties must, of necessity, imply a power to decide the terms on which they shall be made: a war between two nations can only be concluded by treaty. [*236

Surely, the sacrificing public or private property, to obtain peace, cannot be the cases in which a treaty would be void. Vatt. lib. 2, c. 12, § 160, 161, p. 173; lib. 6, c. 2, § 2. It seems to me, that treaties made by congress, according to the confederation, were superior to the laws of the states; because the confederation made them obligatory on all the states. They were so declared by congress on the 13th of April 1787; were so admitted by the legislatures and executives of most of the states; and were so decided by the judiciary of the general government, and by the judiciaries of some of the state governments.

If doubts could exist, before the establishment of the present national government, they must be entirely removed by the 6th article of the constitution, which provides "That all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." There can be no limitation on the power of the people of the United States. By their authority, the state constitutions were made, and by their authority the constitution of the United States was established; and they had the power to change or abolish the state constitutions, or to make them yield to the general government, and to treaties made by their authority. A treaty cannot be the supreme law of the land, that is, of all the United States, if any act of a state legislature can stand in its way. If the constitution of a state (which is the fundamental law of the state, and paramount to its legislature) must give way to a treaty, and fall before it; can it be questioned, whether the less power, an act *of the state legislature, must not be prostrate? It is the declared will of the people of the United States, that every treaty made by the authority of the United States, shall be superior [*237

to the constitution and laws of any individual state; and their will alone is to decide. If a law of a state, contrary to a treaty, is not void, but voidable only, by a repeal, or nullification by a state legislature, this certain consequence follows, that the will of a small part of the United States may control or defeat the will of the whole. The people of America have been pleased to declare, that all treaties made before the establishment of the national constitution, or laws of any of the states, contrary to a treaty, shall be disregarded.

Four things are apparent, on a view of this 6th article of the national constitution. 1st. That it is retrospective, and is to be considered in the same light as if the constitution had been established before the making of the treaty of 1783. 2d. That the constitution or laws of any of the states, so far as either of them shall be found contrary to that treaty, are, by force of the said article, prostrated before the treaty. 3d. That, consequently, the treaty of 1783 has superior power to the legislature of any state, because no legislature of any state has any kind of power over the constitution, which was its creator. 4th. That it is the declared duty of the state judges to determine any constitution or laws of any state, contrary to that treaty (or any other), made under the authority of the United States, null and void. National or federal judges are bound by duty and oath to the same conduct.(*a*)

The argument, that congress had not power to make the 4th article of the treaty of peace, if its intent and operation was to annul the laws of any of the states, and to destroy vested rights (which the plaintiff's counsel contended to be the object and effect of the 4th article), was unnecessary, but on the supposition that this court possess a power to decide whether this article of the treaty is within the authority delegated to that body, by the articles of confederation. Whether this court constitutionally possess such a power, is not necessary now to determine, because I am fully satisfied, that congress were invested with the authority to make the stipulation in the 4th article. If the court possess a power to declare treaties void, I shall never exercise it, but in a very clear case indeed. One further remark will show how very circumspect the court ought to be, before they would decide against the right of congress to make the stipulation objected to. If congress had
*238] no *power (under the confederation) to make the 4th article of the treaty, and for want of power, that article is void, would it not be in the option of the crown of Great Britain to say, whether the other articles in the same treaty shall be obligatory on the British nation?

I will now proceed to the consideration of the treaty of 1783. It is evident, on a perusal of it, what were the great and principal objects in view by both parties. There were four on the part of the United States, to wit: 1st. An acknowledgment of their independence by the crown of Great Britain. 2d. A settlement of their western bounds. 3d. The right of fishery. And 4th. The free navigation of the Mississippi. There were three on the part of Great Britain, to wit: 1st. A recovery by British merchants, of the value in sterling money, of debts contracted, by the citizens of America, before the treaty. 2d. Restitution of the confiscated property of real British subjects, and of persons residents in districts in possession

(*a*) See the oath, in the act of the 24th of September 1789, § 8; 1 U. S. Stat. 76.

of the British forces, and who had not borne arms against the United States; and a conditional restoration of the confiscated property of all other persons. And 3d. A prohibition of all future confiscations and prosecutions. The following facts were of the most public notoriety, at the time when the treaty was made, and therefore, must have been very well known to the gentlemen who assented to it. 1st. That British debts, to a great amount, had been paid into some of the state treasuries, or loan-offices, in paper money of very little value, either under laws confiscating debts, or under laws authorizing payment of such debts in paper money, and discharging the debtors. 2d. That tender laws had existed in all the states; and that by some of those laws, a tender and a refusal to accept, by principal or factor, was declared an extinguishment of the debt. From the knowledge that such laws had existed, there was good reason to fear, that similar laws, with the same or less consequences, might be again made (and the fact really happened), and prudence required to guard the British creditor against them. 3d. That in some of the states, property of any kind might be paid, at an appraisement, in discharge of any execution. 4th. That laws were in force in some of the states, at the time of the treaty, which prevented suits by British creditors. 5th. That laws were in force in other of the states, at the time of the treaty, to prevent suits by any person, for a limited time. All these laws created legal impediments, of one kind or another, to the recovery of many British debts, contracted before the war; and in many cases, compelled the receipt of property instead of gold and silver.

To secure the recovery of British debts, it was, by the latter part of the fifth article, agreed as follows: "That all persons *who have any interest in confiscated lands, by debts, should meet with no lawful [*239 impediment in the prosecution of their just rights." This provision clearly relates to debts secured by mortgages on lands in fee simple, which were afterwards confiscated; or to debts on judgments, which were a lien on lands, which also were afterwards confiscated, and where such debts on mortgages or judgments had been paid into the state treasuries, and the debtors discharged. This stipulation was absolutely necessary, if such debts were intended to be paid. The pledge, or security by lien, had been confiscated and sold. British subjects being aliens, could neither recover the possession of lands by ejectment, nor foreclose the equity of redemption; nor could they claim the money secured by a mortgage, or have the benefit of a lien from a judgment, if the debtor had paid his debt into the treasury, and been discharged. If a British subject, in either of those cases, prosecuted his just right, it could only be in a court of justice, and if any of the above causes were set up as a lawful impediment, the courts were bound to decide, whether this article of the treaty nullified the laws confiscating the lands, and also the purchases made under them, or the laws authorizing payment of such debts to the state; or whether aliens were enabled, by this article, to hold lands mortgaged to them before the war. In all these cases, it seems to me, that the courts, in which the cases arose, were the only proper authority to decide, whether the case was within this article of the treaty, and the operation and effect of it. One instance among many will illustrate my meaning. Suppose, a mortgagor paid the mortgage money into the public treasury, and afterwards sold the land, would not the British creditor, under this article, be entitled to a remedy against the mortgaged lands?

The 4th article of the treaty is in these words: "It is agreed, that creditors, on either side, shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all *bonâ fide* debts, heretofore contracted."

Before I consider this article of the treaty, I will adopt the following remarks, which I think applicable, and which may be found in Dr. Rutherforth and Vattel (2 Ruth. 307 to 315; Vattel, lib. 2, c. 17, § 63 and 271). The intention of the framers of the treaty must be collected from a view of the whole instrument, and from the words made use of by them to express their intention, or from probable or rational conjectures. If the words express the meaning of the parties plainly, distinctly and perfectly, there ought to be no other means of interpretation; but if the words are obscure, or ambiguous, or imperfect, recourse must be had to other means of interpretation, and in these three cases, we must collect the meaning from the
*240] words, * or from probable or rational conjectures, or from both. When we collect the intention from the words only, as they lie in the writing before us, it is a literal interpretation; and indeed, if the words, and the construction of a writing, are clear and precise, we can scarce call it interpretation, to collect the intention of the writer from thence. The principal rule to be observed in literal interpretation, is to follow that sense, in respect both of the words and the construction, which is agreeable to common use. If the recovery of the present debt is not within the clear and manifest intention and letter of the 4th article of the treaty, and if it was not intended by it to annul the law of Virginia, mentioned in the plea, and to destroy the payment under it, and to revive the right of the creditor against his original debtor; and if the treaty cannot effect all these things, I think, the court ought to determine in favor of the defendants in error. Under this impression, it is altogether unnecessary to notice the several rules laid down by the counsel for the defendants in error, for the construction of the treaty.

I will examine the 4th article of the treaty in its several parts; and endeavor to affix the plain and natural meaning of each part. To take the 4th article, in order, as it stands:

1st. "It is agreed," that is, it is expressly contracted; and it appears from what follows, that certain things shall not take place. This stipulation is direct. The distinction is self-evident, between a thing that shall not happen, and an agreement that a third power shall prevent a certain thing being done. The first is obligatory on the parties contracting: the latter will depend on the will of another; and although the parties contracting had power to lay him under a moral obligation for compliance, yet there is a very great difference in the two cases. This diversity appears in the treaty.

2d. "That creditors on either side," without doubt, meaning British and American creditors.

3d. "Shall meet with no lawful impediment," that is, with no obstacle (or bar) arising from the common law, or acts of parliament, or acts of congress, or acts of any of the states, then in existence, or thereafter to be made, that would, in any manner, operate to prevent the recovery of such debts as the treaty contemplated. A lawful impediment to prevent a recovery of a debt can only be matter of law, pleaded in bar to the action.

If the word lawful had been omitted, the impediment would not be confined to matter of law. The prohibition that no lawful impediment shall be interposed, is the same as that all lawful impediments shall be removed. The meaning cannot be satisfied, by the removal of one impediment, and leaving another; and *à *fortiori*, by taking away the less and leaving the greater. These words have both a retrospective and future aspect. [*241

4th. "To the recovery," that is, to the right of action, judgment and execution, and receipt of the money, without impediments in courts of justice, which could only be by plea (as in the present case), or by proceedings, after judgment, to compel receipt of paper money or property, instead of sterling money. The word recovery is very comprehensive, and operates, in the present case, to give remedy from the commencement of suit, to the receipt of the money.

5th. "In the full value in sterling money," that is, British creditors shall not be obliged to receive paper money, or property at a valuation, or anything else but the full value of their debts, according to the exchange with Great Britain. This provision is clearly restricted to British debts, contracted before the treaty, and cannot relate to debts contracted afterwards, which would be dischargeable according to contract, and the laws of the state where entered into. This provision has also a future aspect in this particular, namely, that no lawful impediment, no law of any of the states made after the treaty, shall oblige British creditors to receive their debts, contracted before the treaty, in paper money, or property at appraisement, or in anything but the value in sterling money. The obvious intent of these words was, to prevent the operation of past and future tender laws; or past and future laws, authorizing the discharge of executions for such debts by property at a valuation.

6th. "Of all *bonâ fide* debts," that is, debts of every species, kind or nature, whether by mortgage, if a covenant therein for payment; or by judgments, specialties or simple contracts. But the debts contemplated were to be *bonâ fide* debts, that is, *bonâ fide* contracted before the peace, and contracted with good faith, or honestly and without covin, and not kept on foot fraudulently. *Bonâ fide* is a legal technical expression; and the law of Great Britain and this country has annexed a certain idea to it. It is a term used in statutes in England, and in acts of assembly of all the states, and signifies a thing done really, with a good faith, without fraud or deceit, or collusion or trust. The words *bonâ fide* are restrictive, for a debt may be for a valuable consideration, and yet not *bonâ fide*. A debt must be *bonâ fide*, at the time of its commencement, or it never can become so afterwards. The words *bonâ fide*, were not prefixed to describe the nature of the debt, at the date of the treaty, but the nature of the debt, at the time it was contracted. Debts created before the war, were almost the only debts in the contemplation of the treaty; although debts contracted during the war were covered by the general provision, taking in debts from the most distant period of time, *to the date of the treaty. The recovery, where no lawful impediments were to be interposed, was to have two qualifications: 1st. The debts were to be *bonâ fide* contracted: and 2d. They were to be contracted before the peace. [*242

7th. "Heretofore contracted," that is, entered into at any period of time, before the date of the treaty; without regard to the length or distance

of time. These words are descriptive of the particular debts that might be recovered, and relate back to the time such debts were contracted. The time of the contract was plainly to designate the particular debts that might be recovered. A debt entered into during the war, would not have been recoverable, unless under this description of a debt contracted at any time before the treaty.

If the words of the 4th article, taken separately, truly bear the meaning I have given them, their sense, collectively, cannot be mistaken, and must be the same.

The next inquiry is, whether the debt in question is one of those described in this article. It is very clear, that the article contemplated no debts but those contracted before the treaty; and no debts but only those to the recovery whereof some lawful impediment might be interposed. The present debt was contracted before the war, and to the recovery of it a lawful impediment, to wit, a law of Virginia, and payment under it, is pleaded in bar. There can be no doubt, that the debt sued for, is within the description, if I have given a proper interpretation of the words. If the treaty had been silent as to debts, and the law of Virginia had not been made, I have already proved, that debts would, on peace, have revived, by the law of nations. This alone shows that the only impediment to the recovery of the debt in question, is the law of Virginia. and the payment under it; and the treaty relates to every kind of legal impediment.

But it is asked, did the 4th article intend to annul a law of the states? and destroy rights acquired under it? I answer, that the 4th article did intend to destroy all lawful impediments, past and future; and that the law of Virginia, and the payment under it, is a lawful impediment; and would bar a recovery, if not destroyed by this article of the treaty. This stipulation could not intend only to repeal laws that created legal impediments to the recovery of the debt (without respect to the mode of payment) because the mere repeal of a law would not destroy acts done, and rights acquired under the law, during its existence, and before the repeal. This right to repeal was only admitted by the counsel for the defendants in error, because a repeal would not affect their case; but on the same ground, that a treaty can repeal a law of the state, it can nullify it. I have already proved, that
*243] a treaty can totally annihilate *any part of the constitution of any of the individual states that is contrary to a treaty. It is admitted, that the treaty intended and did annul some laws of the states, to wit, any laws, past or future, that authorized a tender of paper money to extinguish or discharge the debt, and any laws, past or future, that authorized the discharge of executions by paper money, or delivery of property at appraisement; because if the words sterling money have not this effect, it cannot be shown that they have any other. If the treaty could nullify some laws, it will be difficult to maintain that it could not equally annul others.

It was argued, that the 4th article was necessary to revive debts which had not been paid, as it was doubtful, whether debts not paid would revive on peace, by the law of nations. I answer, that the 4th article was not necessary on that account, because there was no doubt, that debts not paid do revive by the law of nations; as appears from Bynkershoeck, Lee, and Sir Thomas Parker. And, if necessary, this article would not have this effect, because it revives no debts, but only those to which some legal impediment

might be interposed, and there could be no legal impediment or bar to the recovery, after peace, of debts not paid, during the war, to the state.

It was contended, that the provision is, that creditors shall recover, &c., and there was no creditor, at the time of the treaty, because there was then no debtor, he having been legally discharged. The creditors described in the treaty were not creditors generally, but only those with whom debts had been contracted, at some time before the treaty; and is a description of persons, and not of their rights. This adhering to the letter, is to destroy the plain meaning of the provision; because, if the treaty does not extend to debts paid into the state treasuries or loan-offices, it is very clear that nothing was done by the treaty as to those debts, not even so much as was stipulated for royalists and refugees, to wit, a recommendation of restitution. Further, by this construction, nothing was done for British creditors, because the law of nations secured a recovery of their debts, which had not been confiscated and paid to the states; and if the debts paid in paper money of little value, into the state treasuries or loan-offices, were not to be paid to them, the article was of no kind of value to them, and they were deceived. The article relates either to debts not paid, or to debts paid into the treasuries or loan-offices. It has no relation to the first, for the reasons above assigned; and if it does not include the latter, it relates to nothing.

It was said, that the treaty secured British creditors from payment in paper money. This is admitted, but it is by force *and operation of the words "in sterling money;" but then the words, "heretofore contracted," are to have no effect whatsoever; and it is those very words, and those only, that secure the recovery of the debts paid to the states; because no lawful impediment is to be allowed to prevent the recovery of debts contracted at any time before the treaty. [*244

But it was alleged, that the 4th article only stipulates, that there shall be no lawful impediment, &c., but that a law of the state was first necessary to annul the law creating such impediment; and that the state is under a moral obligation to pass such a law; but until it is done, the impediment remains.

I consider the 4th article in this light, that it is not a stipulation that certain acts shall be done, and that it was necessary for the legislatures of individual states to do those acts; but that it is an express agreement, that certain things shall not be permitted the American courts of justice; and that it is a contract on behalf of those courts, that they will not allow such acts to be pleaded in bar, to prevent a recovery of certain British debts. "Creditors are to meet with no lawful impediment, &c." As creditors can only sue for the recovery of their debts in courts of justice; and it is only in courts of justice that a legal impediment can be set up, by way of plea in bar of their actions; it appears to me, that the courts are bound to overrule every such plea, if contrary to the treaty. A recovery of a debt can only be prevented, by a plea in bar to the action: a recovery of a debt in sterling money can only be prevented, by a like plea in bar to the action, as tender and refusal, to operate as an extinguishment. After judgment, payment thereof in sterling money can only be prevented, by some proceedings under some law, that authorizes the debtor to discharge an execution in paper money, or in property at a valuation. In all these and similar cases, it appears to me, that the courts of the United States are bound, by the treaty, to interfere. No one can doubt, that a treaty may stipulate, that certain acts shall be done by

the legislature; that other acts shall be done by the executive; and others by the judiciary. In the 6th article, it is provided, that no future prosecutions shall be commenced against any person, for or by reason of the part he took in the war. Under this article, the American courts of justice discharged the prosecutions, and the persons, on receipt of the treaty, and the proclamation of congress (*Respublica* v. *Gordon*), 1 Dall. 233.

If a law of the state to annul a former law was first necessary, it must be either on the ground that the treaty could not annul any law of a state; or that the words used in the treaty were not explicit or effectual for that purpose. Our federal constitution establishes the power of a treaty over the
*245] constitution *and laws of any of the states; and I have shown that the words of the 4th article were intended, and are sufficient, to nullify the law of Virginia and the payment under it. It was contended, that Virginia is interested in this question, and ought to compensate the defendants in error, if obliged to pay the plaintiff, under the treaty. If Virginia had a right to receive the money, which I hope I have clearly established, by what law is she obliged to return it? The treaty only speaks of the original debtor, and says nothing about a recovery from any of the states.

It was said, that the defendant ought to be fully indemnified, if the treaty compels him to pay his debt over again; as his rights have been sacrificed for the benefit of the public. That congress had the power to sacrifice the rights and interests of private citizens, to secure the safety or prosperity of the public, I have no doubt; but the immutable principles of justice; the public faith of the states that confiscated and received British debts, pledged to the debtors; and the rights of the debtors, violated by the treaty; all combine to prove, that ample compensation ought to be made to all the debtors who have been injured by the treaty, for the benefit of the public. This principle is recognised by the constitution, which declares, "that private property shall not be taken for public use without just compensation." See Vattel, lib. 1, c. 20, § 244. Although Virginia is not bound to make compensation to the debtors, yet, it is evident, that they ought to be indemnified, and it is not to be supposed, that those whose duty it may be to make the compensation, will permit the rights of our citizens to be sacrificed to a public object, without the fullest indemnity.

On the best investigation I have been able to give the 4th article of the treaty, I cannot conceive that the wisdom of men could express their meaning in more accurate and intelligible words, or in words more proper and effectual to carry their intention into execution. I am satisfied, that the words, in their natural import and common use, give a recovery to the British creditor from his original debtor of the debt contracted before the treaty, notwithstanding the payment thereof into the public treasuries or loan-offices, under the authority of any state law; and therefore, I am of opinion, that the judgment of the circuit court ought to be reversed, and that judgment ought to be given on the demurrer, for the plaintiff in error; with the costs in the circuit court, and the costs of the appeal.

Paterson, Justice.—The present suit is instituted on a bond, bearing date the 7th of July 1774, and executed by Daniel Lawrence, Hylton & Co.
*246] and Francis Eppes, citizens of the state of Virginia, to Joseph Farrel and William Jones, subjects *of the king of Great Britain, for the

payment of 2976*l.* 11*s.* 6*d.*, British or sterling money. The defendants, among other pleas, pleaded, 1st. Payment; on which issue is joined. 2d. That $\$3,111\frac{1}{9}$, equal to 933*l.* 14*s.* 0*d.*, part of the debt mentioned in the declaration, were, on the 26th of April 1780, paid by them into the loan-office of Virginia, pursuant to an act of that state, passed the 20th of October 1777, entitled, "an act for sequestering British property, enabling those indebted to British subjects to pay off such debts, and directing the proceedings in suits where such subjects are parties." The material section of the act is recited in the plea.

To this plea, the plaintiffs reply, and set up the 4th article of the treaty, made the 3d of September 1783, between the United States and his Britannic majesty, and the constitution of the United States making treaties the supreme law of the land. The rejoinder sets forth, that tne debt in the declaration mentioned, or so much thereof as is equalto the sum of 933*l.* 14*s.* 0*d.*, was not a *bonâ fide* debt due and owing to the plaintiffs on the 3d of September 1783, because the defendants had, on the 26th of April 1780, paid, in part thereof, the sum of $\$3111\frac{1}{9}$, into the loan-office of Virginia, and obtained a certificate and receipt therefor, pursuant to the directions of the said act; without that, that the said treaty of peace, and the constitution of the United States entitle the plaintiffs to maintain their action against the defendants for so much of the said debt in the declaration mentioned as is equal to 933*l.* 14*s.* To this rejoinder, the plaintiffs demur. The defendants join in demurrer.

On this issue in law, judgment was entered for the defendants, in the circuit court for the district of Virginia. A writ of error has been brought, and the general errors are assigned.

The question is, whether the judgment rendered in the circuit court be erroneous? I shall not pursue the range of discussion, which was taken by the counsel on the part of the plaintiffs in error. I do not deem it necessary to enter on the question, whether the legislature of Virginia had authority to make an act, confiscating the debts due from its citizens to the subjects of the king of Great Britain, or whether the authority in such case was exclusively in congress. I shall read and make a few observations on the act, which has been pleaded in bar, and then pass to the consideration of the 4th *article of the treaty. The first and third sections are the only parts of the act necessary to be considered. [*247

§ 1. "Whereas, divers persons, subjects of Great Britain, had, during our connection with that kingdom, acquired estates, real and personal, within this commonwealth, and had also become entitled to debts to a considerable amount, and some of them had commenced suits for the recovery of such debts, before the present troubles had interrupted the administration of justice, which suits were at that time depending and undetermined, and such estates being acquired and debts incurred, under the sanction of the laws and of the connection then subsisting, and it not being known that their sovereign hath as yet set the example of confiscating debts and estates, under the like circumstances, the public faith, and the law and usages of nations require, that they should not be confiscated on our part, but the safety of the United States demands, and the same law and usages of nations will justify, that we should not strengthen the hands of our enemies, during the

continuance of the present war, by remitting to them the profits or proceeds of such estates, or the interest or principal of such debts."

§ 3. "And be it further enacted, that it shall and may be lawful for any citizen of this commonwealth, owing money to a subject of Great Britain, to pay the same, or any part thereof, from time to time, as he shall think fit, into the said loan-office, taking thereout a certificate for the same, in the name of the creditor, with an indorsement under the hand of the commissioner of the said office, expressing the name of the payer, and shall deliver such certificate to the governor and council, whose receipt shall discharge him from so much of the debt. And the governor and council shall, in like manner, lay before the general assembly, once in every year, an account of these certificates, specifying the names of the persons by and for whom they were paid, and shall see to the safe-keeping of the same, subject to the future direction of the legislature."

The act does not confiscate debts due to British subjects. The preamble reprobates the doctrine as being inconsistant with public faith, and the law and usages of nations. The payments made into the loan-office were voluntary, and not compulsive; for it was in the option of the debtor to pay or not. The enacting clause will admit of a construction in full consistency with the preamble; for although the certificates were to be subject to the future direction of the legislature, yet it was under the express declaration, that there should be no confiscation, unless the king of Great Britain should set the example; if he should confiscate debts due to the citizens *of
*248] Virginia, then the legislature of Virginia would confiscate debts due to British subjects. But the king of Great Britain did not confiscate debts on his part, and the legislature of Virginia have not confiscated debts on their part. It is, however, said, that the payment being made under the act, the faith of Virginia is plighted. True, but to whom is it plighted; to the creditor or debtor—to the alien enemy, or to its own citizen who made the voluntary payment? Or will it be shaped and varied according to the event; if one way, then to the creditor; if another, then to the debtor. Be these points as they may, the legislature thought it expedient to declare to what amount Virginia should be bound for payments so made. The act for this purpose was passed on the 3d of January 1780; and is entitled "An act concerning moneys paid into the public loan-office, in payment of British debts."

"§ 1. Whereas, by an act of the general assembly, entitled, 'An act for sequestering British property, enabling those indebted to British subjects, to pay off such debts, and directing the proceedings in suits where such subjects are parties,' it is, among other things, provided, that it shall and may be lawful for any citizen of this commonwealth, owing money to a subject of Great Britain, to pay the same, or any part thereof, from time to time, as he shall think fit, into the said loan-office, taking thereout a certificate for the same, in the name of the creditor; with an indorsement under the hand of the commissioner of the said office, expressing the name of the payer; and shall deliver such certificate to the governor and council, whose receipt shall discharge him from so much of the debt; and the governor and council shall, in like manner, lay before the general assembly, once in every year, an account of these certificates, specifying the names of the persons, by and

for whom they were paid, and shall see to the safe-keeping of the same, subject to the future direction of the legislature.

"§ 2. And whereas, it belongs not to the legislature to decide particular questions, of which the judiciary have cognisance, and it is, therefore, unfit for them to determine, whether the payments so made into the loan-office as aforesaid, be good or void between the creditor and debtor; but it is expedient to declare to what amount this commonwealth may be bound for the payments aforesaid. Be it enacted and declared, that this commonwealth shall, at no time, nor in any event or contingency, be liable to any person or persons whatsoever, for any sum, on account of the payments aforesaid, other than the value thereof, when reduced by the scale of depreciation, established by one other act of the general assembly, entitled, 'an act directing the mode of adjusting and settling the payment *of certain debts and contracts, and for other purposes,' with interest thereon, at the [*249 rate of six *per centum per annum*; any law, usage, custom, or any adjudication or construction of the first recited act already made, or hereafter to be made, notwithstanding."

On the part of the defendants, it has been also urged, that it is immaterial whether the payment be voluntary or compulsive, because the payer, on complying with the directions of the act, shall be discharged from so much of the debt. Be it so. If the legislature had authority to make the act, the congress could, by treaty, repeal the act, and annul everything done under it. This leads us to consider the treaty and its operation. Treaties must be construed in such manner, as to effectuate the intention of the parties. The intention is to be collected from the letter and spirit of the instrument, and may be illustrated and enforced by considerations deducible from the situation of the parties; and the reasonableness, justice and nature of the thing for which provision has been made. The fourth article of the treaty gives the text, and runs in the following words: "It is agreed, that creditors on either side, shall meet with no legal impediment to the recovery of the full value, in sterling money, of all *bonâ fide* debts heretofore contracted."

The phraseology made use of leaves in my mind no room to hesitate as to the intention of the parties. The terms are unequivocal and universal in their signification, and obviously point to and comprehend all creditors, and all debtors, previously to the 3d of September 1783. In this article, there appears to be a selection of expressions, plain and extensive in their import, and admirably calculated to obviate doubts, to remove difficulties, to designate the objects, and ascertain the intention of the contending powers, and in short, to meet and provide for all possible cases that could arise under the head of debts. The words "creditors on either side," embrace every description of creditors, and cannot be limited or narrowed down to such only, whose debtors had not paid into the loan-office of Virginia. Creditors must have debtors; debtors is the correlative term. Who are these debtors? On the part of the defendants in error, it has been contended, that Virginia is the substituted debtor, so far as respects debtors, who may have paid money into the loan-office under its laws. But the idea, that the treaty may be satisfied by substituting the state of Virginia in the stead of the original debtor, is far-fetched and altogether inadmissible. The terms in which the article is expressed, clearly evince a contrary intention, and naturally and irresistibly carry the mind back to the original debtor; for, as between

the British creditor and the *state of Virginia, there was no express and pre-existing stipulation or debt. Besides, what lawful impediment was to be removed out of the way of the creditor, if Virginia was the substituted or self-created debtor? Did this clause make Virginia liable to a prosecution for the debt? Is Virginia now suable by such British creditor? No, he would in such case be totally remediless, unless the nation of which he is a subject would interpose in his behalf. The words "shall meet with no lawful impediment," refer to legislative acts, and everything done under them, so far as the creditor might be affected or obstructed in regard either to his remedy or right. All lawful impediments, of whatever kind they might be, whether they related to personal disabilities, or confiscations, sequestrations, or payments into loan-offices or treasuries, are removed. No act of any state legislature, and no payment made under such act into the public coffers, shall obstruct the creditor in his course of recovery against his debtor. The act itself is a lawful impediment, and therefore, is repealed; the payment under the act is also a lawful impediment, and therefore is made void. The article is to be construed according to the subject-matter or nature of the impediment; it repeals, in the first instance, and nullifies, in the second. Unless this be the construction, it is not true, that the creditor shall meet with no legal impediment to the recovery of his debt. Does not the plea, in the present case, contradict the treaty, and raise an impediment in the way of recovery, when the treaty declares there shall be none? Payments made in paper money into loan-offices and treasuries, were the principal impediments to be removed, and mischiefs to be redressed. The article makes provision accordingly. It stipulates, that the creditor shall recover the full value of his debt, in sterling money; hereby securing and guarding him against all payments in paper money. Suppose, the creditor should call on Virginia for payment; what would it be? the paper money paid into the loan-office, or its value? Would this be a compliance with the article? In the one case, the money being cried down and dead, is no better than waste paper; and in the other, the payment, when reduced by the table of depreciation, would be inconsiderable, and in many cases, not more than six-pence in the pound. Can this be called payment to the full value of the debt, in sterling money?

The subsequent expressions in the article, enforce the preceding observations, and mark the will and intention of the contracting parties, in the most clear and precise terms. The concluding words are, "all *bonâ fide* debts heretofore contracted." In the construction of contracts, words are to be taken in their natural and obvious meaning, unless some good reason be assigned, to show, *that they should be understood in a different sense. *251] Now, if a person, in reading this article, should take the words in their common meaning, and as generally understood, could he mistake the intention of the parties? Their design unquestionably was, to restore the creditor and debtor to their original state, and place them precisely in the situation they would have stood, if no war had intervened, or act of the legislature of Virginia had not been passed. The impediments created by legislative acts, and the payments made in pursuance of them, and all the evils growing out of them, were, so far as respected creditors, done away and cured. This is the only way in which all lawful impediments can be

removed, and all debts, contracted before the date of the treaty, can be recovered to their full value, by the creditors against their debtors.

It has, however, been urged, that this article must be restricted to debts existing and due at the time of making the treaty; that the debt in question was discharged, because it had been paid into the loan-office, agreeable to law; and that the treaty ought not to be construed so as to renovate or revive it. To enforce this objection, the rule laid down by Vattel was relied on, "that the state of things, at the instant of the treaty, is to be held legitimate, and any change to be made in it requires an express specification in the treaty; consequently, all things not mentioned in the treaty are to remain as they were at the conclusion of it." Vatt. lib. 4, c. 2, § 21. The first part of the objection has been already answered; for it is within both the letter and spirit of the instrument, that the creditors should be reinstated and of course, that the debtors should be liable to pay. The act of Virginia, and the payment under it, have, so far as the creditor is concerned, no operation, and are void. There is no difficulty in answering the objection arising from the passage in Vattel. The universality of the terms is equal to an express specification in the treaty, and indeed includes it. For it is fair and conclusive reasoning, that if any description of debtors or class of cases was intended to be excepted, it would have been specified in the instrument, and the words, "that creditors on either side, shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all debts heretofore contracted," would not have been made use of, in the unqualified manner, in which they stand in the treaty. Another article in the treaty now under review, will serve by way of illustration.

"Art. 7. There shall be a firm and perpetual peace between his Britannic majesty and the said states, and between the subjects of the one and the citizens of the other, wherefore, all hostilities both by sea and land shall then immediately cease: all prisoners on both sides shall be set at liberty, and his Britannic *majesty shall, with all convenient speed, and without causing any destruction, or carrying away any negroes or other property of the American inhabitants, withdraw all his armies, garrisons and fleets from the said United States, and from every port, place and harbor within the same; leaving in all fortifications the American artillery that may be therein. And shall also order and cause all archives, records, deeds and papers, belonging to any of the said states, or their citizens, which in the course of the war may have fallen into the hands of his officers, to be forthwith restored and delivered to the proper states and persons to whom they belong." Would it be an objection on the part of his Britannic majesty, that the state of things at the instant of the treaty is to be held legitimate, and any change to be made in it, requires an express specification? That the forts are not specified, and therefore, not to be given up? The objection would be considered as futile and evasive. The answer would be, that there is no doubt, because the expressions are general, comprehend the forts, and are equal to an express specification. So, in the present case, the universality of the terms are equal to a specification of every particular debt, or an enumeration of every creditor and debtor; it is the same thing as though they had been individually named. All the creditors on either side, without distinction, must have been contemplated by the parties in the fourth article. Almost every word, separately taken, is expressive of this idea, and when all

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the words are combined and taken together, they remove every particle of doubt. But if the class of British creditors, whose debtors have paid into the loan-office of Virginia, are not comprehended in the fourth article, then they pass without redress, without notice, without so much as a recommendation in their favor. The thing is incredible. Why a distinction? why should the creditors, whose debtors paid into the loan-office, be in a worse situation than the creditors, whose debtors did not thus pay? The traders, and others of this country, were largely indebted to the merchants of Great Britain. To provide for the payment of these debts, and give satisfaction to this class of subjects, must have been a matter of primary importance to the British ministry. This, doubtless, is at all times, and in all situations, an object of moment to a commercial country. The opulence, resources and power of the British nation, may, in no small degree, be ascribed to its commerce; it is a nation of manufacturers and merchants. To protect their interests, and provide for the payment of debts due to them, especially, when those debts amounted to an immense sum, could not fail of arresting the attention, and calling forth the utmost exertions of the British cabinet. A measure of this kind, it is easy to perceive, would be pursued with
*253] unremitting *diligence and ardor; sacrifices would be made to insure its success; and perhaps, nothing short of extreme necessity would induce them to give it up. But if the debts which have been confiscated, or paid into loan-offices or treasuries, be not within the provision of the fourth article, then a numerous class of British merchants are passed over in silence, and not so much attended to, as the loyalists, or Americans, who attached themselves to the cause of Britain during the war. Is it a supposable case, that the British negotiators would have been more regardful of the interests of the loyalists, than of their own merchants? That they would make a discrimination between merchants, when, in a national and political view, and in the eye of justice, they were equally meritorious, and entitled to receive complete satisfaction for their debts? No line should be drawn between creditors, unless it be found in the treaty. The treaty does not make it: the truth is, that none was intended; for, if intended, it would have been expressed. The indefinite and sweeping terms made use of by the parties, such as "creditors on either side, no lawful impediment to the recovery of the full value in sterling money, of all debts heretofore contracted," exclude the idea of any class of cases having been intended to be excepted, and explode the doctrine of constructive discrimination. The fourth article appears to me to come within the first general maxim of interpretation laid down by Vattel. "It is not permitted to interpret what has no need of interpretation. When an act is conceived in clear and precise terms, when the sense is manifest, and leads to nothing absurd, there can be no reason to refuse the sense which this treaty naturally presents. To go elsewhere in search of conjectures, in order to restrain or extinguish it, is to endeavor to elude it. If this dangerous method be once admitted, there will be no act which it will not render useless. Let the brightest light shine on all the parts of the piece, let it be expressed in terms the most clear and determinate; all this shall be of no use, if it be allowed to search for foreign reasons, in order to maintain what cannot be found in the sense it naturally presents." Vatt. lib. 2, c. 17, § 263.

To proceed, the construction on the part of the defendants excludes

mutuality. The debts due from British subjects to American citizens were not confiscated or sequestered, nor drawn into the public coffers. They were left untouched. Now, if all the British debtors be compelled to pay their American creditors, and a part only of the American debtors be compelled to pay their British creditors, there will not be that mutuality in thething, which its nature and justice require. The rule in such case should work both ways: whereas, the other construction creates mutuality, and proceeds upon *indiscriminating principles. The former construction [*254
does violence to the letter and spirit of the instrument; the latter flows easily and naturally out of it.

It has been made a question, whether the confiscation of debts, which were contracted by individuals of different nations, in time of peace, and remain due to individuals of the enemy, in time of war, is authorised by the law of nations among civilized states? I shall not, however, controvert the position, that by the rigor of the law of nations, debts of the description just mentioned may be confiscated. This rule has by some been considered as a relic of barbarism; it is certainly a hard one, and cannot continue long among commercial nations; indeed, it ought not to have existed among any nations, and perhaps, is generally exploded at the present day in Europe. Hear the language of Vattel on this subject, lib. 3, c. 5, § 77. "But at present, in regard to the advantage and safety of commerce, all the sovereigns of Europe have departed from this rigor. And as this custom has been generally received, he who should act contrary to it, would injure the public faith; for strangers trusted his subjects only from a firm persuasion, that the general custom would be observed. The state does not so much as touch the sums which it owes to the enemy. Everywhere, in case of war, funds credited to the public are exempt from confiscation, and seizure." The legislators of Virginia, who made the act, which has been pleaded in bar, lay down the doctrine relative to this point, in strong and unequivocal terms. For they expressly declare, that the law and usages of nations require that debts should not be confiscated. If the enemy should, in the first instance, direct a confiscation of debts, retaliation might, in such case, be a proper and justifiable measure. The truth is, that the confiscation of debts is at once unjust and impolitic; it destroys confidence, violates good faith, and injures the interests of commerce; it is also unproductive, and in most cases, impracticable. Ingenious writers have endeavored to defend the doctrine, on the ground, that the confiscation of debts weakens the enemy and enriches ourselves. The first is not true, because remittances are seldom, if ever, made during a war, and the second generally proves unprofitable, when attempted to be carried into practice. The gain is, at most, temporary and inconsiderable; whereas, the injury is certain and incalculable, and the ignominy great and lasting. History furnishes a remarkable instance in support and illustration of the foregoing remarks. For, in the war that broke out between France and Spain, in the year 1684, his Catholic majesty endeavored to seize the effects of the subjects of France in his kingdom; but the attempt proved *abortive, for not one Spanish agent or factor violated his trust, [*255
or betrayed his French principal or correspondent. If the payments which have been made into the loan-office, pursuant to the act of Virginia, should be scaled according to a subsequent act of that state, they would not, it is probable, amount to a very large sum. Other reasons in support of the

doctrine have been assigned, namely, that the confiscation of debts operates as an indemnity for past losses, and a security against future injuries; but they do not appear to me to be more solid than those already mentioned. Confiscation of debts is considered a disreputable thing among civilized nations of the present day; and indeed, nothing is more strongly evincive of this truth, than that it has gone into general desuetude, and whenever put into practice, provision is made by the treaty, which terminates the war, for the mutual and complete restoration of contracts and payment of debts.

I feel no hesitation in declaring, that it has always appeared to me to be incompatible with the principles of justice and policy, that contracts entered into by individuals of different nations, should be violated by their respective governments, in consequence of national quarrels and hostilities. National differences should not affect private bargains. The confidence, both of an individual and national nature, on which the contracts were founded, ought to be preserved inviolate. Is not this the language of honesty and honor? Does not the sentiment correspond with the principles of justice, and the dictates of the moral sense? In short, is it not the result of right reason and natural equity?

The relation which the parties stood in to each other, at the time of contracting these debts, ought not to pass without notice. The debts were contracted, while the creditors and debtors were subjects of the same king, and children of the same family. They were made under the sanction of laws common to, and binding on both. A revolution-war could not, like other wars, be foreseen or calculated upon; the thing was improbable. No one, at the time that the debts were contracted, had any idea of a severance or dismemberment of the empire, by which persons, who had been united under one system of civil polity, should be torn asunder, and become enemies for a time, and perhaps, aliens, for ever. Contracts entered into, in such a state of things, ought to be sacredly regarded: inviolability seems to be attached to them.

Considering then the usages of civilized nations, and the opinion of modern writers, relative to confiscation, and also the circumstances under which these debts were contracted, we ought to take the expressions in this fourth article in their most extensive sense. We ought to admit of no comment, *256] that will narrow and restrict their operation and *import. The construction of a treaty made in favor of such creditors, and for the restoration and enforcement of pre-existing contracts, ought to be liberal and benign. For these reasons, this clause in the treaty deserves the utmost latitude of exposition. The fourth article embraces all creditors, extends to all pre-existing debts, removes all lawful impediments, repeals the legislative act of Virginia, which has been pleaded in bar, and with regard to the creditor, annuls everything done under it. This article reinstates the parties; the creditor and debtor before the war, are creditor and debtor since; as they stood then, they stand now.

To prevent mistakes, it is to be understood, that my argument embraces none but lawful impediments, within the meaning of the treaty, such as legislative acts, and payments under them into loan-offices and treasuries. An impediment created by law stands on different ground from an impediment created by the creditor. To conclude, I am of opinion, that the

demurrer ought to have been sustained; and of course, that the judgment rendered in the court below, is erroneous, and must be reversed.

IREDELL, Justice.(*a*)—In delivering my opinion on this important case, I feel myself deeply affected by the awful situation in which I stand. The uncommon magnitude of the subject, its novelty, the high expectation it has excited, and the consequences with which a decision may be attended, have all impressed me with their fullest force. I have trembled, lest by an ill-informed or precipitate opinion of mine, either the honor, the interest, or the safety of the United States should suffer or *be endangered, on the one hand, or the just rights and proper security of any individual, on the other. In endeavoring to form the opinion I shall now deliver, I am sure, the great object of my heart has been, to discover the true principles upon which a decision ought to be given, unbiassed by any other consideration than the most sacred regard to justice. Happy should I have thought myself, if I could as confidently have relied on a strength of abilities equal to the greatness of the occasion. [*257

The cause has been spoken to, at the bar, with a degree of ability equal to any occasion. However painfully I may at any time reflect on the inadequacy of my own talents, I shall, as long as I live, remember, with pleasure and respect, the arguments which I have heard on this case: they have discovered an ingenuity, a depth of investigation, and a power of reasoning fully equal to anything I have ever witnessed, and some of them have been adorned with a splendor of eloquence surpassing what I have ever felt before. Fatigue has given way under its influence, and the heart has been warmed, while the understanding has been instructed.

The action now before the court is an action of debt, brought by a British creditor against an American debtor, to recover upon a bond executed before the late war. To this action there are five pleas, substantially as follows:

The 1st, a plea of payment, on which issue is joined, but not now before the court, and which is to be tried by a jury, in case judgment be given for

(*a*) Judge IREDELL (one of the judges who decided the original cause), in conformity to a practice which the judges of this court have generally pursued, forebore taking any part in this decision, as a judge, upon the present writ of error, having declared from the first, he meant only to do so, in case of an equal division of opinion among the other judges. But he observed, that he thought there would be no impropriety in his reading in his place, the reasons he had given in support of the judgment in the circuit court, a practice expressly authorized in the case of the district judge, upon an appeal to the circuit court from his own decision; though he is, at the same time, excluded from voting. And Judge Iredell added, that upon consulting his brethren on the bench, they had acquiesced in the propriety of this proceeding. He, therefore, read these reasons in his place, so far as they respected the same subject of discussion in both courts, which was only as to the effect of payments into the treasury, every other point in contest in the circuit court having been relinquished.

It is, however, thought proper, on this occasion, to publish the whole of the argument, as delivered in the circuit court, there being some observations on that part of the subject that was relinquished which, it is conceived, serve to illustrate the great topic of controversy that occasioned the present writ of error.

The judge, after reading his opinion, as delivered in the court below, added, that it had not been changed by anything which had occurred, in arguing the case on the present writ of error.

the plaintiff upon the legal questions arising on the other pleas, so as to entitle him to try the issue.

The 2d is a plea of a payment into the treasury of the state, of part of the debt, under an act of assembly of the 20th of October 1777.

The 3d plea is grounded on two acts of assembly: one of May 1779, under which it is alleged, that the debt in question became forfeited to the state; the other, of May 1782, which is relied on as a bar to the recovery. The former part of the plea, I understand to be given up by the defendant's counsel, and certainly with great propriety, because debts are expressly expected in the act it refers to.

The 4th plea alleges a non-compliance with the treaty on the part of Great Britain, and therefore, that the British creditor cannot now recover a benefit under the same treaty. It also alleges acts of hostility by Great Britain since the peace, as likewise forming a bar to the recovery of the plaintiff, who is a British creditor.

The 5th plea is, that this debt was absolutely annulled by the change of government. This also I understand to have *been given up, in the course of the argument, and undoubtedly, it is not tenable.

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The only pleas, therefore, for us to consider, are the second, part of the third, and the fourth. Everything I have to say on that part of the third not relinquished, admitting the fullest operation of the act of 1782, as intending to affect British creditors themselves, as well as assignees, which does not appear to me to have formed any part of its object, will appear from my observations on the second plea; and therefore, to prevent unnecessary repetition, I shall not consider it separately by itself.

It seems proper to speak of the fourth degree first, because, if that can be maintained, it is altogether immaterial to consider either of the others. I am clearly of opinion, that the fourth plea is not maintainable. It is grounded on two allegations. 1st. The breach of the treaty by Great Britain, as alleged in the plea. 2d. New acts of hostility on the part of that kingdom.

1. In regard to the first, I consider the law of nations to be decided as to the following position, viz.: "That if a treaty be broken by one of the contracting parties it becomes (in the expressive language of the law) not absolutely void, but voidable; and voidable, not at the option of any individual of the contracting country injured, however much he may be affected by it, but at the option of the sovereign power of that country, of which such individual is a member." The authorities, I think, are full and decisive to that effect. Grotius, lib. 2, c. 15, § 15; Ibid. lib. 3, c. 20, § 35, 36, 37, 38; 2 Burl. p. 355, part 4, c. 14, in § 8; Vattel, lib. 4, c. 4, § 54.

The gentlemen for the defendant, taking hold of some particular expressions without regarding the whole of these authorities, and considering the reason of them, have argued, that true, in the present instance (for example) congress might have remitted the infraction, but not having done so, the plaintiff is barred for the present, however he might be restored to the right, in case the infraction should hereafter be actually remitted. But to me it is very evident, that such a position is not maintainable, either by the authorities I have recited, or the reason of the thing.

The words of Grotius are pointed and express, to show not that the treaty shall be reputed broken, until a remission is actually pronounced

by the injured party, but that it shall not be reputed as broken, until the injured party shall think proper actually to pronounce it broken; and it is remarkable, that his *words to this effect, are calculated for the very purpose of removing any doubts which other more general expressions might occasion. His words are: "When there is treachery on one side, it is certainly at the choice of the innocent party to let the peace subsist; as Scipio did formerly after many perfidious actions of the Carthagenians. Because no man, by doing contrary to his obligation, can thereby discharge himself from it. For though it is expressed, that by such a fact the peace shall be reputed as broken, yet this clause is to be understood only in favor of the innocent, if he thinks fit to make use of it." Grotius, lib. 3, c. 20, § 38. [*259

The whole clause of Vattel is substantially to the same purpose; and therefore, where in one part of the clause he says, "the offended party may remit the infraction committed," this must be understood, to make the whole consistent, a remission not arising from an express declaration, but from a tacit acquiescence in the breach. Otherwise, what becomes of the words, "but if he choses not to come to a rupture, the treaty remains valid and obligatory." The treaty, therefore, must remain valid and obligatory, until the power, authorized to come to a rupture, does come to it. The same observations apply to Burlamaqui, who expresses himself more generally, but states substantially the same doctrine. His expression is, "it is at the choice of the innocent party to let the peace subsist," which certainly does not require a positive declaration that it shall subsist.

This doctrine appears to me to be grounded on the highest reason. It is undoubtedly true, that each nation is considered as a moral person, and the welfare and interest of all the individuals of that nation, so far as they may be affected by its concerns with foreign nations, are in each country intrusted to some particular power, authorized to negotiate with them, or to speak the sense of the nation on any emergency. When any individual, therefore, of any nation, has cause of complaint against another nation, or any individual of it, not immediately amenable to the authority of his own, he may complain to that power in his own nation, which is intrusted with the sovereignty of it, as to foreign negotiations, and he will be entitled to all the redress which the nature of his case requires, and the situation of his own country will enable him to obtain. The people of the United States, in their present constitution, have devolved on the president and senate, the power of making treaties, and upon congress, the power of declaring war. To one or other of these powers, in case of an infraction of a treaty that has been entered into with the United States, I apprehend, application, is to be made.

*Upon such an application various important considerations would necessarily occur. 1. Whether the treaty was first violated on the part of the United States, or on that of the other contracting power? 2. Whether, if first violated by the latter, it was a violation in an important or an inconsiderable article; whether the violation was by design or accident, or owing to unforeseen obstacles; whether, in short, it was wholly or partially without excuse? 3. Whether, admitting it was either, it was a matter for which compensation could be made, or otherwise? 4. Whether the injury was of such a nature as to admit of negotiation, or to require immediate satisfaction, peremptorily, and without delay? 5. Whether, if the circumstances in [*260

all other cases justified it, it was advisable, upon an extensive view and wise estimation of all the relative circumstances of the United States, to declare the treaty broken, and of course void: for though the party first breaking the treaty cannot make it absolutely void, but it is only voidable, at the election of the injured party, yet when that election is made, by declaring the treaty void, I conceive it is totally so as to both parties, and that all rights enjoyed under the treaty are absolutely annulled, as if no stipulation had been made for them?

These are considerations of policy, considerations of extreme magnitude, and certainly, entirely incompetent to the examination and decision of a court of justice. Miserable and disgraceful, indeed, would be the situation of the citizens of the United States, if they were obliged to comply with a treaty on their part, and had no means of redress for a non-compliance by the other contracting power. But they have, and the law of nations points out the remedy. The remedy depends on the discretion and sense of duty of their own government.

This plea is, therefore, defective, so far as concerns the breach of the treaty, not because this court hath no cognisance of a breach of treaty, but because by the law of nations, we have no authority, upon any information or concessions of any individuals, to consider or declare it broken; but our judgment must be grounded on the solemn declaration of congress alone (to whom, I conceive, the authority is intrusted), given for the very purpose of vacating the treaty, on the principles I have stated. The paper transmitted by order of congress, to the executive of Virginia, on the subject of a violation complained of on the part of the British, certainly cannot amount to so much, especially, as there is another paper of theirs in the year 1787, transmitted to the different states, complaining of violations
*261] *on our part. They have pronounced no solemn decision, which committed the first infraction; much less have they declared that in consequence of the infraction on the part of the British, they chose that the treaty should be annulled.

But it is said, that a declaration by congress, that the treaty was broken by Great Britain, would be exercising a judicial power, which by the constitution, in all cases of treaties, is devolved on the judges. Surely, such a thing was never in the contemplation of the constitution. If it was, a method is still wanting by which it could be executed; for, if we are to declare, whether Great Britain or the United States have violated a treaty, we ought to have some way of bringing both the parties before us. The method contended for by the defendant's counsel is very ill-suited to another part of their doctrine, which is certainly right, that a nation is a moral person, and that the act of a sovereign power to whom its foreign concerns are intrusted, is the act of every individual of that nation, because he represents the whole. But in this case, the king of Great Britain does not act on behalf of the plaintiff, his subject, and the United States on behalf of the defendants, their citizens; but the plaintiff is alleged to represent the king of Great Britain, and the defendant, the sovereignty of the United States, a dignity, for aught I know, of which they may be respectively worthy, but which certainly does not either politically or judicially belong to them.

The judiciary is, undoubtedly, to determine in all cases in law and equity, coming before them, concerning treaties. The subject of treaties, gentlemen

truly say, is to be determined by the law of nations. It is a part of the law of nations, that if a treaty be violated by one party, it is at the option of the other party, if innocent, to declare, in consequence of the breach, that the treaty is void. If congress, therefore (who, I conceive, alone have such authority under our government), shall make such a declaration, in any case like the present, I shall deem it my duty to regard the treaty as void, and then to forbear any share in executing it as a judge. But the same law of nations tells me, that until that declaration be made, I must regard it (in the language of the law) valid and obligatory. The admission of the fact, stated in the plea, cannot be taken as an admission that the fact is strictly true, because the plaintiff had no way of avoiding the plea, but by a demurrer, whether it was true or not. If it was well pleaded, it is an admission of the entire truth, but not otherwise. For the reasons I have given, it is clear to me, that it is not well pleaded.

*2. In regard to the second branch of this plea, new acts of hostility, if meant as constituting a breach (which I don't understand it to be), the observations I have already made will equally apply to this part of the plea. If meant as a proof, that a war in fact, though not in name, subsists, and therefore, that the plaintiff is an alien enemy, the same observations will apply still more forcibly. We must receive a declaration, that we are in a state of war, from that part of the sovereignty of the Union to which that important subject is intrusted. We certainly want some better information of the fact than we have at present. However, this point seems so clear, that the defendant's counsel very faintly attempted to maintain this idea of the case. I conclude, therefore, for these reasons, that there is nothing in the 4th plea which is a bar to the plaintiff's action. [*262

The great difficulty of the case arises from the second plea. This is the only part of the case about which I have, from the beginning, entertained any doubt. And I must confess, I have had very great doubts, indeed, on this subject. My opinion has varied more than once in regard to it. I have endeavored to come to a conclusion, by analysing it in all its parts; and the result of my investigation has been, according to the best judgment I am capable of forming, upon the most deliberate examination, that the plea is supportable. My reasons for this opinion, I must give at considerable length, in order to show it is not a rash one, and that gentlemen may be enabled, in the future progress of this case, more easily to detect my errors, if I should have committed any.

I will divide the consideration of the plea into two points: 1. Whether the plea would have been a bar, if this case had stood independently of the treaty? 2. Whether the treaty destroys the operation of the plea?

In considering the first point, I shall, for the greater perspicuity, consider it under the following heads: 1. Whether the legislature of this state had a right, agreeable to the law of nations, to confiscate the debt in question? 2. Whether, admitting that the legislature had not a right, agreeably to the law of nations, to confiscate the debt, yet, if they in fact did so, it would not, while it remained unrepealed by any subsequent, sufficient authority, have been valid and obligatory within the limits of the state, so as to bar any suit for the recovery of the debt? 3. Whether, if it shall be considered that the legislature did not wholly confiscate the debt, so as totally to extinguish all right in the creditor (as I apprehend they clearly did not),

but only sequester it under the peculiar circumstances stated in the act, the payment in question, under the authority of the act, did not, at that time at least, wholly exonerate the debtor?

*263] *1. It being clear, that there was no absolute confiscation in this case, I shall not give a conclusive opinion upon the right; but as I think it highly probable such a right did exist, some observations on that subject will naturally and properly lead to those upon which my opinion, as to the validity of the payments, is ultimately founded. For this reason, and this reason only, I discuss the present question.

Whatever doubt might have been entertained, by reasoning on the particular examples of Grotius and Puffendorf, Bynkershoeck (who, I believe, is alone, a very great authority) is full and decisive in the very point, as to a general right of confiscating debts of an enemy. His doctrine I take to be this, that the law of nations authorizes it, unless in former treaties between the belligerent powers, there be particular stipulations to the contrary. Vattel recognises the general right, but states a prevailing custom in Europe to the contrary; in consequence of which, he says, "As this custom has been generally observed, he who would act contrary to it would injure the public faith; for strangers trusted his subjects only from a firm persuasion that the general custom would be observed." Vattel mentions the fact, but does not state the origin of the fact; which, I think, it is not improbable, may have arisen in consequence of particular stipulations, as mentioned by Bynkershoeck; very few of the civilized nations of Europe not having treaties with each other.

Whether this customary law (admitting the principle to prevail by custom only) was binding on the American States, during the late war, in respect to Great Britain at least, may be a question of considerable doubt. There were particular circumstances in the relative situation of the two countries, which might possibly exempt this from the force of such a custom, could it be supposed that when this country became an independent nation, this customary law immediately attached upon it. However this country might have been considered bound to observe such a law, in regard to any nation recognising its independence, had we been unfortunately at war with such, and who observed it on her part (for, undoubtedly, a breach on one side would justify a non-observance by the other), it did not necessarily follow, that the people of this country were bound to observe it to a nation, which not only did not recognise, but sought to destroy their very existence as an independent people, considering them in no other light than as traitors, whose lives and fortunes were forfeited to the law. The people of this country literally fought *pro aris et focis;* and therefore, means of defence which, when inferior objects were in view, might not be strictly justifiable, might, in such an extremity, become so, on the great principle on

*264] which the laws of war are * founded, self-preservation; an object that may be attained by any means, not inconsistent with the eternal and immutable rules of moral obligation.

The principles of the common law of England, as appears from a case I showed to the bar (that in Sir Thomas Parker's Reports, p. 267, *The Attorney-General* v. *Weeden and Shales*), do undoubtedly recognise the forfeiture of a *chose in action* due to an enemy. At the utmost, it only requires, that an inquisition should be completed during the war, so as, by

ascertaining the fact, fully to establish the title of the crown. I can see no reason why that principle of the common law should not obtain here. If so, then, independent of any act of legislation whatever, an inquisition completed during the war, finding the fact, would have vested the title to the debt in question absolutely in the state, unless this debt can be distinguished from any other *chose in action*. Such a distinction has been attempted: 1st. Because this debt was due before the war. 2d. Because the state had not possession of the bond. To these objections, I think, easy answers may be given. 1st. The right acquired by war (detached from custom, which I am not now considering, or any express stipulation, if there be such) depends on the power of seizing the enemy's effects. It is not grounded on any antecedent claim of property, but, on the contrary, the property is admitted to be the enemy's, in the very act of seizing it. Its sole justification is, that being forced into a state of hostility, by an injury for which no satisfaction could be obtained in a peaceable manner, reprisals may be made use of, as a means to compel justice to be done, or to enable the injured party to obtain satisfaction for itself. Such a power, from its nature (being grounded on necessity only), seems incapable of limitation by any general rule, and if conscientiously used (of which each nation must judge for itself), the principle applies as well to property which was in the country before the war began, as to any other which may by accident come into its possession. The same objection would apply to the seizure of any other property of an enemy, which had been in the country before the war began, as of an incorporeal right. The first resolution in the case I cited is, as to *choses in action* generally, though the *chose in action* there in question, was, in fact, one which had accrued during the war. 2d. The objection from the state not having possession of the bond (though countenanced by one or two writers), I think, is also susceptible of a satisfactory answer. The bond does not create the debt, but is only evidence of it; possession of it alone can give no right; a robber, or an individual coming to the possession of it by accident, acquires no more title to the money than he had before. The law is so, even as to promissory notes payable to bearer, if the fact can be *made to appear. If a bond be lost, equity has long since afforded a remedy. [*265
In a modern case in a court of law, a *profert* of a deed has been dispensed with, upon a special declaration stating the loss of it.(*a*) It was while the possession and the right were confounded, that this objection was thought of weight. It is observable also, that it would create an idle and a trifling distinction between debts due by specialty, and simple-contract debts, a distinction that might be supported by ingenuity, but certainly not by reason. And it would sound harsh, to say, that simple-contract debts should be forfeitable, if the witnesses were in the country, but otherwise not. Now, if the forfeiture of the debt in question could have been effected at common law, by an inquisition completed during the war, I can see no reason why the legislature could not, with equal propriety as to the right, have effected the same object substantially in any other mode. The proceeding, in each case, must be *ex parte*, and the object affected can be conclusively bound by neither, if his case did not come within the principles of the law. This

(*a*) Read *v.* Brookman, 3 T. R. 151; by three judges against one; in the court of king's bench, in England.

I argue, upon a supposition that the customary law of nations, was not binding here, at least, in this instance. That, however, is a point of some delicacy, and not necessary for me now to determine, because, 2d, I am of opinion, that admitting that the legislature had not strictly a right, agreeable to the law of nations, to confiscate the debt in question; yet, if they in fact did so, it would, while it remained unimpeached by any subsequent sufficient authority, have been valid and obligatory within the limits of the state, so as to bar any suit for the recovery of the debt.

In this opinion, I have the misfortune to differ from a very high authority,(*a*) for which I have the greatest respect. But however painful it may be, to differ from gentlemen, whose superior abilities and learning I readily acknowledge, I am under the indispensable necessity of judging according to the best lights of my own understanding, assisted by all the information I can acquire. I confess, therefore, that I agree entirely with the defendant's counsel, in thinking, that the acts of the legislature of the state, in regard to the subject in question, so far as they were conformable to the constitution of the state, and not in violation of any article of the confederation (where that was concerned) were absolutely binding *de facto*, and that if, in respect to foreign nations, or any individual belonging to them, they were not *266] strictly warranted by the law of nations, which ought *to have been their guide, the acts were not for that reason void, but the state was answerable to the United States for a violation of the law of nations, which the nation injured might complain of to the sovereignty of the Union. There is no doubt, that an act of parliament in Great Britain, would bind in its own country, in every possible case in which the legislature thought proper to act. Blackstone (1 Com. 91) is precise as to that point, even in cases manifestly unjust, if the words of the law are plain and unequivocal. In this country, thank God! a less arbitrary principle prevails. The power of the legislatures is limited; of the state legislatures, by their own state constitutions and that of the United States; of the legislature of the Union, by the constitution of the Union. Beyond these limitations, I have no doubt, their acts are void, because they are not warranted by the authority given. But within them, I think, they are in all cases obligatory in the country subject to their own immediate jurisdiction, because, in such cases, the legislatures only exercise a discretion expressly confided to them by the constitution of their country, and for the abuse of which (if it should be abused) they alone are accountable. It is a discretion no more controllable (as I conceive) by a court of justice, than a judicial determination is by them, neither department having any right to encroach on the exclusive province of the other, in order to rectify any error in principle, which it may suppose the other has committed. It is sufficient for each to take care that it commits no error of its own. As to a distinction between a state court and this court, in this respect, I do, for my part, disclaim, according to my present sentiments, any authority to give a different decision in any case whatsoever from such as a state court would be competent to give, under the same circumstances. I have no conception, that this court is in the nature of a foreign

(*a*) Chancellor Wythe, of Virginia, who had given a contrary opinion in the high court of chancery of Virginia, a few days before.[1]

[1] Page v. Pendleton, Wythe's Rep. (2d ed.) 211.

jurisdiction. The thing itself would be as improper as it would be odious, in cases where acts of the state have a concurrent jurisdiction with it.

With regard to the exception I speak of, no one has suggested, that the act of October 1777, was in any manner inconsistent with the constitution of the state; and at that time, the articles of consideration were not in force; but if they had been, I think, there is no color for alleging any inconsistency with them, since congress could have passed no act on this subject, but if they had wished for an act, must have recommended to the state legislatures to pass it. And the very nature of a recommendation implies, that the party recommending cannot, but the party to whom the recommendation is made, can do the thing recommended.

*The third question under the present head, that I proposed, was this: "Whether, if it shall be considered that the legislature did not absolutely confiscate the debt, so as totally to extinguish all right in the creditor (as I apprehend they clearly did not), but only sequestered it, under the peculiar circumstances stated in the act; the payment in question, under the authority of the act, did not, at that time, at least, wholly exonerate the debtor." [*267

The words of the enacting clause concerning this subject, are as follows: "That it shall and may be lawful for any citizen of this commonwealth, owing money to a subject of Great Britain, to pay the same, or any part thereof, from time to time, as he shall think fit, into the said loan-office, taking thereout a certificate for the said sum, in the name of the creditor, with an indorsement under the hand of the commissioner of the said office, expressing the name of the payer, and shall deliver such certificate to the governor and council, whose receipt shall discharge him from so much of the debt. And the governor and council shall, in like manner, lay before the general assembly, once in every year, an account of these certificates, specifying the names of the persons by and for whom they were paid, and shall see to the safe-keeping of the same, subject to the future direction of the legislature."

We are too apt, in estimating a law passed at a remote period, to combine, in our consideration, all the subsequent events which have had an influence upon it, instead of confining ourselves (which we ought to do) to the existing circumstances at the time of its passing. Let us, however, recollect, that at this period no British creditor could institute a suit for the recovery of his debt, as the war constituted him an alien enemy, and therefore, his remedy stood suspended at common law, so that he ran the risk of the entire loss of every debt, where his debtor proved insolvent, during the war. Consequently, it would, in his own estimation, have been doing him a considerable service, that the state should authorize a receipt on his behalf, had there been no other currency in circulation than gold or silver. It would have been placing him in a state of security, greater than he had any reason to expect. The extremity of the public situation, rendered paper money unavoidable, but this was an evil to which all Americans as well as British creditors were liable, and the former (as we all know) were compelled, upon a tender, under pain of being deemed enemies of their country, to receive it at its nominal value. It was natural, and perhaps, not altogether, if at all, unjust, if a man had 100*l.* due to him from B., and he himself owed C. 100*l.*, and B. paid him the 100*l.*, though in depreciated

*money, that he should immediately carry it to his creditor. Many, I have no doubt, paid their creditors upon these plain grounds of retribution, though others, undoubtedly (for no government can make all men honest), took most scandalous advantages of depreciation, in its advanced periods. When this law was passed, the depreciation, I believe, was little felt, and not at all acknowledged. *De minimis non curat lex*, is an old law maxim. I may parody it on this occasion, by saying *De minimis non curat libertas.* When life, liberty, property, everything dear to man was at stake, few could have coldness of heart enough to watch the then scarcely perceptible gradation in the value of money. In this situation, the legislature of the state passed the law in question. It did all that the then situation of affairs would admit of, even for the benefit of the British creditors themselves, and it put it in the power of American creditors, who were compelled to receive the existing currency, to pay their own debts with it. The deposition of money in the loan-office, was, at that time, by many, even in America itself, thought an eligible method of securing it, and with some foreigners, it was a favorite object of speculation. I know, myself, that the proceeds of some very valuable cargoes were ordered to be so applied, and probably there were such instances of which I knew nothing. The increased difficulties of the American war, in a great degree, disappointed the intentions of the original law, but still, British and American creditors were placed on the same footing, so far as it was in the power of the legislature to effect it. I thought it proper to say thus much, as introductory to the observations I shall make on the legal operation of those payments.

1. If the state, *de jure*, according to the law of nations (which I strongly incline to think), had a right wholly to confiscate this debt, they had undoubtedly a right to proceed a partial way towards it, by receiving the money, and discharging the debtor, substituting itself in his place. We are to be governed by things, and not names, and consequently, if the state had a right to say to a debtor—"We confiscate the right of your creditor, and you must pay your debt to us, and not to him"—they had a right to say—"We do not choose, for the present, absolutely to confiscate this debt, although we have the power so to do, but if you will pay the money to us, you shall be as completely discharged as if we did." In this point of view, I think, there can be no doubt, but that a discharge would, under such circumstances, have as completely extinguished the right of the creditor as to the debtor, as if, in case no war had intervened, and therefore, no right had accrued under it to the states, the debtor had actually paid the money
*269] *to the order of the creditor, and received a discharge from himself.

2. For the reasons I have before given, I think a confiscation, either whole or partial, or any less exercise of that power *de facto*, though not *de jure*, would, in this state, have been perfectly binding, and in legal contemplation, as effectual to bar a recovery, as if the law of nations had been strictly and unquestionably pursued.

3. I believe, there can be no doubt, but that according to the law of nations, even on the most modern notions of it, a sequestration merely for the purpose of recovering the debts, and preventing the remittance of them to the enemy, and thereby strengthening him, and weakening the government, would be allowable, and if so, surely it follows, as a matter of course

(perhaps, it would follow, without a solemn declaration), that when, in virtue of any such act, the money was paid to the government, the debtor was wholly discharged, and the government, if it thought proper not to proceed to confiscation afterwards, became itself liable.

The case cited from the Law of Evidence,(*a*) I think, is an authority substantially in point, to show the complete discharge of the debtor. "In debt upon a lease, the defendant pleaded payment, and in evidence showed, he paid it to sequestrators of the commonwealth, the plaintiff being a delinquent; and it was ruled, this was good payment to prove the issue, which was a payment to the plaintiff himself." *Anonymous*, Clayton 129; Law of Evidence (Edit. of 1744), p. 196, c. 9, c. 11. This case is certainly very strong, for it was not deemed necessary to plead it in bar, but it was admitted in evidence, upon a plea that he paid the money to the plaintiff himself. It does not appear, whether this action was tried under the commonwealth, or after the restoration. If under the former, it is more parallel to the present action. If it was tried after the restoration, it is a still stronger case, for it showed, that courts of justice thought themselves bound to protect individuals, who acted under laws of a government they deemed an usurpation, and on all occasions treated with contempt.(*b*) Besides an objection, which I shall notice presently, I can imagine but one real difference between that case and the one before us; and that is, that in England, the payment was compelled, here, *it was voluntary. I once thought that circumstance of weight, but on reflection, I consider the public faith equally pledged in one case as in the other; that the authority exercised in both is the same; and that it not only would be unjust in itself, but of dangerous example, to tell men that they should be protected under a compulsory obedience to government, but not upon a cheerful submission to it. [*270

4. My observations as to the paper money, which the necessities of this country unfortunately constrained us to use so long, had no other tendency than to show the circumstances of the fact as they really existed. As a judge, I conceive myself bound to say, that that makes no difference as to the right. The competency of such acts at that time was unquestionable; their justice depended on the degree of necessity which gave rise to them. A payment in paper money, then a legal tender, I must consider as complete and effectual a payment, at that time, as payment in gold or silver. Such was the law of the country! A law which severe necessity dictated! and by which, in the course of the war, in which many sacrifices became unavoidable, many thousand American citizens, as well as many British merchants, suffered. It is the lot of our nature to experience many evils for which we can find no remedy, and therefore, nothing can be more fallacious, than in anything of a general nature, to expect perfect exactness.

For these reasons, I am clearly of opinion, that under the acts of seques-

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(*a*) The book commonly called "The Old Law of Evidence;" originally printed in 1735, and afterwards in 1739 and 1744.[1]

(*b*) Upon consulting the Bibliotheca Legum, it appears that Clayton's reports were published in 1651, so that the decision must have been under the commonwealth.[2]

[1] The first edition of this work was published in 1717.

[2] The case cited was tried at the assizes, March 1648, before Thorpe, sergeant at law, judge of assize.

tration, and the payment and discharge, the discharge will be a complete bar in the present case, unless there be something in the treaty of peace to revive the right of the creditor against the defendant, so as to disable the latter from availing himself of the payment into the treasury, in bar to the present action.

The operation of that treaty comes, therefore, now to be considered. None can reverence the obligation of treaties more than I do; the peace of mankind, the honor of the human race, the welfare, perhaps, the being of future generations, must in no inconsiderable degree depend on the sacred observance of national conventions. If ever any people, on account of the importance of a treaty, were under additional obligations to observe it, the people of the United States surely are to observe the treaty in question. It gave peace to our country, after a war attended with many calamities, and, in some of its periods, presenting a most melancholy prospect. It insured, so far as peace could insure them, the freest forms of government, and the greatest share of individual liberty, of which, perhaps, the world has seen any example. It presented boundless views of future happiness and greatness, which almost overpower the imagination, and which, I trust, will not *271] be altogether *unrealized: the means are in our power; wisdom and virtue are alone required to avail ourselves of them. Such was the peace which was procured by the treaty now in question—a treaty which, when it shall be fully executed in all its parts, on both sides, future generations will look up to with gratitude and admiration, and no small degree of fervor towards those who had an active share in procuring it.

In proceeding to examine the treaty, with these sentiments, it may well be imagined, I do it with a reverential and sacred awe, lest by any misconstruction of mine, I should weaken any one of its provisions. The question now is, whether, under this treaty, the payment into the treasury is a bar to so much of the plaintiff's claim, as comprehends money to that amount? I shall examine this question under two divisions: 1st. Whether it would have been a bar, as the law existed, after the ratification of the treaty, and previous to the passing of the present constitution of the United States, even if the words of the treaty must be construed to comprehend such a case. 2d. Whether, under that constitution, it can now be considered as a bar.

I. My opinion, I confess, as to the first question, is, that if the treaty had plainly comprehended such cases, the plaintiff could not have recovered in a court of justice in this state, as the law stood, previous to the ratification of the present constitution of the United States. I feel, as I ought to do, great diffidence, when I am under the necessity, in the execution of my duty as a judge, of differing from the opinions of those entitled, from superior talents, and high authority, to my utmost respect. I am compelled to do so, in the present instance, but I shall, at the same time, assign my reasons for my opinion, and if, in the future course of this great cause, I can be convinced that in this, or in any other instance, I have committed an error, I shall most cheerfully acknowledge it.

The opinion I have long entertained and still do entertain, in regard to the operation of the fourth article is, that the stipulation in favor of creditors, so as to enable them to bring suits, and recover the full value of their debts, could not, at that time, be carried into effect, in any other manner, than by a repeal of the statutes of the different states, constituting the impediments

to their recovery, and the passing of such other acts as might be necessary to give the recovery entire efficacy, in execution of the treaty. I consider a treaty (speaking generally, independent of the particular provisions on the subject, in our present constitution, *the effect of which I shall afterwards observe upon) as a solemn promise by the whole nation, that [*272 such and such things shall be done, or that such and such rights shall be enjoyed. I think, the distinction taken by the plaintiff's counsel as to stipulations in the treaty, executed or executory, will enable me to illustrate my meaning, by considering various stipulations in the treaty in question.

1st. I will consider what may be deemed executed articles. In this class, I would place, the acknowledgment of independence in the first article, the permission to fish on the banks, in the third; the acknowledgment of the right to navigate the Mississippi, in the eighth. These I call executed, because, from the nature of them, they require no further act to be done.

2d. The executory (so far as they concern our part in the execution) I would place in three classes. Those which concern either, 1st, the legislative authority; 2d, the executive; 3d, the judicial.

The fourth article in question, I consider to be a provision, the purpose of which could only be effected by the legislative authority; because, when a nation promises to do a thing, it is to be understood, that this promise is to be carried into execution, in the manner which the constitution of that nation prescribes. When, therefore, a treaty stipulates for anything of a legislative nature, the manner of giving effect to this stipulation is by that power which possesses the legislative authority, and which, consequently, is authorized to prescribe laws to the people for their obedience, passing such laws as the public obligation requires. Laws are always seen, and through that medium, people know what they have to do. Treaties are not always seen; some articles (being what are called secret articles) the public never see. The present constitution of the United States affords the first instance of any government which, by saying, treaties should be the supreme law of the land, made it indispensable that they should be published for the information of all. At the same time, I admit, that a treaty, when executed pursuant to full power, is valid and obligatory, in point of moral obligation, on all, as well on the legislative, executive and judicial departments (so far as the authority of either extends, which in regard to the last, must, in this respect, be very limited), as on every individual of the nation, unconnected officially with either; because it is a promise, in effect, by the whole nation to another nation, and if not in fact complied with, unless there be valid reasons for non-compliance, the public faith is violated.

I have mentioned this great article, which concerns the legislative *department: let me now, by way of further illustration, consider [*273 one which concerns the executive. It is stipulated in one part of this treaty, "that all prisoners on both sides shall be set at liberty." I very much doubt, whether the commander-in-chief, without orders from congress (then possessing the supreme executive authority of the Union), could have been justified in releasing such prisoners as he had then in custody, after the ratification. Certainly, no inferior officer, in whose actual care they were, could, without an order, directly or indirectly, from the commander-in-chief; and yet, I can see no reason, if a treaty is to be considered as operating *de facto*, by superior authority, notwithstanding any impediment arising from

laws then in being, why the rigor of the treaty, which in that instance is said to be uncontrollable, should not be so in every other. If legislative authority is superseded, why not executive? Surely, the former is not less sacred than the latter.

In like manner, as to the judicial. It is stipulated in the 6th article, "That there shall be no future confiscations made, nor any prosecutions commenced against any person or persons, for or by reason of any part which he or they may have taken in the present war: and that no person shall, on that account, suffer any future loss or damage, either in his person, liberty or property; and that those who may be in confinement on such charges, at the time of the ratification of the treaty in America, shall be immediately set at liberty, and the prosecutions so commenced be discontinued." I apprehend, this article, so far as it respected the release of prisoners confined, could only be executed by an order from the judges of the court, having judicial authority, in the cases in question, in consequence either of an actual alteration in the law by the legislature, in conformity to the treaty (where that was necessary), or of a particular pardon by the executive; and that if a jailer, merely because the treaty was ratified, and he found this article in it, had set all such prisoners at liberty, he would have been guilty of an escape.

This reasoning, in my opinion, derives considerable weight from the practice in Great Britain. The king of Great Britain certainly represents the sovereignty of the whole nation, as to foreign negotiations, as completely as the congress of the United States ever represented the sovereignty of the Union, in that particular. His power, as to declaring war and making peace, is as unlimited as the respective authorities for those purposes in the United States. The whole nation of Great Britain speaks as effectually, and as completely, through him, as all the people of the United States can now speak through congress, as to a declaration of *war, or through the president and senate as to making peace; and of course, as they ever did through congress, under the old articles of confederation, the power certainly not being lessened. The law of nations equally applies to his treaties on behalf of Great Britain, as it can apply to any treaty made on behalf of the United States. Yet, I believe, it is an invariable practice in that country, when the king makes any stipulation of a legislative nature, that it is carried into effect by an act of parliament. The parliament is considered as bound, upon a principle of moral obligation, to preserve the public faith, pledged by the treaty, by passing such laws as its obligation requires; but until such laws are passed, the system of law, entitled to actual obedience, remains, *de facto*, as before.[1]

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I doubt not, if my time had admitted of a full search, and I could have had access to the proper books for information, that I could find many instances of this. I will, however, mention one, which I have been able to procure here. It is a transaction of this nature, so late as the commercial treaty between Great Britain and France, in 1786. The information I derive is from the Annual Registers of 1786 and 1787, which I suppose, as to this point, are correct. One article of the treaty was in these words: "The wines of France, imported directly from France to Great Britain, shall, in no case, pay any higher duties than those which the wines of Portugal

[1] See Foster *v.* Neilson, 2 Pet. 253; Jones *v.* Walker, 2 Paine 688.

now pay." This treaty was signed at Versailles, the 26th of September 1786. On the 24th of January 1787, the king met his parliament, and among other things, informed the two houses, "That he had concluded a treaty of commerce with the French king, and had ordered a copy of it to be laid before them. He recommended, as the first object of their deliberation, the necessary measures for carrying it into effect; and expressed his trust, that they would find the provisions contained in it, to be calculated for the encouragement of industry, and the extension of lawful commerce in both countries; and by promoting a beneficial intercourse between their respective inhabitants, likely to give additional permanency to the blessings of peace." On the 15th of February, the house of commons being in a committee of the whole house, Mr. Pitt, the principal minister of the crown, moved the following resolution: "That the wines of France be imported into this country upon as low duties, as the present duties paid on the importation of Portugal wines."

I have not had time to examine them all, but I doubt not, it will be found, on inspection, that there was not a single provision *in the treaty, inconsistent with former parliamentary regulations, but parliament acted upon it by a new law, calculated to give it effect. The following quotation (which is a literal one), I think, is very much to the purpose: "On the Monday following, the report of the committee upon the commercial treaty, was brought up, and on the usual motion being made, that the house do agree to the same, notice was taken of the omission of the mention of Ireland, both in the treaty and the tariff; and it was asked, whether or no she was understood to be included in it? To this question, Mr. Pitt replied, that Ireland was undoubtedly entitled to all the benefits of the treaty; but it was entirely at her own option, whether she would choose to avail herself of those advantages; for it was only to be done, by her passing such laws as should put the tariff on the same footing in that country, as it was stipulated should be done in this. Had the adoption of the treaty by Ireland been a stipulation necessary to be performed, before it could be finally concluded on in this country, then this country would have been deprived of all the benefits resulting from it, in the event of Ireland's refusal." [*275

Now, it is observable, that in speaking of this tariff, in the treaty, the king of Great Britain does not promise, that the parliament shall pass laws to such an effect; but the language is thus: "The two high contracting parties have thought proper to settle the duties on certain goods and merchandises, in order to fix invariably the footing on which the trade therein shall be established between the two nations. In consequence of which, they have agreed upon the following tariff, &c.," viz. In another part, the king of Great Britain says, "His Britannic majesty reserves the right of countervailing, by additional duties on the under-mentioned merchandises, the internal duties actually imposed upon the manufactures, or the import duties which are charged on the raw materials; namely, on all linens or cottons, stained or painted, on beer, glass-ware, plate-glass and iron." Here is no mention of the parliament, and yet, no man living will say that a bare proclamation of the king, upon the ground of the treaty, would be an authority for the levying of any duties whatever; but it must be done in the constitutional mode, by act of parliament, which affords an additional proof, that where anything of a legislative nature is in contemplation, it is

constantly implied and understood (without express words), that it can alone be effected by the medium of the legislative authority.

*276] *That this practice I have noticed, is not an occasional one, but has been constantly observed, I think, is highly probable, from this circumstance; that if treaties were considered in that country as *ipso facto* repealing all laws inconsistent with them, and imposing new ones, they ought to be bound up with the statutes at large (which they never have been); otherwise, the publication would be at least incomplete, if not deceitful.

These examples from Great Britain I consider of very high authority, as they are taken from a kingdom equally bound by the law of nations as we are; possessing a mixed form of government as we do; and, so far as common principles of legislation are concerned, being the very country from which we derive the rudiments of our legal ideas.

But I must admit, that there is also a very high authority, and to which we naturally should be more partial, against this construction. It is the authority of the congress of the United States, in the year 1787. It is an authority derived from an unanimous opinion of that truly respectable body, conveyed in a circular letter from congress to the different states on this very subject. I bow with proper difference to that great authority: but I should be unworthy of the high station I hold, if I did not speak my real sentiments as a judge, uninfluenced by any authority whatsoever. It is certain, that in this particular, congress were not exercising a judicial power; and therefore, the opinion is not conclusive on any court of justice. I feel, however, some consolation in differing from an opinion for which so much respect must, and ought to be entertained, by reflecting that though this was the unanimous opinion of congress, it was not the unanimous opinion of the people of the United States. So far from it, that I believe no suit was ever maintained in any court in the United States, merely on the footing of the treaty, when an act of the legislature stood in the way. It was to remove the obstacle arising from such an opinion, that congress recommended the repeal of all acts inconsistent with the due execution of the treaty. And I must, with due submission, say, that in my opinion, without such a repeal, no British creditor could have maintained a suit in virtue of the treaty, where any legislative impediment existed, until the present constitution of the United States was formed.

II. The article in the constitution concerning treaties I have always considered, and do now consider, was in consequence of the conflict of opinions I have mentioned on the subject of the treaty in question. It was found, in this instance, as in many others, that when thirteen different legislatures were necessary to act in unison on many occasions, it was in vain to expect that they would always agree to act as congress might think it their duty to

*277] require. Requisitions formerly *were made binding in point of moral obligation (so far as the amount of money was concerned, of which congress was the constitutional judge), but the right and the power being separated, it was found often impracticable to make them act in conjunction. To obviate this difficulty, which every one knows had been the means of greatly distressing the Union, and injuring its public credit, a power was given to the representatives of the whole Union to raise taxes, by their own authority, for the good of the whole. Similar embarrassments had been

found about the treaty: this was binding in moral obligation, but could not be constitutionally carried into effect (at least in the opinion of many), so far as acts of legislation then in being constituted an impediment, but by a repeal. The extreme inconveniencies felt from such a system dictated the remedy which the constitution has now provided, "that all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and that the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." Under this constitution, therefore, so far as a treaty constitutionally is binding, upon principles of moral obligation, it is also, by the vigor of its own authority, to be executed in fact. It would not otherwise be the supreme law, in the new sense provided for, and it was so before, in a moral sense.

The provision extends to subsisting as well as to future treaties. I consider, therefore, that when this constitution was ratified, the case as to the treaty in question stood upon the same footing, as if every act constituting an impediment to a creditor's recovery had been expressly repealed, and any further act passed, which the public obligation had before required, if a repeal alone would not have been sufficient.

Before I go to the consideration of the words of the treaty itself, I think it material to say a few words as to the operation which an actual repeal would have had. I believe, no one will doubt, that everything done under the act, while in existence, so far as private rights, at least, were concerned, would have been unaffected by the repeal. If a statute requires a will of lands to be executed in the presence of two witnesses, and a will is actually executed in that manner, and the statute is afterwards repealed, and three witnesses are made necessary, the will executed in the presence of two others, when the former statute was in being, would be undoubtedly good; and if I am not mistaken, a will made according to a law in being has been held good, even though the devisor died after an alteration of it. Of this, however, I am not sure; but the general position, I imagine, will not be questioned.[1]

*Let us now see the words of the treaty. They are these: "It [*278 is agreed, that creditors on either side shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all *bonâ fide* debts heretofore contracted." The meaning of this provision may, perhaps, be better considered, by an analyzation of its parts, so far as they concern the question before us.

1. *Creditors:* There can be no creditor, without two correlatives, a debtor and a debt. *Primâ facie*, therefore, if a debtor has been discharged, he is not the person whom any other person can sue as a creditor. This probably may be fairly applied to the present defendant, who, as a debtor, was discharged by legal authority. With regard to the debt, *that*, in the present instance, was not extinguished even by the act of the state, because the right of the creditor to the money was not taken away. The debt, therefore, remains, but not from the same debtor. The state may be considered as substituting itself, in some measure, in the place of the debtor.

[1] See Mullen *v.* McKelvy, 5 Watts 399; Greenough, 11 Penn. St. 489; Barr *v.* Graybill, Murry *v.* Murry, 6 Id. 353; Greenough *v.* 13 Id. 396; Shinkle *v.* Crock, 17 Id. 159.

The full effect of that substitution, I am not now to consider, nor would it be proper for me, at present, to give an opinion upon it. The question is not, whether the creditor is entitled to his money, or in what manner, but whether he is entitled to recover it against the present defendant.

2. *No lawful impediment:* These words must be construed as relative to the former; for the whole clause must be taken together. Therefore, where there are a creditor and a debtor, there is to be no lawful impediment to the former recovering against the latter. If the present defendant be not a debtor to the plaintiff, how can the treaty operate as against him? The words "lawful impediment," may admit of two senses. One, "any lawful impediment whatsoever, arising from any act done to the prejudice of a creditor's right, during the war." I add that restriction, "during the war," because the rules of construction as to treaties, must narrow the words as to the object, the war, the affairs of which the treaty of peace was intended to operate upon. Or, "any impediment arising from any law then in being, or thereafter to be passed, to the prejudice of a creditor's right." The latter, I think, is not an unnatural construction, and would give the words great operation, and I think is to be preferred to the former, for the following reasons:

1st. This would stipulate for what each legislature of the Union would
*279] rightfully and honestly do, relinquish public claims * to debts existing before the war, and which otherwise might have stood upon a precarious footing; for though peace alone would do away a common-law disability to sue, yet, I apprehend, it would not *ipso facto* remove a disability expressly created by statute, much less extinguish any public right acquired under any act of confiscation.

2d. Though congress possibly might, as the price of peace, have been authorized to give up even rights fully acquired by private persons during the war, more especially, if derived from the laws of war only, against the enemy, and in that case, the individual might have been entitled to compensation from the public, for whose interests his own rights were sacrificed; yet, nothing but the most rigorous necessity could justify such a sacrifice; such a sacrifice is not to be presumed even to have been intended, under the operation of general words, not making such a construction unavoidable. For, it is reasonable to infer, that in such a case special words would have been used to obviate the least colorable doubt. Thus (for example), if it was stipulated in a treaty of peace between two European powers, "that all ships taken during the war should be restored," I imagine, this would not be construed to include ships taken by privateers, and legally condemned during the war, unless it had, in fact, happened that no other ships had been taken, and then, I suppose, they would be understood as comprehended, and their own nation must have indemnified them.

3d. If, according to the practice in Great Britain, in conformity to the law of nations, and upon the principles of a mixed government, in case any impediments had then existed, by acts of parliament in Great Britain, to the recovery of American debts, such impediments could only have been removed by a repeal, we may presume the British negotiator had reason to conclude, that the lawful impediments in this country could only be removed in the same manner; and if so, may we not fairly say, that the impediments in view could be no other than such as the legislatures in the respective coun-

tries could do away by a repeal, or might by subsequent laws enact? If they wanted a further act of legislation, grounded not merely on ordinary legislative authority, but upon power to destroy private rights acquired under legislative faith, long since pledged and relied on, very special words were proper to effect that object, and neither in one country nor the other, could it have been effected, with the least color of justice, but by providing at the same time the fullest means of indemnification.

4th. This construction derives great weight, from the recommendatory letter of congress, I before mentioned, for I will venture to say, had the act they recommended been passed in *the state, in the very words they recommended, they would not have had efficacy enough to [*280 destroy those payments as a bar. And yet, if congress thought such a case ought to have been comprehended, I presume, they would have recommended a special provision, clearly comprehending such cases, and accompanied with a full indemnity.

I said, the words of the treaty would have great operation, without giving them the very rigorous one contended for. And that will more fully appear when we take up the remaining words, viz.:

3. "To the recovery of the full value, in sterling money, of all *bonâ fide* debts heretofore contracted." The operation (exclusive of these payments) would, therefore, be this: 1st. All creditors whose debts had not been confiscated, or where the confiscations were not complete, and no payments had been made, would have a right of recovering their debts. 2d. Perhaps, all creditors, whether their debts were confiscated or not, or whether confiscations were complete or not, excepting those only from whom the government had received the money, would be entitled to recover, because, undoubtedly, the respective legislatures were competent to restore all these. 3d. Another object, of no small importance, was to secure the payment of all these debts, in sterling money, so that the creditors might not suffer by paper currency, either then in existence, or that might be thereafter emitted.

When these general words, therefore, can comprehend so many cases, all reasonable objects of the article, I cannot think, I am compelled, as a judge, and therefore, I ought not to do so, to say, that the general words of this article shall extinguish private as well as public rights. I hold public faith so sacred, when once pledged, either to citizens or to foreigners, that a violation of that faith is never to be inferred as even in contemplation, but when it is impossible to give any other reasonable construction to a public act. I do not clearly see, that it was intended in the present instance. I cannot, therefore, bring myself to say, that the present defendant, having once lawfully paid the money, shall pay it over again. If the matter be only doubtful, I think, the doubt should incline in favor of an innocent individual, and not against him. I should hope that the present plaintiff will still receive his money, as his right to the money certainly has not been divested, but I think, for all the reasons I have given, he is not entitled to recover it from the present defendant.

My opinion, therefore, on the whole of this case is, that judgment ought to be given for the defendant upon the second plea; upon the third, fourth and fifth, for the plaintiff.

*Wilson, Justice.—I shall be concise in delivering my opinion, as [*281 it depends on a few plain principles.

If Virginia had a power to pass the law of October 1777, she must be equally empowered to pass a similar law, in any future war; for the powers of congress were, in fact, abridged by the articles of confederation; and in relation to the present constitution, she still retains her sovereignty and independence as a state, except in the instances of express delegation to the federal government.

There are two points involved in the discussion of this power of confiscation: the first arising from the rule prescribed by the law of nations; and the second arising from the construction of the treaty of peace.

When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement. By every nation, whatever is its form of government, the confiscation of debts has long been considered disreputable: and we know, that not a single confiscation of that kind stained the code of any of the European powers, who were engaged in the war which our revolution produced. Nor did any authority for the confiscation of debts proceed from congress (that body, which clearly possessed the right of confiscation, as an incident of the powers of war and peace), and therefore, in no instance can the act of confiscation be considered as an act of the nation.

But even if Virginia had the power to confiscate, the treaty annuls the confiscation. The fourth article is well expressed to meet the very case: it is not confined to debts existing at the time of making the treaty; but is extended to debts heretofore contracted. It is impossible, by any glossary, or argument, to make the words more perspicuous, more conclusive, than by a bare recital. Independent, therefore, of the constitution of the United States (which authoritatively inculcates the obligation of contracts), the treaty is sufficient to remove every impediment founded on the law of Virginia. The state made the law; the state was a party to the making of the treaty: a law does nothing more than express the will of a nation; and a treaty does the same.

Under this general view of the subject, I think, the judgment of the circuit court ought to be reversed.

Cushing, Justice.—My state of this case will, agreeable to my view of it, be short. I shall not question the right of a state to confiscate debts. Here is an act of the assembly of Virginia, passed in 1777, respecting debts; which, contemplating to prevent the enemy deriving strength by the receipt of them during the war, provides, that if any British debtor will pay his
*282] debt into the loan-office, obtain a certificate and *receipt as directed, he shall be discharged from so much of the debt. But an intent is expressed in the act not to confiscate, unless Great Britain should set the example. This act, it is said, works a discharge and a bar, to the payer. If such payment is to be considered as a discharge, or a bar, so long as the act had force, the question occurs—was there a power, by the treaty, supposing it contained proper words, entirely to remove this law, and this bar, out of the creditor's way? This power seems not to have been contended against, by the defendant's counsel; and indeed, it cannot be denied; the treaty having been sanctioned, in all its parts, by the constitution of the United States, as the supreme law of the land.

Then arises the great question, upon the import of the fourth article of

the treaty: And to me, the plain and obvious meaning of it goes to nullify, *ab initio*, all laws, or the impediments of any law, so far as they might have been designed to impair or impede the creditor's right or remedy against his original debtor. "Creditors on either side shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all *bonâ fide* debts heretofore contracted."

The article, speaking of creditors, and *bonâ fide* debts heretofore contracted, plainly contemplates debts, as originally contracted, and creditors and original debtors; removing out of the way all legal impediments; so that a recovery might be had, as if no such laws had particularly interposed. The words—"recovery of the full value, in sterling money," if they have force or meaning, must annihilate all tender laws, making anything a tender but sterling money; and the other words, or, at least, the whole taken together, must, in like manner, remove all other impediments of law aimed at the recovery of those debts.

What has some force to confirm this construction, is the sense of all Europe, that such debts could not be touched by states, without a breach of public faith: and for that, and other reasons, no doubt, this provision was insisted upon, in full latitude, by the British negotiators. If the sense of the article be as stated, it obviates, at once, all the ingenious, metaphysical reasoning and refinement upon the words, debt, discharge, extinguishment, and affords an answer to the decision made in the time of the *interregnum*—that payment to sequestrators, was payment to the creditor.

A state may make what rules it pleases; and those rules must necessarily have place within itself. But here is a treaty, the supreme law, which overrules all state laws upon the subject, to all intents and purposes; and that makes the difference. Diverse objections are made to this construction: that it is an odious one, and as such, ought to *be avoided: that [*283
treaties regard the existing state of things: that it would carry an imputation upon public faith: that it is founded on the power of eminent domain, which ought not to be exercised, but upon the most urgent occasions: that the negotiators themselves did not think they had power to repeal laws of confiscation; because they, by the 5th article, only agreed, that congress should recommend a repeal to the states.

As to the rule respecting odious constructions; that takes place where the meaning is doubtful, not where it is clear, as I think it is, in this case. But it can hardly be considered as an odious thing, to enforce the payment of an honest debt, according to the true intent and meaning of the parties contracting; especially, if, as in this case, the state, having received the money, is bound in justice and honor, to indemnify the debtor, for what it in fact received. In whatever other lights this act of assembly may be reviewed, I consider it in one, as containing a strong implied engagement on the part of the state, to indemnify every one who should pay money under it, pursuant to the invitation it held out. Having never confiscated the debt, the state must, in the nature and reason of things, consider itself as answerable to the value. And this seems to be the full sense of the legislators upon this subject, in a subsequent act of assembly; but the treaty holds the original debtor answerable to his creditor, as I understand the matter. The state, therefore, must be responsible to the debtor.

These considerations will, in effect, exclude the idea of the power of

eminent domain; and if they did not, yet there was sufficient authority to exercise it, and the greatest occasion that perhaps could ever happen. The same considerations will also take away all ground of imputation upon public faith.

Again, the treaty regarded the existing state of things, by removing the laws then existing, which intended to defeat the creditor of his usual remedy at law.

As to the observations upon the recommendatory provision of the 5th article; I do not see that we can collect the private opinion of the negotiators, respecting their powers, by what they did not do: and if we could, this court is not bound by their opinion, unless the reasons on which it was founded, being known, were convincing. It would be hard upon them, to suppose they gave up all, that they might think they strictly had a right to give up. We may allow somewhat to skill, policy and fidelity.

With respect to confiscations of real and personal estates, which had been completed, the estates sold, and perhaps, passed through the hands of a number of purchasers, and improvements made upon real estates, by the then possessors; they knew, that to give them up absolutely, must create much confusion in this *country. Avoiding that (whether from an apprehension of want of power does not appear from the instrument), they were led only to agree, that congress should recommend a restitution, or composition. The 4th article, which is particularly and solely employed about debts, makes provision, according to the doctrine then held sacred by all the sovereigns of Europe.

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Although our negotiators did not gain an exemption for individuals, from *bonâ fide* debts, contracted in time of peace, yet they gained much for this country: as rights of fishery, large boundaries, a settled peace, and absolute independence, with their concomitant and consequent advantages: all which, it might not have been prudent for them to risk, by obstinately insisting on such exemption, either in whole or in part, contrary to the humane and meliorated policy of the civilized world, in this particular.

The 5th article, it is conceived, cannot affect or alter the construction of the 4th article. For, first, it is against reason, that a special provision made respecting debts by name, should be taken away immediately after, in the next article, by general words, or words of implication, which words, too, have, otherwise, ample matter to operate upon. 2d. No implication from the 5th article can touch the present case, because that speaks only of actual confiscations, and here was no confiscation. If we believe the Virginia legislators, they say, "We do not confiscate—we will not confiscate debts, unless Great Britain sets the example"—which it is not pretended she ever did.

The provision, that "creditors shall meet with no lawful impediment," &c., is as absolute, unconditional and peremptory, as words can well express, and made not to depend on the will and pleasure, or the optional conduct, of any body of men whatever.

To effect the object intended, there is no want of proper and strong language; there is no want of power, the treaty being sanctioned as the supreme law, by the constitution of the United States, which nobody pretends to deny to be paramount and controlling to all state laws, and even state constitutions, wheresoever they interfere or disagree. The treaty, then, as to the point in question, is of equal force with the constitution itself; and

certainly, with any law whatsoever. And the words, "shall meet with no lawful impediment," &c., are as strong as the wit of man could devise, to avoid all effects of sequestration, confiscation, or any other obstacle thrown in the way, by any law, particularly pointed against the recovery of such debts.

I am, therefore, of opinion, that the judgment of the circuit court ought to be reversed.

*By the Court.—All and singular the premises being seen by the court here and fully understood, and mature deliberation had thereon, [*285 because it appears to the court now here, that in the record and process aforesaid, and also in the rendition of the judgment aforesaid, upon the demurrer to the rejoinder of the defendants in error, to the replication of the second plea, it is manifestly erred, it is considered, that the said judgment, for those errors and others in the record and process aforesaid, be revoked and annulled, and altogether held for nought, and it is further considered by the court here, that the plaintiff in error recover against the defendants, 2976*l.* 11*s.* 6*d.* good British money, commonly called sterling money, his debt aforesaid, and his costs by him about his suit in this behalf expended, and the said defendants, in mercy, &c. But this judgment is to be discharged by the payment of the sum of $596, and interest thereon, to be computed after the rate of five per cent. *per annum*, from the 7th day of July 1782, until payment, besides the costs, and by the payment of such damages as shall be awarded to the plaintiff in error, on a writ of inquiry to be issued by the circuit court of Virginia, to ascertain the sum really due to the plaintiff in error, exclusively of the said sum of $596, which was found to be due to the plaintiff in error, upon the trial in the said circuit court, on the issue joined upon the defendant's plea of payment, at a time when the judgment of the said circuit court on the said demurrer was unreversed and in full force and vigor; and for the execution of the judgment of the court, the cause aforesaid is remanded to the said circuit court of Virginia.

Judgment reversed.

Den Onzekeren.

Geyer *et al. v.* Michel *et al.*, and The Ship Den Onzekeren.

Neutrality.

The mere replacement of the guns of a foreign privateer, in a neutral port, is not an augmentation of her force.[1]

This was a writ of error to the Circuit Court for the district of South Carolina; and on the return of the record, the following pleadings appeared:

*On the 2d of February 1795, a libel was filed by the plaintiffs in error, stating, that the ship Den Onzekeren and her cargo, on the 16th [*286 of November 1794, were, and ever since had been, the property of Spooner

[1] The Phœbe Anne, *post*, p. 319. As to what amounts to the augmentation of the force of a foreign privateer in our ports, see United States *v.* Grassen, 3 W. C. C. 65; The Nancy, Bee 73; The Brothers, Id. 76; The Betty Cathcart, Id. 392.

& Springer, and other citizens of the United Netherlands, owners and freighters of the same: that peace and amity subsisted between the United States and the United Netherlands, and that a treaty between the two powers was concluded on the 8th of October 1782, which was in full force: that the Den Onzekeren sailed with her cargo from Demerara, in the West Indies, bound to Middleburg, in Holland, and in the course of her voyage, on the 16th of November 1794, was captured on the high seas, in lat. 27° N., and long. 63° W., by a French armed ship, called the Citizen of Marseilles, commanded by Captain Victor Chabert: that the said armed ship, pretended to be called the Citizen of Marseilles, was fitted out, armed and equipped for war, in the port of Philadelphia, in the United States, contrary to the laws of nations, &c.; that she went to sea, not having a legal commission to cruise; and that at the time of capturing the said ship Den Onzekeren, she was bound to Cayenne, to obtain a commission to cruise against the enemies of the French republic: that the Citizen of Marseilles was armed, equipped and fitted out for war at Philadelphia, or some other place in the river or bay of Delaware, in Pennsylvania, New Jersey or Delaware, contrary to the laws of neutrality, &c. That she was armed, equipped and fitted out for war, while in Philadelphia, with twelve guns, and military stores equal to that force; but that, after quitting the said port, to wit, in the river of Delaware, within the jurisdiction of the United States, her force was added to and augmented, by opening certain other port-holes, and mounting certain other cannon, to wit, sixteen guns, which she had concealed in her hold, and brought, or procured to be brought, from the port of Philadelphia; and by providing herself with other military stores, contrary to the laws of neutrality, &c.: that the captain, officers and crew of the said ship Citizen of Marseilles, could not legally have any commission, power or authority from any prince or state, for a vessel fitted out, armed and equipped for war in the United States; nor for a vessel whose force had been augmented in the United States, by adding to the number or size of her guns, or by addition thereto of any equipment solely applicable to war, much less could they have authority to carry and detain her prizes in the ports of the United States: that the said Victor Chabert, pretended to have a lawful commission from the French republic, which the libellants prayed he might be obliged to show and file; but which said pretended commission (if any there were), *287] having been issued to a vessel, then actually being fitted, armed *or equipped as aforesaid, or whose force had been augmented in the United States, was null and void: That the whole, part, or several of the crew of the Citizen of Marseilles, consisted of American citizens, or inhabitants, enlisted and shipped in the United States: That if the said armed ship had been legally commissioned, previous to her entering the port of Philadelphia, the subsequent augmentation of her force in the United States, rendered her commission null and void, to all intents and purposes: And that the courts of the United States were bound to restore the prizes made by a vessel, whose force has been augmented within the neutral limits thereof. The libel, therefore, concluded, by praying restitution and damages.

On the 4th of March 1795, a claim sworn to in open court, was filed by John Michel, prize-master of the said ship, Den Onzekeren and her cargo, styling himself a native Frenchman, and citizen of the French republic, in behalf of himself, Antonie François Planche, a native Frenchman, now resi-

Den Onzekeren.

dent at Philadelphia, owner of the private armed vessel the Citizen of Marseilles; and in behalf of the officers, mariners and crew, or persons interested in the said vessel of war, being all French citizens. After protesting that the said libel was vexatious, and not good and sufficient in law, the claim proceeded to state, that he, the said John Michel, the said A. F. Planche, and the officers and crew, and persons interested in the said ship Citizen of Marseilles, and her said prize, were all French citizens: that the said ship Citizen of Marseilles, was a French vessel, was not originally armed and equipped, or fitted for war at Philadelphia, or any other port or place of the United States, but she was fitted, armed or equipped for war, at St. Domingo, and was duly commissioned for war, under the authority of the French republic, by Monge, minister of the marine department in France, by a commission issued at the Cape, as appears by a certified copy of the commission of the said Planche, dated at ———, on the ——— day of ————, in the year of our Lord, one thousand seven hundred and ————, filed agreeable to the demand of the libellant: and that the capture was made in open war, on the high seas, and without the neutral limits of the United States. To the claim was added, a plea of the 17th article of the treaty of amity and commerce between the United States and France, in bar to the libel; and a prayer that the libel be dismissed with costs and damages.

The libellant filed a replication, in which, after the usual salvos and protestations, it was stated, that the force of the ship Citizen of Marseilles, was increased and augmented within the neutral limits of the United States, to wit, in the port of Philadelphia, and in the bay and river Delaware, by adding to *the number of her guns, and by additions thereto of certain gun-carriages, and other equipments, [*288 solely applicable to war; by preparing for opening, and actually opening, certain port-holes on her main-deck, abaft the main-chains, and also opening other port-holes in her quarter-deck, and adding to the number of her gun-carriages, and furniture and tackle for gun-carriages, in order to the mounting of other and a greater number of guns than she had mounted at the time of her arrival in the United States, or in the port of Philadelphia: That the crew of the said armed ship was not wholly Frenchmen, as stated in the answer, but was composed partly of native Americans, partly of Englishmen, Irishmen and Scotchmen, and other citizens of the United States: That the said pretended commission, a copy of which was exhibited, said to be given by Monge, minister of marine of the French republic, but which appeared blank as to its date, was not duly issued at St. Domingo, to the said A. F. Planche, but was illegally and improperly delivered and obtained in the United States, on condition of his, the said A. F. Planche, or the said Victor Chabert, repairing to some part of the French republic to perfect the same: That the pretended commission, marked B, pretended to be issued by Liger Felicite Sonthonax, and pretended to be dated the 30th of September 1793, if ever it was really issued, was void and of none effect, the national assembly of the French republic having annulled all acts and authorizations given by the said Santhonax: And that, by the respondent's own showing, it appeared by a certificate signed Petry, at Philadelphia, the 27th of Vendemaire, 3d year of the French republic (18th October 1795), that on a change of the commander of the said ship, the said Victor Chabert was expressly required to repair to some port of the republic, for the purpose of

perfecting the said blank commission first mentioned. The libellant concluded with a demurrer to the plea of the 17th article of the treaty of amity and commerce between the United States and France, in bar; and repeated the prayer of the libel for restitution.

On the above pleadings, a term probatory was obtained, several witnesses were examined at Charleston, and a commission issued to certain commissioners in Philadelphia to examine other witnesses. The commission being executed and returned, the cause was argued, and the district judge, on the 27th of April 1795, by his final sentence, decreed restitution of the ship Den Onzekeren and her cargo, with costs; but without damages, on the ground of augmentation of force only. (*a*)

(*a*) The decree of the district judge, pronounced in the case of Moodie *v.* The Betty Cathcart[1] (on a libel for restitution of a prize, owned by British subjects, and captured by the same privateer) proceeded *upon the same facts, and of course, decided the case reported. I have been favored with a copy of that decree, and I presume, the insertion of it here will be acceptable to the profession. In justice to the judge, however, it is proper to premise, that new evidence was given to the circuit court, who reversed his decree.

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Bee, District Judge.—The cause before the court, and in which I am now about to pronounce my decree, is a cause of considerable importance, as well with respect to the circumstances of the case, as the value of the property. It will not be necessary for me to recite at length the whole of the pleadings and arguments that have been adduced. The facts stated in the libel are partly admitted, and partly denied. The capture of the Betty Cathcart, on the high seas, out of the jurisdictional limits of the United States, and the property of the vessel and cargo as belonging to British subjects, are admitted on all hands. It is admitted also, that at the time of the arrival of the Citizen of Marseilles, in Philadelphia, she was an armed ship, and had a commission to cruise against the enemies of France.

An exception was taken to the commission, on two grounds: 1. That all the commissions issued by Santhonax and Polverel, had been recalled. 2. That the certificate from Mr. Petry, the consul at Philadelphia, was only conditional.

The only points, then, which it is necessary for me to investigate, are: 1. Whether the force of this vessel was increased and augmented within the limits of the United States. 2. Whether such increase is a breach of the laws of neutrality and nations; and 3. What is required by the laws of neutrality, in such cases, or whether the 17th article of the treaty is a suspension thereof as to the United States.

On the 1st point, viz., whether the force of the Citizen of Marseilles was increased and augmented, within the United States, a number of witnesses have been examined, and a variety of other evidences adduced. The proofs in this cause have been very properly divided by one of the counsel, into four classes or sets. I will, therefore, consider them in that order also. 1. The proofs which relate to the vessel at Cape François, before she sailed for Philadelphia. 2. Those which relate to her, whilst at Philadelphia. 3. Those after she left the city, and previous to her going to sea. 4. Those immediately after she got to sea.

To the first point, Mr. Boisseau only speaks of her as an armed vessel generally, to the month of June 1793, but does not specify any paticulars. W. Charrie, who was on board two days, about this period, speaks of her as an armed vessel, with ten ports on each side, and guns in them, and also as having guns in her hold—but no particular number. These are the only witnesses to this point.

If we proceed now to her appearance at Philadelphia, we find a contrariety of evidence. General Stewart, in his letter to the collector, 3d of September 1794, mentions

[1] Bee 392.

Den Onzekeren.

From this decree, an appeal was interposed, and a writ of error was issued out of, and returnable to, the circuit court, which sat at

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her as having at her arrival sixteen nine and ten six pounders; but he does not say whether they were mounted or not. He says, she will only mount twelve guns at going out, and carry the others in her hold. In his letter to the secretary at war, dated the 14th October 1794, he *refers to the above, and also states the different reports of Mr. Milnor, [*290
one of the deputy-inspectors of the port, to him. The first, on the 30th of September 1793. He adds, that the ship arrived last autumn, with sixteen nine and ten six pounders, but will only mount twelve guns, which she brought in that situation—the others she is to carry in her hold. On the 14th of October, General Stewart visited her again, and says, he finds no addition to the armament, she was reported, and had on her arrival, viz., ten six pounders on the main-deck, and two on her quarter-deck and the rest of the guns in the hold. No new ports had been opened since her arrival. General Stewart does not say, who reported her thus, on her arrival. It could not be Mr. Milnor, for he, on the 14th of October, in his reports, says, "having examined the ship called the Citizen of Marseilles, on her arrival in port, I again examined her this day, and find no addition to her armament," &c. The same number of guns are mentioned, that she had on her arrival. His other certificate, which appears from General Stewart's letter to be dated on the 30th of September 1793, and made to him, of the then actual armament of the ship that day, the day of her arrival, says—"boarded the privateer ship the Citizen of Marseilles, commanded by Planche, twelve six pounders mounted and three not mounted, with other warlike apparatus, fifty-six men." By comparing the dates and extracts in this exhibit, it plainly appears, there is some mistake amongst the officers at that port. Mr. Milnor, on the 30th of September 1793, the day she arrived, boarded her, and says she had twelve six pounders mounted, and three not mounted; he also visited her on the 14th of October 1794, and found no addition to her armament, the same number of guns being mounted.

This evidence, from the report of the officers of the port, clearly proves that the ship, on her arrival, had only twelve guns mounted—how many others there were on board, not mounted, must be left to the officers to settle, as I cannot do it from the evidence adduced. Mr. Harrison also fixed to ten on her main-deck, and two or four on her quarter-deck. Michael Williams says she had but five of a side on her main-deck, and two on her quarter-deck. John Grenion, who sailed in the vessel from the Cape to Philadelphia, says she had only five of a side on the main-deck, and one on each side on the quarter-deck, and that there were no more port-holes open than guns. Captain Montgomery, of the revenue cutter, who saw her at a distance, at her first arrival, supposed her to have ten ports of a side, but whether all real, or some painted, he could not say.

From the whole of this evidence, then, it clearly appears to me, that the ship, at her arrival, had only twelve guns mounted, and none in her hold. If we now advert to the number of ports which were open, either at her arrival, or at her leaving the port of Philadelphia, we find she had the same number as of guns mounted. All the witnesses who were near her, swear positively, that there were none abaft the main-chains—though several say, the ports were framed within, but planked over on the outside. Harrison's evidence is conclusive—because he mentions his application to the governor for permission to open more ports, which was refused—and Captain Chabert's reply, that he did not wish to go contrary to the laws of the country, and that as he had carpenters of his own, he could open them elsewhere, and at another place, is fully sufficient to fix this point.

The third class of evidence, is such as relates to the vessel after her leaving the city, and previous to her proceeding to sea. And from a careful revision of this, it does appear, that a number of ports were opened and guns mounted, in the River Delaware. Quin swears *positively to fourteen. Powel says, there were three carpenters at [*291
work to cut the ports through, and fit them—himself, Stevenson and another; and

Columbia, on the 12th of May 1795. On the return of the record, a commission was issued to certain commissioners at Philadelphia, to examine

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that each took one for a day's work. It could not, therefore, take more than five days to effect this, and from the latter end of October to the 4th of November, there was sufficient time to complete it. The evidence of these two witnesses has been impeached in several particulars, but it really appears to me, that there are so many proofs and circumstances stated, that corroborate their testimony to most of the points they speak of, that there is not sufficient ground for me to repel the evidence they have given *in toto*. The witnesses who prove the increase of force in the river, are Quin, who says she mounted 28 guns—Captain Montgomery says 26 or 28. Mr. Kevan says, a whole tier, fore and aft. All then speak of the vessel down the river, and before she went to sea.

The 4th and last class is that relative to her, immediately after her going to sea. One of the counsel for the claimant objected to the testimony of all the witnesses on board the prize, as being interested, and of course, incompetent; but he could not be serious in this, because the constant uniform practice of the civil law courts, has been to admit such evidence to certain points: In Collectanea Juridica, page 135, is the famous case so often resorted to as fixing the law. In this case, it is expressly laid down, that the evidence to acquit or condemn, must, in the first instance, come from the vessel taken, the persons on board, and the examination on oath of the master and other officers.

The evidence they all give is reducible to two points. 1st. The appearance and force of the ship, both as to guns and men. 2d. The intelligence obtained from the crew. As to the last, I think little attention should be paid to the chit-chat on board one of these privateers, and very frequently the witnesses don't understand the language they hear spoken, and report from second-hand: but they certainly are competent witnesses as to the number of guns and crew that were on board at the time of the capture; and in this they all agree, that she mounted 28 guns when she took the Den Onzekeren, out of which she took two guns to make 30, and several of them say, she could mount 34 guns, having ports cut for that number.

Captain Raymon Sanchez, captain of the brig Dichoso, taken on the 6th of November, two days after the vessel left the Delaware, says she mounted 28. Lemuel Janson, of the Den Onzekeren, says she mounted 28 guns. Jacob Vix, a sailor on board the Dutch ship, says the same. John Hallrick, seaman on board the Betty Cathcart, says the same. Charles McDonald, mate of this ship, says she had 28 guns, on the 11th of November, when they took him. Hans Evertson, mate of the Den Onzekeren, taken the 16th of November, says she had then 28 guns mounted. Adrianus Pappagaay, the doctor of the Dutch ship, says she had 28 guns. Here, then, is such con current testimony of the increased force of this vessel, that it is impossible not to admit it; and if admitted, it carries with it the most unequivocal proof that the ship the Citizen of Marseilles, did increase her force of guns mounted and prepared for use, within the territory of the United States.

There was no positive proof as to the new gun-carriages being actually carried on board; neither was there any of their being on board when she first arrived. Mr. Harrison mentions the repairing of some, and where old ones were rotten, the replacing them. If this was solely for those guns that were actually mounted at her arrival, I see nothing against it—it could not be called an *augmentation of her force—neither is there
*292] any evidence sufficient to convince my mind that the crew of the Citizen of Marseilles, at her going out, was increased, or if increased, in any way that could be said to infringe our neutrality. Though some of the witnesses say they were not all native Frenchmen, from their language, yet they all agree, that the strength of the crew were so, the others were a mixture, there is no proof of any one American citizen being on board, unless Quin was; as to other nations, I know of no right we have to control their seamen. The 27th article of our treaty with Holland, which, by the 3d article of the treaty with France, in my opinion, is confirmed to them also, admits the carrying away seaman or other natives or inhabitants of the respective nations on board of any of their vessels, whether of merchandise or war.

witnesses in the cause, and the hearing was adjourned to the next circuit court, which sat at Charleston, on the 25th of October following. At that term, the commissioners having made return of their proceedings, *the circuit court, after a hearing on the new evidence, reversed the decree of the district court. [*293

On the decree of the circuit court, the present writ of error was brought; and the following facts appeared from the evidence and exhibits transmitted with the record:

The Citizen of Marseilles had arrived from Marseilles, at the Cape, in the month of June 1793, at which time she was armed, having ten port-holes on each side of the main-deck, and a number of cannon in her hold. It was soon afterwards proposed, to employ the vessel in carrying certain deputies of the Colony to France; and with that view her warlike equipments were increased, and the captain received a commission, signed in Paris, by

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From a careful review of the evidence produced in this cause, it appears clearly to me, that the ship Citizen of Marseilles, at her arrival in Philadelphia, mounted only twelve guns and had others, but the precise number is not ascertained, in her hold; that at the time of her leaving the river, she had twenty-six or twenty-eight mounted; that Captain Chabert having been refused permission to open new ports, in Philadelphia, and declaring he did not wish to infringe the laws, and having afterwards done so, within the territories of the United States, could not and does not plead ignorance as an excuse. Whatever he did, was with his eyes open, and being forewarned, he must abide the consequences.

It remains now for me to inquire into the law arising from the foregoing facts, and the power and duty of this court thereupon. There cannot be a doubt, that if a prosecution was instituted against Captain Chabert, or any of the persons concerned in increasing, augmenting, or procuring to be increased or augmented, the force of the vessel, under the act of June last, but that a conviction must follow. There, a penalty of fine and imprisonment is declared, as a punishment for a breach of the sovereignty and neutrality of the United States, and this by a municipal law of our own: but what does the law of nations require further? I have, in the course of the last summer, delivered my opinion on this question so fully in this court, that I need only now repeat some part of the law then laid down. In the case of Jansen *v.* Talbot,[1] I stated that this court, by the law of nations, has jurisdiction over captures made by foreign vessels of war, of the vessels of any other nation, with whom they are at war, provided such vessels were equipped here, in breach of our sovereignty and neutrality, and the prizes are brought *infra præsidia* of this country. By the law of nations, no foreign power, its subjects or citizens, has any right to erect castles, enlist troops, or equip vessels of war, in the territory or ports of another. Such acts are breaches of neutrality, and may be punished by seizing the persons and property of the offenders. Vessels of war so equipped, are illegal *ab origine*, and no prizes they make will be legal, as to the offended power, if brought *infra præsidia*. The seizure and restoration of such prizes are what the laws of neutrality justly claim. You must either permit both parties to equip in your ports, or neither. Should either equip without your consent, the least you can do, is, to divest them of the prizes they may have thus illegally taken, and restore them to the other party, or else permit them to equip also. This cause and this decree were submitted to the circuit court, in October last, and there affirmed. An appeal to the supreme court is still undetermined, but until this opinion is overruled by that tribunal, I hold myself bound to consider it as a law.

I gave a like decision lately, in the case of the schooner Nancy,[2] from a full conviction that the principles I laid down formerly, were founded on the rules of propriety and the laws of nations.

[1] Bee 11; affirmed by the supreme court, *ante*, p. 133. [2] Bee 73.

the minister of marine, but not dated, with an authorization indorsed by Santhonax, the civil commissary of the republic, at the Cape, and by Petry, the French consul at Philadelphia.(*a*)

(*a*) It may be useful to illustrate this case, as well as to gratify curiosity at a future period, to subjoin a copy of the commission and indorsements, which are in these words:

Copie de la commission en guerre, du navire le Citoyen de Marseille, Capitaine Victor Chabert pour servir de commission pour le conducteur de la prize Hollandoise nommée Den Onzekeren, Cap. Laurent Hertensvelt venant de Essequebo et Demerary, allant à Middleburg.

LIBERTE MARINE FRANCOISE EGALITE

Le conseil exécutif de la république Françoise permet par ces présentes au Cap. Planche, de faire armer et equiper en guerre un batiment nommè Le Citoyen de Marseille du port de 400 tonneaux ou environ, actuellement au port de la ville du Cap, avec tel nombre de canons, boulets, et telle quantitè de poudre, plomb, et autres munitions de guerre et vivres qu'il jugera nécessaire pour le mettre en état de courir sur les pirates, forbans, gens sans aveu et généralement tout les ennemis de la république Françoise, en quelques lieux qu'il pourra les rencontrer et les prendre et amener prisonniers avec leurs navires, armes, et autres objets dont ils seront saisis; à la charge par le dit Planche, de ce conformer aux ordonnances de la marine et aux loix décretées par les representans du peuple François, et notamment à l'article IV. de la loi du 31 Janvier, concernant le nombre d'hommes devant former son equipage, de faire enregistrer les presentes lettres au bureau des classes du lieu de son depart, d'y deposer un role signé et certifié de lui, contenant les noms, surnoms, age, lieu de naissance et demeure des gens de son équipage, et à son retour, de faire son rapport pardevant l'officier chargé de l'administration des classes de ce qui se sera passé pendant son voyage.

Le conseil executif provisoire requiert tous peuples, amis, ou alliés de la république Françoise, et leurs agents, de donner au dit Planche, toute assistance, passage et retraite en leurs ports avec son dit vaisseau, et les prises qu'il aura pu faire, offrant d'en user de même en pareilles circonstances, mande et ordonne aux commandants des batimens de l'Etat de laisser librement passer le dit Planche avec son vaisseau et ceux qu'il aura pu prendre sur l'ennemi, et de lui donner secours et assistance.

En foi de quoi le conseil executif provisoire de la république a fait signer les presentes lettres par le ministre de la marine et y a fait apposer le sceau de la république.

Donné à Paris le ——— jour du mois de ——— mil sept cent quatre vingt treize, l' an ——— de la Republique Françoise.

Signé, Monge, à l'original.

Par le Ministre de la Marine.

Signé, Cottrau, à l'original.

(AU DOS EST ECRIT.)

Nous, Leger Felicité Sonthonax, commissaire civil de la république, délégué aux Isles Françoises de L'Amérique sous le vent pour y retablir l'ordre et la tranquillité publique.

En vertu des pouvoirs qui nous ont été délégués par la lettre du Ministre du 13 9bre, 1792, en consequence de la loi du même mois.

Permettons à Planche d'armer en course et courir sur les ennemis de la République Françoise en quelques lieux qu'il pourra les rencontrer. La presente bonne et valable, à la charge par lui de se conformer en tous points aux ordres du conseil executif de la republique et à toutes les loix maritimes non abrogées et notamment à celle de 1681.

Fait au Cap, le 30 Septembre 1793, L'An 2eme. de la République.

Signé, Sonthonax, à l'original.

Par le Commissaire Civil de la République.

Signé, Gault, à l'original.

S. adjt. de la Con. Civile.

Den Onzekeren.

*About the end of September 1793 (a few days before her sailing), she had twenty-eight guns mounted, twenty on her main-deck, six on her quarter-deck, and two on her forecastle. Her destination, however, being suddenly changed (the deputies taking another conveyance, and the commissioners putting the vessel in requisition, to carry 300 or 400 sick and wounded Frenchmen to America), an immediate alteration was made, and her warlike equipments were rendered subservient to the accommodation of passengers. A partition was made before the main-mast, the five port-holes abaft were planked up, to make room for passengers' berths, the five shutters were fixed to a corresponding number of port-holes on each side, the iron guns were removed where the shutters had been put up, and wooden guns were *substituted; so that on the whole, she had, externally, an appearance of the same force that existed before the alteration, [*295 namely, twelve iron, and sixteen wooden guns mounted. The number of iron guns in her hold, when she left the Cape, was from twelve to sixteen. On approaching the American coast, she dismounted some of the wooden guns, for the convenience of heaving the lead, and deposited them in the hold, leaving only ten iron guns on the main-deck, and two on the quarter-deck. When she arrived in the bay of Delaware, she was taken for a vessel of war, with a complete tier of guns on each side; and the official certificates of the surveyor and inspector of the port (though there was some apparent, but no real, difference between them, as the one referred to the actual armament of the vessel, and the other included the guns dismounted), represented her as arriving with twelve cannon mounted, and a number of cannon in her hold. Soon after entering the port, the captain applied to a ship-carpenter to open the port-holes, which had been shut up at the Cape; but, having consulted the governor, he declined to do that, or any other thing which was calculated to augment the warlike force of the vessel. She was, however, dismantled at one of the wharves, twenty-four guns were landed from her, two remained in the hold, and two were lashed to the forecastle; and in the course of her general repairs, the state-rooms were knocked down, the vessel was caulked all over, her old gun-carriages were repaired, some new gun-carriages were made by her own carpenters, in the room of an equal number of old ones,

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Je soussigné Jn. Bte. Petry, consul de la Republique Françoise à Philadelphie, Etat de Pennsylvanie, certifie à tous ceux qu'il appartiendra que le citoyen Antoine François Planche dénommé dans la présénte lettre de marque, est resté dans cette ville et que le Capne. Victor Chabert le remplace pour commander le navire Le Citoyen de Marseille, permis à lui en consequence de s'en servir contre les ennemis de la République, ainsi que pour se rendre dans un port de la dite République.

En foi de quoi j'ai délivré ces présentes aux quelles j' ai appose le scel consulaire, le vingt sept Vendemiaire, L' An 3me. de la République Françoise une et indivisible.

Signé, Petry, à l' original.

Je sousigne, capitaine du navire armé Le Citoyen de Marseille, ai délivré la présente copie de ma commission en guerre, pour servir seulement de conduite de prise au Gen. Jean Michel, conducteur de la prise Hollandoise Den Onzekeren, venant d'Esequebo, et Demerary, dont étoit maitre Laurent Harteensvelt, du Port et Havre, de Middleburg, et la dite prise faite par moi soussigne Capne. du dit navire arrivé à la hanteur de 28 dégrés 5 minutes de lattitude nord, et 62 dégrés 20 minutes de longitude occidentale, meridien de Paris—Fait en mer à bord de mon navire armé le 26 Brumaire, l' an 3eme de la Republique Françoise une et indivisible. (16. 9bre, 1694. V. Stile.)

Signé, Chabert, sur la dite copie.

that were broken to pieces, the eye-bolts, for fixing the gun-tackle, were taken out and replaced, and she was furnished with a new mast. The vessel sailed from Philadelphia, publicly, at noon, and gave three cheers on her departure. The officers of the port, and several other witnesses declared, that she departed in the same apparent state of warlike force as she exhibited on her arrival: the same number of guns being mounted, and the same number deposited in her hold. Two witnesses (of very doubtful credit) declared, that on her passage down the river, she took on board swivels, gun-carriages and mariners; that they assisted in opening the port-holes, that very few real Frenchmen belonged to her crew, and that part of them were enlisted in Philadelphia. But other witnesses declared, that the vessel only replaced her wooden guns, in the river; that although some of the crew joined her below, it was customary to do so; and that the crew consisted principally of Frenchmen, though there were men of a variety of nations on board. After the vessel had left the capes, she began immediately to open all the port-holes, and to mount the guns that had been deposited in the hold. She was visited by an American ship, while thus employed; and
*296] all her guns were *mounted, at the time of her taking other prizes; the captain of one of them representing, indeed, in a protest, made *ex parte*, that she mounted upwards of thirty guns; and the American visitor stating, that the gun-carriages had been just painted, and were, together with their tackle, apparently new.

The case was argued by *E. Tilghman* and *Lewis*, for the plaintiffs in error, and by *Ingersoll*, *Dallas* and *Du Ponceau*, for the defendant.

By the *former*, it was contended, that the vessel had not a competent, legal commission; that the force of the vessel was augmented in the port of Philadelphia, by increasing the number of her guns and gun-carriages, by opening new port-holes, and by enlisting American citizens: and that even if the facts were doubtful, as to all the other points, it was incontrovertible, that new gun-carriages had been substituted for old ones, which was an unequivocal alteration and augmentation in a matter solely applicable to war.

By the *latter*, it was answered, that the commission was valid; that, in point of fact, there was no evidence of any augmentation of the force of the vessel by cannon or mariners; that the substitution of new for old gun-carriages, was a mere replacement, not an augmentation of force; and that, in point of law, an augmentation of the force of a French ship of war, within the jurisdiction of the United States, is not sufficient (according to our municipal law, or to the law of nations) to annihilate her warlike character, and to destroy the conventional right of asylum for herself and her prizes.

After consideration, The Court were unanimously of opinion, that the decree of the circuit court ought to be affirmed; but the judges did not assign their reasons.(*a*)

The decree of the circuit court affirmed.

(*a*) See Moodie *v.* The Phœbe Anne, *post*, p. 319.

*AUGUST TERM, 1796.

La Vengeance.

United States *v.* La Vengeance.

Admiralty jurisdiction.—Judicial notice.

An injunction to enforce the forfeiture of a vessel, for an illegal exportation of arms and ammunition, is a civil cause of admiralty and maritime jurisdiction.[1]
The courts will take judicial notice of a geographical fact.[2]

Error from the Circuit Court for the district of New York. It appeared on the return of the record, that La Vengeance, a French privateer, had captured and carried into New York, a Spanish ship, called La Princessa de Asturias; and that, thereupon, Don Diego Pintardo, the owner of the prize, filed a libel in the district court, complaining of the capture; alleging that La Vengeance was illegally fitted out within the United States; and praying restitution and damages: but on a claim exhibited in behalf of the owners of the privateer, the district court dismissed the libel with costs; and upon appeal to the circuit court, that decree was affirmed. The fate of Pintardo's libel determined likewise the fate of an information, filed *ex officio* by the district attorney, claiming the privateer as a forfeiture, upon the same allegation, that she had been illegally armed and equipped in the United States, in violation of the act of congress: and in both these decisions, the parties acquiesced.

But a third proceeding had been instituted against the privateer, in which the district attorney filed, *ex officio*, an information stating "that Aquila Giles, marshal of the said district, had seized to the use of the United States, as forfeited, a certain schooner or vessel, called La Vengeance, with her tackle, apparel and furniture, the property of some person or persons to the said attorney unknown; for that certain cannons, muskets and gunpowder, to wit, two cannon, twenty muskets and fifty boxes of gunpowder were, between the *22d of May 1794, and the 22d of May 1795,(*a*) exported in the said schooner or vessel, from the said United States, [*298 to wit, from Sandy Hook, in the state of New Jersey (that is to say, from the city of New York, in the New York district), to a foreign country, to wit, to Port de Paix, in the island of St. Domingo, in the West Indies, contrary to the prohibitions of the act in such case made and provided," &c.: And praying judgment of forfeiture accordingly.

A claim was filed on behalf of the owners of the privateer, denying the exportation of cannon or muskets; and alleging that the gunpowder constituted part of the equipment of the Semillante, a frigate belonging to the republic of France, and had been taken from her and put on board the privateer, to be carried to Port de Paix, by order of the proper officer of

(*a*) The information was founded on the act of congress, passed the 22d May 1794, prohibiting, for one year ensuing, the exportation of arms and ammunition. (1 U. S. Stat. 369.)

[1] The Sally, 2 Cr. 406; The Samuel, 1 Wheat. 10.

[2] Peyroux *v.* Howard, 7 Pet. 342.

the said republic. It was also alleged, that the schooner, after her arrival at Port de Paix, was *bonâ fide* sold to one Jaques Rouge, a citizen of the French republic, in whose behalf the claim was instituted.

After argument, the district judge decreed, that the schooner should be forfeited; but upon appeal to the circuit court, the decree was reversed, and Judge CHASE certified that the judgment of reversal was founded on the following facts: "1st. That from eighteen to twenty muskets were carried in the said schooner La Vengeance, in the month of March or April 1795, from the United States of America to a foreign country, to wit, to Port de Paix, in the West Indies: but that such muskets were the private property of French passengers on board of the said schooner, carried out for their own use, and not by way of merchandise. 2d. That upwards of forty boxes of gunpowder were carried, at the same time, from the said United States, in the said schooner, to Port de Paix aforesaid: but that such gunpowder was taken from on board the Semilliante frigate, lying in the harbor of New York, was a part of her equipment, did not appear ever to have been landed in the said United States, was carried out for the use of the French republic, was delivered to the commander in chief at Port de Paix; and was not exported by way of trade or merchandise."

From this judgment of the circuit court, a writ of error was brought on behalf of the United States, the general errors were assigned, and the defendant in error pleaded *in nullo est erratum.* The issue was argued, on the 10th of August, by *Lee*, Attorney-General of the United States, for the
*299] plaintiff *in error, and by *Du Ponceau*, for the defendant:(*a*) but no exception was taken by the former, in reference to the merits of the cause.

Lee, Attorney-General.—There are two grounds on which this writ of error is to be supported: 1st. That it is a criminal cause; and therefore, it should never have been removed to the circuit court, the judgment of the district court being final in criminal causes; and 2d. That even if it could be considered as a civil suit, it is not a suit of admiralty and maritime jurisdiction; and therefore, the circuit court should have remanded it to be tried by a jury in the district court.

1st Point. All causes are either civil or criminal; and this is a criminal cause, as well on account of the manner of prosecution, as on account of the matter charged. Thus, informations are a proceeding at common law, and classed with criminal prosecutions (4 Bl. Com. 303); and the act of congress which was framed to protect the United States, at a critical moment, from a serious injury, inflicts for the offence of violating its provisions, a forfeiture of the vessel employed in exporting arms or ammunition, and a fine of $1000. It is true, that it may be considered, in part, as a proceeding *in rem;* but still, it is a criminal proceeding. There are but two kinds of information known in England, one in the exchequer, touching matters of revenue, the other in the king's bench, touching the

(*a*) The case having been opened, and some general principles stated by the attorney-general, on a preceding day, the court were led to suppose that he did not mean to enter into any further discussion, and declared anopinion; but being afterwards informed, that, on account of the importance of the subject, a further argument was expected, they gave this opportunity.

La Vengeance.

punishment of misdemeanors. 3 Bl. Com. 262. Now, the revenue of the United States is not at all concerned in this case; nor would the court of exchequer take cognisance of a similar case, in England. If, therefore, the United States do not claim La Vengeance for debt, nor as a mere exercise of arbitrary will, but on account of some offence, some crime, that has been committed; it follows, of course, that the process used to enforce the claim, must, under any denomination, be, in fact, a criminal process; and in all criminal causes, whether the trial is by a jury, or otherwise, the judgment of the district court is final. Though penal suits have sometimes been construed civil actions; it has only been done, where individuals have been concerned, and in one instance, to admit the testimony of a Quaker, on affirmation; but none of the exceptions to the general rule will reach the present case. 1 Wils. 125; 2 Str. 1227; Cowp. 382.

2d Point. The 9th section of the judicial act declares, that *"the trials of issues in fact, in the district courts, in all causes, except civil causes of admiralty and maritime jurisdiction, shall be by jury." If there are criminal causes of admiralty and maritime jurisdiction, they would not be within the exception, and must be tried by jury. But this criticism is not insisted upon; since, the present case cannot, in any sense, be deemed a civil suit of admiralty and maritime jurisdiction. The principles regulating admiralty and maritime jurisdiction in this country, must be such as were consistent with the common law of England, at the period of the revolution. How, then, would a similar case be considered in England? Blackstone says, "all admiralty causes must be causes arising wholly upon the sea, and not within the precincts of any county." 3 Bl. Com. 106. And Coke had previously remarked, "that *altum mare* is out of the jurisdiction of the common law, and within the jurisdiction of the Lord Admiral." Now, the offence here charged is that of exporting arms and ammunition out of the United States to Port de Paix. The act itself, indeed, without the intervention of the statute, would, doubtless, have been lawful; but an act of exportation, from the force of the term, must be commenced here; and if done part on land, and part on sea, the authorities decide, that the admiralty cannot claim the jurisdiction. It is not made criminal, to receive arms and ammunition at sea, but to export them from the United States, within which the offensive act must, therefore, originate. If, then, this is not a cause of admiralty and maritime jurisdiction, though it should be allowed to be a civil cause, still, the trial ought to have been by jury. It may be proper to add, that the act of congress (§ 4) expressly adopts, in this case, the mode of prosecuting to recover the forfeitures and penalties incurred under the act for more effectually collecting the impost, &c. (passed the 4th of August 1790, § 67), which declares, that on filing a claim, "the court shall proceed to hear and determine the cause according to law:" but there is nothing in this provision that can be construed to exclude a jury trial; any more than in the form of a commission of oyer and terminer, which empowers the judges "to hear and determine," and yet they always hear and determine, as to the facts, through the medium of a jury; nor does the mere institution of a new mode of proceeding necessarily rescind and annul every pre-existing process applicable to the same subject. If, upon the whole, there has been a mistrial, and a representation should be presented to the proper department, the forfeiture would not be allowed to enrich the treasury; but as a judicial

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

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

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

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

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

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

Damages in error.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Hunter *v.* Fairfax's Devisee.

Continuance.

The death of a party's only counsel, so recently before the term, that sufficient time to employ other counsel, and have the case prepared for argument, had not elapsed, at the commencement of the term, is cause for continuing a case of magnitude and difficulty.

By order of the court, a letter from the plaintiff in error, dated the 29th July 1796, and directed to the clerk, was read. The letter stated, "that the plaintiff had employed Mr. Campbell, of Virginia, to argue the cause; that on the 25th of July, he was informed, that Mr. Campbell had died in Richmond, on the 18th of the same month; and that, being left without counsel, in consequence of this event, he prayed the cause might be continued till next term."

Lee and *Ingersoll*, in objection to the request, stated, that from the nature of the cause, delay would be worse to the defendant in error, than a decision adverse to his claim; that the plaintiff ought always to be ready for trial; that there had been sufficient notice of Mr. Campbell's death, for engaging the assistance of other counsel; that the case depended entirely on the record, might yet be considered by counsel, so as to obtain a decision during this court, and that it had already been postponed one term, at the instance of the plaintiff in error. But—

By the Court.—In all questions of this nature, we must be governed by a sound discretion; in order to prevent, on the one hand, an unnecessary procrastination, and on the other hand, to avoid an injurious precipitation of trials. In the present instance, we think, there is a sufficient foundation laid before us, to justify our granting a continuance until the next term. If the cause were now to be taken up, it must be heard and decided *ex parte*. It is true, that counsel might, even at this time, be employed, so as to admit, perhaps, of an argument before the court rises; but it is reasonable, that in a cause of such magnitude, (*a*) the counsel should have an opportunity *to investigate the principles, and to consider the authorities connected [*306 with it, out of term, and unincumbered by the pressure of the current business of the court.

Let the cause be continued.

(*a*) The attorney-general stated the point in controversy to arise on these facts: Lord Fairfax was a citizen of Virginia, and died in the year 1780; having made a will by which he devised certain lands in that state, to the defendant in error, who then was, and ever has been, a British subject, resident in Great Britain. The question is, whether, being thus an alien, the defendant in error can take and hold the lands by devise? And it will be contended, that his title is completely protected by the treaty of peace, concluded between the United States and Great Britain, in the year 1783.

Chase, Justice.—I recollect, that in Harrison's case, a decision in favor of such a devisee's title was given, by a court in Maryland. It is a matter, however, of great moment; and ought to be deliberately and finally settled.

ARCAMBEL *v.* WISEMAN.

Damages.

Counsel fees expended by the plaintiff in prosecuting his cause, cannot be allowed as part of the damages.[1]

THE decree of the Circuit Court for the district of Rhode Island, was affirmed in this cause, without argument, the principal question which it involved having been just decided upon the discussion of another writ of error. It appeared, however, by an estimate of the damages on which the decree was founded, and which was annexed to the record, that a charge of $1600, for counsel's fees in the courts below, had been allowed; to which *Coxe* objected; and *Ingersoll* contended, that it might fairly be included under the idea of damages. But—

BY THE COURT.—We do not think that this charge ought to be allowed. The general practice of the United States is in oposition to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, until it is changed, or modified, by statute.

There are several ways in which the charge may be expunged: but we recommend, as, perhaps, the easiest way, that the counsel for the defendant in error, should enter a *remittitur* for the amount.

A *remittitur* was accordingly entered.

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*307] *THE ALFRED.

MOODIE *v.* The Ship ALFRED.

Neutrality.

The sale of a vessel fitted for a privateer, to the subject of one of two belligerent powers, which the purchaser subsequently equips and furnishes in a port of his own country, is not a breach of our neutrality act.

THE allegation in this case, as supported by the evidence, was, that the privateer, which took the British prize in question, had been built in New York, with the express view of being employed as a privateer, in case the then existing controversy between Great Britain and the United States should terminate in war; that some of her equipments were calculated for war, though they were also frequently used by merchant ships; that the privateer was sent to Charleston, where she was sold to a French citizen; that she was carried by him to a French island, where she was completely armed and equipped, and furnished with a commission; and that she afterwards sailed on a cruise, during which the prize was taken, and sent into Charleston.

Reed, for the plaintiff in error, contended, that this was an original construction or outfit of a vessel for the purpose of war; and that if it

[1] Day *v.* Woodworth, 13 How. 363; Teese *v.* Huntingdon, 23 Id. 2; Oelrichs *v.* Spain, 15 Wall. 211, 230; Whittemore *v.* Cutter, 1 Gallis. 420; Pacific Ins. Co. *v.* Conard, Bald. 138; Stimpson *v.* The Railroads, 1 Wall. Jr. C. C. 164; Blanchard Gun-stock Turning Factory *v.* Warner, 1 Bl. C. C. 258; Bancroft *v.* Acton, 7 Id. 505. And see Flanders *v.* Tweed, 15 Wall. 450; Philp *v.* Nock, 17 Id. 460; Haverstick *v.* Erie Gas Co., 29 Penn. St. 254; Corcoran *v.* Judson, 24 N. Y. 106.

was tolerated as legal, it would be easy by collusion to subvert the neutrality of the United States, and involve the country in a war.

THE COURT, however, without hearing the opposite counsel, directed—

The decree to be affirmed.

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*OLNEY *v.* ARNOLD. [*308

Error to a state court.—Pleading.

That the general assembly may have power to set aside the judgment of a state court, does not prevent it from being the highest court of law to which error will lie, under the act of 1789.

A plea, by a collector of customs, under the fourth section of the act of 4th August 1790, that a former bond for duties was due and imposed *on* the 5th of November, shows ground for rejecting a bond tendered on the 7th of November, and is good, on special demurrer; it need not aver that the former bond was unsatisfied, at the time the subsequent one was tendered.

THIS was a writ of error on a judgment given in the Superior Court of judicature, court of assize and jail delivery, for the county of Providence, in the state of Rhode Island; and the case, appearing on the record, was as follows:

Olney, the plaintiff in error, was the collector of imposts for Rhode Island; Arnold, the defendant in error, was owner of the Ship Neptune; and a citizen named Dexter, as the declaration alleged, was owner of the cargo of the ship; which arrived from Surinam, at Providence, about four o'clock P. M. on the 6th of November 1792. On that day, the parties applied for a permit to land the cargo, and offered bonds to pay the duties; but the collector refused or neglected to accept the bonds and grant the permit. On the 7th of November, a second application was made for a permit, and bonds, actually executed, were tendered for the payment of the duties; but the collector again peremptorily refused to accept the bonds or to grant the permit; in consequence of which, the vessel, with the cargo on board, remained at a heavy expense, from the 6th to the 13th of November; and Arnold laid his damages at 200*l.*

Olney, the defendant in the court below, pleaded that by the 41st section of the act of congress, passed on the 4th of August *1790, "to provide more effectually for the collection of the duties, &c.," it is declared, "that all duties on goods, wares and merchandise imported, shall be paid, or secured to be paid, before a permit shall be granted for landing the same:" and that "no person whose bond for the payment of duties is due and unsatisfied, shall be allowed a future credit for duties, until such bond shall be fully paid or discharged;" that on the 17th of January 1792, Arnold being indebted for duties, gave a bond for the amount, payable on the 17th of May ensuing; that on the 5th of November 1792, the term for payment of the bond was elapsed, but the same then remained unpaid and undischarged; that Arnold was the real owner of the cargo, but had fraudulently transferred it to Dexter, in order to obtain a credit at the custom-house; that though Dexter had tendered a bond on the 7th of November, it was rejected by virtue of the recited act of congress; and that a permit had been refused, until the duties of the cargo were paid, or Arnold's old bond was discharged. [*309

To this plea, the plaintiff below demurred, and assigned the following causes of demurrer: 1st. Because the matters contained in the plea might

be given in evidence, if at all, under the general issue; and they amount to no more than the general issue. 2d. Because the plea states the property of the cargo to be in Arnold, and does not traverse the property of Dexter therein. 3d. Because it does not appear that the old bond given by Arnold was unsatisfied, after the 5th of November 1792. 4th. Because the bond given by Arnold was for his own proper debt, and the bond tendered by Dexter was for his own proper debt: and 5th. Because the plea is inconsistent, uncertain, not issuable and wants form.

The defendant joined in demurrer: and thereupon, the court of common pleas for the county of Providence decided, that the plea was a sufficient bar to the action; and in December 1792, gave judgment for the defendant accordingly. From this judgment, the plaintiff appealed to the superior court of judicature, where it was adjudged, in December 1794, that the plea in bar was not sufficient; and the cause was remitted to the county court for trial. On the trial, the jury gave a verdict for the plaintiff, damages 13*l.* 5*s.*, with costs: and the defendant below brought the present writ of error to remove the proceedings into the supreme court of the United States; the construction and validity of the act of congress, under which the defendant justified, being involved in the decision of the state court. Constitution of the United States, Art. III. § 2. (1 U. S. Stat. 42, § 19.)

*310] *Two leading questions were made in this case? 1st. Whether the plea was a sufficient bar to the action?—particularly on the ground of the third cause assigned upon the demurrer; as the defendant only alleged Arnold's old bond to be unpaid on the 5th of November, whereas, he admitted a tender of a bond for the duties on the 7th of November. And 2d. Whether the superior court, on whose judgment the writ of error was brought, or the general assembly, was the highest court of law or equity of the state of Rhode Island, in which a decision of the fact could have been had?

The first question was argued at the last term, by *Pringle* and *Dexter*, for the defendants in error, and by *Lee*, attorney-general, for the plaintiff in error: but The Court declaring it to be unnecessary to give any opinion on the principal case, until it was decided, whether the record was regularly before them, directed the second question to be discussed at the present term; when *Lee*, attorney-general, again argued for the plaintiff in error, and *Ingersoll*, for the defendant.

The *Attorney-General*, in contending that the writ of error was well brought, stated, that there could be no doubt, that this court had jurisdiction in the present cause, as it appeared upon the record, that the construction of an act of congress, under which the collector justified, had been drawn into question, and no other error could be assigned. He said, that there were two obvious reasons, why the legislature of Rhode Island, could not be considered as the court contemplated by the law: for, in the first place, it must be a court of law or equity,(*a*) in which a decision of the suit could be had. A decision imports a final determination between the litigants; and not a partial adjudication, which settles one point of the controversy, and refers

(*a*) Ellsworth, Chief Justice.—As this is a question of law, it is not material to inquire, whether it was the superior court of equity.

the rest to another tribunal. Though, therefore, the legislature should be vested with an equitable power, to examine the proceedings of a court of law, and if it thinks proper, to direct a new trial; this cannot be regarded as constituting a court of law, within the meaning of the act of congress. But in the second place, it must be a court of law or equity, from which a writ of error could be obtained. The 25th section of the judicial act requires, that the citation, without which, a writ of error cannot be available, should be signed by the chief justice or judge, or chancellor of the court, rendering or passing *the judgment or decree complained of; and no such officer [*311 is a constituent part of the legislature.(*a*) The jurisdiction of the general assembly in matters of law, depends on an act of their own body. Laws of Rhode Island.(*b*)

(*a*) CHASE, Justice.—The citation may likewise be signed by a justice of this court.

Lee, Attorney-General.—True, but the act contemplates giving an alternative to accommodate the party.

(*b*) The act is in the following words: "An act directing the method of preferring petitions unto the general assembly, and of acting thereon. Be it enacted by the general assembly, and by the authority thereof, it is enacted, that whenever any person or persons shall prefer a petition to the general assembly, praying that any judgment, rule of court or determination whatever may be set aside, and that execution may be stayed, he or they so petitioning shall, at least three weeks before the session of the general assembly to which such petition shall be preferred, deliver and lodge his or their petition in the secretary's office; and giving bond in the said office, with one sufficient surety, in such sum as he, the secretary, considering the nature of such suit or executions, shall think meet: the condition of which bond shall be for the payment of all lawful costs and damages, which the adverse party shall sustain by means of preferring such petition; and that, thereupon, the secretary shall issue a citation, for the adverse party to appear (if he or they shall think fit) at the session of the general assembly, to which such petition shall be preferred, to show cause why such petition should not be granted; and the adverse party shall be served with such citation, and a copy of such petition, by the sheriff of the county or his deputy, where he or they may dwell, ten days at least before such session of the general assembly; and if such person or persons cannot be found by the sheriff or his deputy, then, the leaving a copy of the petition and citation at the usual place of his or their abode, shall be deemed a good service; and the sheriff or deputy shall make return of all his proceedings to the clerk of the lower house, at the first opening of the general assembly. And that, when any petition shall be called for trial, if there be not a proper return made by the sheriff or his deputy, that the adverse party hath been duly notified as this act requires, such petition shall be immediately dismissed.

And be it further enacted by the authority aforesaid, that when any petition shall be received by the general assembly, the granting the prayer whereof may, by any means, relate to or concern the interest, property or character of any other person or persons whomsoever, that in such case, every such petition shall be referred to the next session of assembly, and the person or persons so petitioning shall, within ten days after the rising of the assembly, give bond in manner as afore directed; and all persons so concerned shall be duly served with a copy of such petition, and the vote of assembly thereon, and be cited in manner as aforesaid; and if the person or persons so petitioning shall neglect to give bond as aforesaid, then such vote or order of the general assembly referring such petition, shall be void and of no effect.

And be it further enacted by the authority aforesaid, that at the beginning of every session of the general assembly, a time shall be assigned for the hearing and determining all petitions pending before them; and the clerk of the lower house shall make a docket of all such petitions, in the same manner as the clerks of the courts of common

*But, however extensive this power may appear to be, it is wholly of an equitable kind. The legislature may, like a chancellor, review the determinations of the courts of law, and direct the issue to be again tried; *313] but it is not itself a court in *which an ultimate decision can be had. The jurisdiction of the court, on whose judgment the present

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pleas do, of actions, always noting in the margin, the time when each petition was filed or received; which docket shall be set up in view, in the house where the assembly shall sit, with a note at the bottom thereof, of the time appointed for their being heard: that each petition shall be called for and determined in its proper course as it stands upon the docket; and if the petitioner, being called, doth not appear, his petition shall be immediately dismissed, but if he doth appear to enforce his petition, and the respondent, upon being thrice called, shall not appear, the prayer of the petition shall be granted, if the same be reasonable.

And be it further enacted by the authority aforesaid, that no petition shall be received by the general assembly, except the petitioner shall pay the fees established by law; and that the same costs be allowed and taxed upon petitions preferred to the general assembly, in all respects and in every particular as are allowed by law, in cases before the inferior courts of common pleas; and the bills of costs shall be taxed by the clerk of the lower house, and allowed by the secretary: that the secretary shall grant execution for all costs, returnable to the next succeeding general assembly: and that the secretary and the clerk of the lower house, shall be allowed the same fees, in all respects, upon petitions, as are allowed to the clerks of the superior court of judicature, in cases before the said court.

And be it further enacted by the authority aforesaid, that when any new trial shall be awarded by the general assembly, to any person or persons, the party obtaining such new trial, shall pay all lawful costs and damages that he or they may have put the adverse party to, in defending against such petitions, unless he or they shall, upon such new trial, obtain some alteration of the former judgment, in his or their favor.

And be it further enacted by the authority aforesaid, that when any person or persons shall sustain any damage by reason of any petition preferred to the general assembly, concerning which bond shall have been entered into as aforesaid: the secretary shall deliver such bond to the person or persons so aggrieved, who may bring a suit on such bond, against the persons who gave the same; and the judges of the court where such suit shall be brought, are empowered to hear the parties concerning all matters of damages, as hereinbefore expressed; and on hearing, justly and equitably to determine the damages the party or parties complaining hath or have sustained, by staying the execution or other proceedings in such cause, or granting a new trial therein; and also to reduce the sum mentioned in such bond, to just damages, and to award execution accordingly.

And be it further enacted by the authority aforesaid, that every person who shall prefer a petition to the general assembly, for an act of insolvency, shall exhibit therewith a just and true inventory of all his real and personal estate, and also of what estate he may have in reversion or remainder, which shall be sworn to before an assistant justice, or warden, in the county wherein the petitioner shall dwell or be confined; and if such petition be received, the inventory shall be lodged with the clerk of the lower house, who shall give copies thereof to any creditor requiring the same; and if such petition be finally granted, the clerk of the superior court, in the county where the petitioner shall dwell or be confined, shall notify the creditors to appear before the judges of the said court, to nominate commissioners, &c., by an advertisement, to be inserted three weeks successively, in the several papers, where the principal creditors live.

Provided, nevertheless, and be it further enacted by the authority aforesaid, that all matters and regulations in this act, be extended to private petitions only, between party and party, anything hereinbefore contained to the contrary notwithstanding.

writ of error is brought, is of a very different description, in its constitution, as well as in the effect of its adjudications. (*a*) The appeal was *carried from the inferior court into that court, as to the highest court of [*314

(*a*) The Attorney-General referred to the laws of Rhode Island, constituting the superior and inferior courts, which it is thought expedient to insert at large by way of illustration to the case.

"An act for the establishment of a superior court of judicature, court of assize and general jail-delivery, in and throughout this colony.

"Be it enacted by the general assembly, and by the authority thereof it is enacted, That there shall be a superior court of judicature, court of assize, and general jail-delivery, over the whole colony, for the regular hearing and trying all pleas, real, personal and mixed, and all pleas of the crown; also all matters which respect the conservation of the peace, and punishment of offenders, whatever circumstances may attend such matters or things; whether arising between party and party, respecting debt, contract, right of freehold, damages, or personal injury, or whether between the king and his subjects, or mixed in nature; and whether brought in said court by appeal, writ of review, writ of error, *certiorari*, or otherwise, as the law directs: which court shall consist of one chief justice or judge, and four associate or assistant justices or judges, to be appointed and chosen by the general assembly, annually, for that end and purpose, any three of whom shall be a *quorum*, who shall be commissioned for the discharge of their office; and shall thereby have the same power and authority, in all matters and things in this colony, as the court of common pleas, king's bench or exchequer, have, or ought to have, in that part of Great Britain heretofore called England, and be empowered to give judgment in all matters and things before them cognisable, and to award execution thereon; and also to make such necessary rules of practice, as to them, from time to time, shall be thought needful, for the better regulation of such court, and the advantage of his majesty's subjects, so that such rules be not repugnant to any known laws. And that there be chosen annually by the general assembly, one clerk in each county for said court, who shall constantly attend the sitting of such court, in the respective counties for which they shall be chosen, shall keep the seal of the court, and make fair records and entries of the judgments and proceedings of the said court, and do and perform all other things which shall fall within their said office and duty, and that the said clerks shall have the same power and authority of subrogating and appointing deputies under them, in the same manner as the clerks of the several inferior courts of common pleas and general sessions of the peace have by law, and shall be alike accountable for their doings, and that such deputies shall be sworn before the said superior court, or one of the justices thereof, for the true performance of his duty.

"And be it further enacted by the authority aforesaid, that the said superior court of judicature, court of assize and general jail-delivery, in and throughout the colony, shall annually meet and sit at the following places and times, viz., at New Port, within and for the county of New Port, on the first Monday in September, and on the first Monday in March, at Providence, within and for the county of Providence, on the third Monday in September, and on the third Monday in March, at South Kingstown, within and for the county of King's county, on the first Monday in October, and on the first Monday in April, at Bristol, within and for the county of Bristol, on the second Monday in October, and on the second Monday in April; and at East Greenwich, within and for the county of Kent, on the third Monday in October, and on the fourth Monday in April. And that both the grand and petit jury in the several counties, shall give their attendance at said court, on the second day of the court's sitting, by nine of the clock in the forenoon; and in case of non-appearance of a sufficient number, such juries shall be filled up *de talibus circumstantibus*, as at the inferior courts of common pleas and general sessions of the peace, by the sheriff or his deputy.

"And be it further enacted by the authority aforesaid, that in all causes brought by appeal from any of the inferior courts of common pleas and general sessions of the

common law; and is thence brought regularly hither. But if any doubt shall exist upon the subject, the construction should be in favor of that general principle, in the policy of all well-regulated, particularly of all republican governments, which prohibits an heterogeneous union of the legislative and judicial departments.

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peace, unto the said superior courts of judicature, court of assize, and general jail-delivery, such bonds shall be given, reasons filed, and attested copies brought up, and all such other regulations observed, for bringing forward appeals, as are contained and directed in the acts for establishing such courts of common pleas and general sessions of the peace; and that in any appeal from the judgment of any inferior court of common pleas, to the said superior court of judicature, in civil actions, both parties shall have the benefit of any new or further evidence relating to the case.

"And be it further enacted by the authority aforesaid, that when any person shall be found guilty of any crime by the petit jury, at any court of general sessions of the peace, for which he shall have been there tried by original process, and shall appeal from the sentence or judgment given on such verdict to the said court of assize and general jail-delivery, he shall there be duly heard thereon, by the court, who may alter such sentence in such manner as to them shall appear agreeable to law, and according to such discretionary powers as are vested in them; but the appellant shall not, in virtue of his appeal, have another hearing on the merits, or issue in fact, before another jury, at the said court appealed to: any law, custom or usage to the contrary in any wise notwithstanding.

"And for the better attaining justice, in all cases tried at said superior court, where any penalty is forfeited, or conditional estate recovered, or equity of redemption sued for, whether judgment be confessed, or otherwise obtained, the judges of said court are hereby empowered and authorized to proceed according to the rules of equity, and to chancerize forfeitures, and to enter up judgment for just debts and damages, as justice and equity require, and to award execution accordingly.

"And be it further enacted, that any one of the judges of the superior court may, out of term time, grant a prohibition to stay proceedings in any court of vice-admiralty in this colony, if the same shall not appear to be properly within, and to appertain by law to, the jurisdiction of such court, and that a final determination and judgment, with regard to such prohibition, shall and may be given by the judges of the said superior court, or any three of them, being met, or meeting at any time to consider of such matter.

"And all judgments of the aforesaid superior court shall be final, except where actions of review, and appeals to the king in council are by law allowed."

"An act empowering the justices of the several inferior courts of common pleas, in this colony, or any three of them, to constitute and hold special courts of common pleas, on certain occasions.

"Be it enacted by the general assembly, and by the authority thereof it is enacted, that the justices of the several courts of common pleas in this colony, may, and they are hereby fully authorized and empowered to meet and hold special inferior courts of common pleas, within their several counties, any three of whom shall be a *quorum*, for the hearing and trying all such causes, as by law are or shall be cognisable, before such special courts to give judgment thereon, according to law, which shall be final, and to award execution; and that the clerks of the inferior courts of common pleas shall be clerks of the respective special courts to be held as aforesaid.

"And be it further enacted by the authority aforesaid, that all writs and processes for the bringing any cause or suit to trial, shall issue out of the clerk's office of said court, in his majesty's name, under the seal of the court, be signed by the clerk and directed to the sheriff or his deputy, and security for prosecuting shall be given, where the plaintiff is not an inhabitant and freeholder in this colony, in the same manner as by law is required at the taking out a writ to the inferior court of common pleas in

Ingersoll, in reply, classed his arguments under three points of inquiry: 1st. Is the legislature of Rhode Island a court? *2d. Is it a court of law? And 3d. Is it a court capable of giving a decision, within the meaning of the act of congress? [*315

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common cases. And that all such writs and processes issued as aforesaid, shall be served at least three days before the day of the sitting of such court, and the declaration shall be filed on such writ, at the opening of the court.

"Provided, always, and it is the true intent and meaning hereof, that when the sheriff, clerk, or town-sergeant, or any of them, are parties, the writ, original and judicial, shall be signed, directed to, and served by such person, as in such like case as the inferior courts of common pleas is ordered and directed.

"And be it further enacted, that if any person shall have right by law to commence a suit to a special court, he shall go to the chief justice, or one of his associates, justices of the inferior court, and make his request for the calling such special court, and the said justice shall thereupon give forth a notification, in writing, under his hand, to the other justices of such inferior court, warning them to meet at the day by him in such notification appointed, in order to hold a special court; which being done, any other person, entitled by law, may commence actions to such special court, without any further request or notification; and if any writs to special courts be made returnable in term time, no request or notice shall be necessary.

"And be it further enacted by the authority aforesaid, that if issue in fact shall be joined in any such case, a writ of *venire facias* shall issue to the sheriff or his deputy, or in case of the sheriff's being a party, then to such person as by law it may be, in such like case, at the stated inferior courts, to return to such special court twelve good and lawful jurors to try such issue. And that the fees at such special courts shall be the same as are allowed and taxed at the superior court.

"And be it further enacted, that execution on any judgment obtained at such special court, may issue immediately, and shall be returned into the clerk's office, in fourteen days after taking out the same.

"And it is hereby enacted, that the same rules shall be observed in commencing actions at special courts, with respect to the county in which the same shall be commenced, as by law are fixed for bringing transitory actions to the inferior courts of common pleas.

"And be it further enacted by the authority aforesaid, that the vendue-masters of the several towns in this colony be, and they are hereby empowered to bring actions to special courts for the recovery of any sum or sums of money due and payable to them for real estates, goods, effects, or things by them sold at public vendue, upon the buyer's neglecting or refusing to pay for the same, at the time in the conditions of sale set forth.

"And be it further enacted, that if any vendue-master shall neglect or refuse to pay unto any person, who shall have put any real estate, goods, wares, effects or things whatsoever into his hands, to be sold at public vendue, the money arising from such sale (provided he hath received the same), or if he have not received the same, if he shall neglect or refuse to call a special court for the recovery thereof, for the space of fifteen days after the time of payment mentioned in the conditions of sale, and doth not use his utmost speed and diligence for recovering such money, then it shall be lawful for any person, who put such real estate, goods, wares, effects or things whatsoever, into such vendue-master's hands, to sue such vendue-master at a special court, in like manner, and to have the same remedy to all intents and purposes, against such vendue-master, as he hath by law against the buyer.

"And be it further enacted, that the several sheriffs in this colony and their deputies, shall have full power and authority to commence actions to special courts for the recovery of any sum or sums of money, from any person or persons, for real estate, goods and chattels, by them attached and sold at vendue, if the same be not paid according to the conditions of sale.

1. By the act of the general assembly, the legislature of Rhode Island is expressly constituted a court, supereminent in its jurisdiction; though, perhaps, novel in its formation and effects. The characteristic of a superior court of law is the power of calling parties before it, in order to affirm or reverse the judgments of inferior tribunals. This cannot be done by a court *316] of equity; nor can it be done by a legislative body, in *its ordinary capacity: and yet it can be done by the general assembly of Rhode Island, sitting as a court of law, under the authority of a legislative act. For such occasions, a regular docket is kept; the causes are entered; the parties are called upon, in the course of the term; a clerk is employed; and the judgment of the inferior court may be reversed. It is true, that the general assembly cannot try a fact; but neither can the House of Peers; yet, that is, undoubtedly, the highest court of justice in Great Britain. It is, likewise true, that the act of Rhode Island does not say anything respect- *317] ing the power of *the general assembly, to affirm a judgment; but if they refuse to interfere upon any petition, is not the refusal, virtually, an affirmance of the judgment, of which the petition complains? If, then, the powers of a court are thus vested in the general assembly, mere abstract

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And be it further enacted by the authority aforesaid, that the sheriffs of the several counties in this colony, or their deputies, or the town-sergeant of any town, who shall return any execution, that is delivered to them, to the court, to which the same is returnable, satisfied, and do not pay the debt due on such execution to the plaintiff, or party who recovered the judgment, or shall return any execution not satisfied or unsatisfied, without having orders from the party who recovered the judgment, for so doing, or neglecting to make return of any execution in term time to which the same is returnable, or at any particular day mentioned in any execution for the return thereof, the person in whose favor any such execution was granted, shall have full power and authority to call a special court, at any time twenty days after the rising of the court, or time to which such execution was returnable, for the recovery of the contents thereof; and that the sheriffs shall have the same power of calling special courts on their respective deputies who shall be guilty in the premises, or shall neglect to do his duty.

And be it further enacted, that when the marshal of the court of vice-admiralty in this colony, or his deputy, shall sell or dispose of any goods, wares, merchandise, effects or things whatsoever, in consequence of any order, sentence or decree of said court, and the conditions of sale shall not be complied with by the purchaser, the said marshal or his deputy is hereby empowered to call a special court for the recovery of any sum due for goods and merchandise so sold; and shall be liable to be sued at a special court, in the same manner as the vendue-masters in this colony are liable for the money arising on the sale of such goods and merchandise as have been or shall be sold, any law, custom or usage, to the contrary notwithstanding.

And be it further enacted, that the directors of all lotteries which are already, or shall be granted by the general assembly, for raising money for public use, and each of them, shall, for the more speedy recovery of all such sums as are or shall become due for tickets, have power to sue for the same at special courts. And that all persons entitled to a prize or prizes from any director, after demanding payment and a refusal or neglect of the same, shall have like power to sue any such director for the same, at a special court.

And be it further enacted, that special courts shall and may be held, for the trial of persons for any breach or breaches, of an act entituled "an act to prevent stage-plays and other theatrical entertainments, within this colony," and for the recovery of the fines and forfeitures in said act contained.

considerations of policy cannot be allowed, judicially, to obstruct or defeat their exercise.

2. And if the general assembly is a court, its jurisdiction is clearly of a common-law description; in the nature of a writ of error, to revise and correct the decisions of inferior common-law courts.

*3. The act of congress provides, that the removal of a cause from a state court, in the specified cases, should only be "from a final judgment or decree in any suit, in the highest court of law or equity, of a state, in which a decision in the suit could be had." Now, Olney might, by petition, have obtained from the general assembly, a construction on the act of congress, which he pleaded in bar to the action brought against him. The name or title of the officer, who attests the process, cannot be material —whoever was the presiding magistrate, when the general assembly sat as a court,(a) might authenticate the citation, or it might be granted by a judge of the supreme court. Suppose, indeed, that the judgment were to be affirmed here, Olney might still petition the legislature, and obtain a reversal and new trial; unless it can be maintained, that the decision of this court will work a repeal of the law of Rhode Island. [*318

The cause was held under advisement, until the 8th of August, when the Chief Justice delivered the following decision on the point last argued:

By the Court.—We are clearly of opinion, that the superior court of Rhode Island, on whose judgment this writ of error is brought, is the highest court of law of that state, within the meaning of the 25th section of the judicial act. The general assembly might set aside, but they could not make, a decision.

The Chief Justice then delivered the opinion of the court on the first point: in consequence of which, the judgment of the superior court of Rhode Island was reversed, and the judgment of the inferior court affirmed.

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*The Phœbe Anne. [*319

Moodie *v.* The Ship Phœbe Anne.

Neutrality.

Under the treaty with France, a privateer has a right to make repairs in our ports. The mere replacement of her guns, is not an augmentation of her force.

Error from the Circuit Court for the district of South Carolina.

The Phœbe Anne, a British vessel, had been captured by a French privateer, and sent into Charleston. The British consul filed a libel, claiming restitution of the prize, upon a suggestion, that the privateer had been illegally outfitted, or had illegally augmented her force, within the United States. On the proofs, it appeared, that the privateer had originally entered the port of Charleston, armed and commissioned for war; that she had there

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(a) Iredell, Justice.—To show that, in the case of petitions, respecting the judicial proceedings of inferior courts, the general assembly does not act as a legislature, it may be observed, that both houses then sit in one room, as one body; but when engaged in making laws, the houses sit in separate rooms, as distinct bodies.

taken out her guns, masts and sails, which remained on shore, until the general repairs of the vessel were completed, when they were again put on board, with the same force, or thereabouts ; and that, on a subsequent cruise, the prize in question was taken. The decrees in the district and circuit courts were both in favor of the captors ; and on the return of the record into this court, *Reed*, having pointed out the additional repairs, argued, generally, on the impolicy and inconveniency of suffering privateers to equip in our ports.

Ellsworth, Chief Justice.—Suggestions of policy and convenience cannot be considered in the judicial determination of a question of right : the treaty with France, whatever that is, must have its effect. By the 19th article, it is declared, that French vessels, whether public and of war, or private and of merchants, may, on any urgent necessity, enter our ports, and be supplied with all things needful for repairs. In the present case, the privateer only underwent a repair ; and the mere replacement of her force cannot be a material augmentation ; even if an augmentation of force could be deemed (which we do not decide) a sufficient cause for restitution.

By the Court.—Let the decree of the circuit court be affirmed. (*a*)

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*320] *Grayson *v.* Virginia.

Process against a State.

Equity process against a state must be served sixty days before the return-day thereof ; after which, in default of appearance, the plaintiff may proceed *ex parte*.

Such process must be served on the chief executive magistrate, and the attorney-general of the state.

Bill in Equity. The service of the *subpœna* in this case, being proved, *Lewis* moved, at the last term, that a *distringas* might be awarded, in order to compel the state to enter an appearance ; arguing, from the analogy between a state and other bodies corporate, that this was the proper mode of proceeding. The Court, however, postponed a decision on the motion, in consequence of a doubt, whether the remedy to compel the appearance of a state, should be furnished by the court itself, or by the legislature ? And in the present term, *Lewis* argued, that the court was competent to furnish all the necessary means for effectuating its own jurisdiction.

On the 12th of August, the Chief Justice delivered the following opinion.

By the Court.—After a particular examination of the powers vested in this court, in causes of equity, as well as in causes of admiralty and maritime jurisdiction, we collect a general rule for the government of our proceedings ; with a discretionary authority, however, to deviate from that rule, where its application would be injurious or impracticable. The general rule prescribes to us an adoption of that practice, which is founded on the custom and usage of courts of admiralty and equity, constituted on similar principles ; but still, it is thought, that we are also authorized to make such

(*a*) See The Ship Den Onzekeren, *ante*, p. 285.

deviations as are necessary to adapt the process and rules of the court to the peculiar circumstances of this country, subject to the interposition, alteration and control of the legislature.(*a*)

We have, therefore, agreed to make the following general orders; and the counsel, in the present case, will take his measures accordingly.

1. Ordered, that when process at common law or in equity, shall issue against a state, the same shall be served upon the governor, or chief executive magistrate, and the attorney-general of such state.

*2. Ordered, that process of *subpœna* issuing out of this court, in any suit in equity, shall be served on the defendant, sixty days before the return day of the said process; and further, that if the defendant, on such service of the *subpœna*, shall not appear at the return day contained therein, the complainant shall be at liberty to proceed *ex parte*. [*321

Lewis then observed, that the *subpœna* in this case had been issued on the same principles; but as the orders could only operate *in futuro*, he thought it best to withdraw his motion for a *distringas*, and to pray that an *alias subpœna* might be awarded, which was accordingly done.

WISCART *et al.*, Plaintiffs in error, *v.* D'AUCHY, Defendant in error.

Appellate jurisdiction.

The appellate jurisdiction of the supreme court can only be exercised in conformity with the regulations prescribed by congress.[1]

If a decree in equity find a fact, it is such a statement of it, as is required by the judiciary act.

A statement of the facts, placed upon the record by the circuit court, is conclusive, even if the evidence be sent up with it.[2]

ERROR to the Circuit Court for the Virginia district. The original proceeding was on the equity side of the court below, where the defendant in error had filed a bill, charging Adrian Wiscart and Augustine De Neufville, copartners, with having fraudulently conveyed all their estate, real and personal, by three separate deeds, to Peter Robert De Neufville (who was also made a defendant to the bill), with a view to prevent the complainant's recovering the amount of a decree, which he had formerly obtained in another suit against them. The answers averred the conveyances to be made *bonâ fide*, and for a valuable consideration; but after a full hearing of the case, the circuit court (consisting of Judges IREDELL and GRIFFIN) delivered the following opinion:

"That the deeds filed as exhibits in this cause, one dated on the 20th of May 1793, conveying the goods and chattels in the schedule thereunto annexed, to the defendant, P. R. De Neufville; another dated on the 17th of

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(*a*) See the Judicial Act, § 14. (1 U. S. Stat. 81.) The act to regulate processes in the federal courts, § 2. (Id. 93.)

[1] The Perseverance, *post*, p. 336; The Charles Conter, 4 Dall. 22; United States *v.* Hooe, 1 Cr. 318; Sarchet *v.* United States, 12 Pet. 143; Minor *v.* Tillotson, 2 How. 392; Kelsey *v.* Forsyth, 21 Id. 85; Ex parte McCardle, 7 Wall. 512; Merrell *v.* Petty, 16 Id. 342; Murdoch *v.* Memphis, 20 Id. 620.

[2] The Perseverance, *post*, p. 336; Insurance Co. *v.* Folsom, 18 Wall. 249; The Abbotsford, 98 U. S. 442.

the same month, conveying the slaves therein mentioned, to the said P. R De Neufville; and another, dated on the 20th day of the same month, conveying to him the land therein mentioned, are fraudulent, and were intended to defraud the complainant, and to prevent his obtaining satisfaction for a just demand; that the said P. R. De Neufville was a party and privy to the fraud aforesaid; and that the said deeds were void as to the complainant: whereupon, it is decreed and ordered, *that the said deeds be by him, *322] the said P. R. De Neufville, delivered to the clerk of this court, to be cancelled; that when thereunto required, he deliver up to the marshal of this court, so much of the personal property in the said deeds mentioned, or either of them, as is now in his hands or possession, to the end that the complainant may have an execution thereon; that he do account before one of the commissioners of this court for the value of all the personal property mentioned in the said deeds, or either of them, which he shall not be able to deliver up, from having disposed thereof, or from any other cause. And it is further ordered, that the defendants pay to the complainant his costs by him expended in the prosecution of this suit."

The record being returned, containing the above decree at large, and all the pleadings, and depositions and examinations, produced and taken in the cause, the discussion, by *Ingersoll*, for the defendant in error, and by *Lee* and *Du Ponceau*, for the plaintiff, involved these considerations—Whether a statement of facts by the circuit court was in any case conclusive? And whether the decree, in the present case, was such a statement of facts as the law contemplated? (*a*)

For the *defendant* in error.—The court may state the case, in conformity to the act of congress (Jud. Act. § 19, 1 U. S. Stat. 83) by merely sending forward the evidence. In *Talbot* v. *Jansen* (*ante*, p. 138, in note), and *Hills* v. *Ross* (*ante*, p. 184), there was no statement by the circuit court, and the question now agitated was started; but the counsel, in deference to what seemed to be the opinion of the bench, waived the objection, and proceeded upon the evidence at large, as transmitted with the record.

The present case turns upon the point, whether the execution of certain deeds was, or was not, fraudulent? but surely, the decree of the circuit court, declaring the execution to be fraudulent, is not a statement of the facts, but an inference of law arising from the facts. It must have been the design of the legislature to separate the fact from the inference; otherwise, this court would be precluded from examining, on appeal, the justice of the inference, compared with the facts, from which it had been drawn by an inferior tribunal. The statement called for by the act may, indeed, be likened to a special verdict, where the jury ascertain the facts, and the judges decide the law arising from them; and it cannot be denied, that a question of fraud, *323] or not, is a question of law, the result of *the circumstances of each particular case; and every suitor is entitled, by the constitution, to

(*a*) IREDELL, Justice.—The court below did not intend that the decree in this case should have the force of a statement of facts, but transmitted the record, according to its present form, merely in compliance with the precedents established in other circuits. This oral declaration, however, can have no effect to expound the record; nor to influence the final judgment now to be pronounced.

have it re-examined in this court. 1 Burr. 396, 484. (*a*) Every equivocal fact may be explained by circumstances; and those circumstances should appear, wherever the fact is to be made the ground of a judicial decision. But here, the decree not only states the general result that the deeds were fraudulent, but that they were made with a view to defeat and defraud a just creditor, without specifying by what evidence the fraudulent intention was ascertained. If it was only giving a preference to another *bonâ fide* creditor, the act could not be deemed fraudulent; and this court ought not to be bound by the construction of an inferior court, as to that point, but should exercise their own judgment upon a knowledge of all the facts. The decree, therefore, ought not, in any case, to be deemed conclusive; and in this case, at all events, it is not such a statement as the law contemplates, but the statement, on which the cause is now to be taken up, must be that which, reciting the evidence and exhibits, is expressly called a statement, and as such is subscribed by the judge.

For the *plaintiff* in error.—There is no precedent to bind the decision of the court; and therefore, the genuine exposition of the act of congress is to be sought as the only guide on this occasion. Two things are included in the record—1st. The pleadings and decree: and 2d. The statement of the evidence. Now, the act of congress (§ 18) expressly specifies the first of these as one of the three modes, by which the circuit court shall cause the facts on which they found their decree fully to appear. The other modes of stating a case, by agreement of the parties, or, if they disagree, by an act of the court, are merely alternatives to be adopted, when the other is ineffectual; and as, in the present instance, the pleadings and decree fully show all the facts on which the court formed their judgment, all that is superadded, is unnecessary and unauthorzied. Besides, to state a case, and to furnish an abstract of the evidence, are certainly things of a very distinct and distinguishable nature. In no case, does the law require an abridgment of testimony; and in this case, it is obvious, that the law requires the fact to be stated, and not the evidence of the fact. Even, indeed, in the instance of a special verdict, if the jury state the evidence of the fact, and do not find the fact itself, the court will disregard it; and here, independently of the decree, no fact is found, but merely an abstract of the evidence is certified by the court. The fact established by the evidence was *fraud; [*324
and the decree directed the fraudulent deeds to be cancelled: in this, there can certainly be no error in law. Fraud is, indeed, a matter to be tried by a jury; if the jurisdiction is ever changed, it must either be the effect of positive law, or the act of the jury themselves; and the questions of fraud or not, had been previously submitted to a jury, in the very authorities cited from 1 Burr. 396, 484. Suppose this case had been (as it might have been) submitted to a jury, and they had pronounced the deeds to be fraudulent, the court could not, for that cause, afterwards interfere to reverse the judgment, as a jury has exclusive power upon the question of fact. The pleadings and decree, then, state the fact, and if, after such a statement,

(*a*) CHASE, Justice.—Fraud is sometimes a matter of fact, sometimes, a question of law, and sometimes, both: but whenever the *quo animo* is the gist of the inquiry, it is always a question of fact.

the abstract of the evidence could not be judicially submitted to this court, the court will disregard the abstract, though it is transmitted, as an appendage, with the record.

Ellsworth, Chief Justice.—The question, how far a statement of facts by the circuit court is conclusive, having been already argued in another cause,(*a*) we are prepared to give an opinion upon that point; but will reserve for further consideration, the objection, that the present decree is not such a statement of facts as the law contemplates.

1. If causes of equity or admiralty jurisdiction are removed hither, accompanied with a statement of facts, but without the evidence, it is well; and the statement is conclusive as to all the facts which it contains. This is unanimously the opinion of the court.

2. If such causes are removed, with a statement of the facts, and also with the evidence—still, the statement is conclusive, as to all the facts contained in it. This is the opinion of the court; but not unanimously.

Wilson, Justice.—I consider the rule established by the second proposition to be of such magnitude, that being in the minority on the decision, I am desirous of stating, as briefly as I can, the principles of my dissent.

The decision must, indeed, very materially affect the jurisdiction of all the courts of the United States, particularly of the supreme court, as well as the general administration of justice. It becomes more highly important, as it respects the rights and pretensions of foreign nations, who are usually interested in causes of admiralty and maritime jurisdiction.

It appears, however, that two opinions have been formed on this question—how far those facts involved in the investigation of a cause of admiralty and maritime jurisdiction, that were *given in evidence in the *325] circuit court, should also appear in this court, on a writ of error or appeal? For my part, I concur in the opinion, that notwithstanding the provisions of the judicial act, an appeal is the natural and proper mode of removing an admiralty cause; and in that case, there can be no doubt, that all the testimony which was produced in the court below, should also be produced in this court. Such an appeal is expressly sanctioned by the constitution; it may, therefore, clearly, in the first view of the subject, be considered as the most regular process; and as there are not any words in the judicial act, restricting the power of proceeding by appeal, it must be regarded as still permitted and approved. Even, indeed, if a positive restriction existed by law, it would, in my judgment, be superseded by the superior authority of the constitutional provision.

The clauses in the act which more immediately relate to this subject, are the 21st and 22d sections. The material words are these: § 21. "From final decrees in a district court, in causes of admiralty and maritime jurisdiction, where the matter in dispute exceeds the sum or value of $300, exclusive of costs, an appeal shall be allowed to the next circuit court to be held in such district." § 22. "Final decrees and judgments in civil actions in a district court, where the matter in dispute exceeds the sum or value of $50, exclusive of costs, may be re-examined and reversed or

(*a*) I believe the chief justice referred to the case of Pintado *v.* Bernard, an admiralty case, which was argued a few days before, during my absence from the court.

affirmed in a circuit court, holden in the same district, upon a writ of error, whereto shall be annexed and returned therewith, at the day and place therein mentioned, an authenticated transcript of the record, and assignment of errors, and prayer for reversal, &c. And upon a like process, may final judgments and decrees in civil actions, and suits in equity, in a circuit court, brought there by original process, or removed there from courts of the several states, or removed there by appeal from a district court, where the matter in dispute exceeds the value of $2000, exclusive of costs, be re-examined and reversed or affirmed in the supreme court, &c."

Though the term "civil causes" is often descriptively applied, in contradistinction to "criminal causes;" yet, it is not uncommon to apply it, likewise, in contradistinction to causes of maritime and admiralty jurisdiction; and if we carefully compare the two sections to which I have referred, I think, the latter distinction will plainly appear to be the genuine object of the legislature. Thus, in the 21st section, provision is made for removing causes of admiralty and maritime jurisdiction, by appeal from the district to the circuit court; and immediately afterwards, in the 22d section, another provision is made for removing final decrees and judgments in civil actions, *by writ of error from a district to a circuit court. Here, then, is a direct use of the term "civil actions," in contradistinction to "admiralty causes;" and, pursuing the distinct nature of the respective subjects, with technical precision, we find that an appeal is allowed in admiralty causes; and the remedy by writ of error is strictly confined, in this part of the section, at least, to civil actions. [*326

There would, perhaps, be little difficulty in the case, if the act stopped here. But the 22d section, after mentioning a writ of error, proceeds to declare, that "upon a like process," the final judgments and decrees of the circuit court, in civil actions, and suits at equity, whether originally instituted there, or removed thither, from the state court; or by appeal from the district courts, may be re-examined in the supreme court: and it has been urged, that an admiralty cause is a civil suit, and that such a suit being removed by appeal to the circuit court, can only be finally transferred to this court, by a like process; that is, by a writ of error. If, however, causes of admiralty jurisdiction are fairly excluded from the first member of the 22d section, that provides for a removal from the district to the circuit court, impartiality and consistency of construction must lead us likewise to exclude them from this member of the section, that provides for a removal from the circuit to the supreme court. By so doing, the two sections of the law can be reconciled; and by so doing, without including admiralty causes, every description of suit may be reasonably satisfied.

But if admiralty causes are not to be removed by writ of error from the circuit court, to which we see they may be transferred from the district court by appeal, it has been asked, how they are to be brought hither for final adjudication? It is true, the act of congress makes no provision on the subject; but it is equally true, that the constitution (which we must suppose to be always in the view of the legislature) had previously declared that in certain enumerated cases, including admiralty and maritime cases, "the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the congress shall make." The appellate jurisdiction, therefore, flowed, as a consequence,

from this source ; nor had the legislature any occasion to do, what the constitution had already done. The legislature might, indeed, have made exceptions, and introduced regulations upon the subject; but as it has not done so, the case remains upon the strong ground of the constitution, which in general terms, and on general principles, provides and authorizes an appeal ; *327] the process that, in its very nature (as *I have before remarked), implies a re-examination of the fact, as well as the law.

This construction, upon the whole, presents itself to my mind ; not only as the natural result of a candid and connected consideration of the constitution and the act of congress ; but as a position in our system of jurisprudence, essential to the security and the dignity of the United States. And if it is of moment to our domestic tranquillity and foreign relations, that causes of admiralty and maritime jurisdiction should, in point of fact as well as of law, have all the authority of the decision of our highest tribunal ; and if, at the same time, so far from being prohibited, we find it sanctioned by the supreme law of the land, I think, the jurisdiction ought to be sustained.

Ellsworth, Chief Justice.—I will make a few remarks in support of the rule. The constitution, distributing the judicial power of the United States, vests in the supreme court, an original as well as an appellate jurisdiction. The original jurisdiction, however, is confined to cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, only an appellate jurisdiction is given to the court ; and even the appellate jurisdiction is, likewise, qualified ; inasmuch as it is given "with such exceptions, and under such regulations, as the congress shall make." Here, then, is the ground, and the only ground, on which we can sustain an appeal. If congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction ; and if the rule is provided, we cannot depart from it. The question, therefore, on the constitutional point of an appellate jurisdiction, is simply, whether congress has established any rule for regulating its exercise?

It is to be considered, then, that the judicial statute of the United States speaks of an appeal and of a writ of error; but it does not confound the terms, nor use them promiscuously. They are to be understood, when used, according to their ordinary acceptation, unless something appears in the act itself, to control, modify or change the fixed and technical sense which they have previously borne. An appeal is a process of civil law origin, and removes a cause entirely ; subjecting the fact, as well as the law, to a review and retrial : but a writ of error is a process of common-law origin, and it removes nothing for re-examination, but the law. Does the statute observe this obvious distinction? I think it does. In the 21st section, there is a provision for allowing an appeal in admiralty and maritime causes from the district to the circuit court ; but it is declared, that the matter in dispute must exceed the value of $300, or no appeal can be sustained; and yet, in *328] *the preceding section, we find, that decrees and judgments in civil actions may be removed by writ of error from the district to the circuit court, though the value of the matter in dispute barely exceeds $50. It is unnecessary, however, to make any remark on this apparent diversity : the only question is, whether the civil actions here spoken of, include causes of admiralty and maritime jurisdiction? Now, the term civil actions would, from

its natural import, embrace every species of suit, which is not of a criminal kind; and when it is considered, that the district court has a criminal as well as a civil jurisdiction, it is clear, that the term was used by the legislature, not to distinguish between admiralty causes and other civil actions, but to exclude the idea of removing judgments in criminal prosecutions, from an inferior to a superior tribunal. Besides, the language of the first member of the 22d section seems calculated to obviate every doubt. It is there said, that final *decrees* and judgments in civil actions in a district court may be removed into the circuit court, upon a writ of error; and since there cannot be a *decree* in the district court, in any case, except cases of admiralty and maritime jurisdiction, it follows, of course, that such cases must be intended, and that if they are removed at all, it can only be done by writ of error.

In this way, therefore, the appellate jurisdiction of the circuit court is to be exercised; but it remains to inquire, whether any provision is made for the exercise of the appellate jurisdiction of the supreme court; and I think, there is, by unequivocal words of reference. Thus, the 22d section of the act declares, that "upon a like process," that is, upon a writ of error, final judgments and decrees in civil actions (a description still employed in contradistinction to criminal prosecutions) and suits in equity, in the circuit court, may be here re-examined, and reversed or affirmed. Among the causes liable to be thus brought hither upon a writ of error, are such as had been previously removed into the circuit court, "by appeal from a district court," which can only be causes of admiralty and maritime jurisdiction.

It is observed, that a writ of error is a process more limited in its effects than an appeal; but whatever may be the operation, if an appellate jurisdiction can only be exercised by this court conformable to such regulations as are made by the congress, and if congress has prescribed a writ of error, and no other mode, by which it can be exercised, still, I say, we are bound to pursue that mode, and can neither make nor adopt another. The law may, indeed, be improper and inconvenient; but it is of more importance, for a judicial determination, to ascertain what the law is, than to speculate upon what it ought to be. If, however, the construction, that a statement *of facts [*329
by the circuit court is conclusive, would amount to a denial of justice, would be oppressively injurious to individuals, or would be productive of any general mischief, I should then be disposed to resort to any other rational exposition of the law, which would not be attended with these deprecated consequences. But, surely, it cannot be deemed a denial of justice, that a man shall not be permitted to try his cause two or three times over. If he has one opportunity for the trial of all the parts of his case, justice is satisfied; and even if the decision of the circuit court had been made final, no denial of justice could be imputed to our government; much less, can the imputation be fairly made, because the law directs that in cases of appeal, part shall be decided by one tribunal, and part by another; the facts by the court below, and the law by this court. Such a distribution of jurisdiction has long been established in England.

Nor is there anything in the nature of a fact, which renders it impracticable or improper to be ascertained by a judge; and if there were, a fact could never be ascertained in this court, in matters of appeal. If, then, we are competent to ascertain a fact, when assembled here, I can discern no

reason why we should not be equally competent to the task, when sitting in the circuit court ; nor why it should be supposed, that a judge is more able, or more worthy, to ascertain the facts in a suit in equity (which, indisputably, can only be removed by writ of error), than to ascertain the facts in a cause of admiralty and maritime jurisdiction.

The statute has made a special provision, that the mode of proof, by oral testimony and examination of witnesses, shall be the same in all the courts of the United States, as well in the trial of causes in equity and of admiralty and maritime jurisdiction, as of actions at common law : but it was perceived, that although the personal attendance of witnesses could easily be procured in the district or circuit courts, the difficulty of bringing them from the remotest parts of the Union, to the seat of government, was insurmountable; and therefore, it became necessary, in every description of suits, to make a statement of the facts in the circuit court definitive, upon an appeal to this court.

If, upon the whole, the original constitutional grant of an appellate jurisdiction is to be enforced in the way that has been suggested, then all the testimony must be transmitted, reviewed, re-examined and settled here; great private and public inconvenience would ensue ; and it was useless to provide that "the circuit courts should cause the facts on which they found their sentence or decree fully to appear upon the record."

*330] But, upon the construction contained in the rule laid down *by the court, there cannot, in any case, be just cause of complaint, as to the question of fact, since it is ascertained by an impartial and enlightened tribunal ; and, as to the question of law, the re-examination in this court is wisely meant, and calculated to preserve unity of principle, in the administration of justice throughout the United States.(*a*)

On the 12th of August, the Chief Justice delivered the opinion of the court upon the point, whether there was, in this cause, such a statement of facts, as the legislature contemplated ?

By the Court.—The decree states, that certain conveyances are fraudulent; and had it stopped with that general declaration, some doubt might reasonably be entertained, whether it was not more properly an inference, than the statement of a fact ; since fraud must always principally depend upon the *quo animo*. But the court immediately afterwards proceed to describe the fraud, or *quo animo*, declaring, that "the conveyances were intended to defraud the complainant, and to prevent his obtaining satisfaction for a just demand ;" which is not an inference from a fact, but a statement of the fact itself. It is another fact, illustrative of this position, that "the grantee was a party and privy to the fraud."

We are, therefore, of opinion, that the circuit court have sufficiently caused the facts on which they decided, to appear from the pleadings and decree, in conformity to the act of congress.

The decree affirmed.

(*a*) See Jennings *v.* The Brig Perseverance, *post*, p. 336, where Paterson, Justice said, he had been of opinion with Wilson, Justice, on the second rule established by the court.

*Hills *et al. v.* Ross.

Admiralty practice.—Prize-agents.

A plea by one partner, on behalf of himself and his copartners, the rejoinder being signed by a proctor for all the defendants, amounts to a legal appearance for them all.

Prize-agents who receive the proceeds of sales of prize, and pay them over to the captors, without an order of court, are responsible to the owners, in case restitution be decreed, to the extent of the sums actually received by them.

This cause came again before the court (see *ante*, p. 184), and after a discussion upon the merits, it became a question, whether there had been a regular appearance of the parties to the suit below?

The libel was filed by the British consul, on behalf of Walter Ross, against Hills, May & Woodbridge (who formed a partnership in Charleston, under that firm) and John Miller. The plea was headed, "The plea of Ebenezer Hills, one of the company of Hills, May & Woodbridge, in behalf of himself and his said copartners, who are made defendants in the libel of Walter Ross;" and concluded with praying, "on the behalf aforesaid, to be dismissed, as far as respects the said Hills, May & Woodbridge." The replication regarded the plea of Hills as the plea of all the company; and the rejoinder was signed by "Joseph Clay, junior, proctor for the defendants." The decree below was against all the defendants, and the writ of error was issued out in all their names; but there was evidence on the record, that May had been in Europe, during the whole of the proceeding, and no warrant of attorney, or other authority, to appear for him, was produced.

Ingersoll contended, for the plaintiffs in error, that partners had not power to appear for each other to suits; and that, in fact, nothing appeared on the record, to show that they had done so, on the present occasion.

Tilghman, on the contrary, relied upon the rejoinder, where the proctor states himself to be employed by all the defendants; and insisted, that his authority could not be denied or examined, particularly, in this stage of the cause, and in this form of objection.(*a*)

*On the 11th of August, the Chief Justice delivered the opinion of the Court, that, in the present case, there was a sufficient legal appearance of all the defendants. [*332

On the merits, it appeared, that the plaintiffs in error had directed to be

(*a*) Iredell, Justice.—The doubt is, whether, in a case like the present, one partner can authorize a proctor to appear for the whole company?

Chase, Justice.—This court cannot affirm the decree, against persons who were not before the court that pronounced it; and the record must show, that they actually did appear. A bare implication, the entitling of the plea, or a general statement, that one of the partners acts on behalf of them all, is not sufficient: for, though partners, in a course of trade, may bind each other, they cannot compel each other to appear to suits, nor undertake to represent each other in courts of law.[1] What, however, is the legal effect of an appearance by a proctor, an officer of the court, is another ground that merits consideration.

[1] In Taylor *v.* Coryell, 12 S. & R. 250, Judge Duncan says, "this is not the law of the present day, and it would be most inconvenient, if it were." "It is now held, that in an action against several partners, one may enter an appearance for the others, which may in its consequences, lead to a judgment against all."

sold, certain prize cargoes, captured by Captains Talbot and Ballard, under the circumstances stated in the case of *Talbot* v. *Jansen* (*ante*, p. 133); and that, after notice of the claims filed by the owners of the prizes, they had received and paid over the proceeds to the captors: but, in so doing, they had acted merely as commercial agents, without any share in the ownership of the privateers, nor any participation in the direction or emoluments of their illicit cruising. The principal questions, therefore, were: 1st. Whether, in point of fact, the plaintiffs had notice of the claims of the original owners of the prizes? And 2d. Whether, after paying over the proceeds of the cargoes, they were responsible to the claimants for anything, and for how much?

By the Court.—It appears, that the damages have been assessed in the courts below, in relation to the value of the goods that were captured: but the plaintiffs in error were not trespassers *ab initio;* and acting only as agents, they should be made answerable for no more than actually came into their hands. The accounts of sales are regularly collected and annexed to the record. We are, therefore, at no loss for a criterion: and we think that the decree should be so modified, as to charge them with the amount of sales, after deducting the duties on the goods, if the duties were paid by them.

The decree was in the following words.—Ordered, that the decree of the circuit court for Georgia district, pronounced on the 5th of May 1795, be reversed, so far as the same respects the said Hills, May & Woodbridge; and it is further ordered, that the said Hills, May & Woodbridge pay to the said Walter Ross, $32,090.58, the net amount of the sales of the cargo of the said ship, and $5605.12, interest thereon, from the 6th day of June 1794, to the 12th day of August 1796, making together the sum of $37,695.70, and that the said Hills, May & Woolbridge do pay the costs of suit; and a special mandate, &c.

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*333] *The Grand Sachem.

Del Col *v.* Arnold.

Prize.

If a neutral vessel obtain a register from a belligerent power, sail under the belligerent flag, and have on board accounts describing her as belligerent property, there is probable cause for seizing her as lawful prize, and bring her in for examination.

The existence of probable cause for seizing a neutral vessel as prize, and sending her in for examination, does not exonerate the captors from liability for any injury to, or spoliation of, the property captured, if not condemned as lawful prize.[1]

Arnold *v.* Delcol, Bee 5, affirmed.

A Libel was filed in the District Court of South Carolina, by the defendant in error, against Del Col and others, the owners of a French privateer, called La Montague, and of the ship Industry and her cargo, a prize to the privateer, lying in the harbor of Charleston, which the libellant had caused to be attached.

The case appeared to be briefly this: The privateer had captured as

[1] The Amiable Nancy, 3 Wheat. 546; The Invincible, 2 Gallis. 29.

The Grand Sachem.

prize, on the high seas, an American brig called the Grand Sachem, commanded by Ebenezer Baldwin, and owned by the defendant in error. At the time of taking possession of the brig, a sum of $9993 was removed from her into the privateer, a prize-master and several mariners were put on board of her, and they were directed to steer for Charleston. Just, however, as they hove in sight of the lighthouse, the Terpsichore, a British frigate, captured the privateer, and gave chase to the prize: whereupon, the prize-master ran her into shoal water, and there she was abandoned by all on board, except a sailor, originally belonging to her crew, and a passenger. In a short time, she drove on shore, was scuttled and plundered. When the marshal came, with process against the brig, she was in the joint possession of the custom-house officers, and the privateers-men; the latter of whom prevented the execution of the process. The Industry and her cargo were then attached by the libellant, and an agreement was entered into between the parties, that they should be sold, and the proceeds paid into court, to abide the issue of the suit.

On the evidence, it appeared, that the Grand Sachem had been engaged in a smuggling trade at New Orleans, the Spanish Main, &c., and for the purpose of carrying it on, she had procured a register in the name of a Spanish subject, and sailed under Spanish colors. Besides other suspicious circumstances, she had on board, at the time of her capture, a variety of accounts *describing her as Spanish property; and a trunk containing her papers (among which, it was alleged, there was a Spanish register) [*333 had been collusively delivered up to the owner, the defendant in error, by one of the sailors. The money removed from her, and taken in the privateer, by the British frigate, had been condemned in Jamaica.

The district court pronounced a decree, in favor of the libellant, for the sum of $33,329.87 (the full value of the Grand Sachem and her cargo), with interest at ten per cent. from the 8th of August 1795, the day of capture; declared "that the proceeds of the ship Industry and her cargo, attached in this cause, be held answerable to that amount;" and directed that the defendant in error should enter into a stipulation to account to the plaintiffs in error for the money condemned as prize to the British frigate, or any part of it, that he might recover, as neutral property. This decree was affirmed in the circuit court, and thereupon, the present writ of error was instituted.

The case was considered in four points of view: 1st. Whether there was sufficient probable cause for seizing and bringing the Grand Sachem into port for further examination, and adjudication? 2d. Whether, if there was such sufficient cause, the captors can, at all, be made liable for the consequent injury and loss? 3d. Whether, if the immediate captors, who ran the vessel into shoal water, and scuttled her, are responsible, that responsibility can be devolved on the owners of the privateer, who had not authorized nor contributed to the misconduct? And 4th. Whether the Industry and her cargo could, before condemnation, be attached, and made liable in this suit, as the property of the captors?[1]

The first and second points were argued, at the last term, by *Dallas* and *Reed* (of South Carolina), for the plaintiffs in error, and by *Pringle* (of South Carolina), for the defendant: and the third and fourth points were

[1] See Manro *v.* Almeida, 10 Wheat. 487.

argued at the present term, by the same counsel, for the plaintiffs in error, and by *Ingersoll* and *Lewis*, for the defendant.

THE COURT delivered, at different times, the following opinions:

On the first point, that there was a sufficient probable cause for seizing and bringing the Grand Sachem into port.

On the second point, that the right of seizing and bringing in a vessel for further examination, does not authorize or excuse any spoliation or damage done to the property; but that the captors proceed at their peril, and are liable for all the consequent injury and loss.[1]

*335] On the third point, that the owners of the privateer are responsible for the conduct of their agents, the officers and crew, *to all the world; and that the measure of such responsibility is the full value of the property injured or destroyed. (*a*)

On the fourth point, that whatever might, originally, have been the irregularity in attaching the Industry and her cargo, it is completely obviated, since the captors had a power to sell the prize; and by their own agreement, they have consented that the proceeds of the sale should abide the issue of the present suit.

The decree of the circuit court affirmed.

AUGUST TERM, 1796.

RULES.

ORDERED, That when process at common law, or in equity, shall issue against a state, the same shall be served on the governor, or chief executive magistrate and attorney-general of such state.

ORDERED, That process of *subpœna* issuing out of this court in any suit in equity, shall be served on the defendant, sixty days before the return-day of the said process: And further, that if the defendant, on such service of the *subpœna*, shall not appear at the return-day contained therein, the complainant shall be at liberty to proceed *ex parte*.

(*a*) CHASE and IREDELL, Justices, agreed that the owners were responsible, but differed as to the extent, observing that the privateers-men were justifiable in abandoning, to save themselves from captivity, but that the removal of the money into the privateer, and the subsequent scuttling of the brig, were unlawful acts.

[1] See The Invincible, 2 Gallis. 40.

*FEBRUARY TERM, 1797.

The Perseverance.

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

Appeal.—Damages.—Costs.

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

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

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

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

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

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

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

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

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

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

[1] See R. S. § 983.

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

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

Affirm the decree.

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

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

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

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

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

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

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

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

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

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

Huger *et al. v.* South Carolina.

Process against a State.

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

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

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Proceedings in the District Court, 20th September 1794.

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

Process served in due form.

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

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

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

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

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

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

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

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

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

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

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

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

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

First Monday in August, 1795.

Upon which an appeal was interposed by the libellants.

Proceedings in the circuit court.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Practice.—Mandate.—Costs.

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

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

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

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

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

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

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

Philadelphia. 6th February 1796.

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

and that the proceeding upon the reversal was also to be the same, except that after once being remanded, this court may proceed to a final decision, and award execution. In the case, then, of a reversal of a judgment of the circuit court, the 24th section of the judicial act provides, that on reversals in the supreme court, they shall proceed to render such judgment, or pass such decree, as the inferior court should have done; and shall send a special mandate to the circuit court to award execution thereupon. If, therefore, the decree of a circuit, reversing the decree of a district, court, were reversed, the mandate would be sent to the former, and not to the latter, and by a parity of reasoning, in the present instance, the writ should be sent to the court of appeals, and not to the general court. The construction seems to be strengthened by that part of the 25th section, which contemplates, that the cause might be remanded to the state court more than once—as, it is not probable, that the court whose judgment is affirmed, would require a second order; and it is surely proper, that the court, whose judgment is reversed, should be apprised of the event. As to costs, *Dallas* contended, that at least the costs of the court whose judgment was in favor of the defendant in error, ought not to be charged against him. But—

By the Court.—The judgment of the superior court of Maryland being reversed, it has become a mere nullity; and costs must follow the right as decided here.

Let the judgment of the general court be affirmed; let the costs in the courts of Maryland, and in this court, be allowed to the plaintiff in error; and let the mandate for execution issue to the general court.

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*Brown *v.* Van Bramm. [*344

Practice.—Discontinuance.—Damages.

The entry of a default, after a plea of the general issue, no *similiter* being on the record, does not operate as a discontinuance, in Rhode Island.

In Rhode Island, the court may assess damages, in an action on a foreign bill, payable in sterling money.

Interest, on affirmance, is to be calculated on the aggregate amount of principal and interest in the court below, to the time of affirmance, but no further.[1]

Error from the Circuit Court for the district of Rhode Island. The case was as follows: On the 10th of March 1792, Brown & Francis, merchants, of Providence, in Rhode Island, drew four sets of bills of exchange on Thomas Dickason & Co., merchants, of London, payable at 365 days' sight, to Benjamin Page, or order, for the aggregate sum of 3000*l.* sterling. Page, being at Canton, on the 28th of March 1793, indorsed these bills to Van Braam, the defendant in error, and on the same day, as the agent of Brown & Francis, drew another set of bills of exchange, upon Thomas Dickason & Co., payable also at 365 days sight, to Van Braam, or order, for 3000*l.* sterling. On the 9th of April 1793, Page, in the same character of agent, drew a similar set of bills, in favor of Van Braam, or order, for 400*l* sterling. One bill of each set was presented to Thomas Dickason & Co., in London, for acceptance, on the 31st of December 1793, but were then pro-

[1] See Mitchell *v.* Harmony, 13 How. 116; Perkins *v.* Fourniquet, 14 Id. 328.

tested for non-acceptance, of which Brown & Francis had notice on the 1st of July 1794, though the bills and protests were not actually returned to them. The bills were again presented for payment, on the 15th of January 1795 (that is, 10 days after they were actually due), and protested for non-payment, of which Brown & Francis had notice on the 1st of April 1795.

This action was instituted in the circuit court, of November term 1796, to recover the amount of the protested bills, with interest, damages and charges; and the declaration contained a special count on each bill, together with a general *indebitatus assumpsit* for $40,000, money had and received by the defendants to the use of the plaintiff. On the return of the record, it appeared, that Francis had died subsequently to the service of the original writ; that Brown came into court, and, after suggesting the death of Francis, pleaded the general issue; and that the plaintiff having likewise suggested the death of Francis, "prayed judgment against John Brown, the surviving defendant." There was no joinder in issue, continuance or other pleading; *345] but *immediately after the above prayer for judgment, the record proceeded, in this form: "And the said John Brown made default: whereupon, this cause being submitted to the court, and the court having fully heard the parties, by their counsel, and mature deliberation being thereon had, it is considered by the court now here, that the said Andreal E. Van Braam Houchgeest, do recover against the said John Brown, the surviving partner as aforesaid, the sum of $34,455.27 damages, and costs of suit, taxed at $16.52." To the record of this judgment, the following memorandum was annexed: "Nota Bene.—The above sum, as ordered by the court, includes the principal and interest from the 15th January 1795, to the 19th November 1796, and ten per cent. damages, and $29.22, charges of protest."

Upon this record, the following errors were assigned, and argued by *Howell* and *Robbins*, of Rhode Island, and *Dexter*, of Massachusetts, for the plaintiff in error, and by *Barnes*, of Rhode Island, and *Mifflin*, of Pennsylvania, for the defendant in error.

1st. That after plea pleaded, there was a discontinuance of the cause in the court below, and therefore, no judgment could be rendered.

2d. That ten per cent. damages, and six per cent. interest, are included in the judgment, where no damages at all ought to have been given.

3d. That the court assessed the damages, when they ought to have been assessed by a jury.

For the *plaintiff* in error.—1st Error assigned: It appears from the record, that there was a discontinuance of the cause, by an omission of the plaintiff below, and no verdict or judgment can cure the defect. The defendant had come in, and tendered an issue upon every count in the declaration; and without a joinder of issue, or any species of replication, the suggestion of the death of Francis, is the only thing that occurs between the defendant's plea, thus traversing the whole cause of action, and the judgment against him by default. It does not appear, that the plaintiff himself was in court; nor, indeed, under all the circumstances of the record, can it be conclusively ascertained, for whom judgment ought to have been given. It is true, that by the courtesy of the bar, the *similiter* might, perhaps, have

been entered at any time, while the cause was depending in the original jurisdiction; but until it was entered, the defendant, by pleading, had done everything that law or reason could exact from him; and it is too late to enter it, when the cause is removed upon a writ of error. In deciding [*346 *on this exception, the court will be governed by the law of Rhode Island, by virtue of the reference made in the 34th section of the judicial act, to the laws of the several states, as rules of decision in trials at common law, in the courts of the United States, where they apply. But the law of Rhode Island must not be construed to recognise any loose system of practice, introduced upon the principles of mutual indulgence, for the personal accommodation of attorneys. By an act of the state, it is declared, that in all cases, for which the legislature has made no positive provision, the laws of England shall furnish the rule of decision. If, therefore, any custom, usage or practice shall be in opposition to an express statute of Rhode Island; or where there is no statute on the subject, if it shall oppugn the principles of the common law of England, it is void, and ought to be disregarded. In the present instance, there is no express statute; but the discontinuance is fatal, at common law; and therefore, fatal, by the law of Rhode Island. There can be no judgment by default, after an appearance, much less after pleading; but the plaintiff should have entered the *similiter*, and then he would have been entitled to make out his case before a jury, whether the defendant attended or not, to support his plea. As the record stands, it cannot be understood, what was tried, an issue in fact, or a demurrer in law. (*a*)

2d Error assigned.—By the law of Rhode Island, (*b*) it is declared, "that when any bill or bills of exchange shall be returned from any parts beyond sea, duly protested for non-acceptance or non-payment, the person or persons to whom the same was (or were) payable, shall be entitled to have and recover of the drawer or drawers, indorser or indorsers of the bill or bills of exchange, ten per cent. damages, over and above the principal sum for which such protested bill, or bills of exchange so protested, was or were drawn, and also lawful interest from the time such bill or bills of exchange so protested, were purchased, until final judgment for the same be obtained, and also legal charges of protesting said *bill (or bills), with costs of [*347 suit." It is agreed, that under this law, damages might have been recovered upon the protest for non-acceptance merely; but then the bills and protest for non-acceptance must have been returned in a reasonable time; whereas, they were not returned until a year had elapsed; the bills

(*a*) Paterson, Justice.—I shall certainly consider myself bound, in some cases, by the practice of the state courts; and therefore, I wish to get a practical exposition of the statute, to ascertain whether the judgment by default can be considered as good for nothing, after there has been such a discontinuance as the present.

Chase, Justice.—I shall be governed, in forming my opinion, by what the common law says must be the effect of a judgment by default; without regarding the practice of the state. If, indeed, the practice of the several states were, in every case, to be adopted, we should be involved in an endless labyrinth of false constructions, and idle forms.

(*b*) "An act for ascertaining damages upon protested bills of exchange," originally passed in the year 1743, but included in the revised Code of Rhode Island law (1776), page 19.

were protested for non-payment; and in point of fact, it is conceded, that the action is brought upon the protest for non-payment, and not upon the protest for non-acceptance. The notice of the non-acceptance will not alter the case; for the bills, with the protest, should have been returned to the drawers, so as to put it in their power to take them up, and to pursue their remedy over against the drawee, in case he had their effects in his hands at the time of protest. Then, considering the case upon the protest for non-payment, no damages ought to be allowed, unless the bills were duly protested; and it appears, from the plaintiff's own showing, that they were not protested for ten days after they had become payable, which is not so soon as it might have been, from the nature of the case, or as it ought to have been, according to the law of merchants, by which only three days' grace are allowed. It is true, that this protest may be in time for one purpose, at common law, for instance, to maintain an action against the drawer, who had no assets in the hands of the drawee, at the time of protest; and yet the bills shall not be deemed duly protested, for another purpose, by statute, for instance, to entitle the payee to recover damages.

It will be urged, however, that the allowance of damages only appears by the *nota bene* subjoined to the judgment of the court below, and that this ought not to be taken into consideration as a part of the record. But what constitutes a record is a very different thing, in different states. The mode of stating the judgment, or the reasons for it, will likewise admit of great latitude and diversity. If the purport of the *nota bene* had been incorporated with the judgment, there would have been no ground for cavil; and where is the substantial difference, whether the judge delivers the explanation himself, or directs it (which, for aught that appears, may be the fact) to be entered by the clerk? If the court had confined its view to the mere formal part of the record, in the case of *Bingham* v. *Cabot* (*ante*, p. 19), the ground of reversing the judgment below could never have appeared; and if the *nota bene* is reversed here, it cannot be determined what has been tried by the court below. But, after all, the allowance of damages must necessarily be inferred from the record, independent of the *nota bene*. Thus, the declaration sets forth and demands the principal, interest, cost and damages, accruing by virtue of certain bills of exchange; and the demand being
*348] reducible to *certainty by figures, this court can follow the court below, and by mere calculation, from *data* existing on the record, correct any error that has been committed. Since, then, there is a judgment for more than the principal, interest and costs upon the bills of exchange, the surplus must be error; and the *nota bene* only serves to explain how that surplus has arisen.

3d Error assigned.—The damages ought not to have been assessed by the court. It is admitted, that where a demand appears to a certainty upon the record, or may be reduced to a certainty, by the use of figures, the court may itself make the calculation, or refer it to the proper officer to be done. 3 Leon. 213; 1 H. Black. 541. If, therefore, the declaration had demanded nothing more than appears on the face of the bills, the present exception could not prevail; because the specific sum to be adjudged might be conclusively ascertained, by adding, upon a simple process of figures, the amount of the interest to the principal; though even that doctrine has been controverted in a very recent case. 4 T. R. 275. But the demand is

not only for the principal and interest, but likewise for damages, which are altogether uncertain; depending upon the fact, that the bills have been returned duly protested; and that fact involving a complicated investigation into the period of the return, as well as into the time and mode of protest. Even, indeed, with respect to the interest, a similar uncertainty arises under the provision of the Rhode Island law; since, interest is to be allowed from the time of purchasing the bills; and therefore, the time of purchasing the bills was a fact to be ascertained, before any calculation could be made. But exclusive of these points, necessarily connected with the bills, the defendant, under the general issue, which he had tendered, was entitled to bring a great variety of matters into his defence. As there is much diversity in the laws on this subject, some allowing twenty per cent., others, only ten per cent. damages, and some, no specific damages at all, the place of drawing the bills may be material. Nor can it be said, that the judgment by default, even if it had been regularly entered, would admit all that is demanded in the declaration; it admits the cause of action as stated, but does not admit the *quantum* of the demand. The defendant might, therefore, have shown an indorsement after the bills were dishonored, and a subsequent payment, on the principle laid down in 3 T. R. 82; for an indorsement, in such case, is not conclusive against the drawer. 12 Mod. 192.

It is not contended, that, under the principles of the English law, or the usage of New England, the form of a writ of inquiry is indispensable, to ascertain damages upon every judgment by default; but wherever matters of fact can be separated *from matters of law, it will be agreed, to be a general and favorite practice, to allot the assessment of damages [*349 to a jury. The ancient authorities are, it is true, exceedingly crude in relation to the distribution of jurisdiction between judges and juries; but we have received the doctrine in its modern, perfect state; and as such, are deeply interested in adhering to it. So forcible is the modern example of the English courts, that the judges have refused even to value foreign money (4 T. R. 493); and a motion for referring a bill of exchange, drawn for Irish sterling, to the master, in order to see what was due, for principal, interest and costs, has been recently rejected in Westminster Hall. 5 T. R. 87. It is here, indeed, to be remarked, that the bills of exchange, in the present instance, were drawn for British sterling money; which is, surely, as much to be denominated foreign money in an American court, as Irish sterling can be so denominated in an English court. (*a*) Besides, it is to be considered, that in England, damages are compensatory; while in Rhode Island, in most of the other states in the Union, and in many foreign countries, damages are in the nature of a penal sum, given by statute; and not a solitary authority can be produced, where any court has referred a bill of exchange to the prothonotary, to add, by way of damages, any sum beyond the precise computation of interest.

The doctrine having, then, been thus settled in England, the question

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(*a*) PATERSON, Justice.—The value of foreign money, generally speaking, is uncertain; but it may be rendered certain, by adopting the coin and fixing its value by law. There was a resolution of congress adopting the pound sterling and fixing its value in dollars: and the value of the principal foreign coins has been fixed by an act of congress (of 4th August 1790, § 56), so far as relates to the payment of duties.

arises, whether the statutes of Rhode Island have made any difference in the common law? By the act regulating the proceedings in the courts of that state (page 59), it is provided, "That in all cases, both at the inferior and superior courts, where judgment shall pass by default, discontinuance, *nihil dicit*, *non sum informatus*, or demurrer, where damages are to be inquired into and assessed, damages shall be inquired into and assessed by the court, or otherwise by a writ of inquiry, at the discretion of the courts." This provision may be regarded in two points of view: 1st. Considering it, upon the ground of the opposite construction, whether it furnishes a rule for the federal courts, from which they can derive any new authority; and 2d. Considering it, upon the ground of our construction, whether the assessment of the damages ought not to have been referred to a jury.

1st. On the first of these grounds of consideration, there is no key to an explanation, but the act of congress; which declares *that the *350] laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." Now, though this is an adoption of the laws of Rhode Island, where they apply, it cannot be considered as a recognition of all the modes of practice which may have been introduced to determine the rights of a party; compelling the federal courts, whatever may be the extravagance of those modes, to be in all respects as erratic as the courts of the states. For instance, though where the state law regulates the descent of real property, the circuit court must decide conformable to the *lex loci*; yet, if the state legislature had instituted the ordeal, or trial by battle, to ascertain who was the right heir, the judges of the circuit court would not, surely, erect themselves into such a tribunal, and preside at such a mockery. If the federal courts should attempt to alter the fundamental laws of descent, the citizens of Massachusetts, or Rhode Island, would have reason to complain, and the complaint would certainly be heard; but if, disdaining to sanctify the errors of clerks, and the blunders of yearlings (to whom too often the business of keeping and making up a record is confided), the federal courts should discountenance and reject the errors and irregularities of the practice of the state courts, every suitor would gratefully acknowledge the obligation. There is, perhaps, occasion to lament, that errors in jurisprudence have too long kept the citizens of the eastern states in darkness, ignorant of their rights and duties; and it is one of the beneficial consequences that may be fairly expected from the establishment of the national government, that such amendments will everywhere be introduced into the practice of the law, as are consistent with substantial justice, legislative acts and ancient usages, approved by experience or favored by local peculiarities. Take the law and practice of Rhode Island, however, to be such as they are described by the opposite counsel, they cannot prevail over an express law of congress. In this case, there can be no denial, that the plea tendered an issue in fact; and all trials of issues in fact must, says the judicial act, be by jury.

2d. But it is not necessary to insist further on this ground, since a true construction of the Rhode Island law itself, must give the assessment of damages to a jury. The law says that, in certain cases, "damages shall be inquired into and assessed by the court, or otherwise by a writ of inquiry, at

the discretion of the courts." If, then, discretion here means a sound legal discretion, and not mere will, whim and caprice, it must be applied to a discernment and corresponding allotment of the cases, in which the law authorizes a court to fix the **quantum* of debt, and in which it demands the interference of a jury for the assessment of damages. [*351 The opposite construction leads to the absurdest consequences: the judge might, at pleasure, submit a promissory note to a jury, for the mere calculation of interest; and undertake himself to assess the damages in an action for a libel, when judgment has been given on demurrer for the plaintiff. In the latter instance, he would be obliged to try the truth of the allegation, and the credibility of the witnesses, and to decide the extent of the injury which the libel has produced; and if a judgment thus preposterously rendered should be brought hither, this court would be bound to affirm it: but there is surely no case, consistently with the scope of the judicial act, where the circuit court can decide a point of law, without affording an opportunity upon the record, for its being examined, affirmed or reversed on a writ of error. In equity causes, it is provided, that the facts on which the decree of the circuit court is founded, shall be made to appear upon the record; and in common-law causes, the principle equally applies, that a judge ought not to be allowed to travel over ground, where he can never be traced. Then, if the discretion mentioned in the Rhode Island act is a legal discretion to ascertain the distributive jurisdiction between judges and juries, and not an authority for the former to blend and usurp the powers of the latter; and if the judges in this case have decided what the jury ought to have assessed; it is an error in point of law, which this court is competent to correct. Whatever may be the practice of the lawyers of Rhode Island, it is but a construction of the law, and not the law itself; and if it is an erroneous construction, this court, so far from being bound to adopt, is bound to reject it. Nor is the error cured by any statute of *jeoffaile*. The case from 7 Vin. Abr., p. 308, pl. 24, only shows that the want of a formal writ of inquiry was cured, where the damages appeared to have been, in fact, assessed by a jury: but there is no reason in the case itself, nor in the cases there cited, that if damages had not been assessed at all, or had been assessed by an improper tribunal, the error would not be fatal.

For the *defendant* in error.—1st Error assigned: It will be proper to premise, on general principles, that great difficulties must have arisen in organizing the federal courts, so as to prevent an injurious clashing with the jurisdiction and practice of the various state courts. From these difficulties, there could be found no other mode of escaping, than by adopting for the government of the federal courts, the same law and practice that prevailed in the respective states, in which those courts, from time to time, exercised their functions. The policy of the measure was likewise supported by its tendency to *make the new government sit easy on the public mind, and to facilitate the administration of justice throughout the Union. [*352 For as the law and forms of the respective state courts had been adopted in order to accomplish substantial justice, according to the peculiar and local circumstances of each state; and as the people were content under the operation of those municipal regulations; it was natural to presume, that by adopting the same rule for the federal courts, the same salutary effect would

be produced. But on the other hand, it is obvious, that any project for a general system of jurisprudence, co-extensive with the Union, could only have engendered discontents, and must have been abortive. To have attempted a theory of law and practice entirely novel, would have occasioned endless perplexity; and to have superseded the settled practice of some states, in order to introduce the practice of others; to compel, for instance, the lawyers of Massachusetts, to study and enforce the practice of the lawyers of South Carolina, would have occasioned endless jealousy and inconvenience. From these considerations, the congress wisely enacted, "that the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." This adoption of the state laws extends as well to the unwritten, as to the written law—to the law arising from established usage and judicial determinations, as well as to the law created by positive acts of the legislature. And the act for regulating process, in language equally general adopts "in each state respectively, such forms and modes as are used or allowed in the supreme courts of the same."(*a*) The only question, therefore, to ascertain the legal correctness of the present record, is—what are the laws and modes adopted by the state of Rhode Island, in relation to the controverted points? It is immaterial, how far the answer shall be inconsistent with certain *dogma* of the English common law, or at variance with the municipal regulations of any other state; it is enough, to show that such are the laws and modes of Rhode Island, and that they are competent to all the purposes of justice.

With respect, then, to the assignment of error, because there was a discontinuance of the suit, a reference to the uniform practice of Rhode Island, must furnish a decisive refutation. Both in the court of common pleas, and the superior court of that state, the court proceeds to call the parties in the actions depending on the docket. If either party neglects to appear, in whatever state of the pleadings, his non-appearance *is noted by
*353] the clerk, and judgment is rendered for the other party. If, as in the present instance, a plea has been pleaded: and on calling over the docket, the plaintiff appears, and the defendant does not, the judgment is entered for the plaintiff, without regarding the plea. If, on the other hand, the defendant had appeared, and the plaintiff had not, judgment would have been entered, in favor of the former, for costs. But if both had appeared, whenever called by the court, the *similiter* could be entered at any time, and it is usual to enter it, at the time of qualifying the jury. Even, however, where an issue has been regularly joined, the court never proceed to try it, unless both parties appear; but enter judgment as above stated, against the delinquent.(*b*) Thus, it is plain, that the non-attendance of the defendant is considered, in the practice of Rhode Island, as an abandonment of his plea. Nor is the practice without sanction from the books of English law; which show how a departure of a party, in despite of the court, will be recorded, and how, in almost any stage of a suit, it may be a ground for rendering

(*a*) See the acts of the 29th of September 1789, and 8th of May 1792.

(*b*) At the suggestion of the court, Mr. Barnes reduced this statement of the practice of Rhode Island to the form of a certificate, and filed it in the clerk's office.

judgment against him. 7 Vin. Abr. p. 450, pl. 3, 5, 11; Ibid. p. 473, pl. 10; Ibid. p. 474, pl. 19; Ibid. p. 476, pl. 7; Ibid. p. 487, pl. 2; 1 Str. 267. It is material, too, that the judgment is expressly rendered upon the defendants making default. 5 Com. Dig. 11.

2d Error assigned.—The allowance of damages only appears on the *nota bene* annexed to the record, which was an act of supererogation on the part of the clerk, and ought to be treated as mere surplusage. If, however, the court were right in assessing the damages themselves, the assessment stands in the place of a writ of inquiry; and surely, the principles on which a jury give their verdict, can never be the foundation for a writ of error. Bills of exchange and protests are coeval with the 13th century; and from the time of introducing a protest, to the present day, its only use has been to enable the drawer of the protested bill to take his funds out of the hands of the drawee; but if no funds were in the hands of the drawee, then the fate of the bill must have been anticipated, no injury can be done to the drawer, and no notice will be necessary. It is true, that if the drawee had failed, with effects in his hands, between the time of the bills becoming due, and the time of protest, the drawer would be discharged from any responsibility to the holder of the bills; but this fact, operating as a discharge, must be proved on the part of him who wishes to take advantage of it; since *primâ facie*, whatever may be the date of the protest, *the drawer is responsible for the amount of the bills.(a) Ld. Raymond; 12 Mod. 15; [*354
Show. 317; Cun. B. of Ex. 9; 1 T. R. 405; Doug. 55, 654. But independently of this general principle, the bills were duly protested, in time and manner, according to the law of merchants; and as the Rhode Island act does not designate any particular process of protest, that law must have been contemplated as furnishing a rule to decide the question. It is manifest, then, from all the authorities as well as from the reason of the case, that in order to be duly protested, according to the law of merchants, it is not necessary to be done, within the three days of grace, or any other specific term. The usances on bills of exchange differ, in different countries; and the case in Shower's Reports, p. 317, proves that a bill may be duly protested, even thirty days after it has become due, if the drawer does not show that he has sustained some damage by the delay.

3d Error assigned.—It may be thought by some to be a subject for regret, that Rhode Island has not discovered the superior merits of the systems resting on the English common law, or invented by the jurisprudential skill of her sister states; but as it has so happened, it will not be disputed, that within her jurisdiction, whatever is her law, and not what is the law of other countries or states, must furnish the rule for decision. On the cases in which there exists a necessity of employing writs of inquiry, the diversity of theory and practice has been great, at different periods of juridical history, and at

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(a) Chase, Justice.—You surely need not labor that point. The drawer would not be answerable for anything—not for the principal, and of course, not for the damages—if the payee had not done his duty: but what discharges the drawer, he is surely bound to show, and not his adversary.

Dexter.—This is not the ground of our argument: we contend, that the payee is not entitled to damages, under a positive law, because the bills have not been duly protested, within the meaning of the law.

different places, influenced by the principles of the British laws. In some of the states, writs of inquiry are executed on every occasion, even to fix a mere computation of interest, but in New England, and especially in Massachusetts and Rhode Island, a writ of inquiry never issues, but at the request of the parties, or by the discretion of the court, in whose presence it is invariably executed. No language can be more forcible to exclude the opposite construction, than the language of the Rhode Island act, which declares, "that in all cases where judgment shall pass by default, &c., where damages are to be inquired into and assessed, it shall be done by the court, or otherwise, at their discretion." The practice founded on this law, and coeval with it in commencement, furnishes the best exposition. Thus, the judges assign a day, after every term, to assess damages in defaulted cases; and however preposterous it may be deemed by those who practice upon
*355] another *plan, it is not the less true, that they constantly exercise the power of assessment, in trover, in cases of special contract, and even in actions of slander. Suppose, that the statute had said, in explicit terms, the court shall assess damages, and not a jury, could a writ of inquiry be issued? And if the legislature could give the jurisdiction to the court, the uniform construction that they have given it, except where a writ of inquiry is awarded by their own discretion, or requested by a party, ought not to be arbitrarily rejected. Then, if the state court had the power, the circuit court, sitting in Rhode Island, also possessed it; and in their discretion, were bound either to exercise it themselves, or to refer it to a jury. Neither party asked for a writ of inquiry; but in the words of the record, "the cause being submitted to the court,"(a) the court saw no more reason to issue a writ of inquiry to ascertain the damages specifically given by law, than to ascertain the interest at the legal rate; and after the judgment by default, nothing could be submitted to the court, but the damages. This, therefore, was the matter tried; and it sufficiently appears, without the aid of the excrescent *nota bene*.

Besides, on this point, as well as on the point of discontinuance, the English authorities countenance the Rhode Island law and practice. Thus, on a demurrer in law, the justices may award damages for the party by their discretion, or award a writ to inquire of damages, at their election. 7 Vin. Abr. p. 301, pl. 4. Where judgment is by default, the court may give the damages, without putting the party to the trouble of a writ of inquiry. Ibid. p. 308, pl. 22. The court may not only assess damages originally, but increase the damages previously assessed by a jury. Ibid. p. 270, pl. 7, 9. It is the course of the court, to give interest for damages upon a single bill, or bills of exchange, &c., and there needs no writ of inquiry. Ibid. p. 307, pl. 16. Nay, a writ of inquiry is considered, in some cases, merely sounding in damages, as a mere instrument to inform the conscience of the court, "who, if they please (says Chief Justice Wilmot), may themselves assess the damages." 3 Wils. 61; s. p., 2 Ibid. 244. The modern cases, likewise, show the latitude to which the court extend this part of their jurisdiction; and it is the established practice to refer it to the prothonotary, to ascertain

(a) Paterson, Justice.—Is it the usual way of making up a record, where neither party demands a writ of inquiry, to say—the cause is submitted to the court?

Barnes.—Yes, it is the constant practice.

damages and costs, and calculate interest on a promissory note or bill of exchange, after judgment by default. H. Bl. 252, 541, 559, 4 T. R. 275. Bailey on B. of Ex. 66, 67, app. 5; Kyd on B. of Ex. 155. But, after all, when judgment has been entered by default, *the want of a writ of inquiry is aided by the statutes of *jeoffaile*. Fitzg. 162–3; 7 Vin. p. 308, pl. 24; 2 Str. 878. s. c. 2 Ld. Raym. 397. [*356

On the 13th of February 1797, WILSON, Justice, delivered the opinion of the court.

BY THE COURT.—We are unanimously of opinion, that under the laws and the practical construction of the courts of Rhode Island, the judgment of the circuit court ought to be affirmed.(*a*)

With respect to the entry of this affirmance, interest is to be calculated to the present time, upon the aggregate sum of principal and interest in the judgment below; but no further. We cannot extend the calculation to June term next, when the mandate will operate in the circuit court, as the party has a right to pay the money immediately.

The judgment affirmed, with single costs.

RULE.

February 13th, 1797. It is Ordered by the Court, that the clerk of the court to which any writ of error shall be directed, may make return of the same, by transmitting a true copy of the record, and of the proceedings in the cause, under his hand and the seal of the Court.

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*AUGUST TERM, 1797. [*357

FENEMORE, Plaintiff in error, *v.* UNITED STATES.

Assumpsit.—Waiver of tort.—Certiorari.

If one false represent that he is a public creditor, and thereby obtains a certificate of stock in the public funds, the government may waive the *tort*, affirm the transaction, and recover the value of the certificate, in *assumpsit*.[1]

And the interest paid may be recovered back, under a count for money had and received.

It seems, that a *certiorari*, issued on a suggestion of diminution of record, is to be returned in the same manner as a writ of error.

WRIT of Error to the Circuit Court for the district of New Jersey. On the return of the record, it appeared, that a declaration in case had been filed in this action, containing three counts; the first and second of which were special counts for a fraud and deceit, and the third was a general count, for money had and received by the defendant to the use of the plaintiff.

(*a*) CHASE, Justice, observed, that he concurred in the opinion of the court; but that it was on common-law principles, and not in compliance with the laws and practice of the state.

[1] In general, a party may waive his action of *tort* for a deceit, and sue in *assumpsit* for the money paid on the footing of the contract Gray *v.* Griffith, 10 Watts 431; Pearsoll *v*

The first count charged the defendant with an express *assumpsit*, that in consideration that the commissioner for settling continental accounts, would issue a certificate for $4273\frac{42}{90}$, he promised his account against the United States was just for that sum, and exhibited certain vouchers to support it; that the account ought to be allowed, and that the vouchers were true and lawful: it averred that, confiding in the said promises, the United States, by their said commissioner, did issue the said certificate: and it assigned as a breach of the said promises, that the defendant did not regard the same, but craftily deceived the United States in this, that the said certificate ought not to have been issued and delivered; that the account was not, nor was any part of it, for a just debt, but was deceitful, and that the account and vouchers were not true and lawful; whereby, the United States had been greatly deceived.

The second count stated, that whereas, the United States had, before that time, issued and delivered to the defendant the said certificate, and had accepted and received from him, as lawful vouchers for the issuing and delivery thereof, the account aforesaid, together with certain paper writings in *the declaration set forth, in consideration thereof, he undertook and faithfully promised that the said account was a just and true account, and that the sum mentioned in it was lawfully due from the United States and ought to be so certified, and that the said certain paper writings then and there exhibited as further vouchers for issuing the said certificate, were regular and lawful vouchers: nevertheless, the defendant did not regard his said last-mentioned promises, inasmuch as the said account was not true, nor was any part thereof due, nor were the said paper writings lawful vouchers, by means whereof, the United States were by him deceived and greatly injured.

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The third count having stated an *assumpsit* in the usual form, for $8000 received to the plaintiff's use, concluded, that the defendant, not regarding his several promises, for making payment thereof, had not paid the said sum of money, but refused and still refuses to pay the same, to the damage of the United States, $8000.

The defendant pleaded non *assumpsit*, whereupon, issue was joined; and on the trial of the cause, the jury found a special verdict of the following tenor:

"The jury find, that the commissioner named in the first and second counts was the lawful officer of the United States, for transacting the business therein mentioned; and that certain regulations were made by congress, in relation thereto, on the 20th of February 1782, and the 3d of June 1784, to which the jury refer. That the defendant, on the 2d of August 1784,

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Chapin, 44 Penn. St. 9; Camp *v.* Pulver, 5 Barb. 91. So, a party who has been induced to enter into a contract, by fraud, may affirm it, and sue in *assumpsit*, even though the fraud amount to a felony. Benedict *v.* Bank of the Commonwealth, 4 Daly 171. Where goods are fraudulently purchased on credit, the vendor may waive the *tort*, and maintain his action immediately for goods sold and delivered. Wigand *v.* Sichel, 3 Keyes 120; Roth *v.* Palmer, 27 Barb. 652. And it was held, that the government could recover back a sum paid for a spurious treasury note, purchased for retirement, which had never been issued under any act of congress. Cooke *v.* United States, 12 Bl. C. C. 43; s. c. 4 Ben. 376. This case was reversed by the supreme court, on another point, in 91 U. S. 389, but the principle was affirmed

fraudulently exhibited an account, claiming a balance of 1602*l.* 11*s.* 7¾*d.*; equal to $4273\frac{9}{90}$, as due from the United States to him, which account, so fraudulently exhibited, and the vouchers therefor, the jury set forth at large. That then and there, the defendant received, through fraud and imposition, from the United States, the said balance, so as aforesaid falsely pretended to be due to him, in a certificate, which the jury set forth in its proper words and figures. That the defendant gave a receipt for the same, in the words and figures set forth by the jury. That according to law, the defendant, on the 12th of May 1791, subscribed and funded the said certificate, in the funds of the United States, and became a holder of the stock it produced, amounting, with the interest, to $4893\frac{8}{90}$; and that he gave to the United States a receipt for funded debt comprising the said certificate, which was thereupon delivered up and cancelled. But whether the said subscription, the subsequent funding of the said $4273\frac{9}{90}$, with the interest of $619\frac{59}{90}$, and the stock acquired in virtue thereof as aforesaid, ought to be allowed as payment of the amount of the said certificate by the said United States to the said defendant, the said jurors know not; and thereupon, they pray the advice of the court here in the premises: *And if it ought to be allowed, then they say, he was paid the full amount, to wit, $4893\frac{8}{90}$. [*359 And the jurors further find, that prior to the year 1791, the United States had paid part of the interest due on the said certificate, amounting to $1025\frac{58}{90}$. That the defendant, on the 2d of August 1784, undertook and promised to the United States, that the said account was just and true; that the sum of $4273\frac{9}{90}$ was justly due to him from the United States, and ought to be so certified; and that the vouchers produced by him in support of the said account were regular and lawful vouchers for issuing and delivering the said certificate to him. That the said account was not just, nor was the sum specified to be due therein, or any part thereof, justly due, but the said account was fraudulent, and the vouchers produced by him in support thereof were not regular and lawful vouchers for issuing and delivering to him the said certificate. And whether, on the whole matter by the jurors so as aforesaid found, the plaintiff ought to recover against the defendant, they are ignorant, and pray advice of the court. And if, upon the whole matter, &c., it shall appear to the court, that the defendant did assume in manner and form as the United States complain, then they say, he did assume upon himself, &c., and they assess the damages by reason of the non-performance of his promises and assumptions aforesaid, $3939.70, besides costs and charges; and for costs and charges, ten cents: but if it appear to the court that he did not assume, &c., then they say he did not assume, &c. And if, upon the whole matter aforesaid, by the jurors found in the manner aforesaid, it shall appear to the court, that the defendant did assume as to the sum of $1025\frac{58}{90}$ so as aforesaid paid by the United States, in part of the interest so due on the said certificate, funded as aforesaid, &c., then they find he did assume, &c., and assess the damages of the United States by reason of the non-performance of the promises within mentioned, besides costs and charges, at $1023.64,(*a*) and for costs and charges, ten cents: but if, upon the whole matter, &c., it shall appear to the court, that he did not assume, in con-

(*a*) There seems to be a variance between the sums, but no notice was taken of it in the argument.

struction of law, in manner and form as the United States complain, then they say he did not assume as to the said $1025\frac{88}{100}$, &c."

Upon this verdict, the circuit court rendered the following judgment, on the 2d of April 1795: "That the United States do recover against the said Thomas Fenemore, their damages aforesaid, by the jurors aforesaid, in form aforesaid, assessed at $4965.34; and also $169.43, for their costs and charges, by the court *here, to the United States, with their assent, of increase adjudged; which said damages in the whole amount to $5134.77: and the said Thomas in mercy, &c."

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The cause was argued at the last term, upon an issue joined, after an assignment of the general errors, and the plea of *in nullo est erratum*, by *Ingersoll* and *E. Tilghman*, for the plaintiff in error, and by *Lee* (the Attorney-General), for the United States. It was then alleged in diminution, however, that a rule had been made, by consent, in the court below, which was not transmitted with the record, allowing special counts to be added to the declaration, and agreeing "that no objection should be made to them, by reason of their being of such a nature, as not to be joined with the first or any other counts;" in consequence of which, the two special counts above stated had been added. A *certiorari* was, therefore, awarded, at the instance of the attorney-general, upon the return to which, at the present term, the rule was duly certified. (*a*)

For the *plaintiff* in error, it was observed, that the object is to compel Fenemore to pay the full value of a certificate, which the action itself considered as fraudulently obtained, and which, consequently, is a mere nullity. For so much cash as he had actually received on account of interest, an action of *assumpsit* may be regularly brought; but the remedy as to the certificate, is a bill in equity to compel him to surrender it; or, perhaps, an action of deceit might be proper, but *assumpsit* will not lie. Two questions, however, are suggested by the special verdict: 1st. Whether there has been a payment of the amount, by the United States, to Fenemore? And 2d.

(*a*) It became a question, whether the return to a *certiorari* (which was made in this instance, by the clerk of the circuit court, under his hand and the seal of the court) was within the rule established at the last term (*ante*, p. 356), relative to the return of writs of error?

Chase, Justice.—It appears to me, that the cases are embraced by the same principle; and therefore, that the return of the *certiorari* ought to be allowed.

Iredell, Justice.—I cannot think, that a regulation respecting writs of error, extends, of course, to writs of *certiorari*. They are process whose nature and operation are in some respects widely different. The present case, therefore, seems to require a new rule.

Paterson, Justice.—I will not decide, whether, generally speaking, writs of error will include writs of *certiorari;* but as to the present object, they are clearly within the principle of the same rule.

Cushing, Justice.—It is enough for the present purpose, that the principle of the rule applies as strongly to the return of a *certiorari*, as to the return of a writ of error.

Ellsworth, Chief Justice.—By the rule, it was made the duty of the clerk of the circuit court, to return the writ of error, and as the writ of error is not returned, unless all the proceedings in the cause accompany it, the return to the present *certiorari* can only be considered as completing the duty imposed by the original rule, in pursuance of a supplementary order from this court.

Whether *he assumed in the manner and form stated in the declaration? In answering the first question, it is to be remarked, that in a special verdict, nothing is to be intended, the promise, whether express or implied, must be expressly found; and as the special verdict finds no consideration for charging Fenemore with the sum of $3939.70, the certificate of stock (which is still to be presumed to be in his possession, which is not proved to have been converted into cash, and which is, indeed, of no value, on account of the fraud in obtaining it) cannot be presumed to be a payment, either in fact or law; and of course, there is no foundation for a promise, either express or implied.[1] In answering the second question, it is not denied, that an express promise (essentially the same in both of the special counts) is laid in the declaration; and it is supposed, that an attempt was made to prove it as laid; but still, the finding of the jury does not support either the first or second count; for though the jury find the promise, it is not found upon the consideration laid in the declaration, which must be the governing principle. By way of supporting the third count, likewise, the jury find all the circumstances of subscribing to the funding system (which do not amount to a payment); whereas, they were bound to find the actual receipt of the money, and the only finding of an actual receipt of money, is the interest of $1025 on the funded stock.

But the facts arising upon the case, as set forth in the declaration, are inconsistent; the counts are of a nature so different, that they cannot be joined in the same form of action; the defendant could not be apprised of what he must prepare to try; and he ought not to be entrapped by the generality of the count for money had and received. The special counts are in the nature of a deceit; which cannot regularly be united with case upon promises. Again, the first and second counts affirm the transaction, consider the certificates as the lawful property of Fenemore, and bring this action to recover damages for the breach of his engagement; but the third count disaffirms the transaction, considers the certificate as a nullity, and brings this action to recover the money paid to Fenemore, under color of the certificate, as so much money received by him, for the use of the United States. The verdict and the judgment are affected by the same incongruity; for both parts of the finding and judgment cannot be true; the first part supposing the transaction valid, and giving damages; while the second part, supposing it invalid, adjudges the money to be the property of the United States. Thus, the plaintiff presented an inconsistent cause of action; the jury mixed the inconsistent ingredients together; and the court below have unadvisedly given the whole their sanction. But if the inconsistency appears *on the record, this court cannot undertake to decide, to [*362
which part of the finding the jury would have adhered, had the question been seasonably proposed to them; and must, therefore, reverse the whole proceeding. The United States may, perhaps, either affirm or disaffirm the transaction; but they cannot do both; and they must make an election, before they institute their action. (*a*)

(*a*) Cushing, Justice.—May not the money be considered as part of the damages assessed under the special counts, and so avoid the objection of a disaffirmance?

Tilghman.—The finding of the jury negatives that idea. They leave it to the court

[1] See Cushman *v.* Jewell, 7 Hun 525.

The following authorities were cited, in the course of the argument, for the plaintiff in error: 3 T. R. 288; 1 Ibid. 22; 3 Bl. Com. 158; Doug. 39; 1 Esp. 97; Cowp. 414; Doug. 132, 134; 2 T. R. 289, 143; Imp. Pr. 55; 3 Wils. 354; 2 Ld. Raym. 825; Cowp. 818; 2 W. Bl. 848, 849.

For the *defendant* in error, it was premised, that there seemed to be no hesitation in admitting, on the part of the opposite counsel, that every principle of conscience and equity was opposed to the conduct of their client; but they contended (and it must be agreed), that a court of error can only decide on the record, and the principles of law which are pertinent to it. Considering the case, then, in the strictest point of view, the judgment ought to be affirmed. Though the verdict is certainly informal, and appears, at first, to be imperfect; yet, every material fact is found; and any unnecessary reference to the court, will be disregarded as mere surplusage. The judgment is for both the sums found by the verdict; and without giving both, it is manifest, that justice could not be done to the United States. A contract may be affirmed, or disaffirmed: the public policy of the government required that this contract should be affirmed. The person who committed the fraud ought not, however, to be benefited by it; and having recovered from him the value of the certificate, he will himself (*à fortiori*, every purchaser) be entitled, in future, to receive the principal and interest from the United States. The gist, therefore, of the inquiry is, whether it sufficiently appears on the record, that the United States have suffered an injury by the fraudulent conduct of the plaintiff in error? To this inquiry, it is immaterial, whether Fenemore paid or received anything; and even if there had been no express *assumpsit* laid in the declaration, or found in the special verdict, the court were empowered to decide, that there was an implied *assumpsit*, upon the reference of the facts for that purpose, by the jury: the jury having, however, found an express *assumpsit;* that subsequent
*363] *reference to the court must be considered as surplusage. Trials per Pais 269, 270, 169; Hob. 54.

But it is urged, that the counts are inconsistent, and cannot be joined in the same declaration: to which, it is answered, that wherever there can be the same plea, and the same judgment, different counts may be joined (1 T. R. 257; 2 Wils. 321); and wherever there has been an express warranty (which extends to all faults known and unknown to the seller), *assumpsit* is the proper form of action. Doug. 19. There may, however, be different forms of action for the same injury. 4 Co. 92. In 3 Bl. Com. 164, it is stated, that if any one sells one commodity for another, an action on the case lies against him for damages, upon the contract which the law always implies, that every transaction is fair and honest. The same commentator observes, that an action of deceit also lies in the cases of warranty, before mentioned, and other personal injuries committed, contrary to good faith and honesty: but an action on the case for damages, in nature of a writ of deceit, is more usually brought upon these occasions. Ibid. 166; Morg.; Esp. 342–59.

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to decide for whose use the interest money was received, and the court adjudge that it was received for the use of the United States.

On the 7th of August 1787, the judges delivered their opinions to the following effect :

CHASE, Justice.—The judgment of the circuit court ought to be affirmed. Here is a case of a plain fraud. A man sets up a claim, exhibits colorable vouchers to support it, deceives the public officer, obtains a certificate that his claim is just, and finally, converts that certificate into transferable stock. The transaction is rank from the beginning to the end ; and the jury have properly found, not only the fraud, but the value of the certificate obtained by it. The United States, by adopting the present mode of proceeding, have precluded themselves from ever disputing hereafter, the validity of the certificate; and they will never, perhaps, be able to indemnify themselves against the subsequent payments of interest, unless Fenemore remains solvent, and accessible to legal process. But, surely, it ought never to have been a subject of argument in a court of justice, whether, on stating a manifest fraud practised upon the public credit and treasury, the United States is entitled to recover an equivalent for the pecuniary injury, from the avowed delinquent.

IREDELL, Justice.—I am clearly of the same opinion. Upon strict technical rules, I had, at first, some doubts, whether the inconsistence of the counts in the declaration would not be fatal: but on the appearance of the rule entered into by consent, for the very purpose of obviating objections on that ground, my mind was perfectly satisfied. The only question, therefore, that remains to be decided, turns upon the right of the *United States to affirm the original transaction ; and if they have that right, [*364 it follows, inevitably, that they ought to recover from the defendant an equivalent for the value of the certificate, which was surreptitiously obtained. I have no difficulty in saying, that the right exists ; and that the public interest, involved in the credit of a public paper medium, required the exercise of the right, in a case of this kind. The circulation of the certificate should be unimpaired ; but the defendant ought, at least, to be made responsible in his purse for the fraud. The defence is, indeed, an extraordinary one: it is an attempt to make the very act of fraud, an instrument or shield of protection. But I trust, no man will ever be able to defend himself in an American court of justice, upon the ground of his own turpitude. As, therefore, every exception to form has been obviated by consent, and as the special verdict finds every material fact to justify the judgment of the court below, I think, that judgment ought to be affirmed.

CUSHING, Justice.—The cause is susceptible of little doubt. The United States had a right to affirm the original transaction, and to proceed, as they have done, for the recovery of the value of the certificate and the interest.

ELLSWORTH, Chief Justice.—Giving a reasonable effect to the rule, which the parties themselves have entered into, all objection as to the form and inconsistencies of the declaration, is obviated. Then, it is to be considered, that the United States had an option, either to affirm or disaffirm the original contract ; and by the present action, they have chosen to affirm it. The special verdict fairly authorized the court below to give judgment for the value of the certificate, on the first and second counts, and for the amount of the money received as interest, on the third count. With respect, how-

ever, to the right of disaffirmance, I wish to be understood, as limiting it to the continuance of the certificate in the hands of the original party; for, if the certificate had passed into the hands of a *bonâ fide* purchaser, even a court of equity would, I think, refuse to invalidate it; and I am sure, public policy would forbid the attempt.

PATERSON, Justice.—As I joined in giving the judgment of the circuit court, it gives me pleasure to be relieved from the necessity of delivering any opinion on the present occasion. But though I have no doubt on the case now to be decided, it appears to me, to be another, and a great question, how far a bill in equity would reach all the points involved in the original transaction. Judgment affirmed.

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*365] *BROWN, Plaintiff in error, *v.* BARRY.

Construction of statute.—Bills of exchange.—Verdict.

A repealing act, and one suspending its operation, passed at the same session, are to be taken together, as parts of the same act.

A statute in derogation of the common law, is to be strictly construed.

In an action against the drawer of a bill, for non-payment, it is unnecessary to aver or prove that the bill was accepted, or, if not, that it was protested for non-acceptance.[1]

In an action on a bill of exchange, if the jury specially find the value of foreign money, the want of an averment of its value in the declaration, is cured;[2] and in such case, a declaration in the *debet* is not erroneous.

ERROR from the Circuit Court for the district of Virginia. An action of debt had been instituted in the circuit court, by James Barry, a citizen of Maryland, against James Brown, a citizen of Virginia; in which, the declaration set forth, that the plaintiff, by his attorney, "complains of James Brown, &c., of a plea that he render to him the sum of 770*l.* sterling money of Great Britain, with interest thereon, at the rate of ten per cent. *per annum*, from the 11th of February 1793, which to him he owes, and from him unjustly detains: For that whereas, the said defendant, on the 11th of February 1793, at Virginia aforesaid, according to the custom of merchants, did make his first bill of exchange, to the court now here shown, bearing date the said 11th of February 1793, signed with his name, by his proper hand subscribed, and directed to Messrs. Donald & Burton, whereby he requested the said Donald & Burton, at sixty days sight of that his first of exchange (his second and third not paid), to pay to the order of Mr. Hector Kennedy, 770*l.* sterling, for value in current money here received (that is to say, at Virginia aforesaid), and to place the same to the account of him the said James Brown." The declaration then proceeded to set forth, in the usual form, successive indorsements by H. Kennedy to Joseph Hadfield, by Joseph Hadfield to Richard Muilman & Co., and by Richard Muilman & Co. (on the 26th of June 1793) to James Barry, the present plaintiff; and a protest for non-payment, on the 21st of June 1793. After averring that none of the bills of the set had been paid, it concluded, "whereby, and by force of the act of the general assembly of the commonwealth of Virginia in that case made and provided, action accrued

[1] Clarke *v.* Russell, *post*, p. 415; Nicholson *v.* Patton, 2 Cr. C. C. 164; Read *v.* Adams, 6 S. & R. 356. But see United States *v.* Bisher, 4 W. C. C. 464, 469.

[2] See Butt *v.* Hoge, 2 Hilt. 81.

to the said plaintiff, to demand and have of the said defendant, the aforesaid sum, &c."

*To this declaration, there was a plea of *nil debet*, issue was thereupon joined, and, after a trial, the jury found a special verdict in the following words: "We of the jury find, that the consideration given for the bill of exchange in the declaration mentioned, was the undertaking of Andrew Clow & Co., a party interested in receiving the same, to deliver to James Brown, the drawer thereof, other bills of exchange, in sterling money, to the same amount: If the court shall be of opinion that the consideration above mentioned, did not come within the operation of the 4th section of the act of assembly of the 28th Geo. II., c. 2, entitled 'an act to amend an act entitled, an act declaring the law concerning executions, and for the relief of insolvent debtors, and for other purposes therein mentioned,' then we find for the plaintiff $4404.42 damages—if otherwise, we find for the plaintiff $3303.82 damages." To the special verdict, this memorandum was added: "And it is agreed by the parties, that if, in the opinion of the court, the plaintiff could not legally give parol testimony to prove that the bill in the declaration mentioned was, in fact, drawn for other consideration than current money, the verdict shall be changed from the greater to the less sum found in the said verdict." [*366

The case was first argued in the circuit court, on a motion made by the defendant to arrest the judgment, for the following reasons: 1st. Because the declaration aforesaid demands foreign money, without stating the value thereof in the current money of the United States of America, or of the commonwealth of Virginia. 2d. Because the said declaration does not charge that the bill of exchange therein mentioned was protested for non-acceptance; neither doth it charge, that the said bill was presented to the persons on whom it was drawn for acceptance, or that they ever were required to accept it. 3d. Because the said action is founded on an act of assembly, which was not in force, at the time when the bill of exchange mentioned in the declaration was drawn." But these objections having been overruled, the law arising on the special verdict was argued, and adjudged to be in favor of the plaintiff; whereupon, judgment was rendered for the sum of $4404.42, with interest at five per cent. from the day of rendering the judgment, and costs.

From the judgment of the circuit court, the present writ of error was brought, a variety of exceptions were taken to the record, and after argument by *Lee*, Attorney-General, for the plaintiff in error, and by *E. Tilghman*, for the defendant, the opinion of the court was delivered by the Chief Justice, in the following terms:

*Ellsworth, Chief Justice.—In delivering the opinion of the court, I shall briefly consider the exceptions to the record, in the order in which they have been proposed at the bar. [*367

I. The first exception states, that the act of the legislature of Virginia, passed in the year 1748, on which the action is founded, as an action of debt, was not in force, when the bill of exchange was drawn, to wit, on the 11th of February 1793. The question is, whether two subsequent acts of the legislature of that state, passed at a session in 1792 (namely, one of November, declaring the repeal of the act of 1758, and another of December, de-

claring a suspension of that repeal until October 1793), did, in fact, repeal, and leave repealed, the said act of 1748. This, it is contended, must have been their effect, as ascertained and limited by two other statutes, namely, one of 1789, declaring, that the repeal of a repealing act shall not revive the act first repealed; the other of 1783, declaring, that statutes should take effect from the day on which they in fact passed, unless another day was named. It must be taken, however, that the act of 1748 remained in force; and that, until after the bill was drawn, for the following reasons: 1. The act suspending the repealing act of November 1792, is not within the act of 1789, which declares, that the repeal of a repealing act shall not revive the act first repealed. The suspension of an act for a limited time, is not a repeal of it: and the act of 1789, being in derogation of the common law, is to be taken strictly. 2. The repealing act, and the act suspending it (acts of the same session) are, according to the British construction of statutes, and the rule which appears to have prevailed in Virginia, parts of the same act, and have effect from the same day: and taken together, as parts of the same act, they only amount to a provision, that a repeal of the act of 1748 should take place at a day then future. The act of 1785, declaring the commencement of acts to be from the day on which they in fact pass, does not apply here; for, by the third section of the act of 1789, it is provided, that when a question shall arise, whether a law passed during any session, changes or repeals a former law, during the same session, which is the present case, the same construction shall be made, as if the act of 1785 had never been passed, that is, both acts being of the same session, shall have the same commencement, on the first day of the session. 3. The manifest intent of the suspending act was, that the act repealed by the repealing act, should continue in force until a day then future, the first of October 1793. It could have had no other intent. And the intention of the legislature, when discovered, must prevail, any rule of construction declared by previous acts, to the contrary notwithstanding. Thus *the act of 1748 clearly was in force when the bill was drawn.

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II. The second exception states, that there is no averment of a protest for non-acceptance of the bills. This exception is invalid, on two grounds. 1. It does not appear, that the bill was not accepted, so that there could have been such protest; and, if accepted, it would have been immaterial for the plaintiff to show, that it was so, as his right of action could in no measure depend on that fact. The silence of the declaration as to the question, whether the bill was accepted or not, does not vitiate it; the action being on a protest for non-payment. 2. As to bills drawn in the United States and payable in Europe, of which this is one, the custom of merchants in this country does not ordinarily require, to recover on a protest for non-payment, that a protest for non-acceptance should be produced, though the bills were not accepted. I say, the custom of merchants in this country; for the custom of merchants somewhat varies in different countries, in order to accommodate itself to particular courses of business, or other local circumstances.

III. The third exception states, that the judgment is for too large a sum, the bill having been taken for sterling, when, by the act of 1775, it ought to have been taken for current money of Virginia. That act requires, that if the consideration of a bill be a pre-existing currency-debt, or be cur-

rent money paid at the time of the draft, the bill shall express the amount of the debt, or currency paid, which was the real consideration. And that on failure so to do, the bill, though it may be expressed for sterling, as in this case, shall be taken to be for current money. The bill is thus expressed, "for value received in current money;" but it does not say how much. The jury, however, have, by their special verdict, ascertained, that the real consideration of the bill was an engagement to draw other sterling bills. Now, it is clear, that the consideration, in fact, though variant from the face of a bill, is regarded by the act, and must be sought for, to give the act effect. Upon inquiry, the jury have found the consideration to be such as to take the case out of the statute. In this bill, then, the words added to value received, viz., "in current money," were immaterial and without effect: and therefore, the words in the declaration, as descriptive of the bills, might be disregarded by the jury and the court.

IV. The fourth exception states, that the action is for foreign money and its value is not averred. The verdict cures this: the jury have found the value, their verdict being in dollars. The value of sterling money, here sued for, had been long ascertained in Virginia by statute, and was certain enough.

*V. The fifth exception states, that the declaration is in the *debet*, as well as the *detinet*, though for foreign money. The reason of the rule, that *debet* for foreign money is ill, is the uncertainty of its value; and therefore, both the answers given to the fourth, apply to this present exception. [*369

Let the judgment of the circuit court be affirmed.

Emory *v.* Grenough.

Averment of citizenship.

Where the jurisdiction depends on the citizenship of the parties, it must be set forth in the process and pleadings.[1]

Error from the Circuit Court for the district of Massachusetts.

The plaintiff in error was a native of Massachusetts, formerly resident in Boston, where he contracted the debt in question to the defendant in error, who was also a native, and had always continued a resident of that state. Some years afterward, the plaintiff in error removed into Pennsylvania, became a resident citizen of the state, took the benefit of her bankrupt law (which, in its terms and operation, was analogous to the bankrupt laws of England), and duly obtained a certificate of conformity from the commissioners. Subsequent to this discharge, he returned, on a transient visit, to Boston; and being there arrested by the defendant in error, for the old debt, he caused the suit to be removed from the state into the circuit court, and pleaded his certificate in bar to the action: but the court (consisting of Judge Iredell and

[1] There are numerous decisions to this point: Bingham *v.* Cabot, *post*, p. 382; Turner *v.* Enrille, 4 Dall. 7; Mossman *v.* Higginson, Id. 12; Evans *v.* Stead, Id. 22; Abercrombie *v.* Dupuis, 1 Cr. 343; Wood *v.* Wagner, 2 Id. 9; Capron *v.* Van Norden, Id. 126; Martold *v.* Murray, 4 Id. 46; Sullivan *v.* Fulton Steamboat Co. 6 Wheat. 450; Browne *v.* Keene, 8 Pet. 112; Scott *v.* Sandford, 19 How. 393; Hornthall *v.* The Collector, 9 Wall. 560.

the district judge), overruled the plea, and gave judgment for the plaintiff below: whereupon, the present writ of error was brought.(*a*)

The argument of the cause had been considerably advanced, when a contagious fever made its appearance again in Philadelphia, and the business of the court was unavoidably suspended. But at February term 1797, the *370] court having decided, *in the case of *Bingham* v. *Cabot* (*post*, p. 382), that in order to sustain the jurisdiction of the federal court, it, must be set forth in the process, that the parties are citizens of different states; and that form having been omitted in the present suit, this and several other writs of error were stricken off the docket.

Ingersoll and *Dallas*, for the plaintiff in error. *Lewis* and *E. Tilghman*, for the defendant in error.(*b*)

(*a*) It appeared, during the discussion, that a great diversity existed in the law and practice of the several states, upon this subject; and that a decision, directly contrary to that of the circuit court of Massachusetts, had been given in the circuit court of Rhode Island, composed of Judge Wilson and the district judge.

(*b*) The following extract from Huberus was translated for, and read in, this cause; and I am persuaded that its insertion here will be approved by the profession.

Huberus, 2 vol., lib. 1, tit. 3, p. 26: "It often happens, that contracts entered into in one place, take effect in different governments, or are judicially decided upon in other places than those in which they were entered into. It is also well known, that when the Roman empire was destroyed, the Christian world was divided into many nations, not united under any common head, nor connected by any uniformity of regulations. It is not wonderful, that we do not find anything upon this subject in the Roman law; when the government of the Roman people was extended over a great part of the habitable globe, the frequent conflict and contrariety of laws could not occur; the rule was one and the same. However, the fundamental rules by which this question ought to be decided, appear to be derived from the Roman law, although the inquiry itself appears to belong rather to the law of nations than to the civil law; as what different nations observe between themselves, it is obvious, forms the law of nations.

In order to render this very intricate business plain and clear, we will lay down three maxims, which, being fully established, as it appears to us they may easily be, the deduction of the consequences, necessary to an entire understanding of the subject, will be of no great difficulty. They are these: 1st. The laws of every empire have force within the limits of that government, and are obligatory upon all who are within its bounds. 2d. All persons within the limits of a government are considered as subjects, whether their residence is permanent or temporary. 3d. By the courtesy of nations, whatever laws are carried into execution, within the limits of any government, are considered as having the same effect everywhere, so far as they do not occasion a prejudice to the rights of the other governments or their citizens.

It appears, therefore, upon this occasion, that we ought to consult, not the civil law only, but what is to be inferred from the mutual convenience, and the tacit consent of different people, because, as the laws of one people cannot have any force or effect directly with another people, so, on the other hand, nothing would be more inconvenient in the promiscuous intercourse and practice of mankind, than that what was valid by the laws of one place, should be rendered of no effect elsewhere, by a diversity of law, which is the reason of the third maxim, of which, heretofore, no doubt appears to have been entertained.

With respect to the second maxim, some have thought otherwise, who deny that foreigners are subject to the law of the place. I acknowledge, there are exceptions to the rule, which I will notice hereafter; but this position we hold as most certain, that whoever live within the bounds of a government, are to be accounted its subjects. This is evident, from considering the nature of a republic, and the universal custom among

*Hamilton *v.* Moore.

Practice.

A writ of error or appeal must be docketed at the term to which it is returnable, otherwise, it will be non-prossed.

Error from the Circuit Court for the district of Georgia. Judgment had been rendered in the court below, for the defendant in error, on the

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all nations of controlling all those by their laws, who live among them, exemplified, as Grotius mentions, 2 c. u. n. 5, in the instance of personal arrest, practised everywhere.

Whoever makes a contract in any particular place, is subjected to the laws of the place, as a temporary citizen. Nor, indeed, are they supported or justified by any reason, in compelling foreigners to abide by the decisions of the law, where they happened to be, except on the general principle that the jurisdiction of a government is considered as competent to the control of all those who are within its limits.

From these considerations, the following position arises. All business and transactions in court, and out of court, whether testamentary or other conveyances or acts, which are regularly done according the law of any particular place, are valid, even where a different law prevails, and where, had they been so transacted, they would not have been valid. On the contrary, transactions and acts which are executed, contrary to the laws of a country, as they are void at first, never can be good and valid, and this applies, not only with respect to those who have their residence in the place of the contract; but those who were there only occasionally; under this exception only, that if the rulers of another people would be affected by any peculiar inconvenience of an important nature, by giving this effect to transactions performed in another country, according to the laws of the place they are in, such particular place is not bound to give effect to those proceedings, or to consider them as valid, within their jurisdiction. It is worth while to exemplify the principle by examples and instances.

In Holland, a last will and testament may be made before a notary, and two witnesses: in Friezeland, it is of no effect, unless established and witnessed by seven witnesses. A Batavian makes a will in Holland, according to the law of the place, under which the goods, situated and found in Friezeland, are demanded; ought the judges of Friezeland to grant the demand, founded upon the will made in Holland? The laws of Holland cannot bind the people of Friezeland, therefore, to decide according to the first maxim, the will would not be good in Friezeland; but by the third maxim, its validity is supported, and by that, judgment is given in its favor. But a Frizian *makes a journey into Holland, and there executes a will, according to the law [*372
of the place, contrary to the law of Friezeland, and returns and dies there: Is the will good? It is good according to the second maxim; because, while he was in Holland, though but for a temporary purpose, he was bound by the law of the place, and an act, good where done, ought to prevail everywhere, according to the third maxim, and that, without any distinction between movable and immovable estate, and so the law is practised. On the other hand, the Frizian makes his will in his own country, before a notary, with two witnesses; it is carried into Holland, and demand made of the goods found there: it will not be granted, because not made in a valid manner at first, being made contrary to the laws of the place. It would be the same thing, if the Batavian was to make such a will in Friezeland, although in Holland it would have been good; for it is true, that such a deed would not be good in its commencement, for the reasons just stated.

What we have said with respect to wills, applies equally to conveyances to take effect during the life of the grantor: provided a contract is made according to the law of the place in which it is entered into, throughout, in court, and out of court, even in those places where such a mode of contracting is not allowed, it will be supported. For example, in a certain place, particular kinds of merchandise are prohibited—if sold there, the contract is void—but if the same merchandise were sold

15th of November 1796. On the 2d of January 1797, the writ of error was sued out, and lodged in the office of the clerk of the circuit court; and it

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elsewhere, in a place where there was not any prohibition, and a suit is brought in a place where they were prohibited, the purchaser will be condemned, and the suit maintained, because the contract was good in its origin, where made. But if the merchandise, sold in another place, where they were prohibited, were delivered, the purchaser would not be condemned, because it would be contrary to the law and convenience of the government where they were sold, and an action would not be countenanced, wherever instituted, even to compel the delivery; for, if, on the delivery being made, the purchaser would not pay the price, he would be bound, if at all, not by the contract, but that having got the goods of another, it would be unreasonable, that he should enrich himself at the expense and loss of another.

The rule is equally applicable to adjudged cases. A sentence pronounced in any place, or a pardon granted by those who had jurisdiction, has equal effect everywhere. Nor is it lawful for the magistrates of another commonwealth, to prosecute, or suffer to be prosecuted, a second time, one who has been absolved or pardoned, although without a sufficient reason. Still, however, under this exception, that no evident danger or inconvenience result from it to the other commonwealth, as an instance within our own memory may exemplify. Titius having struck a man on the head, on the borders (within the limits) of Friezeland, who, the following night, discharged a great deal of blood at the nose, and after having supped and drank heartily, died: Titius escaped into Transylvania; being apprehended there, as it appears, voluntarily, he was tried and acquitted, upon the suggestion that the man did not die of the wound. This sentence was sent into Friezeland, and he applied for a discharge from the prosecution, as having been acquitted. Although the manner of trial was not very exceptionable, yet the court of Friezeland was much disgusted at the idea of excusing the delinquent, and giving effect to the foreign proceedings, although demanded by the Transylvanians; because the flight into the neighboring government, and the pretended process, appeared too evidently calculated to elude the jurisdiction of Friezeland; which is the exception under the third maxim.

*373] *The same principle is observed in judgments respecting civil matters, as is evident from the following example, within our memory. A citizen of Harlem made a contract with one in Groningen, and submitted himself to the judges of Groningen. Being cited by virtue of this submission, and not appearing, he was condemned, as contumacious. Execution of the sentence being demanded, it was doubted, whether it ought to be granted in a Frizian court. The reason of doubting was, that by force of the submission, if he was not found in the foreign territory, they could not proceed against him, as contumacious, as we shall see elsewhere; nor without prejudice to our jurisdiction, and also of our citizens, could effect be given to such sentences. However, it was allowed at that time, certain magistrates concurring, that it should not be permitted to the Frizians to examine by what principle the sentence passed at Groningen could be justified, but only whether it was valid, according to the law of the place. Others were governed by the following reason, that the magistrate at Harlem, on request, had granted a citation, which he ought rather not to have done, and the Amsterdam magistrate denies the execution of the sentence passed against the absent, being cited to the court of Friezeland by an edict founded on the terms of the submission, and condemned without being heard, and that such proceedings ought not to affect any one. With this opinion, I concur, on account of the restriction contained in the third axiom.

Again, it has been made a question, whether, if a contract is entered into at any supposed place abroad, and an action is commenced with us, and the rule was different here, and there, either in allowing or denying the action, which law is to govern? For instance, a Frizian becomes a debtor in Holland, on account of merchandise sold there, and is sued in Friezeland, after the expiration of two years; the act of limita-

was served, with the proper notices, on the defendant in error, upon the 14th of January 1797; but the affidavit of service was not made until the

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tion is pleaded, which bars such actions with us, after a lapse of two years; the creditor replies, that in Holland, where the contract was made, such prescription and limitation do not exist; and therefore, is not to be urged against him in this case. But it was otherwise decided, once between Justice Bleckenfeldt against G. Y., and again, between John Jenollin against N. B., both before the great holidays in 1680. For the same reason, if a debtor, resident in Friezeland, executed an instrument in Holland, before a magistrate, which may there entitle him to an execution, but not by common right, no execution can issue here, but the merits of the original demand must be examined. The reason is, that acts of limitation, and modes of execution, do not belong to the essence of the contract, but to the time and manner of bringing suits, which is a distinct thing, and therefore, it is established upon the best ground, that in entering a judgment, the law of the place where it is rendered, is to govern, although it respects a contract made elsewhere—Sandius, lib. 1, tit. 12, def. 5, where he says, that in the execution of a sentence given abroad, the law of the place in which the execution is asked, is to govern, not the law of the place where the judgment was given.

The contract of matrimony is also regulated by the same rules. If it is regular and valid in that place where it was contracted and celebrated, it is binding everywhere, under the same exception of not doing prejudice to others—to which exception, may be added, if incest should be permitted anywhere, or marriage in the second degree, which indeed is scarcely supposable. In Friezeland, matrimony is, when a man and woman agree to marry, and voluntarily take each other for man and wife, although no ceremony is performed at church. *In Holland, matrimony cannot be contracted in that manner. The Frizians, however, without doubt, enjoy among the Hollanders the right of married people, in the particulars of dower, jointure, the rights of children to inherit the property of their parents, &c. [*374

In like manner, if a Brabanter, who should marry under a dispensation from the Pope, within the prohibited degrees, should remove here, the marriage would be considered as valid; yet, if a Frizian marries the daughter of his brother, in Brabant, and celebrates the nuptials there, returning here, he would not be acknowledged as a married man, because, in this way, our law might be eluded, by bad examples, and this induces me to make an observation upon this point. It often happens, that young people, desirous of forming improper connections, and to sanction their illicit intercourse with the ceremony of marriage, go into East Friezeland, or other places, in which the consent of curators or guardians is not necessary to marriage, according to the Roman laws. There they celebrate marriage, and presently return to their country—I think, that this is a manifest fraud or evasion of our law, and therefore, that the magistrates here, are not obliged, by the law of nations, to acknowledge such marriages, or to hold them as valid; especially, with respect to those, who transgress and evade their own laws, knowingly and intentionally. Moreover, not only the contract of marriage itself, properly and regularly celebrated in one place, is good in all places, but the rights and incidents which attend it where celebrated, attend it elsewhere. In Holland, married people have a communion of all their goods, unless it be otherwise expressly covenanted by them; this will be the effect, as to goods situated in Friezeland, although there, marriage only occasions a common risk of profit and loss, not of the goods themselves; therefore, the Frizians remain, after the marriage, each one, both husband and wife, separate owners of their goods situated in Holland. When, however, the married couple remove from the one state or province to the other, whatever is afterwards acquired or falls to either, is not in common, but held by distinct right, and what was before made common between them, will be either in common, or otherwise, as they direct: as Sandius lays it down, who tells us, lib. 2, decis., tit. 5, def. 10, there was a dispute among the learned doctors, whether immovable goods, situated in another country, were to be affected and regulated by the rules as

May following; nor was the writ even transmitted, or returned, until the present term.

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we have laid it down. The reason of the doubt was, that the laws of one commonwealth cannot affect the integral parts, the territory of another commonwealth—to this two answers may be given. First, That it cannot be done by the immediate force and operation of a foreign law, but with the concurring consent of the supreme power in the other government, which gives an effect to foreign laws, exercised upon property within its own jurisdiction, without any prejudice being received to its sovereignty or the rights of its citizens, regarding the mutual convenience of the two nations or governments, which is the foundation of all these rules. The other answer is, that it is not so much by force of law, as by the consent of the parties reciprocally communicating their rights to each other, by which means a change or modification of property may arise, not less from matrimony than any other contract.

The place, however, where the contract is entered into, is not to be exclusively considered: if the parties had in contemplation another place at the time of the contract, the laws of the latter will be preferred, in the construction of the contract. Every one is considered as having contracted in that place, in which he bound himself to pay or perform anything, lib. 21, de O. et A., and the place where matri-
*375] mony is contracted is not so much the place where *the ceremony is performed, as where they expect and intend to live and settle. It happens daily, that men in Friezeland, natives or sojourners, marry wives in Holland, which they immediately bring into Friezeland. And if, at the time of the marriage, they intended immediately to settle in Friezeland, there will not, in such case, be a community of goods. Although they make no special marriage contract, not the law of Holland, but of Friezeland, will govern: the latter, not the former, is the place of their contract.

There is a further application of the restriction so often mentioned. The effects of a contract entered into at any place, will be allowed, according to the law of that place in other countries, if no inconvenience results therefrom to the citizens of that other country, with respect to the law which they demand, and the sovereignty of the latter place is not bound, nor indeed, can it so far extend the law of another territory. For example, the oldest and first hypothecation (mortgage) of a movable, is to be preferred even against a third possessor, by the law of Cæsar, and in Friezeland, not among the Bavarians; therefore, if any one, upon such an hypothecation, proceeds to demand the article from a third person, he shall not be heard, but his suit rejected; because the right of the third person to that chattel shall not be taken away by the law of another jurisdiction or territory. Let us enlarge this rule to the following extent: If the law of the place in another government is contrary to the law of our state, in which also a contract is made, inconsistent with a contract celebrated and made in another place, it is reasonable, in such case, that we should observe our own law, rather than a foreign law. For example: In Holland, matrimony is contracted with this agreement, that the wife shall not be responsible for the debts contracted by the husband only; although this is a private contract, it is said to be valid, in Holland, to the prejudice of the creditors, with whom the husband shall afterwards contract debts, but in Friezeland, such a kind of contract would not be binding, unless published, nor would ignorance of the necessity of making it public, be an excuse, according to the law of Cæsar and equity. The husband contracts debts in Friezeland, and the wife is sued as jointly responsible, and liable for one-half of the debt—she pleads her marriage contract; the creditors reply, that this contract is contrary to the laws of Friezeland, because not published; and this is the rule with us, where the marriage was contracted here; as I lately gave my opinion, when consulted upon the point. But those who contracted in Holland, and in whose favor the debts were contracted there, were nonsuited, notwithstanding their suit was brought in Friezeland, because, so far as respected them, the law of the place where the marriage was contracted, not the laws of the two countries, came into consideration.

From the rules laid down in the beginning, the following axiom may be deduced.

Ingersoll and *Dallas*, for the defendant in error, objected, that a writ of error must be tested of the term preceding that to which it is made returnable; that a term cannot intervene between the *teste* and the return.

Personal rights or disabilities, obtained or communicated by the laws of any particular place, are of a nature which accompany the person wherever he goes, with this effect, that in all places, he either enjoys the immunities or exemptions, or is subject to the disabilities imposed by the law of the country where they at any time happen to be, on characters of that description. Therefore, those who, with us, are under tutors or curators, as young men, prodigals, married women, are everywhere reputed as persons subject to curators, and whatever the law of any place considers as the right or disabilities of persons of that description, they may suffer, exercise and enjoy; hence, he who is excused the consequences of crimes, or *contracts, on account of his want of age, in Friezeland, cannot make binding contracts in Holland, [*376 and one declared prodigal here, contracting elsewhere, will not be bound. Again, in some provinces, one above the age of twenty-one years may convey his real estate; such a person may do the same in those places where twenty-five is the period of full age; because, whatever the laws and judicial proceedings in any place, decide as to their subjects, other people allow to have the same effect with them, unless a prejudice or inconvenience would result to them or their laws.

There are persons who understand these personal rights to the following extent, that whoever, in a certain place, is of full age, or a minor, a child, or put out of the control of the father, will enjoy the same rights, and be subject to the same disabilities, as in the place where he became such a character, or was so reputed; and whether the same thing would, or would not, have happened in his own country, still, that the same consequence necessarily follows. It appears to me, that this is laying down the rule too broadly, and would subject us to a burdensome inconvenience by the laws of our neighbors. An example will make the thing plain: A child, not emancipated or exempted from the power of his father, and who has not ceased to be one of his family, cannot make a will in Friezeland. He goes into Holland, and there makes a will—is it valid? I think it valid in Holland, by the first and second rules, that the laws regulate as to all those within its limits, nor is it reasonable, that the people there, respecting a business done there, neglecting their own laws, should judge according to the laws of other people; but that will would not be valid in Friezeland, by the third rule, because, by that means, nothing would be more easy than to elude our laws, and our citizens might elude them every day. But in other places, out of Friezeland, the will would be valid, even where, by their laws, a child, while one of the father's family, could not make a will, because there the reason would not apply, that their citizen had gone to Holland to elude their law *in fraudem legis*.

The example I have given respects an act prohibited at home, on account of a personal disability. We will give another act allowed at home, but prohibited abroad, where done, some time since, decided in our supreme court: Rudolph Monsema, aged 17 years and 14 days, was born and lived at Groningen, after that, he went abroad to learn the business of a druggist, he made a will, which he might have made in Friezeland, but at Groningen, says D. Nauta, the reporter, it is not lawful for an infant to make a will, under twenty, or in the time of his last illness, or for more than half his patrimony. The young man died of that sickness, leaving his father his heir, and leaving nothing to his mother's relations, who contended that the will was void, as made against the law of the place. The heirs insisted, that a personal quality accompanies the person everywhere, and, as he could have made this will at home, he could make it abroad. But it was decided against the will, although there was no intention to avoid the law, but the judgment was not universally approved, Nauta himself dissenting. MS. 134, An. 1643, d. 27 Oct.

The foundation of all this doctrine, we have said, and we insist upon it, is the subjection that men owe to the laws of every country within which they are at any time;

E. Tilghman endeavored to support the writ, considering the objection as founded on a mere error in form, and cited 2 W. Bl. 918; 2 Ld. Raym. 1269; Judicial Act, § 32.

But THE COURT observed, that there was no error in point of fact; nor any clerical error to amend. The writ bears the date when it was actually sued out and lodged in the office: there is, therefore, nothing on the record, by which it can be amended; and the objection is fatal.

The writ of error was, therefore, non-prossed.

AUGUST TERM, 1797.

RULE.

IT is ORDERED BY THE COURT, that no record of the court shall be suffered by the clerk to be taken out of his office, but by consent of the court; otherwise, he is to be responsible for it.

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from whence it follows, that an act, valid or void, in its beginning, and where it first takes place, must be the same elsewhere. But this observation does not apply equally to immovable property, since it is considered, not as depending altogether upon the *377] disposition of every master or owner of a family—but the commonwealth *affixes certain rights as resulting from real property, and is interested in its disposal nor could a nation, without a great inconvenience, suffer its real property to be conveyed, with these incident rights, by the laws of another country, and contrary to its own laws—therefore, a Frizian having fields and houses, in the province of Groningen, cannot make a will disposing of them, because it is prohibited there, to make a will of real estate; the Frizian law not affecting lands which constitute integral parts of a foreign territory. But this does not contradict the rule that we have before laid down, that if a will is made accordingly to the ceremonies of the place, where the testator resides, it will be good with respect to his property in another country, if a will could be made there; because the diversity of laws in that respect, does not affect the soil, but directs the manner of making the will, which being rightly done, may pass real estate in another country, so far as may not interfere with any incidents connected with the ownership of real property in the country where it is situated. This rule takes place in common conveyances—things annexed to the freehold in Friezeland, sold in Holland, in a manner prohibited in Friezeland, but allowed in Holland, are well sold—corn growing in Friezeland is sold in Holland, according to the lasts, as it is called, the sales are void, because it is prohibited in Friezeland, whether prohibited in Holland or not, because it is annexed to the freehold, and is a part of it.

The same rule held with regard to the succession to an intestate estate. If the deceased was father of a family, whose property was in different provinces, so far as respects the real estate, it would descend according to the laws of the place where situated: but with respect to the personal property, it would go according to the law of the place where the intestate lived, and of which he was an inhabitant—for which see Sandius, lib. 4, Decis. tit. 8, def. 7.

These observations are of a nature that require more full explanation, seeing there are not wanting writers, who think otherwise in some particulars, whom you will see respectfully spoken of by Sandius, in his reports of causes; to which add Rodenbergius' Treatise of Laws, in the title of the Marriage Contract."

*FEBRUARY TERM, 1798.

HOLLINGSWORTH *v.* VIRGINIA.

Suits against a state.—Constitutional law.

The 11th amendment to the constitution having deprived the supreme court of jurisdiction over suits against a state, by a citizen of another state, pending actions could be no further prosecuted.

An amendment to the constitution need not be presented to the president for his approval.

THE decision of the court, in the case of *Chisholm* v. *Georgia* (2 Dall 419), produced a proposition in congress, for amending the constitution of the United States, according to the following terms:

"The judicial power of the United States shall not be construed to extend to any suit in law and equity, commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of any foreign state."

The proposition being now adopted by the constitutional number of states, *Lee*, Attorney-General, submitted this question to the court—whether the amendment did, or did not, supersede all suits depending, as well as prevent the institution of new suits, against any one of the United States, by citizens of another state?

W. Tilghman and *Rawle* argued in the negative, contending, that the jurisdiction of the court was unimpaired, in relation to all suits instituted, previously to the adoption of the amendment. They premised, that it would be a great hardship, that persons legally suing, should be deprived of a right of action, or be condemned to the payment of costs,[1] by an amendment of the constitution, *ex post facto;* 4 Bac. Abr. 636–7, pl. 5. And that the jurisdiction being before regularly established, the amendment, notwithstanding the words "shall not be construed," &c., must be considered, in fact, as introductory of a new system of judicial authority. There are, however, two objections to be discussed.

*The amendment has not been proposed in the form prescribed by the constitution, and therefore, it is void. Upon an inspection of [*379 the original roll, it appears, that the amendment was never submitted to the president for his approbation. The constitution declares, that "every order, resolution or vote, to which the concurrence of the senate and house of representatives may be necessary (except on a question of adjournment), shall be presented to the president of the United States; and before the same shall take effect, shall be approved by him, or, being disapproved by him, shall be repassed by two-thirds of the senate and house of representatives, &c." Art. I. § 7. Now, the constitution likewise declares, that the concurrence of both houses shall be necessary to a proposition for amendments. Art. V. And it is no answer to the objection, to observe, that as two-thirds of both houses are required to originate the proposition, it would be nugatory to return it with the president's negative, to be repassed by the same number; since the reasons assigned for his disapprobation might be so satis-

[1] See Walker *v.* Smith, 1 W. C. C. 202.

factory as to reduce the majority below the constitutional proportion. The concurrence of the president is required in matters of infinitely less importance; and whether on subjects of ordinary legislation, or of constitutional amendments, the expression is the same, and equally applies to the act of both houses of congress.

2d. The second objection arises from the terms of the amendment itself. The words, "commenced or prosecuted," are properly in the past time; but it is clear, that they ought not to be so grammatically restricted; for then a citizen need only discontinue his present suit, and commence another, in order to give the court cognisance of the cause. To avoid this evident absurdity, the words must be construed to apply only to suits to be "commenced and prosecuted." The spirit of the constitution is opposed to everything in the nature of an *ex post facto* law, or retrospective regulation. No *ex post facto* law can be passed by congress. Const. Art. I. § 9. No *ex post facto* law can be passed by the legislature of any individual state. Ibid. § 10. It is true, that an amendment to the constitution cannot be controlled by those provisions; and if the words were explicit and positive, to produce the retrospective effect contended for, they must prevail. But the words are doubtful; and therefore, they ought to be so construed as to conform to
*380] the general principle of the constitution. (*a*) In *4 Bac. Abr. 650, pl. 64, it is stated, that "a statute shall never have an equitable construction, in order to overthrow an estate;" but if the opposite doctrine prevails, it is obvious, that many vested rights will be affected, many estates will be overthrown. For instance, Georgia has made and unmade grants of land, and to compel a resort to her courts, is, in effect, overthrowing the estate of the grantees. So, in the same book (p. 652, pl. 91, 92), it is said, that "a statute ought to be so construed, that no man, who is innocent, be punished or endamaged;" and "no statute shall be construed in such manner, as to be inconvenient or against reason:" whereas, the proposed construction of the amendment would be highly injurious to innocent persons; and driving them from the jurisdiction of this court, saddled with costs, is against every principle of justice, reason and convenience. Presuming, then, that there will be a disposition to support any rational exposition, which avoids such mischievous consequences, it is to be observed, that the words "commenced and prosecuted" are synonymous. There was no necessity for using the word "commenced," as it is implied and included in the word "prosecuted;" and admitting this glossary, the amendment will only affect the future jurisdiction of the court. It may be said, however, that the word "commenced" is used in relation to future suits, and that the word "prosecuted" is applied to suits previously instituted. But it will be sufficient to answer in favor of the benign construction for which the plaintiffs contend, that the word "commenced" may, on this ground, be confined to actions originally instituted here, and the word "prosecuted" to suits brought hither by writ of error or appeal. For it is to be shown, that a state may be sued originally,

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(*a*) CHASE, Justice.—The words "commenced and prosecuted," standing alone, would embrace cases both past and future.

W. Tilghman.—But if the court can construe them, so as to confine their operation to future cases, they will do it, in order to avoid the effect of an *ex post facto* law, which is evidently contrary to the spirit of the constitution.

and yet not in the supreme court, though the supreme court will have an appellate jurisdiction; as, where laws of the state authorize such suits in her own courts, and there is drawn in question the validity of a treaty, or statute of, or authority exercised under, the United States, and the decision is against their validity. (1 U. S. Stat. 80, § 13; Id. 85, § 25.) Upon the whole, the words of the amendment are ambiguous and obscure; but as they are susceptible of an interpretation, which will prevent the mischief of an *ex post facto* construction (worse than an *ex post facto* law, inasmuch as it is not so easily rescinded or repealed), that interpretation ought to be preferred.

Lee, Attorney-General.—The case before the court is that of a suit against a state, in which the defendant has never entered an appearance; but the amendment is equally operative in all the cases against states, where there has been an appearance, or even where there have been a trial and judgment. An amendment *of the constitution, and the repeal of a law, are not, manifestly, on the same footing; nor can an explanatory [*381 law be expounded by foreign matter. The amendment, in the present instance, is merely explanatory, in substance, as well as language. From the moment those who gave the power to sue a state, revoked and annulled it, the power ceased to be a part of the constitution; and if it does not exist there, it cannot in any degree be found or exercised elsewhere. The policy and rules which, in relation to ordinary acts of legislation, declare that no *ex post facto* law shall be passed, do not apply to the formation or amendment of a constitution. The people limit and restrain the power of the legislature, acting under a delegated authority; but they impose no restrain on themselves. They could have said, by an amendment to the constitution, that no judicial authority should be exercised, in any case, under the United States; and if they had said so, could a court be held, or a judge proceed, on any judicial business, past or future, from the moment of adopting the amendment? On general grounds, then, it was in the power of the people, to annihilate the whole, and the question is, whether they have annihilated a part of the judicial authority of the United States? Two objections are made: 1st. That the amendment has not been proposed in due form. But has not the same course been pursued relative to all the other amendments that have been adopted?(*a*) And the case of amendments is evidently a substantive act, unconnected with the ordinary business of legislation, and not within the policy or terms of investing the president with a qualified negative on the acts and resolutions of congress. 2d. That the amendment itself only applies to future suits. But whatever force there may be in the rules for construing statutes, they cannot be applied to the present case. It was the policy of the people, to cut off that branch of the judicial power, which had been supposed to authorize suits by individuals against states; and the words being so extended as to support that policy, will equally apply to the past and to the future. A law, however, cannot be denominated retrospective, or *ex post facto*, which merely changes the remedy, but does

(*a*) CHASE, Justice.—There can, surely, be no necessity to answer that argument. The negative of the president applies only to the ordinary cases of legislation: he has nothing to do with the proposition or adoption of amendments to the constitution.

not affect the right; in all the states, in some form or other, a remedy is furnished for the fair claims of individuals against the respective governments. The amendment is paramount to all the laws of the Union; and if any part of the judicial act is in opposition to it, that part must be expunged. There can be no amendment of the constitution, indeed, which may
*382] *not, in some respect, be called *ex post facto;* but the moment it is adopted, the power that it gives, or takes away, begins to operate, or ceases to exist.

THE COURT, on the day succeeding the argument, delivered a unanimous opinion, that the amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a state was sued by the citizens of another state, or by citizens or subjects of any foreign state.

BINGHAM, Plaintiff in error, *v.* CABOT *et al.*

Jurisdiction.

The process and pleadings must set forth the citizenship of the parties, in order to confer jurisdiction on the circuit court.[1]

THIS action came again before the court,(*a*) on a writ of error; and an objection was taken to the record, that it was not stated, and did not appear in any part of the process and pleadings, that the plaintiffs below, and the defendant, were citizens of different states, so as to give jurisdiction to the federal court. The caption of the suit was—"At the circuit court begun and held at Boston, within and for the Massachusetts district, on Thursday, the first day of June, A. D. 1797, by the honorable Oliver Ellsworth, Esq., Chief Justice, and John Lowell, Esq, district judge—John Cabot *et al. v.* William Bingham:" And the declaration (which was for money had and received to the plaintiff's use) set forth, "that John Cabot, of Beverly, in the district of Massachusetts, merchant, and surviving copartner of Andrew Cabot, late of the same place, merchant, deceased, Moses Brown, Israel Thorndike and Joseph Lee, all of the same place, merchants, Jonathan Jackson, Esq., of Newburyport, Samuel Cabot, of Boston, merchant, George Cabot, of Brooklyn, Esq., Joshua Ward, of Salem, merchant, and Stephen Cleveland, of the same place, merchant, all in our said district of Massachu-
*383] setts, and Francis Cabot, of Boston *aforesaid, now resident at Philadelphia aforesaid, merchant, in plea of the case, for the said William, at said Boston, on the day of the purchase of this writ, being indebted to the plaintiffs, &c., promised to pay, &c." The defendant pleaded *non assumpsit,* and an issue being thereupon joined and tried, there was a verdict and judgment for the plaintiff, for $27,224.93 and costs.

Lee, Attorney-General, contended, for the plaintiff in error, that there was not a sufficient allegation on the record, of the citizenship of the parties, to sustain the jurisdiction of the circuit court, which is a limited jurisdiction. Though the constitution declares, that "the citizens of each state shall be

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(*a*) See *ante,* p. 19.

[1] See note to Emory *v.* Grenough, *ante,* p. 369.

entitled to all privileges and immunities of citizens of the several states," Art. iv., § 2, it contemplates, in the judicial article, the distinction between citizens of different states. A citizen of one state may reside for a term of years in another state, of which he is not a citizen; for citizenship is clearly not co-extensive with inhabitancy. In the present case, neither the plaintiffs, generally, nor any individual of them, nor the defendant, will be found expressly designated as aliens, or as citizens of any other place or state, than that in which the suit was brought. Besides, there is not an entirety of parties, even as to the plaintiffs, and they are not all stated as belonging to the same state. Wherever there is a limited jurisdiction, the facts that bring the suit within the jurisdiction must appear on the record. 9 Mod. 95.

Dexter (of Massachusetts) urged, on the other hand, that sufficient appeared to show, that, by legal intendment, the cause was within the jurisdiction of the court; that though it is difficult to establish a general rule, as to what makes citizenship, yet that the citizenship of a particular state may be changed by a citizen of the United States, without going through the forms and solemnities required in the case of an alien; that, on the principle of the constitution, a citizen of the United States is to be considered more particularly as a citizen of that state in which he has his house and family, is a permanent inhabitant, and is in short, domiciliated; that stating in the declaration, the party to be of a particular place, designates his home, and, of course, his citizenship; and that the description of Francis Cabot (of Boston aforesaid, now resident in Philadelphia, &c.), proves what was intended, by stating the places of abode of the several parties. 2 Danv. Cont. p. 20; 5 Com. Dig. 289; 2 Str. 786, 290; 1 Ld. Raym. 405; 2 Ibid. 1403.

The Court were clearly of opinion, that it was necessary to set forth the citizenship (or alienage, where a foreigner was concerned) of the respective parties, in order to bring the *case within the jurisdiction of the circuit court; and that the record, in the present case, was in that respect defective. [*384

This cause and many others, in the same predicament, were, accordingly, stricken off the docket.

Jones, indorsee, *v.* Le Tombe.

Consuls.

A foreign consul is not personally liable on a bill of exchange, drawn on the public treasury of his government, in his official capacity.

Capias in case. This was an action brought, originally, in the supreme court, by John Coffin Jones, a citizen of Massachusetts, as indorsee of James Swan, against the defendant, the consul-general of the French republic, as drawer of a number of protested bills of exchange (for the aggregate amount of 385,964 livres turnois, 3 sols, 8 den., equal to $70,052.46), corresponding with the following form:

CONSULAT GENERAL
Pres les ETATS UNIS.

AN———

No.———

TROISIEME.

Philadelphie, le———an——— de la Republique Française, une & indivisible. } 179 (v. s.)

ARGENT TOURNOIS———

faisant, à 18 cents & 15 100mes de cent de dollar per livres tournois

CITOYEN,

A trente jours de vue, je vous prie de payer par cette troisième de change (la premiére, la seconde ou la quatriéme ne l'étant, à l'ordre de ——— la somme ——— tournois, en écus de six livres ou autres espèces d'or ou argent, à la valeur réduite de dix-huit cens & quinze centiémes de cent de dollar, par livres tournois, ou en lettres-de-change sur Hambourg, à l'acceptation & au change convenus avec le Porteur, valeur reçue de dit, conformément au compte rendu au Ministre de ——— par dépêché du ——— an ——— No. ——— timbrée ——— & à ma lettre d'avis en date de ce jour No.

(Signé) LE TOMBE, Le Consul General.

Au Citoyen Payeur Général des dépenses du Département de ———.

A la Tresorerie Nationale,
A PARIS.

Je prie le Citoyen Ministre de ——— de faire acquttier la presente de laquellé j'ai garanti le payment sur l'honneur de la Nation Française.

(Signé) ADET,
Le Ministre Plénipotentiare de la République Française prés les Etats Unis d'Amérique.

Enregistrée sous le No. ——— au Consulat particulier de la République Française.
A Philadelphie, le ———
an ———
(Signé) Le Consul, LIVT.

*385] *At the opening of the term, *Dallas* and *Du Ponceau* had obtained a rule, that the plaintiff show his cause of action, and why the defendant should not be discharged on filing a common appearance; and now *Ingersoll* and *E. Tilghman* showed cause, produced the bills of exchange, and the plaintiff's positive affidavit of a subsisting debt, including a declaration, "that he was induced, principally, to purchase the bills, in consideration of the character and private fortune of the defendant, and that without the fullest confidence in the personal credit and responsibility of the defendant, he verily believed he would not have purchased them." They then contended, that the positive affidavit was sufficient, in this court, for holding the defendant to bail; that it was not incumbent on them to show to whose use the money was applied, since it was paid to the defendant; that when a consul acts as a merchant, and draws bills for cash advanced, he is not entitled to any privilege; that the defendant must prove that he had a right to draw the bills as consul; that even if he had the right to draw, he might pledge his private credit, in aid of his official function; and that the critical situation of the French republic raises a presumption, that the reliance was placed on the private credit of the defendant. The cases heretofore decided in the English courts, are perfectly distinguishable from the present case. 1 T. R. 174. They occurred between parties belonging to the same government; and there was no proof of credit being given to the individual.

In support of these positions, were cited, 2 H. Bl. 554; Vatt. lib. 4, c. 6, § 74, p. 139, § 114; 2 Dall. 247; 2 Str. 955.

The counsel for the defendant were stopped, when they rose to reply; and THE COURT were unanimously and clearly of opinion, that the contract was made on account of the government; that the credit was given to it as an official engagement; and that, therefore, there was no cause of action against the present defendant.

The rule was, accordingly, made absolute; and the plaintiff soon afterwards discontinued the action.

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*AUGUST TERM, 1798. [*386

CALDER and wife *v.* BULL and wife.

Constitutional law.—Eminent domain.—Ex post facto laws.

The judiciary is a co-ordinate branch of the government, and may declare a statute to be void, as repugnant to the constitution.

Private property may be taken for public use, by allowing the owners a reasonable equivalent.

A statute granting a new trial in a particular case, is not unconstitutional, as an *ex post facto* law.[1]

An *ex post facto* law, within the meaning of the constitution, is one that punishes as a crime, an act done before its passage, and which, when committed, was not punishable; an act that aggravates a crime, or inflicts a greater punishment, than the law annexed to it, when committed; or a law that alters the rules of evidence, in order to convict an offender.

If congress, or a state legislature, pass a law, within the general scope of their constitutional power, the courts cannot pronounce it void, merely because, in their judgment, contrary to the principles of natural justice.[1] IREDELL, J.

An act of the legislature, contrary to the first principles of the social compact, cannot be considered a rightful exercise of legislative power. CHASE, J.

IN error from the State of Connecticut. The cause was argued at the last term (in the absence of the Chief Justice) and now the court delivered their opinions *seriatim*.

CHASE, Justice.—The decision of one question determines (in my opinion) the present dispute. I shall, therefore, state from the record no more of the case, than I think necessary for the consideration of that question only.

The legislature of Connecticut, on the 2d Thursday of May 1795, passed a resolution or law, which, for the reasons assigned, set aside a decree of the Court of Probate for Hartford, on the 21st of March 1793, which decree disapproved of the will of Normand Morrison (the grandson), made the 21st of August 1779, and refused to record the said will; and granted a new hearing by the said court of probate, with liberty of appeal therefrom, in six months. A new hearing was had, in virtue of this resolution or law, before

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[1] It has been decided in Pennsylvania, that as the legislature possesses no judicial power, it cannot order a new trial. Chastellux *v.* Fairchild, 15 Penn. St. 18. Nor direct the court to entertain a bill of review.. Boggs' Appeal, 43 Id. 512.

[2] To the same effect, see Sharpless *v.* Philadelphia, 21 Penn. St. 147; Erie and North East Railroad, 26 Id. 287.

the said court of probate, who, on the 27th of July 1795, approved the said will, and ordered it to be recorded. At August 1795, appeal was then had to the superior court at Hartford, who, at February term 1796, affirmed the decree of the court of probate. Appeal was had to the supreme court of errors of Connecticut, who, in June 1796, adjudged that there were no errors. More than eighteen months elapsed from the decree of the court of probate (on the 1st of March 1793), and thereby Caleb Bull and wife were barred of all right *of appeal, by a statute of Connecticut. There *387] was no law of that state whereby a new hearing or trial, before the said court of probate, might be obtained. Calder and wife claimed the premises in question, in right of the wife, as heiress of N. Morrison, physician; Bull and wife claimed under the will of N. Morrison, the grandson.

The counsel for the plaintiffs in error contend, that the said resolution or law of the legislature of Connecticut, granting a new hearing, in the above case, is an *ex post facto* law, prohibited by the constitution of the United States; that any law of the federal government, or of any of the state government, contrary to the constitution of the United States, is void; and that this court possesses the power to declare such law void.

It appears to me a self-evident proposition, that the several state legislatures retain all the powers of legislation, delegated to them by the state constitutions; which are not expressly taken away by the constitution of the United States. The establishing courts of justice, the appointment of judges, and the making regulations for the administration of justice within each state, according to its laws, on all subjects not intrusted to the federal government, appears to me to be the peculiar and exclusive province and duty of the state legislatures. All the powers delegated by the people of the United States to the federal government are defined, and no *constructive* powers can be exercised by it, and all the powers that remain in the state governments are indefinite; except only in the constitution of Massachusetts.

The effect of the resolution or law of Connecticut, above stated, is to revise a decision of one of its inferior courts, called the court of probate for Hartford, and to direct a new hearing of the case by the same court of probate, that passed the decree against the will of Normand Morrison. By the existing law of Connecticut, a right to recover certain property had vested in Calder and wife (the appellants), in consequence of a decision of a court of justice, but in virtue of a subsequent resolution or law, and the new hearing thereof, and the decision in consequence, this right to recover certain property was divested, and the right to the property declared to be in Bull and wife, the appellees. The sole inquiry is, whether this resolution or law of Connecticut, having such operation, is an *ex post facto* law, within the prohibition of the federal constitution?

Whether the legislature of any of the states can revise and correct by law, a decision of any of its courts of justice, although not prohibited by the constitution of the state, is a question of very great importance, and not necessary now to be determined; because the resolution or law in question does not go so far. I cannot subscribe to the omnipotence of a state *legislature, or that it is absolute and without control; although its *388] authority should not be expressly restrained by the constitution, or fundamental law of the state. The people of the United States erected their

constitutions or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it. The nature, and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free republican governments, that no man should be compelled to do what the laws do not require; nor to refrain from acts which the laws permit. There are acts which the federal, or state legislature cannot do, without exceeding their authority. There are certain vital principles in our free republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An act of the legislature (for I cannot call it a law), contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law, in governments established on express compact, and on republican principles, must be determined by the nature of the power on which it is founded.

A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys or impairs the lawful private contracts of citizens; a law that makes a man a judge in his own cause; or a law that takes property from A. and gives it to B.: it is against all reason and justice, for a people to intrust a legislature with such powers; and therefore, it cannot be presumed that they have done it. The genius, the nature and the spirit of our state governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them. The legislature may enjoin, permit, forbid and punish; they may declare new crimes; and establish rules of conduct for all its citizens in future cases; they may command what is right, and prohibit what is wrong; but they cannot change innocence into guilt; or punish innocence as a crime; or violate the right of an antecedent lawful private contract; or the right of private property. To maintain that our federal, or state legislature possesses such powers, if they had not been expressly restrained; would, *in my opinion, be a political heresy, [*389
altogether inadmissible in our free republican governments.

All the restrictions contained in the constitution of the United States on the power of the state legislatures, were provided in favor of the authority of the federal government. The prohibition against their making any *ex post facto* laws was introduced for greater caution, and very probably arose from the knowledge, that the parliament of Great Britain claimed and exercised a power to pass such laws, under the denomination of bills of attainder, or bills of pains and penalties; the first inflicting capital, and the other less punishment. These acts were legislative judgments; and an exercise of judicial power. Sometimes, they respected the crime, by declaring acts to be treason, which were not treason, when committed;(*a*) at other times, they

(*a*) The case of the Earl of Strafford, in 1641.

violated the rules of evidence (to supply a deficiency of legal proof) by admitting one witness, when the existing law required two; by receiving evidence without oath; or the oath of the wife against the husband; or other testimony, which the courts of justice would not admit;(*a*) at other times, they inflicted punishments, where the party was not, by law, liable to any punishment;(*b*) and in other cases, they inflicted greater punishment, than the law annexed to the offence.(*c*) The ground for the exercise of such legislative power was this, that the safety of the kingdom depended on the death, or other punishment, of the offender: as if traitors, when discovered, could be so formidable, or the government so insecure! With very few exceptions, the advocates of such laws were stimulated by ambition, or personal resentment and vindictive malice. To prevent such and similar acts of violence and injustice, I believe, the federal and state legislatures were prohibited from passing any bill of attainder, or any *ex post facto* law.

The constitution of the United States, article I., section 9, prohibits the legislature of the United States from passing any *ex post facto* law; and, in § 10, lays several restrictions on the authority of the legislatures of the several states; and, among them, "that no state shall pass any *ex post facto* law."

It may be remembered, that the legislatures of several of the states, to wit, Massachusetts, Pennsylvania, Delaware, Maryland, and North and South Carolina, are expressly prohibited, by their state constitutions, from passing any *ex post facto* law.

*390] *I shall endeavor to show what law is to be considered an *ex post facto* law, within the words and meaning of the prohibition in the federal constitution. The prohibition, "that no state shall pass any *ex post facto* law," necessarily requires some explanation; for, naked and without explanation, it is unintelligible, and means nothing. Literally, it is only, that a law shall not be passed concerning, and after the fact, or thing done, or action committed. I would ask, what fact; of what nature or kind; and by whom done? That Charles I., king of England, was beheaded; that Oliver Cromwell was protector of England; that Louis XVI., late king of France, was guillotined; are all facts that have happened; but it would be nonsense to suppose, that the states were prohibited from making any law, after either of these events, and with reference thereto. The prohibition, in the letter, is not to pass any law concerning, and after the fact; but the plain and obvious meaning and intention of the prohibition is this: that the legislatures of the several states, shall not pass laws, after a fact done by a subject or citizen, which shall have relation to such fact, and shall punish him for having done it. The prohibition, considered in this light, is an additional bulwark in favor of the personal security of the subject, to protect his person from punishment by legislative acts, having a retrospective operation. I do not think it was inserted, to secure the citizen in his private rights of either property or contracts. The prohibitions not to make anything but gold and silver coin a tender in payment of debts, and not to pass

(*a*) The case of Sir John Fenwick, in 1696.

(*b*) The banishment of Lord Clarendon, 1669 (19 Car. II., c. 10), and of the Bishop of Atterbury, in 1723 (9 Geo. I., c. 17).

(*c*) The Coventry act, in 1670 (22 & 23 Car. II., c. 1).

any law impairing the obligation of contracts, were inserted to secure private rights; but the restriction not to pass any *ex post facto* law, was to secure the person of the subject from injury or punishment, in consequence of such law. If the prohibition against making *ex post facto* laws was intended to secure personal rights from being affected or injured by such laws, and the prohibition is sufficiently extensive for that object, the other restraints I have enumerated, were unnecessary, and therefore, improper; for both of them are retrospective.[1]

I will state what laws I consider *ex post facto* laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender. *All these, and similar laws, are manifestly unjust and oppressive. In [*391 my opinion, the true distinction is between *ex post facto* laws, and retrospective laws. Every *ex post facto* law must necessarily be retrospective; but every retrospective law is not an *ex post facto* law: the former only are prohibited. Every law that takes away or impairs rights vested, agreeable to existing laws, is retrospective, and is generally unjust, and may be oppressive; and it is a good general rule, that a law should have no retrospect: but there are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement; as statutes of oblivion or of pardon. They are certainly retrospective, and literally both concerning and after the facts committed. But I do not consider any law *ex post facto*, within the prohibition, that mollifies the rigor of the criminal law: but only those that create or aggravate the crime; or increase the punishment, or change the rules of evidence, for the purpose of conviction. Every law that is to have an operation before the making thereof, as to commence at an antecedent time; or to save time from the statute of limitations; or to excuse acts which were unlawful, and before committed, and the like, is retrospective. But such laws may be proper or necessary, as the case may be. There is a great and apparent difference between making an unlawful act lawful; and the making an innocent action criminal, and punishing it as a crime. The expressions "*ex post facto* laws," are technical, they had been in use long before the revolution, and had acquired an appropriate meaning, by legislators, lawyers and authors. The celebrated and judicious Sir William Blackstone, in his commentaries, considers an *ex post facto* law precisely in the same light as I have done. His opinion is confirmed by his successor, Mr. Wooddeson; and by the author of the *Federalist*, who I esteem superior to both, for his extensive and accurate knowledge of the true principles of government.

I also rely greatly on the definition or explanation of *ex post facto* laws,

[1] Southwick *v.* Southwick, 49 N. Y. 510.

[2] Watson *v.* Mercer, 8 Pet. 88; Carpenter *v.* Pennsylvania, 17 How. 456; Locke *v.* New Orleans, 4 Wall. 172; Cummings *v.* Missouri, Id. 277; United States *v.* Hall, 2 W. C. C. 366; Shepherd *v.* People, 25 N. Y. 406.

as given by the conventions of Massachusetts, Maryland and North Carolina, in their several constitutions or forms of government. In the declaration of rights, by the convention of Massachusetts, part 1st, § 24, "Laws made to punish actions done before the existence of such laws, and which have not been declared crimes by preceding laws, are unjust, &c." In the declaration of rights, by the convention of Maryland, art. 15th, "Retrospective laws punishing facts committed before the existence of such laws, and by them only declared criminal, are oppressive, &c." *In the declaration of rights, by the convention of North Carolina, art. 24th, I find the same definition, precisely in the same words, as in the Maryland constitution. In the declaration of rights, by the convention of Delaware, art. 11th, the same definition was clearly intended, but inaccurately expressed: by saying "laws punishing offences (instead of actions or facts) committed before the existence of such laws, are oppressive, &c."

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I am of opinion, that the fact, contemplated by the prohibition, and not to be affected by a subsequent law, was some fact to be done by a citizen or subject. In 2 Lord Raymond 1352, RAYMOND, Justice, called the stat. 7 Geo. I., stat. 2, par. 8, about registering contracts for South Sea stock, an *ex post facto* law; because it affected contracts made before the statute.

In the present case, there is no fact done by Bull and wife, plaintiffs in error, that is in any manner affected by the law or resolution of Connecticut: it does not concern, or relate to, any act done by them. The decree of the court of probate of Hartford (on the 21st March), in consequence of which Calder and wife claim a right to the property in question, was given before the said law or resolution, and in that sense, was affected and set aside by it; and in consequence of the law allowing a hearing and the decision in favor of the will, they have lost what they would have been entitled to, if the law or resolution, and the decision in consequence thereof, had not been made. The decree of the court of probate is the only fact, on which the law or resolution operates. In my judgment, the case of the plaintiffs in error, is not within the letter of the prohibition; and for the reasons assigned, I am clearly of opinion, that it is not within the intention of the prohibition; and if within the intention, but out of the letter, I should not, therefore, consider myself justified to construe it within the prohibition, and therefore, that the whole was void.

It was argued by the counsel for the plaintiffs in error, that the legislature of Connecticut had no constitutional power to make the resolution (or law) in question, granting a new hearing, &c. Without giving an opinion, at this time, whether this court has jurisdiction to decide that any law made by congress, contrary to the constitution of the United States, is void: I am fully satisfied, that this court has no jurisdiction to determine that any law of any state legislature, contrary to the constitution of such state, is void.[1] Further, if this court had such jurisdiction, yet it does not appear to me, that the resolution (or law) in question, is contrary to the charter of Connecticut, or its constitution, which is said by counsel to be composed of its *acts of assembly, and usages and customs. I should think, that the courts of Connecticut are the proper tribunals to decide, whether laws

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[1] Hunt *v.* Lamphier, 3 Pet. 280; Watson *v.* Mercer, 8 Id. 88; Gilchrist *v.* Little Rock, 1 Dill. 261; Runlett *v.* Leavenworth, Id. 263.

contrary to the constitution thereof, are void. In the present case, they have, both in the inferior and superior courts, determined that the resolution (or law) in question was not contrary to either their state, or the federal constitution.

To show that the resolution was contrary to the constitution of the United States, it was contended, that the words, *ex post facto* law have a precise and accurate meaning, and convey but one idea to professional men, which is, "by matter of after fact; by something after the fact." And Co. Litt. 241; Fearne's Cont. Rem. (Old Ed.) 175 and 203; Powell on Devises 113, 133, 134, were cited; and the table to Coke's Reports (by Wilson), title *ex post facto*, was referred to. There is no doubt, that a man may be a trespasser from the beginning, by matter of *after fact;* as where an entry is given by law, and the party abuses it; or where the law gives a distress, and the party kills or works the distress.

I admit, an act unlawful in the beginning may, in some cases, become lawful by matter of *after fact.* I also agree, that the words "*ex post facto*" have the meaning contended for, and no other, in the cases cited, and in all similar cases, where they are used unconnected with, and without relation to, legislative acts or laws. There appears to me a manifest distinction between the case where one fact relates to, and affects, another fact, as where an after fact, by operation of law, makes a former fact either lawful or unlawful; and the case where a law made after a fact done, is to operate on, and to affect, such fact. In the first case, both the acts are done by private persons; in the second case, the first act is done by a private person, and the second act is done by the legislature, to affect the first act.

I believe, that but one instance can be found in which a British judge called a statute, that affected contracts made before the statute, an *ex post facto* law; but the judges of Great Britain always considered penal statutes, that created crimes, or increased the punishment of them, as *ex post facto* laws. If the term *ex post facto* law is to be construed to include and to prohibit the enacting any law, after a fact, it will greatly restrict the power of the federal and state legislatures; and the consequences of such a construction may not be foreseen. If the prohibition to make no *ex post facto* law extends to all laws made after the fact, the two prohibitions, not to make anything but gold and silver coin a tender in payment of debts; and not to pass any law impairing the obligation of contracts, were improper and unnecessary.

*It was further urged, that if the provision does not extend to prohibit the making any law, after a fact, then all *choses in action;* [*394 all lands by devise; all personal property by bequest, or distribution; by *elegit;* by execution; by judgments, particularly on *torts;* will be unprotected from the legislative power of the states; rights vested may be divested at the will and pleasure of the state legislatures; and therefore, that the true construction and meaning of the prohibition is, that the states pass no law to deprive a citizen of any right vested in him by existing laws.

It is not to be presumed, that the federal or state legislatures will pass laws to deprive citizens of rights vested in them by existing laws; unless for the benefit of the whole community; and on making full satisfaction. The restraint against making any *ex post facto* laws was not considered by the framers of the constitution, as extending to prohibit the depriving a citi-

zen even of a vested right to property; or the provision "that private property should not be taken for public use, without just compensation," was unnecessary.

It seems to me, that the right of property, in its origin, could only arise from compact, express or implied, and I think it the better opinion, that the right, as well as the mode, or manner of acquiring property, and of alienating or transferring, inheriting or transmitting it, is conferred by society; is regulated by civil institution, and is always subject to the rules prescribed by positive law. When I say, that a right is vested in a citizen, I mean, that he has the power to do certain actions; or to possess certain things, according to the law of the land.

If any one has a right to property, such a right is perfect and exclusive right; but no one can have such right, before he has acquired a better right to the property, than any other person in the world; a right, therefore, only to recover property, cannot be called a perfect and exclusive right. I cannot agree, that a right to property vested in Calder and wife, in consequence of the decree (of the 21st of March 1783) disapproving of the will of Morrison, the grandson. If the will was valid, Mrs. Calder could have no right, as heiress of Morrison, the physician; but if the will was set aside, she had an undoubted title. The resolution (or law) alone had no manner of effect on any right whatever vested in Calder and wife. The resolution (or law), combined with the new hearing, and the decision in virtue of it, took away their right to recover the property in question. But when combined, they took away no right of property vested in Calder and wife; because, the decree against the will (21st March 1783) did not vest in or transfer any property to them.

*395] *I am under a necessity to give a construction or explanation of the words, "*ex post facto* law," because they have not any certain meaning attached to them. But I will not go further than I feel myself bound to do; and if I ever exercise the jurisdiction, I will not decide any law to be void, but in a very clear case.

I am of opinion, that the decree of the supreme court of errors of Connecticut be affirmed, with costs.

Paterson, Justice.—The constitution of Connecticut is made up of usages, and it appears, that its legislature have, from the beginning, exercised the power of granting new trials. This has been uniformly the case, until the year 1762, when this power was, by a legislative act, imparted to the superior and county courts. But the act does not remove or annihilate the pre-existing power of the legislature, in this particular; it only communicates to other authorities a concurrence of jurisdiction, as to the awarding of new trials. And the fact is, that the legislature have, in two instances, exercised this power, since the passing of the law in 1762. They acted in a double capacity, as a house of legislation, with undefined authority, and also as a court of judicature, in certain exigencies. Whether the latter arose from the indefinite nature of their legislative powers, or in some other way, it is not necessary to discuss. From the best information, however, which I have been able to collect on this subject, it appears, that the legislature, or general court of Connecticut, originally possessed and exercised all legislative, executive and judicial authority; and that, from

time to time, they distributed the two latter in such manner as they thought proper; but without parting with the general superintending power, or the right of exercising the same, whenever they should judge it expedient. But be this as it may, it is sufficient for the present, to observe, that they have, on certain occasions, exercised judicial authority, from the commencement of their civil polity. This usage makes up part of the constitution of Connecticut, and we are bound to consider it as such, unless it be inconsistent with the constitution of the United States. True it is, that the awarding of new trials falls properly within the province of the judiciary; but if the legislature of Connecticut have been in the uninterrupted exercise of this authority, in certain cases, we must, in such cases, respect their decisions, as flowing from a competent jurisdiction or constitutional organ. And therefore, we may, in the present instance, consider the legislature of the state as having acted in their customary judicial capacity. If so, there is an end of the question. For if the power, thus exercised, comes more properly within the description of a judicial than of a legislative power; and if by usage or the *constitution, which, in Connecticut, are synonymous terms, the legislature of that state acted in both capacities; then, in the case [*396 now before us, it would be fair to consider the awarding of a new trial, as an act emanating from the judiciary side of the department.

But as this view of the subject militates against the plaintiffs in error, their counsel has contended for a reversal of the judgment, on the ground, that the awarding of a new trial was the effect of a legislative act, and that it is unconstitutional, because an *ex post facto* law. For the sake of ascertaining the meaning of these terms, I will consider the resolution of the general court of Connecticut, as the exercise of a legislative and not a judicial authority. The question, then, which arises on the pleadings in this cause, is, whether the resolution of the legislature of Connecticut, be an *ex post facto* law, within the meaning of the constitution of the United States? I am of opinion, that it is not. The words, *ex post facto*, when applied to a law, have a technical meaning, and, in legal phraseology, refer to crimes, pains and penalties. Judge Blackstone's description of the terms is clear and accurate. "There is," says he, "a still more unreasonable method than this, which is called making of laws, *ex post facto*, when, after an action, indifferent in itself, is committed, the legislature, then, for the first time, declares it to have been a crime, and inflicts a punishment upon the person who has committed it. Here, it is impossible, that the party could foresee, that an action, innocent when it was done, should be afterwards converted to guilt, by a subsequent law; he had, therefore, no cause to abstain from it; and all punishment for not abstaining, must, of consequence, be cruel and unjust." 1 Bl. Com. 46. Here, the meaning annexed to the terms *ex post facto* laws, unquestionably refers to crimes, and nothing else. The historic page abundantly evinces, that the power of passing such laws should be withheld from legislators; as it is a dangerous instrument in the hands of bold, unprincipled, aspiring and party men, and has been too often used to effect the most detestable purposes.

On inspecting such of our state constitutions, as take notice of laws made *ex post facto*, we shall find, that they are understood in the same sense. The constitution of Massachusetts, article 24th of the declaration of rights: "Laws made to punish for actions done before the existence of such

laws, and which have not been declared crimes by preceding laws, are unjust, oppressive, and inconsistent with the fundamental principles of a free government." The constitution of Delaware, article 11th of the declaration of rights: *"That retrospective laws punishing offences committed before the existence of such laws, are oppressive and unjust, and ought not to be made." The constitution of Maryland, article 15th of the declaration of rights: "That retrospective laws, punishing facts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust and incompatible with liberty; wherefore, no *ex post facto* law ought to be made." The constitution of North Carolina, article 24th of the declaration of rights: "That retrospective laws, punishing facts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust and incompatible with liberty; wherefore, no *ex post facto* law ought to be made."

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From the above passages, it appears, that *ex post facto* laws have an appropriate signification; they extend to penal statutes and no further; they are restricted, in legal estimation, to the creation, and, perhaps, enhancement of crimes, pains and penalties. The enhancement of a crime or penalty seems to come within the same mischief as the creation of a crime or penalty; and therefore, they may be classed together.

Again, the words of the constitution of the United States are, "That no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." Article I., § 10. Where is the necessity or use of the latter words, if a law impairing the obligation of contracts, be comprehended within the terms *ex post facto* law? It is obvious, from the specification of contracts in the last member of the clause, that the framers of the constitution did not understand or use the words in the sense contended for on the part of the plaintiffs in error. They understood and used the words in their known and appropriate signification, as referring to crimes, pains and penalties, and no further. The arrangement of the distinct members of this section, necessarily points to this meaning.

I had an ardent desire to have extended the provision in the constitution to retrospective laws in general. There is neither policy or safety in such laws; and therefore, I have always had a strong aversion against them. It may, in general, be truly observed of retrospective laws of every description, that they neither accord with sound legislation, nor the fundamental principles of the social compact. But on full consideration, I am convinced, tnat *ex post facto* laws must be limited in the manner already expressed; they must be taken in their technical, which is also their common and general, acceptation, and are not to be understood in their literal sense.

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*Iredell, Justice.—Though I concur in the general result of the opinions which have been delivered, I cannot entirely adopt the reasons that are assigned upon the occasion.

From the best information to be collected, relative to the constitution of Connecticut, it appears, that the legislature of that state has been in the uniform, uninterrupted habit of exercising a general superintending power over its courts of law, by granting new trials. It may, indeed, appear strange to some of us, that in any form, there should exist a power to grant, with respect to suits depending or adjudged, new rights of trial, new privileges of

proceeding, not previously recognised and regulated by positive institutions; but such is the established usage of Connecticut, and it is obviously consistent with the general superintending authority of her legislature. Nor is it altogether without some sanction, for a legislature to act as a court of justice. In England, we know that one branch of the parliament, the House of Lords, not only exercises a judicial power, in cases of impeachment, and for the trial of its own members, but as the court of dernier resort, takes cognisance of many suits of law and in equity; and that in construction of law, the jurisdiction there exercised is by the king in full parliament; which shows that, in its origin, the causes were probably heard before the whole parliament. When Connecticut was settled, the right of empowering the legislature to superintend the courts of justice, was, I presume, early assumed; and its expediency, as applied to the local circumstances and municipal policy of the state, is sanctioned by a long and uniform practice. The power, however, is judicial in its nature; and whenever it is exercised, as in the present instance, it is an exercise of judicial, not of legislative, authority.

But let us, for a moment, suppose, that the resolution, granting a new trial, was a legislative act, it will by no means follow, that it is an act affected by the constitutional prohibition, that "no state shall pass any *ex post facto* law." I will endeavor to state the general principles which influence me, on this point, succinctly and clearly, though I have not had an opportunity to reduce my opinion to writing.

If, then, a government, composed of legislative, executive and judicial departments, were established, by a constitution which imposed no limits on the legislative power, the consequence would inevitably be, that whatever the legislative power chose to enact, would be lawfully enacted, and the judicial power could never interpose to pronounce it void. It is true, that some speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I cannot think that, under such a government any court of justice would possess a power to declare it so. Sir William Blackstone, having put the strong case of an act of parliament, which [*399 *authorize a man to try his own cause, explicitly adds, that even in that case, "there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the legislature, or no." 1 Bl. Com. 91.

In order, therefore, to guard against so great an evil, it has been the policy of all the American states, which have, individually, framed their state constitutions, since the revolution, and of the people of the United States, when they framed the federal constitution, to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. If any act of congress, or of the legislature of a state, violates those constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the court will never resort to that authority, but in a clear and urgent case. If, on the other hand, the legislature of the Union, or the legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the court

could properly say, in such an event, would be, that the legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice. There are then but two lights, in which the subject can be viewed: 1st. If the legislature pursue the authority delegated to them, their acts are valid. 2d. If they transgress the boundaries of that authority, their acts are invalid. In the former case, they exercise the discretion vested in them by the people, to whom alone they are responsible for the faithful discharge of their trust: but in the latter case, they violate a fundamental law, which must be our guide, whenever we are called upon, as judges, to determine the validity of a legislative act.

Still, however, in the present instance, the act or resolution of the legislature of Connecticut, cannot be regarded as an *ex post facto* law; for the true construction of the prohibition extends to criminal, not to civil cases. It is only in criminal cases, indeed, in which the danger to be guarded against, is greatly to be apprehended. The history of every country in Europe will furnish flagrant instances of tyranny exercised under the pretext of penal dispensations. Rival factions, in their efforts to crush each other, have superseded all the forms, and suppressed all the sentiments of justice; while attainders, on the principle of retaliation and proscription, have marked all
*400] the *vicissitudes of party triumph. The temptation to such abuses of power is unfortunately too alluring for human virtue; and therefore, the framers of the American constitutions have wisely denied to the respective legislatures, federal as well as state, the possession of the power itself: they shall not pass any *ex post facto* law; or, in other words, they shall not inflict a punishment for any act, which was innocent at the time it was committed; nor increase the degree of punishment previously denounced for any specific offence.

The policy, the reason and humanity of the prohibition, do not, I repeat, extend to civil cases, to cases that merely affect the private property of citizens. Some of the most necessary and important acts of legislation are, on the contrary, founded upon the principle, that private rights must yield to public exigencies. Highways are run through private grounds; fortifications, light-houses, and other public edifices, are necessarily sometimes built upon the soil owned by individuals. In such, and similar cases, if the owners should refuse voluntarily to accommodate the public, they must be constrained, so far as the public necessities require; and justice is done, by allowing them a reasonable equivalent. Without the possession of this power, the operations of government would often be obstructed, and society itself would be endangered. It is not sufficient to urge, that the power may be abused, for such is the nature of all power—such is the tendency of every human institution: and, it might as fairly be said, that the power of taxation, which is only circumscribed by the discretion of the body in which it is vested, ought not to be granted, because the legislature, disregarding its true objects, might, for visionary and useless projects, impose a tax to the amount of nineteen shillings in the pound. We must be content to limit power, where we can, and where we cannot, consistently with its use, we must be content to repose a salutary confidence. It is our consolation, that there never existed a government, in ancient or modern times, more free from danger in this respect, than the governments of America.

Upon the whole, though there cannot be a case, in which an *ex post facto* law in criminal matters is requisite or justifiable (for providence never can intend to promote the prosperity of any country by bad means), yet, in the present instance, the objection does not arise: because, 1st, if the act of the legislature of Connecticut was a judicial act, it is not within the words of the constitution; and 2d, even if it was a legislative act, it is not within the meaning of the prohibition.

Cushing, Justice.—The case appears to me to be clear of all difficulty, taken either way. If the act is a judicial act, it is not touched by the federal constitution: and if it is a legislative *act, it is maintained and justified by the ancient and uniform practice of the state of Connecticut. [*401

Judgment affirmed.

Wilson *v.* Daniel.

Jurisdiction in error.

The original citation to the defendant in error, signed by the judge, must be returned; otherwise, the case is not properly before the court.

If a judgment, though imperfect and informal, be one on which execution may issue, it may be reviewed on error.

The amount actually in dispute, and not the sum recovered by the verdict, determines the jurisdiction of the supreme court, on a writ of error.[1]

Error from the Circuit Court of Virginia. On the return of the record, it appeared, that the district judge had indorsed the following *fiat* on the petition and assignment of errors, presented by the plaintiff in error: "Let a writ of error and *supersedeas* issue, agreeable to the prayer of the petition, on the petitioner's entering into bond, with security, in the penalty of $3600, conditioned as usual in such case. Cyrus Griffin." A writ of error accordingly issued; but it would seem, that only a copy of the writ was transmitted with the record (to which the seal of the circuit court was affixed, though the writ itself was not said to be under the seal of the court), and the copy was signed by "William Marshall, clerk," who added, in the margin, the following memorandum, in his own handwriting, not subscribed by the judge: "Allowed by Cyrus Griffin, Esq., judge of the middle circuit in the Virginia district." The original citation to the defendant in error was, likewise, omitted, and only a copy accompanied the record, with an affidavit subjoined, that the deponent "did, on the 24th of September 1796, deliver to Thomas Daniel, within named, a citation, whereof the above is a true copy." There was no certificate of the judge or clerk of the court, that the record was returned in obedience to the writ, though at the end of the paper, purporting to be the record, the clerk subjoined the following minute: "Copy: *Teste*—William Marshall, clerk."

*In February term 1797, *E. Tilghman*, for the defendant in error, objected to the return of the writ, that it was not said to be issued [*402 under the seal of the court; that the seal affixed to the record was not stated to have been affixed by order of the court; that the original writ was not

[1] Overruled, in Gordon *v.* Ogden, 3 Pet. 33, on the ground that a contrary practice had since prevailed. See Cooke *v.* Woodrow, 5 Cr. 13; Wise *v.* Columbian Turnpike Co. 7 Id. 276; Spear *v.* Place, 11 How. 522.

transmitted; that the paper purporting to be a citation, being a mere copy, did not appear, from the signature, or any other proof, to have been signed by the judge, which the act of congress expressly requires (1 U. S. Stat. 84, § 22), and that there was not even any certificate of the clerk of the court, that the entire record had been annexed and transmitted with the copy of the writ of error.

Lee (the Attorney-General) and *Ingersoll*, answered, that the district judge had, in effect, allowed the writ of error, by directing it to issue, when security was given; that the seal being actually affixed, it was unnecessary to state that the writ was under the seal of the court; that the seal implies and authenticates the fact, that the citation had been signed, as well as the writ of error allowed, by the judge; and that the clerk having asserted that the proceedings transmitted were a copy, it must be presumed to be an entire copy of the record, unless diminution is alleged.

But THE COURT were clearly of opinion, that the verification of the record was defective; and that they could not, consistently with the judicial act, dispense with a return of the original citation, subscribed by the judge himself.

The cause was, then, continued, upon an agreement between the counsel, that the defendant in error might either argue it upon the record, in its present state; or allege a diminution of the record, and issue a *certiorari*. The latter mode was adopted; and the diminution alleged was, that "there is not certified the judgment of the said circuit court, rendered on inspection of the record of a district court of the commonwealth of Virginia, held in the town of Dumfries, awarding to the said Thomas Daniel his costs against John Hollingsworth, William Merle and William Miller, on the dismission of a certain attachment by them against him sued forth, which record of the said district court is stated in the declaration of the said Thomas Daniel, filed in the said circuit court, and is again stated in the replication of the said Thomas Daniel, in the said circuit court, with an averment, that he was ready to verify the same, by a transcript thereof, certified under the hand of a proper officer; to which said replication, the said William Wilson, in the said circuit court, rejoined, that there was no such record." The clerk of the circuit court returned the *certiorari*, with a certificate indorsed, "that there *403] is not remaining on the rolls and records, the judgment of the *said circuit court, on the inspection of the transcript of the record of the district court of Dumfries, awarding the said Thomas Daniel, his costs against John Hollingsworth and others, on the dismission of a certain attachment against him by them prosecuted; nor did the said circuit court ever enter up their judgment thereon."

The circumstances, which now became material on the record, were as follows: It appeared by the declaration, that an action of debt was brought in the circuit court, by Thomas Daniel, a British subject, against William Wilson and others, upon a bond, dated the 11th of October 1791, for the penal sum of 60,000*l.*; that the bond had been taken, as an indemnity, from the defendants below, in an attachment brought by them against the plaintiff in a state court; and that the attachment was dismissed by the court, and the plaintiffs adjudged to pay the costs. The present plaintiff laid his damages, in conseqence of the attachment, at 20,000*l.*

Wilson v. Daniel.

The sole defendant below, William Wilson (the other defendants being dead, or not being arrested on the process), pleaded: 1. Performance of the condition of the bond: 2. That no costs had been awarded to the plaintiff below, in the attachment-suit, nor had any damages been recovered by him against the parties, for suing out the attachment. The plaintiff below replied: 1. That the defendant had not performed the condition of the bond: 2. That the court did award costs in the attachment-suit to the plaintiff below, which he was ready to verify by a transcript of the record: and 3. The plaintiff demurred to so much of the defendant's plea, as respects damages. The defendant below rejoined: 1. As to the judgment for costs in the attachment-suit, *nul tiel record:* and 2. As to the replication upon the question of damages, joinder in demurrer.

The record then proceeded: "The parties, by their attorneys, being fully heard, it seems to the court; that the said second plea of the defendant, and the matter therein contained, are not sufficient in law to bar the plaintiff from having and maintaining his action against the said defendant: therefore, it is considered, that judgment be entered for the plaintiff on his demurrer to that plea." "And at another day, to wit, &c., came the parties, &c.: and thereupon, also came a jury, &c. And now, &c., the jury aforesaid returned into court, and brought in their verdict in these words:—'We of the jury find for the plaintiff, the debt in the declaration mentioned, to be discharged by the payment of $1800 damages.'" * "Therefore, it is considered by the court, that the plaintiff recover against the defendant 60,000*l.*, of the value of $200,000, his debt aforesaid, and his costs by him about his suit in this behalf expended. And the said defendant in mercy, &c. But the judgment is to be discharged by the payment of the said $1800 and the costs." [*404

At the present term, as well as in February term 1797, two questions were made and argued, independent of the objection to the form of issuing and returning the writ of error: 1. Whether the judgment below was so defective, that a writ of error would not lie on it, inasmuch as no judgment was given upon the plea of *nul tiel record.* 2. Whether the supreme court had jurisdiction of the cause, inasmuch as the real and operative judgment of the circuit court was only for $1800; and the judicial act provides, that there shall be no removal of a civil action from the circuit court into the supreme court, unless the matter in dispute exceeds the sum or value of $2000 (1 U. S. Stat. 84, § 22).(*a*) On the first point, no opinion was given by the court at the former argument; but on the second point, CHASE, PATERSON and CUSHING, Justices, concurred in considering the judgment as a judgment at common law, for the penalty of the bond, and therefore, that the court had jurisdiction: WILSON, Justice, dissented; and IREDELL, Justice (who had presided in the circuit court), declined taking a part in the decision. The second point was, however, re-argued, at the instance of *E. Tilghman*, who was answered by *Lee* and *Ingersoll;* and the opinion of the court was given to the following effect.

ELLSWORTH, Chief Justice.—There have been two exceptions taken to the record in the present case: 1. That the judgment of the inferior court

(*a*) See 2 Dall. 358; Cases temp. Hardw. 5.

is so defective, that a writ of error will not lie upon it. It is evident, however, that the judgment is not merely interlocutory; but is in its nature final, and goes to the whole merits of the case. Though imperfect and informal, it is a judgment on which an execution could issue; and as the defendant below might be thus injured by it, we are unanimously of opinion, that he is entitled to a writ of error.

2. The second exception is, that the judgment is not for a sum of sufficient magnitude to give jurisdiction to this court. On this exception, there exists a diversity of sentiment, but it is the prevailing opinion, that we are not to regard the verdict or judgment, as the rule for ascertaining the value of the matter in dispute between the parties. By the judicial statute, it is
*405] provided, that certain decisions of the circuit courts, in certain *cases, may be reversed on a writ of error in the supreme court; but it is declared, that the matter in dispute must exceed the sum or value of $2000. To ascertain, then, the matter in dispute, we must recur to the foundation of the original controversy—to the matter in dispute, when the action was instituted. The descriptive words of the law point emphatically to this criterion; and in common understanding, the thing demanded (as in the present instance, the penalty of a bond), and not the thing found, constitutes the matter in dispute between the parties.

The construction which is thus given, not only comports with every word in the law, but enables us to avoid an inconvenience, which would otherwise affect the impartial administration of justice. For, if the sum or value found by a verdict, was considered as the rule to ascertain the magnitude of the matter in dispute, then, whenever less than $2000 was found, a defendant could have no relief against the most erroneous and injurious judgment, though the plaintiff would have a right to a removal and revision of the cause, his demand (which is alone to govern him) being for more than $2000. It is not to be presumed, that the legislature intended to give any party such an advantage over his antagonist; and it ought to be avoided, as it may be avoided, by the fair and reasonable interpretation, which has been pronounced.

Iredell, Justice.—I differ from the opinion which is entertained by a majority of the court, on the second exception; though, if the merits of the cause had been involved, I should have declined expressing my sentiments. As, however, the question is a general question of construction, and is of great importance, I think it a duty, briefly, to assign the reasons of my dissent.

The true motive for introducing the provision, which is under consideration, into the judicial act, is evident. When the legislature allowed a writ of error to the supreme court, it was considered that the court was held permanently at the seat of the national government, remote from many parts of the Union; and that it would be inconvenient and oppressive to bring suitors hither for objects of small importance. Hence, it was provided, that unless the matter in dispute exceeded the sum or value of $2000, a writ of error should not be issued. But the matter in dispute here meant, is the matter in dispute on the writ of error. In the original suit, indeed, I agree, that the demand of the party furnishes the rule of valuation; but the writ of error is of the nature of a new suit; and whatever may have been form-

erly the question on the merits, if we think the plaintiff is not entitled to recover more than *$1800, the court has not jurisdiction of a cause of such value, and cannot, of course, pronounce a judgment in it. [*406

At common law, indeed, the penalty of the bond was alone regarded; and though, in a case like the present, only one shilling damages should be given by the jury, the judgment at common law would be rendered for the whole penalty; so that the suffering party would be obliged to resort to a court of equity for relief. The legislature, however, has deemed it expedient to guard against the mischief, and at the same time, to prevent a circuity of action, by empowering the common-law courts to render judgment, in causes brought to recover the forfeiture annexed to any articles of agreement, covenant, bond or other specialty, for so much as is due, according to equity. From the time of passing the act, the plaintiff can recover no more, under the penalty of the bond, than the damages assessed or adjudged; and if a court of common law is thus empowered to regard the matter in dispute, independent of the strict common-law forfeiture of the penalty, this ought to be deemed, to every legal intent, the proper mode of settling and ascertaining the value or amount, to which the words of the law shall be applied, in the case of a writ of error.

The objection, which seemed, principally, to operate against this doctrine, in the mind of the court, as well as of the bar, was its tendency to entitle one party to a writ of error, and to exclude the other: but the objection cannot arise in this case, as both parties would be alike estopped by the insufficiency of the sum. A new law, however, of a scope so extensive, cannot be expected to provide for every possible case; and it is no reason why a plain provision should not operate, that another provision may be necessary, to avoid an inconvenience, or to establish equality between the parties.

I must, therefore, repeat my opinion, that although the plaintiff's demand is to be regarded in the original action; yet, that the sum actually rendered by the judgment, is to furnish the rule for fixing the matter in dispute upon a writ of error. And the sum actually rendered being less than $2000, the court cannot, I think, exercise a jurisdiction in the present cause.

CHASE, Justice.—On the first exception to this record, there is no diversity of opinion; and I also agree with the majority of the court, in the decision upon the second exception, though for reasons different from those that have been assigned.

This is a question of jurisdiction; and the law vests the jurisdiction, if the matter in dispute between the parties exceeds the sum or value of $2000. Whenever the objection arises on the amount of the matter in dispute, it is not, in my *opinion, to be settled here, by what appears on the writ of error, but it is to be settled in the inferior court, according to the circumstances appearing there, in each particular case. There is no common, uniform rule that can be applied to the subject. I do not think, that the demand of the plaintiff ought to be made the sole criterion; for then every plaintiff might entitle himself, in every case, to a writ of error, by laying his damages proportionally high: and I think, that the amount rendered by the judgment would be found, in the far greater number of cases, to be the true rule. It must be acknowledged, however, that in actions of *tort* or tres- [*407

pass, from the nature of the suits, the damages laid in the declaration afford the only practicable test of the value of the controversy.

Inquiring, therefore, what was in dispute in the present case, we find, that the action was brought on a bond, with a condition for performing two acts, and the non-performance of both acts constitutes the breach assigned. The record is distorted by great irregularities; but every part of the pleadings, verdict and judgment, that is not conformable to the common law, I reject, as not belonging to the case, which is neither founded on the statute of 8 & 9 *Wm. III.*, *c.* 10, nor on the act of the assembly of Virginia. Considered, therefore, as an action at common law, the penalty is forfeited on the non-performance of either of the acts which are the subject of the condition. The judgment of the court is rendered for that penalty; and though it is stated, that the judgment shall be discharged, on payment of a smaller sum, such a stipulation is inconsistent with the nature of a common-law judgment; it must be treated as mere surplusage; and in this view of the case, I am of opinion, that the court has jurisdiction.

Ellsworth, Chief Justice.—I will repeat and explain one expression, which was used in delivering the opinion of the court, and which seems to have been misunderstood.

It was not intended to say, that on every such question of jurisdiction, the demand of the plaintiff is alone to be regarded; but that the value of the thing put in demand furnished the rule. The nature of the case must certainly guide the judgment of the court; and whenever the law makes a rule, that rule must be pursued. Thus, in an action of debt on a bond for 100*l.*, the principal and interest are put in demand, and the plaintiff can recover no more, though he may lay his damages at 10,000*l.* The form of the action, therefore, gives in that case the legal rule. But in an action of trespass, or assault and battery, where the law prescribes no limitation as to the amount to be recovered, and the plaintiff has a right to estimate his damages at any sum, the damage stated in the declaration is the thing put
*408] in *demand, and presents the only criterion, to which, from the nature of the action, we can resort, in settling the question of jurisdiction.

The proposition, then, is simply this: Where the law gives no rule, the demand of the plaintiff must furnish one; but where the law gives the rule, the legal cause of action, and not the plaintiff's demand, must be regarded.

The objections overruled, and judgment affirmed. (*a*)

(*a*) Besides the exceptions above stated, several errors were assigned, which had been argued at a former term, in the absence of the chief justice. The court, after deciding the question of jurisdiction, called on the counsel to proceed in the argument on those errors; but *E. Tilghman* observed, that the court had been so evidently against him, that he would not press the subject further.

*FEBRUARY TERM, 1799.

On the opening of the Court, a commission, dated the 20th of December 1798, was read, appointing Bushrod Washington, one of the associate judges of the supreme court of the United States, and he was qualified according to law. (*a*)

Dewhurst *v.* Coulthard.

Jurisdiction.—Case stated.

The supreme court will not take cognisance of a case brought before it by a case stated.[1]

The following statement of a case was presented by *E. Tilghman* to the court, at the instance of the attorneys for both the parties in the suit, in the circuit court of the New York district, with a request, that it might be considered and decided.

"This was an action commenced by Isaac Coulthard against John Dewhurst, in the supreme court of the state of New York, and was removed by petition to the circuit court of the United States for the New York district, agreeable to the act of congress in such case made and provided, by the defendant, he being a citizen of the state of Pennsylvania.

"The plaintiff's action is prosecuted against the above defendant, as the, indorser of a foreign bill of exchange, drawn by G. B. Ewart, of the city and state of New York, on Thomas Barnes, of Baldork, near London, dated the 10th day of January 1792. On the part of the defendant, it is admitted, that at the time of the making and indorsing said bill, the said John Dewhurst was a citizen of, and resident in, the city and state of New York, *and that he duly received notice of the protest of the said bill for non-acceptance and non-payment. That on or about the 25th day of [*410 May 1792, the defendant removed to the city of Philadelphia, in the state of Pennsylvania, where he has resided since that period. That shortly after his removal to Philadelphia, viz., on or about the 7th day of June 1792, a commission of bankruptcy was awarded and issued forth against him, in pursuance of two certain acts or statutes of the said state of Pennsylvania, the one entitled 'An act for the regulation of bankruptcy;' the other entitled, 'An act to amend an act entitled, an act for the regulation of bankruptcy:' And in pursuance of which said statutes, the defendant did actually deliver, assign and transfer to the commissioners appointed under the said commission, the whole of his effects, as well in the state of Pennsylvania, as elsewhere, which consisted principally of credits due to the said defendant,

(*a*) The appointment of Mr. Washington was in the room of Mr. Justice Wilson, deceased. Mr. Justice Chase was prevented by indisposition from attending the court, during the whole of the present term.

[1] Keene *v.* Whitaker, 13 Pet. 459. The appellate jurisdiction of the supreme court can only be exercised in conformity with the regulations prescribed by congress. Wiscart *v.* D'Auchy, *ante*, p. 321; The Perseverance, *ante*, p. 336; The Charles Carter, 4 Dall. 22; United States *v.* Hooe, 1 Cr. 318; Sarchet *v.* United States, 12 Pet. 143; Minor *v.* Tillotson, 2 How. 392; Kelsey *v.* Forsyth, 21 Id. 85.

in the state of New York. It is further admitted, that the said John Dewhurst in all things complied with the said statutes of bankruptcy before referred to, and that on the 11th of August 1792, he obtained a certificate of bankruptcy duly executed.

"Upon the above state of the case, it is submitted to the supreme court of the United States, to determine whether the certificate issued under the laws of Pennsylvania, operates as a discharge of the said debt, notwithstanding its being contracted in another state, where there was no bankrupt law, and while the defendant was resident in the said state of New York. If the court should be of opinion that it does, it is agreed that judgment be entered for the defendant; otherwise, for the plaintiff, for $1120 damages, and six cents costs."

The Court, on the ensuing morning, returned the state of the case, declaring, that they could not take cognisance of any suit or controversy, which was not brought before them, by the regular process of the law.

Motion refused.

Ex parte Hallowell.

Attorneys.

An attorney of the supreme court may be transferred to the roll of counsellors.

Mr. Hallowell had been admitted, originally, as an attorney of this court; but now *Lewis* moved, that his *name should be taken from the roll of attorneys, and placed on the list of counsellors.

*411]

The Court directed the transfer to be made; and Mr. Hallowell was qualified, *de novo*, as counsellor.

Fowler *et al. v.* Lindsey *et al.*

Fowler *et al. v.* Miller.

Certiorari.—States as parties.

A *certiorari* does not lie to remove a canse, on account of the absence of jurisdiction in the court in which it is pending.

The fact that the land which is the subject of controversy was granted by, and is claimed under, a state, does not make the state a party to the suit; nor does an issue, whether it be within the limits of a state.[1]

A rule had been originally obtained in these actions (which were depending in the circuit court for the district of Connecticut), at the instance of the defendants, requiring the plaintiff to show cause why a *venire* should not be awarded to summon a jury from some district, other than that of Connecticut or New York; but it was changed, by consent, into a rule to show cause why the actions should not be removed by *certiorari* into the supreme court as exclusively belonging to that jurisdiction.

On showing cause, it appeared, that suits, in the nature of ejectments had been instituted in the circuit court for the district of Connecticut, to re-

[1] And see United States Bank *v.* Planters' Bank, 9 Wheat. 904; Bank of Kentucky *v.* Wister, 2 Pet. 318.

cover a tract of land, being part of the Connecticut Gore, which that state had granted to Andrew Ward and Jeremiah Hasley, and by whom it had been conveyed to the plaintiffs. The defendants pleaded that they were inhabitants of the state of New York; that the premises for which the suits were brought, lay in the county of Steuben, in the state of New York; and that the circuit court for the district of New York, or the courts of the state, and no other court, could take cognisance of the actions. The plaintiffs replied, that the premises lay in the state of Connecticut; and issue being joined, a *venire* was awarded. On the return, however, the defendants challenged the array, because the marshal of the district of Connecticut, a resident and citizen of that state, had arrayed the jury by his deputy, who was also a citizen of Connecticut, and interested as a purchaser or claimant in the Connecticut Gore, under the same title as the plaintiffs. The plaintiffs prayed *oyer* of the record and return, averred that the deputy-marshal was not interested in the question in issue, and demurred to the challenge, for being double, and contrary to the record, which did not show that the jury was returned by the deputy-marshal. The defendants joined in demurrer. THE COURT overruled the challenge, as it respected the general interest of the marshal and his deputy, owing to their being citizens of Connecticut; but allowed it, and quashed the array, on account of the particular *interest of the deputy, he being interested in the same tract of land, under color of the same title as the plaintiffs. [*412

The amended rule was argued by *Lewis* and *Hoffman* (the Attorney-General of New York), in favor of its being made absolute, and by *Hillhouse*, of Connecticut, against it, on the question, whether the suits ought to be considered as virtually depending between the states of Connecticut and New York? And the following opinions were delivered by the court, the Chief Justice, however, declining, on account of the interest of Connecticut, to take any part in the decision, and CHASE and IREDELL, Justices, being absent on account of indisposition.

WASHINGTON, Justice.—The first question that occurs from the arguments, on the present occasion, respects the nature of the rights, that are contested in the suits, depending in the circuit court. Without entering into a critical examination of the constitution and laws, in relation to the jurisdiction of the supreme court, I lay down the following as a safe rule: That a case which belongs to the jurisdiction of the supreme court, on account of the interest that a state has in the controversy, must be a case in which a state is either nominally, or substantially, the party. It is not sufficient, that a state may be consequentially affected; for in such case (as where the grants of different states are brought into litigation), the circuit court has clearly a jurisdiction. And this remark furnishes an answer to the suggestions, that have been founded on the remote interest of the state, in making retribution to her grantees, upon the event of an eviction.

It is not contended, that the states are nominally the parties; nor do I think that they can be regarded as substantially the parties to the suits: nay, it appears to me, that they are not even interested or affected. They have a right either to the soil or to the jurisdiction. If they have the right of soil, they may contest it, at any time, in this court, notwithstanding a decision in the present suits; and though they may have parted with the

right of soil, still, the right of jurisdiction is unimpaired. A decision, as to the former object, between individual citizens, can never affect the right of the state, as to the latter object: it is *res inter alios acta.* For, suppose the jury in some cases should find in favor of the title under New York; and in others, they should find in favor of the title under Connecticut, how would this decide the right of jurisdiction? And on what principle, can private citizens, in the litigation of their private claims, be competent to investigate, determine and fix the important rights of sovereignty?

*413] *The question of jurisdiction remaining, therefore, unaffected by the proceedings in these suits, is there no other mode by which it may be tried? I will not say, that as tate could sue at law for such an incorporeal right as that of sovereignty and jurisdiction; but even if a court of law would not afford a remedy, I can see no reason why a remedy should not be obtained in a court of equity. The state of New York might, I think, file a bill against the state of Connecticut, praying to be quieted as to the boundaries of the disputed territory; and this court, in order to effectuate justice, might appoint commissioners to ascertain and report those boundaries.[1] There being no redress at law, would be a sufficient reason for the interposition of the equitable powers of the court; since, it is monstrous, to talk of existing rights, without applying correspondent remedies.

But as it is proposed to remove the suits under consideration from the circuit court into this court, by writs of *certiorari*, I ask, whether it has ever happened, in the course of judicial proceedings, that a *certiorari* has issued from a superior to an inferior court, to remove a cause merely from a defect of jurisdiction? I do not know that such a case could ever occur. If the state is really a party to the suit in the inferior court, a plea to the jurisdiction may be there put in; or, perhaps, without such a plea, this court would reverse the judgment on a writ of error: and if the state is not a party, there is no pretence for the removal.

A *certiorari*, however, can only issue, as original process, to remove a cause, and change the *venue*, when the superior court is satisfied, that a fair and impartial trial will not otherwise be obtained; and it is sometimes used, as auxiliary process, where, for instance, diminution of the record is alleged, on a writ of error: but in such cases, the superior court must have jurisdiction of the controversy. And as it does not appear to me, that this court has exclusive or original jurisdiction of the suits in question, I am of opinion, that the rule must be discharged.

Paterson, Justice.—The rule to show cause why a *venire* should not be awarded to summon a jury from some district other than that of Connecticut or New York, cannot be supported. It has, indeed, been abandoned. The argument proceeds on the ground of removing the cause into this court, as having exclusive jurisdiction of it, because it is a controversy between states. The constitution of the United States, and the act of congress, although the phraseology be somewhat different, may be construed in perfect conformity with each other. The present is a controversy between individuals, respect-

*414] ing their right or title to a particular tract of land, and *cannot be extended to third parties or states. Its decision will not affect the state

[1] Rhode Island *v.* Massachusetts, 12 Pet. 657.

of Connecticut or New York; because neither of them is before the court, nor is it possible to bring either of them, as a party, before the court, in the present action. The state, as such, is not before us. Besides, if the cause should be removed into this court, it would answer no purpose; for I am not able to discern by what authority we could change the *venue*, or direct a jury to be drawn from another district. As to this particular, there is no devolution of power, either by the constitution or law. The authority must be given—we cannot usurp or take it.

If the point of jurisdiction be raised by the pleadings, the circuit court is competent to its decision; and therefore, the cause cannot be removed into this court previously to such decision. To remove a cause from one court to another, on the allegation of the want of jurisdiction, is a novelty in judicial proceedings. Would not the *certiorari* to remove, be an admission of the jurisdiction below? Neither of the motions is within the letter or spirit of the constitution or law.

How far a suit may, with effect, be instituted in this court, to decide the right of jurisdiction between two states, abstractedly from the right of soil, it is not necessary to determine. The question is a great one; but not before us. I regret the incompetence of this court to give the aid prayed for. No prejudice or passion, whether of a state or personal nature, should insinuate itself in the administration of justice. Jurymen, especially, should be above all prejudice, all passion, and all interest in the matter to be determined. But it is the duty of judges to declare, and not to make the law.

Cushing, Justice.—These motions are to be determined, rather by the constitution and the laws made under it, than by any remote analogies drawn from English practice.

Both by the constitution and the judicial act, the supreme court has original jurisdiction, where a state is a party. In this case, the state does not appear to be a party, by anything on the record. It is a controversy or suit between private citizens only; an action of ejectment, in which the defendant pleads to the jurisdiction, that the land lies in the state of New York, and issue is taken on that fact. Whether the land lies in New York or Connecticut, does not appear to affect the right or title to the land in question. The right of jurisdiction and the right of soil may depend on very different words, charters and foundations. A decision of that issue can only determine the controversy as between the private citizens, who are parties to the suit, and the event only *give the land to the plaintiff or defendant; but could have no controlling influence over the line [*415 of jurisdiction; with respect to which, if either state has a contest with the other, or with individuals, the state has its remedy, I suppose, under the constitution and the laws, by proper application, but not in this way; for she is not a party to the suit.

If an individual will put the event of his cause in a plea of this kind, on a fact, which is not essential to his right; I cannot think, it can prejudice the right of jurisdiction appertaining to a state. I agree with the rest of the court, that neither of the motions can be granted.

By the Court.—Let the rules be discharged.

Clarke *v.* Russell.

Exceptions.—Bills of exchange.—Guarantee.

Where the bill of exceptions is part of the record, and comes up with it, the acknowledgment of the judge's seal is unnecessary; if not tacked to the record, such acknowledgment might be proper.

In an action against the drawer of a bill, protested for non-payment, it is unnecessary to show a protest for non-acceptance.

To charge one person with the debt of another, the undertaking must be clear and explicit.

It seems, that a letter of introduction, containing the following words—"You may be assured of their complying fully with any contracts or engagements they may enter into with you"—does not import an undertaking of guaranty.

In Error from the Circuit Court for the district of Rhode Island. On the return of the record, it appeared, that a declaration, containing the following count, had been filed in an action brought by "Nathaniel Russell, of Charleston, in the district of South Carolina, merchant and citizen of the state of South Carolina, against John Innes Clarke, of Providence, in the county of Providence, and district of Rhode Island, merchant and citizen of the state of Rhode Island, and surviving partner of the company of Joseph Nightingale, now deceased, and the said John Innes Clarke, heretofore doing business under the firm of Clarke & Nightingale."

1st Count. "That the said John Innes Clarke and Joseph Nightingale, then in full life, on the 10th day of March 1796, at the district of Rhode Island, in consideration that the plaintiff would, at the special instance and request of the said Joseph and John Innes, indorse seven several sets of bills of exchange, of the date, tenor and description as set forth in the annexed schedule, drawn by a certain Jonathan Russell, who was agent and partner, in that particular, of the company of Robert Murray & Co., of New York, in the district of New York, on themselves assumed, and to the plaintiff faithfully promised, that if the said bills should not be paid by the person on whom the same were drawn, and the plaintiff, in consequence of such indorsement, should be obliged to pay the same bills, with damages, costs and interest thereon, they the said Joseph and John Innes would well and truly pay to the plaintiff the amount of the said bills, damages, and costs and interest, if the drawer *of said bills did not pay the same to the said plaintiff. And the said plaintiff in fact saith, that in consideration of, and trustng to, the said assumption and promise, he did indorse the said bills: and the said plaintiff further in fact saith, that the person, on whom the said bills were drawn, did not accept or pay the said bills, but that the said bills were, in due form of law, protested for non-payment, of which non-payment and protest, notice was given, in due form of law, to the drawer thereof, and also to the plaintiff, to wit, on the 13th day of September 1796, at said district of Rhode Island; by reason whereof, in consequence of said indorsement, the plaintiff was obliged to pay the said bills, with damages, costs and interest thereon, amounting to 4744*l.* 13*s.* 1*d.*, sterling money of Great Britain, equal in value to $20,338.52, and actually did pay the sum of money last mentioned, in discharge of the said bills, before the commencement of this suit, to wit, on the said 13th day of September 1796, at the district of Rhode Island aforesaid, of which the drawer of the said bills, on the day and year, and at the district last aforesaid, had notice, and the said drawer was then and there requested by the plaintiff to pay to him the sum

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of money last aforesaid, which he, the said drawer, refused to do, of all which the said Joseph and John Innes, afterwards, to wit, on the day and year last aforesaid, at the district aforesaid, had notice. Nevertheless, &c.'

The defendant pleaded *non assumpsit;* and thereupon, issue was joined. On the trial, the jury found for the plaintiff on the first count, with $22,839.80, damages; and for the defendant, on all the other counts in the declaration. On this verdict, judgment was rendered; but the defendant having filed a bill of exceptions, brought the present writ of error. The bill of exceptions was founded on the following reasons, which it set forth at large:

1st. That upon the trial of the issue "the counsel learned in the law for the said Nathaniel Russell, to maintain and prove the said issue, offered in evidence the aforesaid foreign bills of exchange, with protests for non-payment, but without any protests for non-acceptance of the same, or of any of them."

2d. That "the said counsel also contended and insisted before the jury, that two letters of Clarke & Nightingale, directed to the plaintiff, and dated January 20th and 21st, 1796, did import an engagement or promise by the said Clarke & Nightingale to the plaintiff, that the said Robert *Murray & Co. would fully comply with any contract or engagements they might make with the plaintiff. [*417

3d. That "the said counsel also contended and insisted before the jury, that parol testimony is allowable by law, to explain said written promise or engagement, expressed in said letters."

"But the counsel for the said John Innes Clarke, before said court, did object against said bills of exchange, as evidence in said case, by reason that the same, or any of them, did not appear to have been protested for non-acceptance: and did insist before the jury, that the said letters did not import any promise or engagement by the said Clarke & Nightingale, to the plaintiff, that the said Robert Murray & Co. would fully comply with any contract or engagements they might make with the plaintiff: and that the promise or engagement, by the plaintiff attempted to be proved to be made by the said Clarke & Nightingale with the plaintiff, in the said letters, ought not to be explained by parol testimony, which had passed to the jury, without objection thereto by the said counsel—they only objecting afterwards to its applicability to the said written evidence of the said promise, in the said letters.

"And the justice who tried the said cause,(*a*) did then and there deliver his opinion to the jury aforesaid, that said foreign bills of exchange ought to be admitted and pass in evidence before the said jury in said case, without any protest for non-acceptance: and the said justice did also declare and deliver his opinion to the said jury, that the said letters of Clarke & Nightingale, directed to the plaintiff, and dated the 20th and 21st days of January 1796, did import an engagement or promise by the said Clarke & Nightingale, to the plaintiff, that the said Robert Murray and Co. would fully comply with any contract or engagements they might enter into with the plaintiff: and the said justice did then and there declare, that the said written promise,

(*a*) The cause was tried by Judge CUSHING, but the district judge, BROWN, having been originally of counsel for the defendant, did not sit.

by the plaintiff attempted to be proved, with him by the said Clarke & Nightingale, by said letters of 20th and 21st January 1796, to have been made, might be explained by parol testimony."

The letters, on which the action was founded, were expressed in the following words :

*418] *Providence, 20th January 1796.

Nathaniel Russell, Esq.

Dear Sir:—Our friends, Messrs. Robert Murray & Co., merchants in New York, having determined to enter largely into the purchase of rice and other articles of your produce in Charleston, but being entire strangers there, they have applied to us for letters of introduction to our friends. In consequence of which, we do ourselves the pleasure of introducing them to your correspondence, as a house on whose integrity and punctuality the utmost dependence may be placed. They will write you the nature of their intentions, and you may be assured of their complying fully with any contracts or engagements they may enter into with you. The friendship we have for these gentlemen, induces as to wish you will render them every service in your power, at the same time, we flatter ourselves this correspondence will prove a mutual benefit. We are, &c.,

CLARKE & NIGHTINGALE.

Providence, 21st January 1796.

Nathaniel Russell, Esq.

Dear Sir :—We wrote you yesterday a letter of recommendation in favor of Messrs. Robert Murray & Co. We have now to request that you will endeavor to render them every assistance in your power. Also, that you will, immediately on the receipt of this, vest the whole of what funds you have of ours, in your hands, in rice, on the best terms you can. If you are not in cash, for the sales of china and nankeens, perhaps, you may be able to raise the money from the bank till due, or purchase the rice upon a credit, till such time as you are to be in cash for them. The truth is, we expect rice will rise ; and we want to improve the amount of what property
*419] *we can muster in Charleston, vested in that article, at current price. Our Mr. Nightingale is now at Newport, where it is probable we shall write you on the subject. We are, &c.,

CLARKE & NIGHTINGALE.

It appeared upon the record, that William McWaugh, being examined as a witness under a commission, testified, among other things, that in a conversation with Joseph Nightingale, the deceased partner, after the bills of exchange had been protested, Joseph Nighingale declared to the deponent, that "there could be no doubt but that the defendants, Clarke & Nightingale, must see the plaintiff, Nathaniel Russell, secured." But the defendant applied to put off the cause in the court below, on account of the absence of a material witness, and filed an affidavit stating, that "he believed the witness would testify, that he was present at the conversation mentioned in W. McWaugh's examination, upon the request of Nightingale: but nothing of the import suggested by McWaugh then passed." The court declared, that the cause should be continued on this application, unless the plaintiff agreed that the fact alleged in the defendant's affidavit, should be considered upon

the trial as proved, to every purpose which it could effect, were the witness present; and the agreement was accordingly entered into.

The general errors being assigned, and issue being joined on the plea *in nullo est erratum*, the cause was argued by *Lee*, the Attorney-General, *Howell* (of Rhode Island) and *Ingersoll*, for the plaintiff in error; and by *E. Tilghman*, *Dexter* (of Massachusetts) and *Robbins* (of Rhode Island), for the defendant in error. (*a*)

For the *plaintiff* in error, the following points were urged, and supported by the corresponding authorities: 1st. That the bills of exchange mentioned in the declaration were laid before the jury, without a protest for non-acceptance, or any proof *that they were so protested. (*b*) Lov. on Bills 176; Bull. N. P. 273; 1 T. R. 167; Lov. 81; 3 Bac. Abr. 613; 2 Gord. Univ. Acc. 363; Bull. N. P. 270; Lov. 81, 76–7; 10 Stat. at Large p. —; 11 St. at L. 106; 5 Burr. 2671–2; 8 Mod. 80; 1 Salk. 131; Kyd 137, 140, 151; 2 T. R. 713. [*420

2d. That the court below gave it in charge to the jury, that the letters written by Clarke & Nightingale, amounted to a guarantee of any engagement into which Robert Murray & Co. might enter with the plaintiff: whereas, the letters did not import such a guarantee; there was no other written evidence of it before the jury; and a collateral undertaking to pay the debt of another, must be in writing, agreeable to the English statute of frauds (29 *Car II., c.* 3), which is in force in Rhode Island. Cowp. 227. For any mistake of a judge, in his directions or decisions upon a trial, a bill of exceptions may be tendered. 3 Bl. Com. 372; Reg. Brev. 282; 2 Inst. 287. Even before the statute of frauds, if any contract was made in writing, the writing must be produced; and its contents could not be proved by parol testimony, on the general principle, that the best evidence of which the case is susceptible, must be given. Esp. 780–1. But since the statute, a promise like the one now alleged, can only be made in writing. 3 Woodes. 420–2; 4 Bl. Com. 439. The letters do not contain evidence of such a promise. They are not, in form, letters of credit, which are a species of bills of exchange, are always confined to money transactions, and invariably

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(*a*) On opening the case, *Howell* observed, that it was necessary, he presumed, to call on the judge, who presided at the trial, to acknowledge his seal, affixed to the bill of exceptions.

Ellsworth, Chief Justice.—The bill of exceptions is part of the record, and comes up with it. For that reason, the acknowledgment of the judge's seal is unnecessary. But if the bill of exceptions had not been tacked to the record, such an acknowledgment might have been proper. See Bull. N. P. 317, 319.

(*b*) On *Howell's* stating this point, the Chief Justice remarked, that it was proper to apprise the counsel, that in the case of Brown *v.* Barry (*ante*, p. 365) the same question had been agitated and decided: but *Howell* representing, that he thought there was a distinction between the case of Brown *v.* Barry, where the indorsee sued the drawer of a bill; and the present case, where the indorsee sues the indorser; The Court declared they were willing to hear the argument, though the distinction did not strike them as material. *Howell* then endeavored to support the distinction, on the ground, that a drawer may not be injured by the non-acceptance, as in the case of his not having assets in the hands of the drawee, but that an indorser could not be in that predicament, as a second indorser might resort to the first, and every indorser may resort to the drawer, upon the non-acceptance of the drawee. Lov. on Bills 176.

include a direct and positive undertaking to repay the money, which shall be advanced. Beawes L. M. 447–8; Jacob's L. D., "Letters of credit." Marius 81–2. And, in substance, the letters are nothing more than letters of friendly introduction. The court and not the jury are to construe all deeds and written instruments. 1 T. R. 172. If, when an opinion is declared of the solvency of their friends, there had been any deception, an action in the nature of deceit would lie (3 T. R. 51); Peake's N. P. 226; but there is
*421] no such imputation *here, and the words do not import a promise. 1 Vin. Abr. 261; 1 Roll. Abr. 6; Noy 11; 2 Com. Rep. 558, Cas. 237. Nor is there any equity against the plaintiff in error; for the obligation of a surety is always strictly construed, according to the letter of his engagement. 2 T. R. 266, 366; Yelv. 40–1; Peake's N. P. 226; 1 Esp. Rep. 290. Besides, notice ought to have been given by Russell to Clarke & Nightingale, if he made any advances on account of the letters; and the mere finding of the *assumpsit* will not let in a presumption that such a notice was given. Marius 85; Esp. 290, 442. The first count is a special count, and must be proved as it is laid (Doug. 24); but as those letters would apply as well to any other speculation, as to the indorsement of the bills of exchange, the special count is no notice of the contract given in evidence. The plaintiff should have stated in the declaration all the inducements; should have set forth the letters; should have averred, that Russell was the agent of Clarke & Nightingale; and that in consideration of their request, the bills had been indorsed. But the declaration does not even aver that they ever made the request, in consideration of which the bills were indorsed. Doug. 659.

3d. That the promise alleged to be made in the letters of Clarke & Nightingale, ought not to have been explained by parol testimony: for such testimony is not admissible to explain a deed, or any written instrument.(*a*) 2 W. Bl. 1249; 1 Esp. 780; 3 Wils. 275; Cas. temp. Talb. 240; 3 T. R. 474; 6 Ibid. 671; Doug. 24; 2 Roll. Abr. 276; 1 Atk. 13; Pow. Cont. 277, 290; *Day* v. *Barker et al.*, New Annual Register 1795; Pow. Cont. 373; 1 P. Wms. 618; Pow. Mort. 61; Pow. Cont. 431; 2 Atk. 384; 1 Bro. Ch. 90; Gilb. L. of Ev. 5, 6, 112; 3 Woodes. 327–8; 1 Bro. Ch. 54, 93–4; 2 W. Bl. 1249–50; 1 T. R. 180–2; Bull. N. P. 269, 280; Yelv. 40; 2 Ves. 56, 232.

For the *defendant* in error, it was answered: 1st. That there was no necessity to produce, or to prove, a protest for non-acceptance of the bills of exchange. 3 Dall. 365, 344.

(*a*) Ellsworth, Chief Justice.—On this point, I would wish to see any authorities that distinguish between solemn instruments, and loose commercial *memoranda*. There is seemingly a distinction in principle; though I do not recollect, that it is expressly recognised by any writer on the law. I will, for instance, state this case—A. and B., being at a wharf, the former says to the latter, "I will sell you my ship John." B. asks an hour to think of the proposition; goes home; and shortly after sends a note to A. in these words—"I will take your ship John." May not the party go beyond the note, to explain, by existing circumstances, the word take, which according to existing circumstances, will equally embrace a purchase, a charter-party and a capture? This exemplification will serve to convey my general idea; and it, evidently, includes many cases of daily occurrence in commercial transactions.

2d. That even admitting the letters of Clarke & Nightingale *to be part of the record (which, however, was contested), the decision of the court below was right; for, on a just construction of their contents, they import a promise or guarantee; and the terms of the letters ought to be taken most strongly against the writer. 1 Bac. Abr. 168; 2 T. R. 366.

3d. That the parol evidence at the trial was properly admitted. The bill of exceptions states, that the evidence passed to the jury, without exception, the counsel only objecting, afterwards, to its applicability. Where objectionable evidence is given, and not objected to, but admitted by the defendant's counsel, it is no ground for a bill of exceptions. The applicability of the evidence to the letters, was a matter of fact for the jury, not the court, to determine; and on that point, the court said nothing, though they were of opinion, that the written promise might be explained by parol testimony. What the testimony was, does not appear: (*a*) nor does it appear

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(*a*) *Ingersoll* was proceeding, in the course of his argument, to remark upon the testimony of McWaugh, but was stopped by the Chief Justice, who referred it to the court to decide, whether that testimony could be taken into consideration, in the discussion of the present bill of exceptions?

Washington, Justice.—It has been contended, on the one hand, that even the letters, which are the foundation of the action, do not make a part of the record; but it has been answered, that they are embraced by express words of reference contained in the bill of exceptions. I will not preclude myself, at this stage of the argument, from giving a further consideration to that point: but it appears to me, that although McWaugh's testimony might be deemed a part of the record; yet, as it is not stated, nor even referred to, in the bill of exceptions, we cannot presume that it was the evidence objected to; and therefore, must exclude it from the present discussion, which arises on the bill of exceptions.

Paterson, Justice.—It was objected in the court below, that parol testimony had passed to the jury, to explain the written contract, on which the action was founded; and McWaugh's testimony goes directly to that point. Considering, therefore, all the papers returned with the writ of error, as forming a part of the record, I think, it ought to be taken into view on the present occasion.

Iredell, Justice.—I do not think that in arguing this bill of exceptions, the deposition of McWaugh ought to be regarded. The reference to the letters of Clarke & Nightingale is sufficiently direct to render them part of the record; but when the bill of exceptions speaks of the parol testimony, it does not state what was its import, nor does it anywhere appear, that the deposition of McWaugh was the subject of objection.

Cushing, Justice.—The clerk of the inferior court has certified the record, and that it contains the whole of the proceedings in the cause, the deposition of McWaugh making a part. The bill of exceptions is tacked to the record; and, among other things, it contains an objection to the admission of parol testimony, in explanation of the written contract. When, therefore, we find that McWaugh's testimony is explanatory of the letters of Clarke & Nightingale, I am of opinion, that the reference is sufficient to entitle the deposition to be considered, in deciding upon the bill of exceptions.

Ellsworth, Chief Justice.—The whole of the record is exhibited in a loose and imperfect state; but I am clear, that we ought not to travel out of the bill of exceptions, to find matter to support it. The letters of Clarke & Nightingale, though they might, properly, have been inserted more at large, are so referred to, by words and plain intendment, that we cannot doubt their being the same, to which the bill of exceptions was applied. This is not the case with the deposition of McWaugh. The bill of exceptions does not expressly refer to that document; and though it speaks generally of

that the *court was of opinion, that the promise might be explained by the parol testimony, specifically, whose applicability the counsel denied, though the jury have found that it did apply. 3 Salk. 373; Bull. N. P. 317. Where the parol testimony was given, without objection, how could the court interfere? It must operate with the jury, and the party consented that it should operate, by allowing that it should be delivered, without objection. It does not appear, indeed, that the statute of frauds was insisted on; and certainly, it is not necessary to state a written promise in the declaration. 1 T. R. 451; Bull. N. P. 279; 2 Jones 158. Nor will the court apply the statute to the case, if the party does not. Peake 15. But even where the statute has been pleaded, parol testimony has been attended to, in explanation of written contracts. Skin. 142–3; 2 Vent. 361; Esp. 780. If, however, the construction of the letters is correct, on the part of the defendant in error, the bare declaration of the court below, that parol testimony might explain them, will not invalidate his right of recovery; and this court will not reverse a judgment rendered upon conclusive evidence, appearing on the record, though improper evidence may afterwards have been admitted. The general rule is, that parol testimony is admissible to explain, though not to contradict, a writing. Thus, it has been admitted, *424] in consistence with the writing, to show a consideration other *than that which the deed itself expressed (3 T. R. 474); to explain a certificate of a pauper's settlement (7 Ibid. 609; 2 W. Bl. 1250); to show whether a cellar was comprehended within a lease (1 T. R. 701); to explain a will (2 Ves. 216); and to prove a mistake in an agreement (1 Ibid. 456). It has been admitted, to show declarations at, and after, the writing (1 Chan. Cas. 180; 1 Dall. 193, 426; 1 Atk. 448; 2 Dall. 171, 173, 196); to ascertain a fact under a will (Ibid. 70); to rebut an equity; to prove legacies augmented, not repealed (1 Bro. Ch. 448; 2 Ibid. 521); to prove the advancement of a sum of money to be an ademption of a legacy (2 Atk. 48; 3 Ibid. 77–8; 2 Bro. Ch. 165, 519–21; 2 Ves. 28); and to prove the intention of the father, as to the mode of education, on a devise of guardianship (Ibid. 56). It is admitted in cases of resulting trusts; and constantly in mercantile contracts (Ibid. 331). In fine, the statute speaks, not only of the contract being in writing, but of some note or memorandum of the contract; and therefore, any memorandum in writing of the intent of the parties (such as the letters in question) will serve to take the case out of the statute.

The opinion of the Court, after some days' deliberation, was delivered by the Chief Justice, in the following terms.

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parol testimony, there is nothing said, that points more at McWaugh's deposition, than at the testimony of any other witness, or number of witnesses, examined upon the trial. It is said, that the deposition of McWaugh is a part of the record: but I do not think it would be considered so, on principle, in Massachusetts; and it is too illusory (since all the parol testimony is not annexed), to be long countenanced in practice. There may have been other parol testimony to counteract and invalidate the testimony of McWaugh; and there must, we perceive, have been parol testimony on some points of fact, arising on the face of the bills of exchange themselves. I think, therefore, that the deposition of McWaugh ought to be excluded from all consideration, in arguing the present bill of exceptions.

By the Court.—The deposition of McWaugh is not to be regarded, in the argument on the bill of exceptions.

Ellsworth, Chief Justice.—This cause comes up on a bill of exceptions; on the face of which, three exceptions appear.

1. That bills of exchange, which had been non-accepted, and protested for non-payment, were admitted in evidence unaccompanied by protests for non-acceptance. According to a general rule, laid down by this court, in the case of *Brown* v. *Barry*, from Virginia, and from which rule there appear no special circumstances to exempt the present case, this exception will not hold.

2. A further exception is, that the judge, in his charge to the jury, held, that the two letters from the defendants to the plaintiff below, of the 20th and 21st of January 1796, which were set up to prove an undertaking or guarantee, might be explained by parol testimony; of which kind of testimony, some had passed to the jury, without objection, but for what purpose, does not now appear, as there were divers counts, some of which parol testimony might have supported. The undertaking declared upon, in the count to which the verdict applies, being for the duty of another, it must, to save it from the statute of frauds and perjuries, be in writing, and wholly so. The two letters, therefore, which are relied upon as the written agreement, cannot be added to or varied by parol testimony. Nor can they be so far explained by parol testimony, as to affect their import, with regard to the supposed *undertaking. The charge then, of the judge, that "they might be explained by parol testimony," expressed as a general rule, [*425 and without any qualifications or restrictions, was too broad; and may have misled the jury. On this ground, there must be a reversal.

3. It is, therefore, unnecessary to decide the remaining question—whether the two letters did, of themselves, import an undertaking or guarantee? It may be proper to suggest, however, that a majority of the court, at present, incline to the opinion that they do not.(*a*)

Judgment reversed, and a *venire de novo* awarded.

Sims's Lessee *v.* Irvine.

Land law of Pennsylvania.—Montour's Island.—Compact with Virginia.

In Pennsylvania, a survey and payment of purchase-money confer a legal right of entry, which will support an ejectment.

A military right to unappropriated land in America, acquired under a royal proclamation, in 1763, was assignable, by the law of Virginia, to an inhabitant of that state.

Obtaining a warrant on such right, and locating it, gave the assignee a complete equitable title, which was confirmed by the compact between Pennsylvania and Virginia.[1]

Error from the Circuit Court for the Pennsylvania district. An ejectment being instituted in the inferior court, by the lessee of *Sims* v. *Irvine*, the jury found a special verdict, upon which judgment was rendered for the plaintiff, by consent, and this writ of error was brought to settle the title.

(*a*) I have understood, that the Chief Justice, and Cushing, Justice, were for the affirmative; and Iredell, Paterson and Washington, Justices, were for the negative answer, on the third question.

[1] And see Ross *v.* Cutshall, 1 Binn. 399.

The parts of the special verdict material to the points in controversy were, in substance, as follows:

Plaintiff's title. "The jury find that the premises in dispute was called Montour's Island, situated in the river Ohio, on the south-east side, within the original limits of the Virginia charter, granted in 1609, and within the limits of the territorial district in dispute between Virginia and Pennsylvania, for several years prior to the 23d of September 1780, when those states entered into the following compact relative to their boundaries, as it is inserted in the journals of the general assembly of Pennsylvania; and afterwards ratified by a law passed the 1st of April 1784 (2 Dall. Laws, 207).

"Resolved, That although the conditions annexed by the legislature of Virginia, to the ratification of the boundary line agreed to by the commissioners of Pennsylvania and Virginia, on the 31st day of August 1779, may tend to countenance some unwarrantable claims, which may be made under the state of Virginia, in consequence of pretended purchases, or settlements, pending the controversy, yet this state, determining to give to the world the most unequivocal proof of their desire to promote peace and harmony with a sister state, so necessary during this great contest against the common enemy, do agree to the conditions proposed by the state of Virginia, in their resolves of the 23d of June last, to wit:

*426] *"That the agreement made on the 31st day of August 1779, between James Madison and Robert Andrews, commissioners for the commonwealth of Virginia, and George Bryan, John Ewing and David Rittenhouse, commissioners for the commonwealth of Pennsylvania, be ratified and finally confirmed, to wit: That the line commonly called Mason's and Dixon's line, be extended due west, five degrees of longitude, to be computed from the river Delaware, for the southern boundary of Pennsylvania; and that a meridian line drawn from the western extremity thereof to the northern limits of the said states respectively, be the western boundary of Pennsylvania for ever. On condition, that the private property and rights of all persons acquired under, founded on, or recognised by the laws of either country, previous to the date hereof, be saved and confirmed to them, although they should be found to fall within the other, and that in the decision of disputes thereon, preference shall be given to the elder or prior right, whichever of the said states the same shall have been acquired under, such persons paying to the state within whose boundary their lands shall be included, the same purchase or consideration money which would have been due from them to the state under which they claimed the right; and where any such purchase or consideration money hath, since the declaration of American independence, been received by either state for lands, which, according to the before recited agreement, shall fall within the territory of the other, the same shall be reciprocally refunded and repaid; and that the inhabitants of the disputed territory, now ceded to the state of Pennsylvania, shall not, before the first day of December, in the present year, be subject to the payment of any tax, nor, at any time, to the payment of arrears of taxes or impositions heretofore laid by either state. And we do hereby accept and fully ratify the said recited condition, and the boundary line formed thereupon.

"Resolved, That the president and council of this state be, and they are hereby empowered to appoint two commissioners on the part of this state,

in conjunction wish commissioners to be appointed by the state of Virginia, to extend the line commonly called Mason's and Dixon's line, five degrees of longitude from Delaware river, and from the western termination of the line so extended, to run and mark, as soon as may be, a meridian line to the Ohio river, the remainder of that line to be run as soon as the president and council, taking into their consideration the disposition of the Indians, shall think it prudent. And the president and council are hereby authorized to give to the said commissioners such instructions in the premises as they shall think fit."

*"The jury find that William Douglas was a field-officer in the service of the king of Great Britain, in a regiment raised in the colony [*427 of New Jersey, who continued in service during the war between France and Great Britain, which terminated in 1763; and that the said king gave to him, his heirs and assigns, by proclamation, a right to 5000 acres of waste and unappropriated lands in America; the part of the proclamation relating to the gift being expressed in these words:

"And whereas, we are desirous, upon all occasions, to testify our royal sense and approbation of the conduct and bravery of the officers and soldiers of our armies, and to reward the same, we do hereby command and empower our governors of our said three new colonies, and other our governors of our several provinces on the continent of North America, to grant, without fee or reward, to such reduced officers as, having served in North America, during the late war, and are actually residing there, and shall personally apply for the same, the following quantities of land, subject, at the expiration of ten years, to the same quit-rents as other lands are subject to, in the province within which they are granted, as also subject to the same conditions of cultivation and improvement, viz.: To every person having the rank of a field officer, 5000 acres; to every captain, 3000 acres; to every subaltern or staff officer, 2000 acres; to every non-commission officer, 200 acres; to every private, 50 acres.

"We do, likewise, authorize and require the governors and commanders-in-chief of all our said colonies upon the continent of North America, to grant the like quantities of land, and upon the same conditions, to such reduced officers of our navy, of like rank, as served on board our ships of war in North America, at the times of the reduction of Louisburg, and Quebec, in the late war, who shall personally apply to our respective governors, for such grants."(*a*)

"The jury find that the said W. Douglas, for a valuable consideration, assigned, on the 17th of January 1779, to Charles Sims, and his heirs, all his right and title to the said bounty of 5000 acres of land; that C. Sims was born in Virginia, before the year 1760; that he was an inhabitant thereof since his birth; that he is the lessor of the plaintiff and a citizen of Virginia; that William Irvine, the defendant below, is a citizen and inhabitant of Pennsylvania; and that the lands mentioned in the declaration exceed the value of 2000 dollars.

*"The jury find, *in hæc verba*, a law of Virginia, enacted in May 1779, entitled 'An act for adjusting and settling the titles of [*428

(*a*) The proclamation also contains a provision, prohibiting any grant or purchase of lands occupied by the Indians. See the Annual Register for 1763.

claimers to unpatented lands, under the present and former government, previous to the establishment of the commonwealth's land-office'; the material parts of which law are expressed in the following terms :

"'An act for adjusting and settling the titles of claimers to unpatented lands under the present and former government, previous to the establishment of the commonwealth's land-office.

"'§ 1. Whereas, the various and vague claims to unpatented lands under the former and present government, previous to the establishment of the commonwealth's land-office, may produce tedious and infinite litigation and disputes, and in the meantime, purchasers would be discouraged from taking up lands upon the terms lately prescribed by law, whereby the fund to be raised in aid of the taxes for discharging the public debt, would be in a great measure frustrated ; and it is just and necessary, as well for the peace of individuals as for the public weal, that some certain rules should be established for settling and determining the rights to such lands, and fixing the principles upon which legal and just claimers shall be entitled to sue out grants ; to the end that subsequent purchasers and adventurers may be enabled to proceed with greater certainty and safety : Be it enacted by the general assembly, that all surveys of waste and unappropriated land, made upon any of the western waters, before the first day of January, in the year 1778, and upon any of the eastern waters, at any time before the end of this present session of assembly, by any county-surveyor commissioned by the masters of William and Mary college, acting in conformity to the laws and rules of government then in force, and founded either upon charter, importation rights, duly proved and certified according to the ancient usage, as far as relates to indented servants, and other persons not being convicts, upon treasury rights for money paid the receiver-general duly authenticated upon entries on the western waters, regularly made before the 26th day of October, in the year 1763, or on the eastern waters, at any time before the end of this present session of the assembly, with the surveyor of the county, for tracts of land not exceeding four hundred acres, according to act of assembly, upon any order of council, or entry in the council-books, and made during the time in which it shall appear, either from the original or any subsequent order, entry or proceedings in the council-books, that such order
*429] or entry remained in force, the terms *of which have been complied with, or the time for performing the same unexpired, or upon any warrant from the governor for the time being, for military service, in virtue of any proclamation, either from the king of Great Britain or any former governor of Virginia, shall be, and are hereby declared good and valid ; but that all surveys of waste and unpatented lands made by any other person, or upon any other pretence whatsoever, shall be, and are hereby declared null and void : provided, that all officers or soldiers, their heirs or assigns, claiming under the late Governor Dinwiddie's proclamation of a bounty in lands to the first Virginia regiment, and having returned to the secretary's office, surveys made by virtue of a special commission from the president and masters of William and Mary college, shall be entitled to grants thereupon, on payment of the common office fees ; that all officers and soldiers, their heirs and assigns, under proclamation warrants for military service, having located lands by actual surveys made under any such special commission, shall have the benefit of their said locations, by taking out warrants upon such rights,

resurveying such lands according to law, and thereafter proceeding according to the rules and regulations of the land-office. All and every person or persons, his, her or their heirs or assigns, claiming lands upon any of the before recited rights, and under surveys made as hereinbefore mentioned, against which no *caveat* shall have been legally entered, shall, upon the plats and certificates of such surveys being returned into the land-office, together with the rights, entry, order, warrant, or authentic copy thereof, upon which they were respectively founded, be entitled to a grant or grants for the same, in manner and form hereinafter directed.

"'§ 2. Provided, that such surveys and rights be returned to the said office, within twelve months next after the end of this present session of assembly, otherwise they shall be and are hereby declared forfeited and void. All persons, their heirs or assigns, claiming lands under the charter and ancient custom of Virginia, upon importation rights as before limited, duly proved, and certified in any court of record, before the passing of this act; those claiming under treasury rights for money paid the receiver-general, duly authenticated, or under proclamation warrants for military service, and not having located and fixed such lands by actual surveys, as hereinbefore mentioned, shall be admitted to warrants, entries and grants for the same, in manner directed by the act of assembly entitled *An act for establishing a land-office, and ascertaining the terms and manner of granting *waste and unappropriated lands*, upon producing to the register of the land-office the proper certificates, proofs or warrants, as the [*430 case may be, for their respective rights, within the like space of twelve months after the end of this present session of assembly, and not afterwards. All certificates of importation rights, proved before any court of record, according to the ancient custom, and before the end of this present session of assembly, are hereby declared good and valid: And all other claims for importation rights, not so proved, shall be null and void; and where any person, before the end of this present session of assembly, hath made a regular entry, according to act of assembly, with the county surveyor for any tract of land not exceeding four hundred acres, upon any of the eastern waters, which hath not been surveyed or forfeited, according to the laws and rules of government in force at the time of making such entry, the surveyor of the county where such land lies, shall, after advertising legal notice thereof, proceed to survey the same accordingly, and shall deliver to the proprietor a plat and certificate of survey thereof, within three months; and if such person shall fail to attend at the time and place so appointed for making such survey, with chain-carriers and a person to mark the lines, or shall fail to deliver such plat and certificate into the land-office, according to the rules and regulations of the same, together with the auditor's certificate of the treasurer's receipt for the composition money hereinafter mentioned, and pay the office fees, he or she shall forfeit his or her right and title; but upon performance of these requisitions, shall be entitled to a grant for such tract of land, as in other cases.

"'§ 3. And be it enacted, that all orders of council or entries for land in the council-books, except so far as such orders or entries respectively have been carried into execution by actual surveys, in manner hereinbefore mentioned, shall be, and they are hereby declared void and of no effect; and except also a certain order of council for a tract of sunken grounds, com-

monly called the Dismal Swamp, in the south-eastern part of this commonwealth, contiguous to the North Carolina line, which said order of council, with the proceedings thereon, and the claim derived from it, shall hereafter be laid before the general assembly, for their further order therein. No claim to land within this commonwealth for military service, founded upon the king of Great Britain's proclamation, shall hereafter be allowed, except a warrant for the same shall have been obtained from the governor of Virginia, during the former government, as before mentioned; *or where *431] such service was performed by an inhabitant of Virginia, or in some regiment or corps actually raised in the same; in either of which cases, the claimant, making due proof in any court of record, and producing a certificate thereof to the register of the land-office, within the said time of twelve months, shall be admitted to a warrant, entry and grant for the same, in the manner hereinbefore mentioned; but nothing herein contained shall be construed or extend, to give any person a title to land for service performed in any company or detachment of militia.'

"The jury find *in hæc verba* another law of Virginia enacted also in May 1779, entitled 'An act for establishing a land office and ascertaining the terms and manner of granting waste and unappropriated lands;' the material parts of which law are expressed in the following terms:

"'§ 3. And be it enacted, that upon application of any person, their heirs or assigns, having title to waste or unappropriated lands, either by military rights, or treasury rights, and lodging in the land-office a certificate thereof, the register of the said office shall grant to such person or persons, a printed warrant, under his hand and the seal of his office, specifying the quantity of land and the right upon which it is due, authorizing any surveyor, duly qualified according to law, to lay off and survey the same, and shall regularly enter and record in the books of his office, all such certificates and the warrants issued thereupon; which warrants shall be always good and valid, until executed by actual survey, or exchanged in the manner hereinafter directed, &c.

"'Any person holding a land-warrant upon any of the before mentioned rights, may have the same executed in one or more surveys, and in such case, or where the lands on which any warrant is located shall be insufficient to satisfy such warrant, the party may have the warrant exchanged by the register of the land-office for others of the same amount in the whole, but divided as best may answer the purposes of the party, or entitle him to so much land elsewhere as will make good the deficiency, &c.

"'Every person having a land-warrant, founded on any of the before mentioned rights, and being desirous of locating the same on any particular waste and unappropriated lands, shall lodge such warrant with the chief surveyor of the county wherein the said lands or the greater part of them lie, who shall give a receipt for the same, if required. The party shall direct the location thereof so specially and precisely, as that others may be *432] enabled with certainty to locate *other warrants on the adjacent *residuum*; which location shall bear date the day on which it shall be made, and shall be entered, by the surveyor, in a book to be kept for that purpose, in which there shall be left no blank leaves or spaces between the different entries, &c.

"'No entry or location of land shall be admitted within the county and

limits of the Cherokee Indians, or on the north-west side of the Ohio river, or in the lands reserved by act of assembly for any particular nation or tribe of Indians, or on the lands granted by law to Richard Henderson & Co., or in that tract of country reserved, by resolution of the general assembly, for the benefit of the troops serving in the present war, and bounded by, &c., until the further order of the general assembly, &c.

"'All persons, as well foreigners as others, shall have right to assign or transfer warrants or certificates of survey for lands; and any foreigner, purchasing warrants for lands, may locate and have the same surveyed, and after returning a certificate of survey to the land-office, shall be allowed the term of eighteen months, either to become a citizen, or to transfer his right in such certificate of survey to some citizen of this, or any other of the United States of America.'

"The jury find *in hæc verba* another law of Virginia, enacted in October 1779, entitled 'An act for explaining and amending an act entitled an act for adjusting and settling the titles of claimers to unpatented lands under the present and former government, previous to the establishment of the commonwealth's land-office.' The law is expressed in the following terms:

"'§ 1. Be it enacted by the general assembly, that whereas, doubts have arisen concerning the manner of proving rights for military service, under the proclamation of the king of Great Britain, in the year 1763, whereby great frauds may be committed: Be it declared and enacted, that no person, his heirs or assigns, other than those who had obtained warrants under the former government, shall hereafter be admitted to any warrant for such military service, unless he, she or they produce to the register of the land-office, within eight months after the passing of this act, a proper certificate of proof, made before some court of record within the commonwealth, by the oath of the party claiming, or other satisfactory evidence that such party was *bonâ fide* an inhabitant of this commonwealth, at the time of passing the said recited act, or that the person having performed such military service, was an officer or soldier in some regiment or corps (other than militia) actually raised in Virginia, before the date of the said proclamation, and had continued to serve until the *same was disbanded, had been discharged on account of wounds or bodily infirmity, or had died in [*433
the service, distinguishing particularly in what regiment or corps such service had been performed, discharge granted, or death happened, and that the party had never before obtained a warrant or certificate for such military service: provided, that nothing in this act shall be construed in any manner to affect, change or alter the title of any person under a warrant heretofore issued.

"'§ 2. And whereas, the time limited in the before-recited act, to the commissioners for adjusting and settling the claims to unpatented lands within their respective districts, may be too short for that purpose: Be it further enacted, that all the powers given to the said commissioners by the said recited act, shall be continued and remain in force, for and during the further term of two months, from and after the expiration of the time prescribed by the said act, and no longer. And where it shall appear to the said commissioners, that any person, being an inhabitant of their respective districts, and entitled to the pre-emption of certain lands, in consideration of

an actual settlement, is unable to advance the sum required for the payment of the state price, previous to the issuing of a warrant for surveying such land, the said commissioners shall certify the same to the register of the land-office, who shall thereupon issue such pre-emption warrant to the party entitled thereto, upon twelve months credit for the purchase money, at the state price, from the date of the warrant. The said register shall keep an exact account of all such warrants issued upon credit, and shall not issue grants upon surveys made thereupon, until certificates are produced to him from the auditors of public accounts of the payment of the purchase-money respectively due thereon into the treasury; and if the same shall not be paid within the said term, the warrant, survey and title founded thereon, shall be void, and thereafter, any other person may obtain a warrant, entry and grant, for such land, in the same manner as for any other waste and unappropriated land: provided, that nothing herein contained shall be construed to extend to any person claiming right to the pre-emption of any land, for having built an house or hut, or made any improvements thereon, other than an actual settlement as described in the said recited act. No certificate of right to land for actual settlement, or of pre-emption right, shall hereafter be granted by the said commissioners, unless the person entitled thereto hath taken the oath of fidelity to this commonwealth, or shall take such oath before the said commissioners, which they are hereby empowered and directed to render and administer; except only in the particular case of the inhabitants of the territory in dispute between this commonwealth and that of Pennsylvania, who
*434] shall be entitled to certificates *upon taking the oath of fidelity to the United States of America.

"'§ 3. And be it further enacted, that all persons, their heirs or assigns, claiming lands by virtue of any order of council, upon any of the eastern waters, under actual surveys made by the surveyor of the county in which the land lay, may, upon the plats and certificates of such surveyors being returned into the land-office, together with the auditor's certificate of the treasurer's receipt for the composition money of thirteen shillings and four pence per hundred acres due thereon, obtain grants for the same, according to the rules and regulations of the said office; notwithstanding such surveys or claims have not been laid before the court of appeals. And all other claims for lands, upon surveys made by a county surveyor, duly qualified, under any order of council, shall, by the respective claimers be laid before the court of appeals, at their next sitting, which shall proceed thereupon in the manner directed by the before-recited act. Any person claiming right to land surveyed for another, before the establishment of the commonwealth's land-office, may enter a *caveat* and proceed thereupon, in the same manner as is directed by the act of assembly for establishing the said office, and upon recovering judgment, shall be entitled to a grant, upon the same terms, and under the same conditions, rules and regulations, as are prescribed by the said act in the case of judgments upon other *caveats*, upon producing to the register a certificate from the auditors of the treasurer's receipt for the composition money of thirteen shillings and four pence per hundred acres due thereon.'

"The jury find that the court of the county of Prince William, in Virginia, issued a certificate in favor of the said Charles Sims, in the words following:

"'Prince William Court, the 4th day of April 1780. Charles Sims, gent. produced to the court a commission from Francis Bernard, Esq., formerly governor of the province of New Jersey, with the seal of that province affixed, and dated the 15th day of March 1759, appointing William Douglass major of a regiment of foot, to be raised in the province of New Jersey, whereof the honorable Peter Schuyler was colonel. He also produced the affidavit of the Reverend David Griffith, taken before William Ramsay, Esq., a justice of the peace for the county of Fairfax, the first day of this instant, that William Douglass, commonly called Major Douglass, who formerly resided on Staten Island, did actually serve as an officer, in the corps of provincials raised by the province of New Jersey, in the late war between Great Britain and France; and a certain George Beardmor, in *open court, upon his oath saith, that he served as a soldier a campaign with the [*435 said Douglass, in the late war of Great Britain with France, and hath reason to believe the said Douglass served the time for which the said regiment was raised. The said Charles Sims likewise produced to the court an assignment indorsed on the back of said commission, dated the 16th day of January 1779, signed William Douglass, in these words: "In consideration of the sum of 100*l.* current money, as well as for other good causes of consideration; I, William Douglass, of the state of New Jersey, do make over, assign, transfer and convey unto Charles Sims, of the state of Virginia, all my right, title and interest to the lands which I am entitled to, by virtue of the within commission under the king of Great Britain, and his proclamation issued in the year 1763. Given under my hand and seal, this 16th day of January 1779." The said Charles Sims made oath that he believed the said William Douglass, who made the before assignment, is the same person whom the Reverend David Griffith mentions in his affidavit, and that the said assignment was made to him for a valuable consideration, and that he has never before made any claim nor received any lands in consequence of the beforementioned assignment; and the same is ordered to be certified: And the court doth further certify that the said Charles Sims is, and hath always been, from the time of his birth, an inhabitant of this state.

Teste, Robert Graham, Clerk Court.

"'The within is a copy taken from one of the vouchers, upon which a military warrant, No. 915, issued to Charles Sims, the 7th day of April 1780.

July 21st, 1796. Wm. Price, Re. L. Off.'

"The jury find that the register of the Virginia land-office, on the 8th of May 1780, issued to the said Charles Sims, assignee of the said William Douglass, one military warrant, in the usual form; that the said Charles Sims delivered the warrant, on the 30th of May 1780, to the surveyor of Yohagany county (within which Montour's island lay), in Virginia, and directed it to be entered and located on several parcels of land, of which Montour's island aforesaid was one; that the said surveyor did, on the same day and year last mentioned, enter and write in his book, kept by him as surveyor, the said warrant on the said parcels of land, and indorsed the said entry and location on the said original warrant; and that the said two several papers (or minutes) refer to and mean one and the same warrant, though the warrant is dated on the 8th of May 1780, and the record in the register of the land-office is under date of 7th of April 1780.

*"The jury find, that the governor of Virginia transmitted, in the year 1784, a just and true list of the entries of land made under the authority of Virginia in the disputed territory, to the executive of Pennsylvania, which list, among others, contained the following item in relation to the military warrant of the said C. Sims: '30 May 1788, Charles Sims, Military, 5000. Racoon;' '30 May 1780, Charles Sims, Military warrant, 3000. Racoon.'

"The jury find, that the said list of entries, included the said entry and location of the lessor of the plaintiff's, and was transmitted to the land-office of Pennsylvania, in the said year 1784; and that upon the said entry of the lessor of the plaintiff with respect to 3002 acres on Racoon creek, a survey was made, and a patent, dated 6th January 1795, had been issued under the authority of Pennsylvania.

"The jury find, *in hæc verba*, another law of Virginia, enacted on the 20th of June 1780, at a session which commenced on the 1st of May preceding, entitled 'An act for giving further time to obtain warrants upon certificates for pre-emption rights, and returning certain surveys to the land-office, and for other purposes;" the material parts of which law, are expressed in the following terms:

"'Whereas, the time fixed by an act entitled An act for adjusting and settling the titles of claimers to unpatented lands, under the present and former governments, previous to the establishment of the commonwealth's land-office, for surveying and returning surveys to the land-office upon entries made with the surveyor of a county, before the 26th day of June 1779, for lands lying upon the eastern waters, and for returning the plats of legal surveys made upon the western waters, under the former government, and exchanging military warrants granted under the royal proclamation of 1763, and not yet executed, will shortly expire, and many persons be thereby deprived of the benefit of such warrants and surveys: Be it therefore enacted, that all persons having such warrants, shall be allowed until the first day of July 1781, to exchange such warrants; and that the like time shall be allowed for returning such surveys to the land-office, to such who were entitled to land for military service, for which certificates have not yet been obtained.

"'§ 4. And be it further enacted, that the further time of eighteen months be given to all persons who may obtain certificates from the said commissioners for pre-emptions, on their obtaining warrants from the register of the land-office to *enter the same with the surveyor of the respective counties in which their claims were adjusted: provided, that the court of commissioners for the district of the counties of Monongalia, Yohogany and Ohio, do not use or exercise any jurisdiction respecting claims to lands within the territory in dispute between the states of Virginia and Pennsylvania, north of Mason's and Dixon's line, until such dispute shall be finally adjusted and settled.

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"'§ 5. And be it further enacted, that all surveys upon entries, the execution of all warrants, and the issuing of patents for lands within the said territory, shall also be suspended until the said dispute shall have been finally adjusted and settled; but that such suspension shall not be construed in any manner to injure or affect the title of any person claiming such lands. And whereas, the business of such commissioners for settling the claims of

unpatented lands, will be much lessened in the counties of Monongalia, and Yohogany and Ohio, &c.

"'§ 7. And whereas, some doubts have arisen upon the construction of the acts, directing the granting warrants for land due for military service under the king of Great Britain's proclamation in the year 1763: It is hereby declared, that no officer, his heirs, executors, administrators or assigns, shall be entitled to a warrant of survey for any other or greater quantity of land than was due to him, her or them, in virtue of the highest commission or rank in which such officer had served, nor in virtue of more than one such commission, for services in different regiments or corps, nor shall any non-commissioned officer or soldier be entitled to a bounty for land, under the said proclamation, for his services in more than one regiment or corps.

"'§ 8. And it is further declared, that the register shall not issue to any person or persons whatever, his or their heirs or assigns, a grant for land for more than one service, as above described, nor to those who have received warrants for services, since October 1763, notwithstanding a warrant or warrants may have been heretofore issued, and the land surveyed, unless the claimant shall, within six months from the end of this present session of assembly, produce to the said register the auditor's certificate for the payment of the state price of forty pounds per hundred, for the quantity of land in such warrant or warrants; and if such money is not so paid, that then the said warrants or surveys shall be to all intents and purposes void; and that the register may be able to comply with this law, he is hereby directed to make out, and keep an alphabetical list of all military warrants issued under the former as well as the present government; *in case of any assignment, marking therein the name of the assignor; and the several surveyors with whom military warrants obtained under the former government, have been lodged or located, are directed to transmit to the register, in the month of November next, or before that time, a list of all such warrants.' [*438

"The jury find a variety of orders issued by the late supreme executive council of Pennsylvania; and of proceedings entered into by the board of property, in relation to running the boundary, and to the list of Virginia claims and entries on lands within the disputed territory, &c.; a variety of patents issued by Virginia, for islands in the Ohio; sundry treaties with the Indians, and cessions made by them, particularly at Fort Stanwix, on the 5th of November 1768, and on the 30th of October 1784; and they find the constitution and laws of Virginia, respecting the right of purchasing lands occupied by the Indians; but which findings it does not seem necessary to set forth more particularly.

"The jury find, that Presly Neville and Matthew Ritchie, two deputy-surveyors, received from the surveyor-general a list of entries made under the authority of Virginia, which said list included the entry for the land in the declaration mentioned; that their commission was dated the 4th of April 1785, appointing them deputy-surveyors of all that part of Washington county, lying within the specified boundaries; and that on the 13th of April 1787, they surveyed Montour's island, and returned the survey *in hæc verba*, into the surveyor-general's office, some time in March 1788; the return of the survey setting forth, that it was made for Charles Sims, assignee of William Douglass, and under the Virginia warrant, entry and location.

"The jury find, that before the year 1779, the Indian tribes, in consequence of hostilities between them and the United States, retired to the north-west side of the Ohio river, having abandoned and relinquished all the lands, except on the north-west side of the said Ohio river; and that by various treaties since made with the United States of America, the boundary line of their hunting-grounds is very distant from the north-west side of the Ohio river aforesaid.

"The jury find, that according to the practice of Virginia, no money was required to be paid, since the passing the said act, entitled 'An act for giving further time to obtain warrants upon certificates for pre-emption rights, and returning certain surveys into the land-office, and for other purposes,' by the holder of a military warrant for lands, except where more than one warrant is issued for the same service.

*439] * "The jury find, that the defendant, William Irvine, had actual notice of the claim of the lessor of the plaintiff, some time before the 25th of December 1783, which was before the said defendant made any payment of money to Pennsylvania, whose first and only payment was of the sum of 283*l.* 13*s.* 6*d.*, on the 18th of April 1787."

II. Defendant's title. "The jury find a law of Pennsylvania, enacted the 24th of September 1783, entitled 'An act to grant the right of pre-emption to an Island known by the name of Montour's Island in the Ohio river, to Brigadier-General William Irvine;' which law is expressed in the following terms:

"'§ 1. Whereas, Brigadier-general William Irvine, during his separate command at Pittsburgh, hath rendered essential service to this state, particularly the frontier settlements thereof: In consideration whereof—

"'§ 2. Be it enacted, and it is hereby enacted by the representatives of the freemen of the commonwealth of Pennsylvania in general assembly met, and by the authority of the same, that the island, situated in the Ohio river, below Pittsburgh, known by the name of Montour's island, and every part thereof, be, and the same is hereby, granted unto the said William Irvine in fee, to have and to hold the same unto him, his heirs and assigns for ever; subject to such purchase-money as a future house of assembly may direct.

"'§ 3. And be it further enacted by the authority aforesaid, that the supreme executive council be, and they hereby are, empowered to direct the surveyor-general of this state, at the proper cost and charge of the said William Irvine, to lay out the said island, and cause it to be returned into the office for confirmation.

"'§ 4. Provided always, that nothing in this act shall be taken or deemed to bar any person or persons, their heirs or assigns, who may have obtained any just or lawful right to the said island, or any part thereof, before the passing of this act.'

"The jury find another law of Pennsylvania, enacted on the 8th of April 1785, entitled 'An act to provide further regulations whereby to secure fair and equal proceedings in the land-office, and in the surveying lands;' which act contains a section in these words:

"'§ 1. Whereas, the time for opening the land-office of this state, for the lands contained within the purchase lately made by the commonwealth of the Indian natives, of all the residue of waste lands within the charter bounds of Pennsylvania, as the same have been adjusted between this state and the

*state of Virginia, is fixed to be from and after the first day of May next, when it is probable that numerous applications will be made to the said land-office at the said time, for lands within the bounds of the said late purchase, and the officers of the land-office must necessarily be obliged to give preference to some persons, before others whose applications may be made equally early, and thereby great dissatisfaction must arise, unless some provision be made by law to regulate the same,' &c.

"The jury find, that the defendant, on the 19th of April 1787, having previously returned a survey into the office of the surveyor-general of Pennsylvania, of the lands in the declaration mentioned, obtained a patent for the same, in due form, dated the 19th of April 1787.

"The jury find another law of Pennsylvania, enacted the 26th of March 1785, entitled 'An act for the limitation of actions to be brought for the inheritance or possession of real property, or upon penal acts of assembly'; which law contains the following section:

"'§ 5. And be it further enacted by the authority aforesaid, that no person or persons that now hath or have any claim to the possession of any lands, tenements or hereditaments, or the pre-emption thereof, from the commonwealth, founded upon any prior warrant, whereon no survey hath been made, or in consequence of any prior settlement, improvement or occupation, without other title, shall hereafter enter or bring any action for the recovery thereof, unless he, she or they, or his, her or their ancestors or predecessors, have had the quiet and peaceable possession of the same, within seven years next before such entry, or bringing such action: Provided always, that if any person or persons, so claiming as aforesaid, hath been forced or driven away from his, her or their possessions, by the savages, or by the terror of them, or any other persons, or by any other means, except by the judicial authority of the state, hath quitted the same, during the late war, then such person or persons, and his, her or their heir or heirs shall or may, notwithstanding the said seven years be expired, bring his, her or their action, or make his, her or their entry, within five years from the passing of this act.'

"And the jury find the lease, entry and ouster in the declaration mentioned. And if upon the whole matter, &c."

After an assignment of the general errors, *in nullo est erratum* pleaded, and issue joined, the cause was argued by *Lewis*, *E. Tilghman* and *Dallas*, for the plaintiff in error; and by *Lee*, *Ingersoll* and *Rawle*, for the defendant: the former contended, that the title of the lessor of the plaintiff was defective both in law and equity; but admitting that it was an equitable title, they insisted, that the remedy was in equity, and not at law.

*I. The title of the lessor of the plaintiff is defective, because:

1st. The special verdict does not find that William Douglass was [*441 entitled to the bounty, under the proclamation of 1763, as being an officer within the description, and complying with the conditions of the gift. To be entitled, he must have been a reduced officer; he must have served during the war of 1763; the service must have been in America; he must have been resident there; and he must have made a personal application for the benefit of the bounty. Not one of these requisites is clearly stated in the verdict, and some of them are entirely omitted. The rule, with respect to

special verdicts, is, that they must find facts, not the evidence of facts; and no implication, however pregnant, will be allowed. In trover, for instance, the jury must find an actual conversion; finding a demand and a refusal, though these are evidence of a conversion, will not be sufficient. Here, some of the facts are found, but not all of them; and setting forth the proclamation, *in hæc verba*, will not cure the partial finding. 7 Bac. Abr. p. 6, pl. 5, p. 7 (new edit.). It is particularly important, that a personal application of the donee should have been found, since the inducements of the government in making the gift in that form, independent of an acknowledgment for past services, evidently arose from the policy of insuring the settlement of military men on an exposed frontier; and a desire to prevent frauds and speculation.

2d. If the special verdict does not find the facts, which were indispensable to entitle William Douglass to the bounty of the proclamation, it follows, of course, that nothing passed by the assignment of his right to Charles Sims. It is true, that William Douglass had a just claim to the bounty, and might be considered as having a right to it, even before a personal application; but without a personal application, he could never reduce it to possession and enjoyment himself, nor sell and transfer it to another. An assignment is not a substitution of one person for another, but a transfer of something from the assignor to the assignee.

3d. The assignment from W. Douglass to C. Sims was made on the 16th of January 1779, before any law was enacted in Virginia, in relation to claims and rights of this description; and therefore, its validity and operation must depend upon the terms and conditions of the proclamation, unless it shall be found, that the legislature of the state afterwards altered and improved the condition of the assignee: this, therefore, must be investigated.

4th. The first act of the Virginia legislature upon the subject, passed in May 1779, uses the terms, "all persons, their heirs or assigns," claiming lands under proclamation warrants *for military service, shall be admitted to grants for the same as in other cases: but whether the claim was by the donee, or his assignee, the provision (if at all applicable to the bounty of the proclamation of 1763) can only be expounded to embrace claims that were fairly vested by the donee's making personal application, and proving a conformity to the other conditions of the gift. This part of the law, however, has a variety of other cases upon which it must attach, and which were unquestionably of an assignable nature. It cannot, therefore, be regarded as creating or recognising an assignable quality in the bounty of the proclamation, which the proclamation itself does not create or support; and if no assignment could take place under the proclamation, unless there had been a previous personal application by the donee, the words, "heirs and assigns," coupled in the law with the donee, must be construed to refer to cases, in which the donee has duly obtained warrants and surveys.

*442]

But the material section (§ 3) in the act of May 1779, provides that no proclamation claim to lands shall hereafter be allowed, except in the following cases: 1st, where a warrant had been obtained during the former government: or 2d, where the military service was performed by an inhabitant of Virginia; or 3d, where the military service was performed in some Virginia corps; and in either case, the claimant must make due proof in a

court of record, and produce a certificate of it to the register of the land-office, within twelve months. Now, it is manifest, that the case of the lessor of the plaintiff is not within any of these provisions: a warrant had not been obtained for W. Douglass' bounty, under the old government: William Douglass had never been an inhabitant of Virginia: nor were his military services performed in any Virginia corps. William Douglass himself, therefore, would not have been entitled under the law; and so far, likewise, the claim of his assignee can only be maintained upon his title. By the revolution, Virginia, within the boundaries of the state, acquired all the territorial rights, with greater powers, than the king of Great Britain previously possessed: the king was bound by his gift, and could neither defeat, nor modify the rights of the donee; but Virginia, with the establishment of her independence and sovereignty, became the absolute proprietor of the unappropriated soil; and was at liberty to impose conditions, to give the law, in relation to antecedent inchoate gratuities and grants of the British monarch. In the exercise of this authority, she opened her land-office to claims for old military services, upon the reasonable stipulation, that a warrant should already have issued, or that the services should have been performed by a person inhabiting the state, or in a corps belonging to it.

*5th. But by the preceding law, it is evident, that two things are ambiguously expressed: It is not clearly defined, who is meant by [*443 the claimant, in the 3d section; and it is not ascertained, to what period the inhabitancy of the person performing the military services, refers—to the time of the service, or to the time of the claim. Hence arose the necessity of introducing the law of October 1779, which was passed (as its title declares, and great respect has been paid to a title in construing an ambiguous law, Hob. 232), "for explaining and amending" the act that has just been examined; and the doubts that had arisen, are recited in the preamble to the first section—"doubts concerning the manner of proving rights for military service, under the proclamation of the king of Great Britain in the year 1763, whereby great frauds may be committed."

The first enacting words are "that no person, his heirs *or* assigns, other than those who had obtained warrants under the former government, shall be hereafter admitted to any warrant for such military service, unless he, she or they produce, &c., a proper certificate of proof, &c., by the oath of the party claiming, or other satisfactory evidence," 1st. That such party was *bonâ fide* an inhabitant of Virginia, at the time of passing the preceding law (May 1779); or 2d. That the person having performed the military service, was in a Virginia corps, before the date of the proclamation, and continued in it until the corps was disbanded, or he was discharged or died. Now, in order to a fair understanding and exposition of the law, it should be remembered, that it contains no repealing clause or expression; and consequently, the two laws, being *in pari materia*, must be so construed as to be rendered consistent and operative in all their parts. 1 Bl. Com. 82. Under this impression, the act of October 1779, is evidently a restraining, and not an enlarging statute. By the act of May 1779, the donee, claiming under the proclamation, must have been an inhabitant of Virginia, or have served in a Virginia corps; and the act of October 1779, without impairing or altering that requisite, in the case of the donee himself, only fixing the period of his inhabitancy to the passing of the former act, superadds that, in the case

of an assignment, the assignee or claimant must likewise have been an inhabitant of Virginia. William Douglass would not, it is clear, be entitled under either law; and is it not extravagant, to insist, that the assignee shall take, when the assignor is excluded?

When the act of October 1779, speaks of "the party claiming," it must, indeed, intend a party who can legally claim, but it by no means describes who shall be a legal claimant; and when it speaks of "such party," the *444] reference (which is not *always to the next immediate antecedent; 18 Vin. Abr.; Hard. 77), must, in order to preserve the sense of the context, be applied to the donee, or to the heirs and assigns of a donee, duly entitled, according to the requisites of the proclamation and law.(a) Besides, the same section provides for proof being made, "that the party had never before obtained a warrant or certificate for such military service;" which must be applied to the party performing the service, since it would not surely be enough to prove that an assignee had not, though the assignor might have, before obtained a warrant. And it may be observed, by the bye, that the special verdict does not find the fact that no warrant had issued on Douglass' claim, before the warrant which issued to the lessor of the plaintiff.

6th. In addition to the exceptions already stated, another objection arises upon the Virginia law, enacted the 20th of June 1780, which provides that only one warrant shall issue to one person, founded on claims for military service; nor shall even one warrant issue, unless the claimant shall, within six months from the end of the session, in which the law was enacted, prove a payment of 40*l.* per hundred for the quantity of land in the warrant. This payment is not found by the special verdict, nor has it ever, in fact, been made, either to Virginia, or to Pennsylvania, acquiring all the rights of Virginia under the compact; but in aid of this defect, the verdict finds, that it was not the practice of Virginia to require the money to be paid by the holder of a military warrant for lands, except where more than one warrant issued for the same service. This finding, however, that the money was not required to be paid in Virginia, cannot prove that it was not due and payable to Pennsylvania; and a mere practice of office in one state (which could not have been a practice of a long continuance when the compact took effect), is not sufficient to control the plain provisions of a law, or to affect the rights of another state. Whatever, therefore, might previously have been the pretensions of the lessor of the plaintiff, his non-compliance with the stipulated payment, is an abandonment or forfeiture of his claim.

7th. But Montour's Island lay within the district of country occupied by the Indians, and therefore, it could not be the subject of location, for satisfying a private claim to lands. The proclamation of 1763, the constitution and laws of Virginia and the laws of Pennsylvania, all concur on this point. *445] It is *true, the special verdict finds, that before the year 1779, the Indian tribes had retired to the north-west side of the Ohio, having abandoned and relinquished all the land, except on the north-west side of the river, and that by various treaties, since made with the United States, the boundary line of their hunting-grounds is very distant from the north-west side: but it is to be remembered, that it is also found by the special verdict,

(a) Ellsworth, C. J.—The rule is, that "such" applies to the last antecedent, unless the sense of the passage requires a different construction.

that the retreat of the Indian tribes was, "in consequence of hostilities between them and the United States." A retreat, under such circumstances, is neither a dereliction nor a cession. Acquisitions of territory, in consequence of hostilities, do not pass in full sovereignty; the transfer is not complete, unless confirmed by the treaty of peace; and even if it was an acquisition in war, it was a national acquisition, and inured to the use of the United States. It appears, however, that the abandonment of the lands was owing to the necessities of war, and not with a view to a dereliction; for, afterwards, at the treaty at Fort Stanwix, in the year 1784, this very property is ceded by the Indians, and the cession is made to Pennsylvania, not to Virginia. There may be an appropriation (which, it is said, is the effect of a warrant and survey) of an equitable estate; but, in the present case, the entry of the surveyor, in the year 1787, was the entry of the public officer, not of the agent of the lessor of the plaintiff; it did not constitute an actual possession; and could not be effectual for any other purpose, than creating an appropriation of an equitable or executory estate.

8th. Though the treaty or compact between Virginia and Pennsylvania, ought to be held sacred, it cannot be so construed as to change the pre-existing state of property; rendering that perfect which was before imperfect, and making valid what was before void. The compact secures private property of every description; but it does not convert claims into rights, nor equitable rights into legal estates. The rights confirmed are those which would have been good against Virginia: complete rights are confirmed, without any act to be done by the party; and incomplete rights are confirmed in the precise situation in which they were, at the date of the compact, to be rendered complete according to the law of the state acquiring the jurisdiction and sovereignty. It must be conceded, that the warrants granted by Virginia, on lands which proved to belong to Pennsylvania, were *ipso facto* void; though it was reasonable and just to recognise them on a settlement of the territorial controversy. Reason and justice do not require, however, that such a recognition should be construed into a confirmation of the title (Co. Litt. 295), giving to the compact *the legal operation of a patent, without express words to produce that effect. Nor can the [*446
state be regarded as a trustee under the compact, for the use of the lessor of the plaintiff; for she had granted the pre-emption right to the defendant; and the defendant, in a court of equity, would have been regarded as the trustee, if any trust could be raised by implication.

What, then, were the circumstances of the parties at the date of the compact and afterwards? So early as the year 1783, the defendant had procured an actual survey of the premises; and according to the adverse doctrine, was thereupon in possession. But the lessor of the plaintiff never attempted to procure a survey, until the year 1787 (which could not divest the defendant's previous possession), and he rested simply on his Virginia warrant and entry; though a survey was surely requisite, if not to locate the land (inasmuch as naming the island might, in that respect, be deemed a sufficient designation), at least, to ascertain the quantity. It is to be considered, indeed, that in the very list of entries in the land-office, transmitted by the executive of Virginia to the executive of Pennsylvania, there is no specific mention of a location on Montour's island; and though the special verdict finds that Neville and Ritchie received a list of Virginia entries, including an

entry for the lands in the declaration mentioned, the list is not set forth *in hæc verba;* and the entry, for aught that appears, may have been made subsequent to the compact, or it may be in favor of the defendant.

Besides, there was a general prohibition as to surveying islands in the Ohio (2 Dall. Laws, 317, § 13); and the survey of Neville and Ritchie was, in fact, unauthorized by their commission, which circumscribes their district to limits, not including Montour's island. The commission authorizes them to survey in a district formed of a part of Washington county: now, Montour's island lay, originally, within Westmoreland county; it lies at present within Allegheny county; but it never was at any time included in Washington county. (1 Dall. Laws, 874; 2 Ibid. 595.) If, then, the survey itself is not lawful, it cannot be brought in aid of the title of the lessor of the plaintiff.

9th. It only remains, on the question of title, to show that the Pennsylvania act of limitations, is a bar to the claim of the lessor of the plaintiff. The act was passed on the 26th of March 1785; and it declares, "that no person having a claim to lands, or to the pre-emption thereof, founded upon any prior warrant, whereon no survey hath been made, &c., shall hereafter *447] *enter, or bring any action for the recovery thereof, unless he, or his ancestors or predecessors, had the quiet and peaceable possession, within seven years before such entry, or bringing such action." The present case, it is insisted, is plainly described in the law; and the right of Pennsylvania to legislate in relation to all the lands within her territorial boundary, cannot be denied, on general principles, and is not impaired by the terms or meaning of her compact with Virginia.

II. From this review, it was concluded, that the title of the lessor of the plaintiff was defective both in law and equity; but admitting, that it was an equitable title, the counsel for the defendant urged, that the remedy was in equity, and not at law.

The title of the lessor of the plaintiff rests on the Virginia warrant and entry, coupled with the Pennsylvania survey; no patent has been issued by either state; and the compact between them, though it gave a right to have the title completed, did not *ipso facto* complete it. On this statement, therefore, it is contended, that the legal estate has not yet been vested in the lessor of the plaintiff; and that a court of equity is alone competent to supply the defect of the conveyance. It is true, that in Pennsylvania, where no municipal court of equity exists, necessity has compelled the judges to apply a legal remedy, in every instance of an equitable title; but the same necessity does not occur in a case before the federal tribunals, which have an equitable, as well as a legal jurisdiction; and the act of congress that adopts the laws of the several states as rules of decision, does not adopt their forms of action, nor their modes of proceeding. (1 U. S. Stat. 92, § 34.) A contract made in Pennsylvania may furnish a subject for litigation in any country upon earth; and though the law of Pennsylvania would be regarded in expounding the contract, wherever the ligitation took place, the remedies of that place, and not the judicial remedies of Pennsylvania, would be applied to investigate and enforce it.

If it is only an equitable title, will the legal process of an ejectment afford a plain, adequate and complete remedy? (1 U. S. Stat. 82, § 16.) Ejectment is merely a possessory action: a judgment in favor of the lessor of

the plaintiff will not cure the defect in his title. But a court of equity could decree the defendant to convey to the plaintiff; the only remedy that can be complete.

It will be said, however, that a warrant and survey constitute a legal title in Pennsylvania: but the position is incorrectly taken, by confounding the nature of the estate, with the necessity which compels the use of a legal remedy for effectuating *justice. The application of a legal remedy to protect an equitable estate, still leaves the estate an equitable one. [*448 The principle applies to a variety of cases, as well as to the present. Thus, where an estate is held simply by articles of agreement, covenanting to convey, the widow of the covenantee shall be endowed, by the law of Pennsylvania: where the trustee sells the estate for a valuable consideration, without notice of the trust, the grantee shall hold it: And, generally, where there is an equitable estate, it shall descend like a legal estate. (2 Dall. 205.) But never was it conceived, that a legal estate, and an equitable estate, were synonymous terms in Pennsylvania; or that a warrant and survey came within the former description. A warrant was merely a direction from the proprietary, authorizing a survey of the lands specified; it contained no words of grant; and after the survey was made and returned, a patent became essential, not only to the title of the patentee, but to declare and secure the proprietary purchase-money, quit-rents, reservations of mines, &c. Until the patent issued, the terms of the bargain were not settled; nor had the proprietary parted with the fee: and is it just or legal to contend, that the proprietary could never evict a warrantee, who refused to pay the price of the lands, and to enter into the usual stipulations of the patent; or that the legal estate could exist in two persons, the proprietary and the warrantee, at the same time? The practice of Pennsylvania, in the application of legal remedies to equitable rights, has given rise, perhaps, to a seeming confusion of ideas and expressions, in the decisions that have occurred on the subject; but it does not appear in the report of *Fothergill's Lessee* v. *Stover*, 1 Dall. 6, whether the defendant's was a legal or an equitable title; and in *McCurdy* v. *Potts*, 2 Dall. 98, it is probable, that the words "*legal* possession" were inadvertently used by the judge, or the reporter, instead of the words "*lawful* possession," since the case naturally points at the latter; and a possession may, certainly, be lawful, without being legal.

Upon the whole, it was insisted, that the lessor of the plaintiff had no right that could in law or equity divest the possession of the defendant, whose title was complete in all its parts—a legislative grant, carried into effect by a regular survey and patent.

The counsel for the lessor of the *plaintiff* answered the objections to his title, and to his remedy, under the following general considerations: 1st. His rights before the compact between Virginia and Pennsylvania: 2d. The true construction of that compact: 3d. The right of the lessor of the plaintiff to be relieved in the present form of action.

*I. The right of the lessor of the plaintiff before the compact between [*449 Virginia and Pennsylvania, is, undoubtedly, founded on the previous right of William Douglass, under the proclamation of 1763; but the right of William Douglass is no longer questionable, since the special verdict expressly finds the fact, that "by the proclamation, the king gave to him, his heirs

and assigns, a right to a bounty of 5000 acres of land." When it is found, that he took by virtue of the proclamation, it follows, that he had complied with all the requisites; for otherwise, he could not so have taken. It is agreed, that if a jury collect the contents of a deed, and find them, and then find the deed, *in hæc verba*, the court must regard the deed itself, and not the construction; because the jury are not to judge of the law; and the very circumstance of their finding the verdict specially, shows that they disclaim judging of the law, and submit it to the court. (Vaugh. 77.) But when a deed contains certain facts, without which the party cannot take, the finding that he did take, and the deed that shows he could not have taken, exclusively of those facts, is a finding of the facts themselves. If upon an inspection of the proclamation, it should appear to contain no words implying a grant, or to be insufficiently expressed in that respect, it is a matter of law on which the court will judge; though always with a favorable countenance to support the verdict. (Hob. 54; 2 Burr. 700.) But the terms of the grant are unequivocal; the power of the crown to make the grant was incontrovertible; the description of the persons to receive it, is comprehensive and plain; and the finding of the jury settles the right of the lessor of the plaintiff.

Having considered the operation of the proclamation, connected with the finding of the special verdict, to vest a right in William Douglass, the next step is, to trace the course of the title from him to the lessor of the plaintiff, under the sanction of the laws of Virginia; which, even after the revolution, fulfilled the intentions of the royal donor, with liberality and justice. (Wythe Rep. 40; Washington's Rep. 230.) For the general gift of the proclamation was not reduced to specific appropriation, until the royal authority had ceased; and until Virginia, had she been unjust, or even ungenerous, might have refused a compliance.

The first and second laws of Virginia, both enacted in May 1779, before the lessor of the plaintiff had taken out a warrant, ought to be considered together. The first law, it is true, excludes claims for military services, unless the service was performed by an inhabitant of Virginia, or in a Virginia corps: but the special verdict does not exclude the possibility that
*450] *Douglass was an inhabitant of Virginia, although it finds that the corps in which he served was raised in New Jersey. It is not necessary, however, to resort to this hypothesis, since the meaning of the inhabitancy here spoken of, is expounded in the second law, so as to meet precisely the case of the plaintiff. But the first law substantiates, at least, the assignability of military rights, inasmuch as the first section, after classing charter or importation rights, treasury rights and military rights, expressly entitles the heirs and assigns of each class, to take out and locate warrants. The principle runs throughout the law: the 5th section provides that officers, &c., or their assignees, may locate their claims on waste and unappropriated lands; and the 11th section provides, that certain regulations shall not extend "to officers, soldiers, or their assignees, claiming lands for military service." These passages embrace all military rights; and whatever may have been the necessity of a personal application of the donee, under the proclamation of the British king, it is thus obviously dispensed with by the legislature of Virginia.

Under an erroneous interpretation of the first law, however, inhabitants

of Virginia had paid their money, in numerous instances, for what might be denominated foreign rights—rights of persons, who never inhabited the state, and never served in a corps belonging to it. Discovering the error, the legislature deemed it just and politic to come to the aid of the purchasers, being her own citizens; and by the second law, virtually ratified their purchases. Without keeping this policy in view, without admitting such claims as the claim of the lessor of the plaintiff, some words of the law of October 1779, will be nugatory. A Virginian, serving in a New Jersey corps, or a citizen of New Jersey serving in a Virginia corps, would have been entitled under the preceding law; but a third description was to be favored, the Virginia purchasers of military rights; and hence, the phraseology of "he, *she* or they," which cannot refer to the officers or soldiers, but to their assigns.

Soon after the law of October 1779, was passed, within the period of eight months, the lessor of the plaintiff obtained his warrant, and entered it, with a location on Montour's island, in the register's office. The warrant, entry and location are all in conformity to the laws and practice of Virginia. The description of the island possesses sufficient certainty; and it is found by the verdict, to be on the north-west side of the Ohio, not within any prohibited district of country. From the 20th of June 1780, when the law enacted that all proceedings to execute warrants on the disputed territory, should be suspended, until the compact and cession to Pennsylvania, it was impossible *for the lessor of the plaintiff to pursue any measures for effectuating his title: but his rights were not impaired, nor was the [*451 warrant annihilated, because it was not executed and returned; and the subsequent survey of Neville and Ritchie amounted to an entry and possession on behalf of the lessor of the plaintiff. There is, perhaps, no decision in Virginia that places a warrant and location on the footing of a legal title; but a military warrant has always been deemed a good equitable right. (Wythe's Rep. 40; Washington's Rep. 230.)

It has been contended, however, that the non-payment of 40*l.* per hundred acres, either to Virginia or Pennsylvania, within the stipulated period of six months, amounts to an abandonment or forfeiture of all the pre-existing rights of the lessor of the plaintiff. But the special verdict finds a usage directly opposed to this construction; and usage is a safe expositor of the law. The fraud intended to be guarded against was the issuing of two warrants for one claim; and the court will not presume that more than one had issued upon the present claim, in which case, the 40*l.* was never required or exacted, for a warrant founded on military services. But it is impossible to consider the provision as applying to lands in this predicament for the following reasons: 1st. Before the expiration of the six months which the law, passed on the 20th of June 1780 (2 Dall. Laws 208), allowed, the lands, and the right to the price, were ceded by Virginia to Pennsylvania, to wit, on the 23d of June 1789. From the time of her cession, Virginia had no right to the price; and Pennsylvania never fixed a time for paying it, nor imposed a penalty for a neglect or refusal. If, then, the performance of a condition becomes impossible by the act of the party, he shall never himself take advantage of the failure (Doug. 659). 2d. By suspending the powers of the commissioners, in relation to the execution of warrants, within the disputed territory, those lands were virtually excepted from the general provision of the act. It is harsh, indeed, to subject a man to a penalty for

not paying for lands, which he could neither locate nor possess. If the forfeiture does not apply, the result is, that the money, if payable at all, must be paid, before a patent can be obtained. Virginia thought the warrant still in force, for it was certified in the list transmitted by her executive; and Pennsylvania has also manifested her opinion on the subject, by issuing a patent for the lands located on Racoon creek, under circumstances exactly similar. It is here proper to add that, although the law was passed during a session, which commenced on the 1st of May 1780, it was not, in fact, enacted until the 20th of June 1780; so that it can have no effect to invalidate
*452] the warrant and location, *which were made by the lessor of the plaintiff, on the 8th and 30th of May, respectively. The relation of laws to the first day of the session of the legislature, is a legal fiction, which will never be allowed to work an injury. (Comb. 431; 2 Mod. 310.)

But it is another objection, that Montour's Island lay within the country which belonged to the Indians; and could not, therefore, be the subject of a lawful location, under a private warrant. Without confessing the aboriginal title of the Indian tribes, it is enough for the lessor of the plaintiff to allege, upon the finding of the special verdict, that before the year 1779, they had abandoned and relinquished all the lands, except on the north-west side of the Ohio; and that in pursuance of treaties, they have since receded very distantly from that boundary. Lands may be acquired by conquest; and a relinquishment, in consequence of hostilities, is tantamount to conquest. (*a*) (2 Bl. Com. 9.) The lands are likewise found to have been within the charter boundaries of Virginia; so that as far as royal jurisdiction and Indian surrender are involved, the sovereignty and property of that state were complete. It is said, however, that after this dereliction, possession should have been taken; and here too the special verdict meets the objection, by finding that the lands mentioned in the declaration were included in the bounds of Yohagany county.

It is not honorable to the character, nor consistent with the practice, of Pennsylvania, to urge the treaty at Fort Stanwix, in the year 1784, as a proof that the Indian title had not been previously extinguished. Rather let it be said, that she purchased tranquillity from the Indians, for the benefit of all who held lands within their hunting-grounds; and that the deed inured to their use, for their respective proportions, and to her use only for the *residuum*. Besides, the Virginia rights were original charges on the land, which she was bound to support and defend; and the success of her operations, whether by treaty or by arms, could never abridge or destroy them. It does not now lie with her, to dispute the right of Virginia, even if usurped; for she is estopped by her own act.

II. This leads to a second general consideration—what is the true construction of the compact between Virginia and Pennsylvania? The compact was ratified by the former, the 23d of June 1780; by the latter, on the 23d of September 1780; when it became mutually obligatory, and
*453] neither state could afterwards disable herself from complying with its *terms. On the contrary, indeed, each party was bound to the other, and to the individuals concerned, that every necessary act should be performed

(*a*) Ellsworth, C. J.—The finding of the jury is that the lands became derelict; and it is no matter, from what cause.

to effectuate the objects of the agreement and cession. That no private right, antecedently acquired, should be diminished or destroyed, was expressly contemplated; and with that view, the list of entries in the land-office of Virginia was transmitted by the executive of that state to the executive of Pennsylvania; with that view, the list was communicated to the land-officers and surveyors of Pennsylvania; with that view, all the precautions were taken, which appear in the records of the executive council and of the board of property: and with that view Neville and Ritchie surveyed and returned a draft of the island, in favor of the lessor of the plaintiff. Previously, however, to the Virginia list of warrantees, though after the compact, the legislature of Pennsylvania, by a law, enacted the 24th September 1783, had granted the pre-emption of Montour's Island to the defendant; but in doing this, it must have been remembered, that the premises lay within the disputed territory; and therefore, with a laudable caution, a proviso was inserted, "that nothing in the act shall be taken or deemed to bar any person or persons, their heirs or assigns, who may have obtained any just or lawful right to the said island, or any part thereof, before the passing of the act." (2 Dall. Laws, 150, § 4.) It is said, that the list transmitted by the governor of Virginia does not specify the location of Montour's Island; but it is found that the list on which Neville and Ritchie made their survey for the lessor of the plaintiff, did comprise the lands mentioned in the declaration; and the defendant had full notice of the Virginia claim, before he paid any part of his purchase-money.

Having, then, precisely ascertained the spot by the location (and in the present case, a survey was unnecessary, either to identify the island, or to ascertain the quantity of land it contained) the lessor of the plaintiff acquired a right under Virginia, which wanted no other form or act than the ratification of the compact, to make it complete. That ratification is accordingly given on the express condition, "that the private property and rights of all persons acquired under, founded on, or recognised by, the laws of either country, previous to the date hereof, be saved and confirmed to them, although they shall be found to fall within the other." The right of the lessor of the plaintiff, it is repeated, was acquired under, founded on, and recognised, by the laws of Virginia, and that right is not only saved, but confirmed, by a covenant or law of Pennsylvania. That a new warrant was not necessary, after the session, is proved by the proceedings on the Virginia location upon Racoon creek; and *there is no magic in the description of a patent, which may not be supplied by something equivalent; [*454
as, in the present case, by a solemn compact. The property of the island originally belonged to one or other of the states—one of them grants it to the lessor of the plaintiff, and the other confirms the grant—what form of conveyance can be more effectual and conclusive? Co. Litt. 295 *b* (1); Ibid. 301 *b*; Ibid. 302 *a*; 2 Dall. 98.

In this view of the subject, it is easy to dispose of other objections that the defendant's counsel have suggested: Thus, the act of limitations (2 Dall. Laws 282) relates only to Pennsylvania warrants, or improvement rights; whereas, the lessor of the plaintiff claims entirely under a Virginia warrant. Again, the reservation and exception of islands in the Ohio from applications for warrants and surveys, can only operate where the islands belong to Pennsylvania; they are reserved and excepted from applications,

under a particular section of the law, but not from applications founded on a previous lien; and there is a saving of the defendant's pre-emption right, which is virtually, and by reference to the proviso in his grant, a saving of the right of the lessor of the plaintiff.

With respect to the title of the defendant (though the lessor of the plaintiff must succeed upon the strength of his own title, and not by the weakness of his antagonist's), it may be permitted generally to observe, that it is founded on a grant made out of the usual course; that it is made subject to all previous rights; that the patent was taken out with express notice of the Virginia right: and that, under such circumstances, if the lessor of the plaintiff has a good title, the defendant's patent must be merely void.

III. But it remains to consider the right of the lessor of the plaintiff to be relieved in the present form of action: and it is surely extraordinary, after his suit has actually been dismissed in equity, because his remedy in Pennsylvania was at law, that he should now be told, that he must fail at law, because his remedy is in equity—doomed to be for ever suspended between the two jurisdictions, like Mahomet's coffin between heaven and earth! But the title of the lessor of the plaintiff is a legal title; and even if it were only an equitable title, the remedy by ejectment is the only one in Pennsylvania.(*a*)

The 34th section of the judicial act (1 U. S. Stat. 92) adopts the laws of
*455] the several states, as rules of decision in trials *at common law: Now, as in England, the laws are defined to be general customs, local customs, and acts of parliament (1 Bl. Com. 63); so, in Pennsylvania, the laws must be defined to be the common law, as modified by practice and acts of the general assembly. If, therefore, a plain, adequate and comp ete remedy can be had at law, according to the laws of Pennsylvania, the lessor of the plaintiff is not entitled to resort to a court of equity. Such a remedy can be had, to the extent of the present demand. A plaintiff may (consistently with the principles of law) frame his demand for the whole, or for a part, of his right: he may claim a portion of it, as possession of the estate, at law; and if he thinks it necessary, he may resort to equity for a conveyance, or an injunction, to fortify and secure his possession. The lessor of the plaintiff asserts a legal right of possession; and an action of ejectment is a possessory remedy. (3 Bl. Com. 205, 180; 1 Burr. 119.) It is immaterial, how minute his interest is, if it is a legal interest (Run. 9); and it may easily be shown that the title is a legal title in Pennsylvania, against the state, and against all claimers under the state. By the charter of Pennsylvania, the system of feudal tenures was recognised; and lands were held in socage, so that seisin was a technical principle, originally incorporated into the tenure of our estates; but what constitutes a seisin, is, perhaps, still as uncertain, as it was formerly thought to be by Lord Mansfield, who says in a general definition, that "seisin is a technical term, to denote the completion of that investiture, by which the tenant was admitted into the tenure; and without which, no freehold could be constituted or pass." (1 Burr. 60,

(*a*) It is true, that the cause was originally instituted on the equity side of the court, but owing to some objection on account of the citizenship of the parties, as well as to an opinion that a legal remedy was applicable to an equitable title in Pennsylvania, the bill was dismissed.

107.) To effectuate this seisin, shorter and easier modes, by deeds executed, acknowledged and recorded, were soon adopted in Pennsylvania, than feoffments at common law, or conveyances under the statute of uses. (1 Dall. Laws 111, § 85; Ibid. app'x, 27–8.) And though these modes alone are adopted by positive statutes, long usage has given the same force and effect to other evidences of title; as a warrant and survey; a contract to purchase lands, and payment or tender of the consideration; which give a legal estate, and produce all the consequences of a feoffment; namely, dower, tenancy by the curtesy, forfeiture, escheat, &c. 2 Dall. 98. But the title of the lessor of the plaintiff, though it sprung from the proclamation, and though it is fortified by the usage of Pennsylvania, will be found, on still higher ground, to be a legal title: it emanates from the legislature, and therefore, from the commonwealth; it is, emphatically, a law, and therefore, superior to any mere executive exemplification; it is a public covenant; it must be construed as a patent from the sovereign; and wherever *two constructions arise on any instrument of grant or confirmation, that which gives effect to it shall prevail. (9 Co. 131 *a*; 10 Ibid. 67 *b*; 9 Ibid. 27 *b*; 6 Ibid. 6 *a*. [*456

From this mode of granting, it is also to be remarked, a legal title only can be derived; for where a title of an equitable nature arises, it must be supported by an express or implied trust in the grantor; and in relation to a sovereign, or to a corporation, the strict rules of the common law will not allow either to stand in the predicament of a trustee (2 Bac. Abr. 11, tit. "Corporation," 5th edit.; Gilb. on Uses and Trusts, 5, 170). Founding the rights of the lessor of the plaintiff on legal principles, there is no pretence for considering the defendant as his trustee, under a patent afterwards obtained, and which is merely void. But words of grant used in the legislative act of a republican government, such as the compact, must always be construed to pass the legal estate, unless a trustee is expressly appointed.

The Chief Justice, on the last day of the term, delivered the opinion of the court as follows:

Ellsworth, Chief Justice.—It appears that William Douglass, for services rendered, acquired, under the king's proclamation of 1763, a right to 5000 acres of unappropriated land in America; which right he assigned to Charles Sims, the lessor of the plaintiff below. And although by the terms of the proclamation, the personal application of Douglass was requisite to obtain a land-warrant on the said right, yet the laws of Virginia, passed subsequently to her independence, dispensed with such personal application, and made a warrant issuable to the assignee, Sims, he being an inhabitant of that state, on the 3d of May 1779. A warrant he accordingly obtained, and the same duly located on Montour's Island, the land in question; which his warrant was more than sufficient to cover, and which, from its description as an island, was perfectly aparted and distinguished from all other land. By which means, Sims acquired to the said island a complete equitable title, and one which needed only a patent of confirmation to render it a complete legal title. A confirmation of this equitable title, as effectual as that of any patent could have been, was afterwards comprised in the compact between Virginia and Pennsylvania, and in the ratification of the same by the legislative act of the latter. The terms therein of "reserve and confirmation" of

the "rights" which had been previously acquired under Virginia, in the territory thereby relinquished to Pennsylvania, must, from the nature of the transaction, be expounded favorably for those rights, and so that titles, *457] before substantially good, should not, *after a change of jurisdiction, be defeated or questioned for formal defects.

It further appears, that Sims, since the said compact and ratification, has, without any *laches* that would prejudice his claim, obtained a legal survey of the said land, under Pennsylvania: In which state, payment, or, as in this case, consideration passed, and a survey, though unaccompanied by a patent, give a legal right of entry, which is sufficient in ejectment. Why they have been adjudged to give such right, whether from a defect of chancery powers or for other reasons of policy or justice, is not now material. The right once having become an established legal right, and having incorporated itself, as such, with property and tenures, it remains a legal right, notwithstanding any new distribution of judicial powers, and must be regarded by the common-law courts of the United States, in Pennsylvania, as a rule of decision.

The judgment of the circuit court affirmed.

Iredell, Justice.(*a*)—Though I concur with the other judges of the court, in affirming the judgment of the circuit court, yet, as I differ from them in the reasons for affirmance, I think it proper to state my opinion particularly. In order to do this with the greater distinctness, it is necessary that I should observe upon the nature of this title, according to my ideas of it, from its origin to what may be deemed its consummation, at least, for the purpose of maintaining this ejectment. My observations, therefore, will be under the following heads of inquiry:

1st. Whether it sufficiently appears, that William Douglass was entitled to a military right, such as it was, under the proclamation of 1763.

2d. Whether the right of Douglass, in case he was so entitled, was assignable, under the royal government, or since.

3d. Whether the lessor of the plaintiff in the ejectment, had a title, and if any, of what nature it was, under the laws of Virginia.

4th. Whether he had any title, subsequently to the compact, under the laws of Pennsylvania.

5th. Whether, if he had a title, it was such as was sufficient to maintain this ejectment.

1. *The first question is—Whether it sufficiently appears that *458] William Douglas was entitled to a military right, such as it was, under the proclamation of 1763?

Though the finding be not altogether so correct as it might have been, yet, I think, it may be fairly inferred, that William Douglass had all the requisites to entitle him to a military right under that proclamation, especially, as the jury have said, generally, that the king gave to him the right in question, by that proclamation, which could not have been, in fact, true, had any of the requisites been wanting, and though a general finding, inconsistent

(*a*) The Chief Justice observed, at the conclusion of the opinion of the court, that Judge Iredell (whose indisposition prevented his attendance) concurred in the result, but for reasons, in some respects, different from those which had been assigned. As I have since been favored with a copy of Judge Iredell's notes, I should think the report of the case imperfect, without publishing them.

with a particular one, cannot stand, yet I am of opinion, a particular finding, consistent with a general one, may.

2. The next question is—Whether the right of Douglas was assignable, under the royal goverment, or since?

The grant was general, to all who were the objects of it, and required only evidence of proper service, and the usual steps towards obtaining a grant under any of the then provinces. The royal faith was pledged, that in such a case, a grant should issue. It was immaterial, at that time, in what province the grant was obtained, as all belonged equally to the crown. The grant was for meritorious services, already performed, and therefore, it was an interest, though in some degree indefinite in its nature, sanctioned by every principle of moral obligation, and such as the party entitled might, on the most solemn principles of public justice, confidently demand. Upon a large scale, the crown was certainly a trustee for all those persons to whom its faith was pledged; and therefore, so far as no particular prerogative of the crown interfered, it was rational to consider it in the light of any other trust. It has been doubtful, whether the crown could in any case be a trustee, so as to be the object of any municipal decision, but the law could never presume (however the fact may be), that the crown would not faithfully perform any trust belonging to it. The only difference between that and a private trust, is, that the latter is clearly enforceable by a court of equity; the former, perhaps, must be left to the conscience of the crown itself. But this makes no difference in the nature of the interest. If this had been a private trust, it would, at least, have amounted to what, in equity, is called a possibility, and it has been long settled, that a possibility is assignable in equity, for a valuable consideration. I see no reason why that principle cannot apply here. The necessity of a personal application was undoubtedly indispensable, under the royal government; but the two things are, in my opinion, perfectly compatible. Suppose, such an assignment *had been made, a personal application was still necessary, and very [*459
probably, for the judicious reasons signed at the bar; but after the grant, obtained on such personal application, if the interest had been fairly assigned before, the assignee would have been entitled to a conveyance. If none had been made, which would have been an acknowledgment of the fairness of the transaction, chancery only could have been applied to, to compel a conveyance. The assignor, or his heir, would then have had to answer on oath, and an examination of all particulars might have been made, after which, if the court had entertained the least doubt of the fairness of the transaction, they would not have ordered a conveyance. This would be a sufficient guard against fraud. But the assignment, previous to an actual grant, might have been necessary, even to save an officer from starving. How hard would have been his condition, if he could have made no immediate use of a bounty of the crown, expressly intended as a provision for him, but which circumstances might prevent his receiving for years?

Thus the case stood, as I conceive, under the royal government. By the revolution, the circumstances of it were, in some degree, changed, but not so as, in my opinion, materially to alter the nature of the title in this respect. The duty of the crown, substantially, devolved on the several states, who became possessed of the territory formerly belonging wholly to the crown; but as it might be an unreasonable thing, to burden any one state with the

whole of these provisions, some modification of the title might be expected, so as prevent this injury. This, however, does not seem to afford any reason why it should not remain an assignable interest, subject to the restriction I mentioned before, in case a personal application was still insisted upon, which it was undoubtedly optional in the states to require or not. I, therefore, am of opinion, that the interest still remained assignable, subject only to such regulations as each state might think proper to require.

3. The next subject of inquiry is, whether the lessor of the plaintiff in the ejectment had a title, and if any, of what nature it was, under the laws of Virginia?

I confess, I have had great difficulty in construing the two Virginia acts of May and October 1779, and if the latter act had admitted of such a construction, that I could, without absurdity or manifest injustice, have confined the words "or assigns" in that act, to mean only the heirs or assigns of those specially named in the former, I should, undoubtedly, have preferred that construction; because, in the last act of May 1779, the Virginia legis-
*460] lature expressly designated the objects, for whom they *meant to provide; and whatever I might think of that proviso (though I am far from thinking it an unjust one), I should deem it unwarranted, to extend it to any others, by constrruction of a subsequent law, without plain words of extension, unless there was an irresistible implication to authorize it. Such an implication, I think, exists here. The first act specifies the various objects of its provision: 1st. Those who had obtained a warrant from the governor of Virginia, under the former government. 2d. Where the service was performed by an inhabitant of Virginia. 3d. Where the service was performed in some regiment or corps actually raised in Virginia. The act of October 1779, introduces a new provision for some persons or other, viz., a residence in Virginia, at the passing of the former act (the 3d of May 1779), but they expressly except from the operation of this provision, those who had obtained warrants under the former government, and those who had performed military service in some regiment or corps actually raised in Virginia, and had served under the circumstances particularly described in the act. They also except persons who had obtained a title under any former warrant. They do not, however, except in any manner one description of persons, who were provided for in the former law, viz., persons who were inhabitants of Virginia, and had performed military service in some other than a Virginia regiment or corps, unless they or some persons claiming under them had previously obtained a warrant for it. But the act affords no indication from which we have a right to infer, that the legislature meant to repeal any of the provisions in the former law; and if they did not, then, upon the construction of the counsel for the plaintiff in error, the provision, as to the persons I have last mentioned, in plain English, would stand thus: "We are willing to reward the services of any of the inhabitants of our own particular state, when under the royal government, by giving full effect to the royal proclamation, by which the faith of the former government was pledged, provided the person, his heirs or assigns, actually resided in Virginia, on the 3d of May 1779. But if such person moved out of this state, before that day, or died and left heirs or assigns, who either never resided in Virginia, or did not actually reside there, on the auspicious 3d of May 1779, he, she or they, shall receive nothing for such service." Such a provision would,

undoubtedly, be highly ridiculous, for the grant under the proclamation was for services actually past, services of a highly meritorious nature, the risk of life, and sacrifice of private ease, by entering into the army, at a critical period, for the defence of their country; and to such persons certainly no additional merit could attach by a *residence in Virginia on the 3d of May 1779. I, therefore, am compelled, upon principles of respect [*461 to the legislature, to abandon this construction; and then there remains no other, but to suppose, that they meant to provide, by implication, for a new description of persons (though under negative, informal and incorrect words), viz., persons who had fairly obtained titles under any military grant, though not of the special description before enumerated, if such person, his heirs or assigns, actually resided in Virginia, on the 3d of May 1779. Willing, in short, to confirm all fair purchases made by permanent, not occasional, residents in Virginia (of which the residence at that time should be a test), when they might innocently have supposed, either that Virginia was bound to provide for all military rights presented, or would be disposed, upon a large and liberal scale, to do so, and had thus laid out their money from a kind of definite confidence in the future conduct of their own legislature: And the word "hereafter," that has been commented upon (in the 3d section of the act of the 3d of May 1779), and the express saving in the act of October 1779, of all titles under warrants formerly issued, independent of the saving of titles under warrants from the former government, seem strongly to favor this construction. By construing the act in this manner, though some difficulties yet remain, they are, in my opinion, fewer than upon the other construction; and as they are more consistent with equity, justice and common sense, I deem it my duty as a judge, to support the construction which will tolerate these, in preference to one which is attended with greater difficulties, and accompanied with absurdity and injustice: especially, as that construction will make both acts consistent in their main objects, and the other (without any indication from the apparent meaning of the legislature) would amount to an express repeal of an important provision; and nearly, in effect, revoke a grant actually made, which, if within the competency of a legislature, is undoubtedly one of the most odious acts of its power, and which nothing but absolute necessity should force us to say they intended.

The title, therefore, so far, under the laws of Virginia, I think, was a vested right. But it seems to me now material to inquire, whether the title under the laws of Virginia was complete or incomplete. It is admitted, that a patent was regularly necessary to complete the title, even had a survey been made, and it is, at least, doubtful, whether a warrant and survey would have given any legal right of possession at all. But in this case, it is contended, a survey was not necessary, for two reasons: 1. Because the location of an island was certain, and the whole island would not exceed the quantity he was entitled to. *2. Because no money was to have been [*462 paid upon it. These reasons do not satisfy me, that a survey was unnecessary. A survey, I consider, in all instances, to be highly useful, in order that it may be officially ascertained, and officially known, not only what land in particular is taken up, but also its exact quantity, so far as it is material to specify it, for the information of the public, from whom the grant is to be obtained, as well as that of any individual who may have in-

terfering claims or pretensions. The private knowledge of a few particular persons, who may know the spot thoroughly, is by no means equal to the authentic information which an actual survey, a regular report, and a correct record, can convey; and the instances are so very few, where exact information can otherwise be obtained, that there is no occasion, for the sake of those, to make an exception. It would do no good, and might lead to endless difficulties. I think, therefore, the necessity of a survey ought to be deemed general and indispensable, and there being none in this case, previous to the compact made with Pennsylvania, the title so far was incomplete. But I admit, had a survey been unnecessary, and had such steps been taken in Virginia, as would, of course, have entitled the defendant in error to a patent, then the compact and the act of confirmation, in consequence, might have been deemed a complete and perfect assurance of it, and as effectual as if a patent had been actually granted, before the compact, under the laws of Virginia.

With respect to the payment of 40*l.*, it is clear to me, that as that was meant as full purchase-money for land, to which the person who entered had no right before, it never can apply to a case where the grant was for service already performed, unless the legislature had wanted both common sense and common honesty. I have not hesitated a moment to reject that construction, the words in no manner requiring it, and easily admitting of the construction given by the counsel for the defendant in error.

The finding in this case, I think, sufficiently establishes a relinquishment of the Indian title, previous to the year 1779, so as to authorize an entry and location in the river Ohio, at the times the entry and location on behalf of the defendant in error took place, without a violation of any duty either to a particular state or to the United States.

4. I come now to the next head of inquiry—Whether the defendant in error had any title, subsequently to the compact, under the laws of Pennsylvania?

I do not consider that this compact, and the act in confirmation of it, immediately converted all inchoate and imperfect rights under Virginia, *463] into absolute and perfect ones, under *Pennsylvania, but that the intention was, such as the title was under Virginia, it should substantially be under Pennsylvania, in reference to any younger right that might have been obtained in any manner, under Pennsylvania. If the manner of proceeding on both sides was the same, then the Virginia claimant had nothing to do, but to proceed under the laws of the latter, as if his original title had been obtained from Pennsylvania. If the manner of proceeding in both states had been different, then I should have supposed, it would have been proper for Pennsylvania to pass a new law, adequate to this new case, that the faith of the state might have been duly observed. But I conceive under both states a survey was indispensable, the same reasons which I have urged on this subject, in considering the case of the Virginia right, applying equally to both states. The survey that was accordingly had, under the state of Pennsylvania, I think, was a valid one, notwithstanding the objection as to the bed of the river, for as the law is general (such at least it appears to me), that where two countries, or two counties, border on a navigable river, the middle of the bed of the river is the boundary line,

[see nothing in this case to prove it an exception, and consequently, the survey appears to have been made by the proper authority.

With regard to the objection, that in the 9th finding, it is stated, that the governor of Virginia transmitted, in 1784, a just and true list of entries, made under the authority of Virginia, in the disputed territory, in which list the island in question is not comprehended, and therefore, the verdict impliedly excludes it, I answer: 1st. If the governor had or had not transmitted a perfect list, this could not have deprived any party really entitled of showing a title which had been omitted, either designedly (though that could not be presumed, but I state it as the strongest case) or inadvertently, on the part of the governor, where, at least, an adverse claimant under Pennsylvania was not prejudiced by such omission, but had early and sufficient notice of the prior right, before he had completed his own. 2d. It may be a true list, so far as it goes, but not perfect, for want of a complete knowledge of all particulars, some of which might have been omitted to be ascertained in the usual and proper manner. 3d. The implication in this case cannot have the effect contended for, because the 10th finding refers to that list, as including the entry and location of the defendant in error, and the 4th finding declares, that two deputy-surveyors under the surveyor-general of Pennsylvania did, in 1785, receive from the surveyor-general's office, a list of entries made under the authority of Virginia, which list included the entry for the land in the declaration mentioned.

The survey being, in my opinion, good, though it was subsequent [*464
*to the grant to the plaintiff in error, shall be deemed to relate to the time of taking out the warrant, not only in consequence of the compact which secured all prior rights of Virginia, and the act in confirmation of it, but also on account of the express saving or all prior rights in the grant to the plaintiff in error, by the commonwealth of Pennsylvania, who seem to have guarded with solicitude against any supposed breach of public faith, and therefore, it is immaterial to inquire, what would have been the case, had Pennsylvania expressly violated it. But where a legislature has constitutional authority to pass any law, I can conceive a manifest distinction between right and power ; between the obligation on the part of the legislature, upon principles of morality, to give effect to a solemn compact, and their, in fact, making a law in violation of it, which it is the duty of the courts to obey. The legislature is restricted, indeed, in this particular by the constitution of the United States ; and a treaty of the United States is, by its own authority, *de facto*, as well as morally, binding, while it continues in force, because it shall be the supreme law of the land. But until this constitution did pass, I should doubt very much, whether, if the legislature had actually violated the compact, the court could here set up the compact against the law, upon principles which I have stated at large, in my argument on the subject of the British debts, and to which I beg leave to refer, as it is now publishing in Mr. Dallas's reports.(*a*) I say this only incidentally, on account of observations on this subject at the bar, in which I by no means acquiesce.

5. The warrant and survey being thus by me deemed complete and unexceptionable, under the commonwealth of Pennsylvania, the only remaining

(*a*) *Ante*, p. 256.

inquiry is—Whether if the defendant in error had a title, it was such as was sufficient to maintain this ejectment?

Two objections are stated under this head. 1. That the title, such as it is, is only an equitable, not a legal one, and therefore, will not maintain an ejectment. 2. That it is not brought within proper time, but is barred by the statute of limitations.

As to the first objection, did this title stand merely as an equitable one, I should strongly incline against it, if not deem it altogether insufficient. It is of infinite moment, in my opinion, that principles of law and equity should not be confounded, otherwise, inextricable confusion will arise; neither will be properly understood; and instead of both being administered with useful guards, which the policy of each system has devised against abuse, an heterogeneous mass of principles, not intended to assort with each other, will be
*465] blended together, and the substance *of justice will soon follow the forms calculated to secure it. I totally reject all the modern cases introduced by Lord MANSFIELD, and supported by some other judges, but lately, wisely, as I conceive, discountenanced by the present court of king's bench, of taking notice of a *cestui que trust* at all, in any other right than as holding in fact possession, with the concurrence of the legal trustee. So far, consistent with legal principles, a court may go, but not, as I conceive, one step farther, and that it violates the most important principles of the common law, to consider a *cestui que trust* as having an iota of legal right against the trustee himself. Whatever excuse a court may have for doing this, when the want of a court of equity may urge them to procure substantial justice, by a deviation from legal strictness as to form, I should hesitate long, before I should deem myself warranted in assenting to such a practice, when both powers are vested in the very same court, but each has different modes of proceeding prescribed to it. But I think we are relieved from any dilemma of this kind, by strong and unequivocal declarations of highly respectable gentlemen of long experience in this state, that a warrant and survey, where no money remained to be paid, and a patent was only to ascertain that all previous requisites had been complied with, has been uniformly deemed a legal title, as opposed to an equitable one; and has all the consequences as such, even as to dower, which affords a strong presumption in favor of the supported legal title, for it has been so long held (though I think erroneously at first), that there should be no dower of a trust estate, that, perhaps, no judge would be warranted in a court of chancery in allowing it. Whether this opinion was originally right or not, yet having been the ground of many titles, it would be improper in the court to shake it. I am not certain also, but it may properly be considered, that the proprietor under a warrant and survey (according to long usage) is at least in the nature of a tenant at will to the public, and as such has a right of possession against all others, except some person having a better right, claiming under the public, which better right does not, for the reasons I have given, exist in this case, in the plaintiff in error. This point, however, I merely intimate, it not being necessary to deliver an opinion upon it.

Another circumstance has occurred to me, which I suggest with diffidence, as it was not spoken to at the bar, that though the compact and confirming act did not render a survey unnecessary, yet when a survey was made, it being a right derived from compact alone, the title ought to stand

on that ground alone, and not depend on a patent, which imports a grant by the *state, at its own discretion, of property of its own, and seems to imply that the state is the sole agent in the conveyance of the title. [*466

With respect to the objection from the statute of limitations, it is sufficient to say, that that act, in my mind, clearly contemplates other objects, and neither in its letter or spirit, is to be applied to this new and peculiar case; but admitting that it did, the facts in this case do not come within the provisions of it, there appearing to have been no such *laches* as the act contemplated to prevent.

Judgment affirmed.

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SUPREME COURT OF PENNSYLVANIA.

DECEMBER TERM, 1798.

RESPUBLICA *v.* COBBETT.[1]

Removal to a circuit court.

An action on a recognisance for good behavior, is not removable into the circuit court, on the ground, that the defendant is an alien.[2]

THE defendant, being charged as a common libeller, before the Chief Justice, was bound by recognisance to be of good behavior, &c., and on a supposition, that he had broken the condition, by a continuance of his libellous publications, an action of debt was instituted upon the recognisance, in this court. At the time of his entering his appearance, however, he filed a petition, setting forth, upon oath, that he was an alien, a subject of the king of Great Britain; and praying, that the suit might be removed for trial into the circuit court, upon the terms prescribed by the 12th section of the judicial act. (1 U. S. Stat. 79.) The removal being objected to, a rule to show cause was granted; which was argued by *Ingersoll* and *Dallas*, for the Commonwealth, and by *E. Tilghman*, *Lewis*, *Rawle* and *Harper* (of South Carolina), for the defendant.

The argument embraced two propositions: 1st. Whether, in any case, a state can be compelled, by an alien, to prosecute her rights in the circuit court? 2d. Whether, admitting the general jurisdiction of the circuit court, a state can be so compelled, in a case like the present?

I. For the *defendant*, it was urged, that the present case came clearly within the constitutional investment of judicial authority in the federal government, being a case between a state and a subject of a foreign state (Art. III., § 2); that the 11th section of the judicial act gives the circuit court "original cognisance, concurrent with the courts of the several *468] *states, of all suits of a civil nature, at common law or in equity, &c., where an alien is a party" (1 U. S. Stat. 79), and that whatever doubt might be raised, whether this original jurisdiction embraced the case of a

[1] S. C. 2 Yeates 352.

[2] So, in a suit against the same defendant, by Dr. Benjamin Rush, to recover damages for the publication of a libel (and in which there was an actual recovery of $5000 damages), a motion for a removal of the cause to the circuit court was denied. Rush *v.* Cobbett, 2 Yeates 275. This case would hardly be held for law, at the present day; an action for a *tort* is certainly removable to a circuit court. Norton *v.* Hayes, 4 Denio 245.

plaintiff state upon a recognisance ; yet, the act precludes all doubt when, in the nature of an appellate jurisdiction, it provides, by the 12th section, for the removal of "a suit (not saying, as before, a suit of a 'civil nature') commenced in any state court against an alien." The jurisdiction, thus expressly recognised by the constitution and law, is founded on the policy of assuring to foreigners an independent and impartial tribunal—a policy more entitled to be respected, than the mere dignity of the individual states, in the administration of justice. But neither the principle nor the terms of the constitution will affect the present case ; for the principle goes no further than to prevent issuing any compulsory process, to render a state amenable at the suit of individuals ; and the terms of the amendment, conforming to the principle, provide only, that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." This is not a suit against a state, so the judicial power of the United States may still extend to it ; but being a suit in which a state is a party, against an alien, the supreme court has, constitutionally, an original jurisdiction ; which, however, does not preclude the exercise of jurisdiction, by way of appeal ; particularly, where the act of the state itself, in resorting to her own tribunal, leaves no alternative.

II. Nor is there anything in the peculiar nature of the present suit, to bar the federal jurisdiction. It is an action of debt—a suit of a civil nature, instituted by the same process, though in the name of the commonwealth, as any other action to recover a debt ; and not as a criminal prosecution for a breach of the law, or recognisance. If, instead of applying for a removal, the defendant had pleaded, the plaintiff had demurred to the plea, and judgment had been given for the state, the defendant would, in this case, as in all cases of a civil nature, be entitled to a writ of error. To obviate, indeed, all cavil on the nature of the actions to be removed, the 12th section of the judicial act rejects epithets and qualifications of every description, using simply the term, "a suit," which is, what the logicians would denominate, *genus generalissimum*, comprehending every form of action. See 6 Mod. 132; 7 T. R. 357; 2 Bl. Com. 341; 2 Dall. 358; 1 Ibid. 393.

*469] *I. For the *Commonwealth*, it was answered, that if the present attempt was successful, it would prostrate the authority of the individual states ; and render them, whenever a foreigner was an offender, and the offence was bailable, completely dependent upon the federal courts for the administration of criminal justice. But recognisances are a part of the proceedings in the exercise of a criminal jurisdiction ; and wherever the principal question attaches, it is a rule of law, that every incident follows. The case never could, indeed, be within the contemplation of the constitution or law, as a subject of federal jurisdiction. Every government ought to possess the means of self-preservation ; and no court can exist, without the power of bailing, binding to good behavior, &c. It is absurd and nugatory to say, a state court may possess the power, but that a federal court, in the numerous instances of foreigners, is necessary to enforce it. Nor is the adverse doctrine confined to the case of a recognisance like the present ; but it equally applies to the cases of a recognisance for the appearance of a defendant or witness, and for answering interrogatories upon a contempt committed. Is

it reasonable to suppose, that such an effect was intended to be produced, by the framers of the constitution, or that it could long be tolerated by the people?

It is contended, the word "suit," is *genus generalissimum*, and embraces every species of action; but however logical the phrase, the inference is, certainly, politically wrong. The powers of the general government extend no further than positive delegation; and, in relation to crimes, they are either specified in the constitution, or enacted in laws, made in pursuance of it. The state has likewise its penal sanctions, more general and indefinite than those of the Union; every inhabitant owing obedience to its laws. If an alien, as well as if a citizen, commits murder, burglary, arson or larceny, in Pennsylvannia, he is punishable by indictment exclusively in the state courts; and yet an indictment or information is, in legal phraseology, "a suit." (4 Bl. Com. 298; 2 Wood. Lect. 551; 2 Com. Dig. 227.) As are actions on penal statutes, whether brought by a common informer, or by the state. If, then, the word "suit" is so comprehensive, what is to prevent an alien from transferring an indictment from the state to the federal court?

But the truth is, that this is not a suit of a civil nature; and therefore, not within the view of the constitution, or of the act of congress. Speaking of indictments and informations, they would be called criminal prosecutions; and this suit, though not strictly a criminal prosecution, is a suit of a criminal *nature. What is its origin? A complaint on oath, that the party menaces the public peace. What is the cause of action? A breach [*470 of the condition, to keep the peace and be of good behavior. What will be the fact in issue? Whether the defendant has kept the peace, and been of good behavior, according to the law of Pennsylvania. What must be the plaintiff's proof? Proof that the defendant has committed an offence. The recognisance is, in short, a part of the criminal process of the law; it must set forth on the record; and it is the mere instrument of substituting bail for the imprisonment of the defendant's person.

II. But a state cannot be, and never could have been, compelled, by an alien, to prosecute her rights in a circuit court. The constitution contemplates the subjects, and the tribunals, for the exercise of the judicial authority of the Union. The cases of public ministers and individual states, are vested, as matter of original jurisdiction, in the supreme court; and even if the word original does not mean exclusive, the courts of the respective states possessed, at the time of framing the constitution, a concurrent jurisdiction, by which the provision may be satisfied. The jurisdiction of the state courts has never since been taken away; but as the constitution does not give a concurrent jurisdiction to the circuit court, it is, at least, incumbent on the defendant's counsel to show, by express words, that such a jurisdiction is given in the act of congress.

In distributing among the federal courts their respective portions of the judicial authority, congress has declared, in the 13th section, "that the supreme court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also been a state and citizens of other states, or aliens, in which latter case, it shall have original, but not exclusive jurisdiction." When these exceptions were made, the concurrent jurisdiction of the state courts existed to satisfy them; and the act of congress does not, in any other sec-

tion, name or describe the case of a state, either upon the principle of an original, exclusive or appellate jurisdiction. The principal policy suggested as to aliens, was likewise answered; for they might all have sued in the supreme court; and the case of one state against a citizen of another state, is put on the same footing with the case of a state against an alien. By this section, therefore, the provision in the constitution is effectuated; and we must presume, that if a state was meant to be included in any grant of jurisdiction to an inferior court, the meaning would be clearly expressed, and not left to doubtful implication.

*471] *There are, then, no words, in creating the jurisdiction of the circuit court, that expressly include a state: and, indeed, it has almost been conceded, that the case is not within the 11th section of the judicial act. It is to be shown, however, that if it is not within the 11th section, it cannot be embraced by the 12th section. The concurrent jurisdiction given by the 11th section to the circuit court, refers to the state courts, and not to the supreme court; and the generality of the terms might, upon the opposite construction, be extended to cases evidently not included in the reason of the provision, or excluded by other parts of the law—to suits below the value of $500, to suits for costs, and to suits between aliens. It is insisted, however, to be enough to give the jurisdiction, that an alien is a party. But *expressio unius est exclusio alterius;* and it would violate another rule of law, to embrace the case of a superior, a state, by merely naming the case of an inferior, a foreign individual. In the constitution, and in the 13th section of the judicial act, the cases of an alien, and of a citizen of another state, are placed on the same footing, because it is plain, that their cases are within the same policy: but if the adverse doctrine is correct, the principle is abandoned in the 11th section; for the jurisdiction will affect the suit of a state, where an alien is a party, though it will not affect the suit of a state, where the citizen of another state is a party. Alien party, means party plaintiff, as well as defendant; and therefore, if the jurisdiction is not limited to private suits between individuals, what was there, before the amendment of the constitution, to prevent an alien from suing a state in the circuit court? And yet was such an attempt ever made, or would ever such an attempt have been tolerated?

These considerations, and the dignity of the party, must evince that the constitution and law intended to vest in the supreme court alone, an original jurisdiction in the case of states, unless the states themselves voluntarily resort to state tribunals, which are, therefore, left with a concurrent authority. Neither in the constitution, nor the law, is there an express delegation of a concurrent authority to the circuit courts. For although it is said, that the 12th section meant to enlarge the jurisdiction of the circuit courts, beyond the boundaries prescribed in the 11th section; yet the sections are *in pari materia;* they speak of the same parties; they refer to the same value of the matter in controversy; and, in short, the 12th section only provides a mode of transferring from the state court to the federal court, such suits, in which an alien is made a defendant, as he could have originally

*472] brought there in *the character of a plaintiff: In the character of a plaintiff he could never have sued a state in the circuit court; and such is the uniform opinion of all who have ever commented on the consti-

tution, or expounded the law. 2 Federalist, 317, 318, 323, 327; 2 Dall. 436, 299, 402, 415.

But, surely, the amendment to the constitution must put an end to every difficulty. It ordains, that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of any foreign state." The language of the amendment, indeed, does not import an alteration of the constitution, but an authoritative declaration of its true construction. Then, there are only two cases in which a state can be affected: 1st. Where she is plaintiff: 2d. Where she is defendant: the amendment declares, that she shall not be affected as a defendant; and as a plaintiff she can never be affected but by her own act; since there is no constitutional injunction, that she shall sue in a federal court. The mischief which was apprehended in allowing states to be sued in the supreme court, is not greater than the mischief in allowing them to be forced to sue in the circuit court: the process in both cases is alike compulsory; and many interlocutory decisions, as well as final judgments, might be pronounced, to which a state plaintiff would be as averse as a state defendant. If she does not recover, shall she be condemned in costs? If there is a set-off pleaded, and a verdict against her, can the defendant maintain a *scire facias* under the Pennsylvania act of assembly, which the act of congress recognises as the rule of decision? (1 Dall. Laws, 65.) Or, if she recovers as a plaintiff, in the circuit court, can she be converted into a defendant in the supreme court, upon a writ of error? Such is the labyrinth, in which the opposite doctrine is involved!

After advisement, the unanimous opinion of the Court was delivered by the Chief Justice, in the following terms:

McKean, Chief Justice.—This action is brought on a recognisance to the commonwealth of Pennsylvania, for the good behavior, entered into by the defendant before me. The defendant has appeared to the action, and exhibited his petition to the court, praying that the jurisdiction thereof be transferred to the circuit court of the United States, as he is an alien, and a subject of the king of Great Britain. His right to this claim of jurisdiction is said to be grounded on the 12th section of the act of congress, entitled "an act to establish the *judicial courts of the United States, passed the 24th of September 1789, in the first clause of which section it is enacted, [*473 that if a suit be commenced in any state court against an alien, &c., and the matter in dispute exceeds the sum or value of $500, exclusive of costs, on a petition of the defendant, and a tender of bail to appear in the circuit court, &c., it shall be the duty of the state court to accept the surety, and proceed no further in the case, &c.

Previous to the delivery of my opinion in a cause of such importance, as to the consequences of the decision, I will make a few preliminary observations on the constitution and laws of the United States of America. Our system of government seems to me to differ, in form and spirit, from all other governments that have heretofore existed in the world. It is, as to some particulars, national, in others, federal, and in all the residue, territorial, or in districts called states. The divisions of power between the national, federal and state governments (all derived from the same source, the author-

ity of the people), must be collected from the constitution of the United States. Before it was adopted, the several states had absolute and unlimited sovereignty, within their respective boundaries; all the powers, legislative, executive and judicial, excepting those granted to congress under the old constitution: they now enjoy them all, excepting such as are granted to the government of the United States, by the present instrument, and the adopted amendments, which are for particular purposes only. The government of the United States forms a part of the government of each state; its jurisdiction extends to the providing for the common defence against exterior injuries and violence, the regulation of commerce, and other matters specially enumerated in the constitution; all other powers remain in the individual states, comprehending the interior and other concerns; these combined, form one complete government. Should there be any defect in this form of government, or any collision occur, it cannot be remedied by the sole act of the congress or of a state; the people must be resorted to, for enlargement or modification. If a state should differ with the United States about the construction of them, there is no common umpire but the people, who should adjust the affair by making amendments in the constitutional way, or suffer from the defect. In such a case, the constitution of the United States is federal; it is a league or treaty, made by the individual states, as one party, and all the states, as another party. When two nations differ about the meaning of any clause, sentence or word in a treaty, neither has an exclusive right to decide it; *they endeavor to adjust the matter by negotiation, but if it cannot be thus accomplished, each has a right to retain its own interpretation, until a reference be had to the mediation of other nations, an arbitration, or the fate of war. There is no provision in the constitution, that in such a case the judges of the supreme court of the United States shall control and be conclusive: neither can the congress by a law confer that power.[1] There appears to be a defect in this matter, it is a *casus omissus*, which ought in some way to be remedied. Perhaps the vice-president and senate of the United States; or commissioners appointed, say one by each state, would be a more proper tribunal than the supreme court. Be that as it may, I rather think the remedy must be found in an amendment of the constitution.

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I shall now consider the case before us. It is an action brought in the name of the Commonwealth of Pennsylvania, against an alien, a British subject. By the express words of the second sentence of the 2d section of the 3d article of the constitution of the United States, in such an action the supreme court shall have original jurisdiction; whereas, it is now prayed by the defendant, that original jurisdiction be given to the circuit court. From this, it would reasonably be concluded, that the congress, in the 12th section of the judicial law, did not contemplate an action wherein a state was plaint-

[1] In Cohens *v.* Virginia, 6 Wheat. 413–14, Chief Justice MARSHALL says, that "the United States form, for many, and for most important purposes, a single nation; and the federal government can, in effecting the objects for which it was instituted, legitimately control all individuals or governments within the American territory. The doctrine of Chief Justice McKEAN would now be considered a political heresy, and yet, though the supreme court of the United States has decided otherwise, the fundamental question must constantly recur, from whence does that high court derive its authority to determine the extent of its own jurisdiction over the state tribunals? It is, certainly, not given, in express terms, by the constitution.

iff, though an alien was defendant, for it is there said, "that if a suit be commenced in any state court against an alien, &c.," as it does not mention by a state, the presumption and construction must be, that it meant by a citizen. This will appear pretty plain, from a perusal of the 11th section of the same act, where it is enacted, that the circuit courts shall have original cognisance, concurrent with the courts of the several states, of all suits of a civil nature, of a certain value, where the United States are plaintiffs or petitioners, or where an alien is a party. This confines the original cognisance of the circuit courts, concurrently with the courts of the several states, to civil actions commenced by the United States, or citizens, against aliens, or where an alien is a party, &c., and does not extend to actions brought against aliens by a state, for of such the supreme court had, by the constitution, original jurisdiction. I would further remark, that the jurisdiction of the circuit courts is confined to actions of a civil nature against aliens, and does not extend to those of a criminal nature; for although the word "suit" is used generally in the 12th section, without expressing the words "of a civil nature," yet the slightest consideration of what follows, manifestly shows that no other suit was meant; for the matter in dispute must exceed $500 in *value, special bail must be given, &c.—terms applicable to [*475 actions of a civil nature only.

Let us now consider, whether this suit against William Cobbett is of a civil or criminal nature. It is grounded on a recognisance for the good behavior, entered into before the chief justice of this state. This recognisance, it must be conceded, was taken to prevent criminal actions by the defendant, in violation of the peace, order and tranquillity of the society; it was to prevent crimes, or public wrongs and misdemeanors, and for no other purpose. It is evidently of a criminal nature, and cannot be supported, unless he shall be convicted of having committed some crime, which would incur its breach, since its date, and before the day on which the process issued against him. Besides, a recognisance is a matter of record, it is in the nature of a judgment, and the process upon it, whether a *scire facias* or summons, is for the purpose of carrying it into execution, and is rather judicial than original; it is no further to be reckoned an original suit, than that the defendant has a right to plead to it: it is founded upon the recognisance, and must be considered as flowing from it, and partaking of its nature; and when final judgment shall be given, the whole is to be taken as one record. It has been well observed by the attorney-general, that by the last amendment, or legislative declaration of the meaning of the constitution, respecting the jurisdiction of the courts of the United States over the causes of states, it is strongly implied, that states shall not be drawn, against their will, directly or indirectly, before them, and that if the present application should prevail, this would be the case. The words of the declaration are: "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of any foreign state." When the judicial law was passed, the opinion prevailed, that states might be sued, which by this amendment is settled otherwise.

The argument *ab inconvenienti* is also applicable to the construction of this section of the act of congress. Can the legislature of the United States be supposed to have intended (granting it was within their constitutional

powers), that an alien, residing three or four hundred miles from where the circuit court is held, who has, from his turbulent and infamous conduct in his neighborhood, been bound to the good behavior by a magistrate of a state, should, after a breach of his recognisance and a prosecution for it commenced, be enabled to remove the prosecution before a court at such a
*476] distance, and held but twice in a year, to be tried by a jury, *who know neither the persons nor characters of the witnesses, and consequently, are unqualified to try their credit; and to oblige the prosecutor and witnesses to incur such an expense of time and money, in order to prove that he had committed an assault, or any other offence that would amount to a violation of it? If so, such a recognisance, though it would operate as a security to the public against a citizen, would be of little avail against an alien. It cannot be conceived, that they intended to put an alien in a more favorable situation than a citizen, in such a case, and by difficulties thrown in the way to discourage and weaken, if not defeat, the use of a restraint, found often to be very salutary in preserving the peace and quiet of the people. Many other inconveniences have been mentioned by the counsel, which I shall not repeat. If, therefore, any other construction can be made, it ought to prevail.

Upon the whole, our opinion is, that where a state has a controversy with an alien about a contract, or other matter of a civil nature, the supreme court of the United States has original jurisdiction of it, and the circuit or district courts have nothing to do with such a case. The reason seems to be founded in a respect for the dignity of a state, that the action may be brought in the first instance before the highest tribunal, and also that this tribunal would be most likely to guard against the power and influence of a state over a foreigner. But that neither the constitution nor the congress ever contemplated, that any court under the United States should take cognisance of anything savoring of criminalty against a state: That the action before the court is of a criminal nature and for the punishment of a crime against the state: That yielding to the prayer of the petitioner would be highly inconvenient in itself, and injurious in the precedent: and that cognisance of it would not be accepted by the circuit court, if sent to them; for even consent cannot confer jurisdiction. For these reasons, and others, omitted for the sake of brevity, I conclude, the prayer of William Cobbett cannot be granted.

The petition rejected.[1]

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[1] William Cobbett, the defendant in this case, was one of the boldest and most unscrupulous political writers of his time. In 1797, he was indicted in the court of oyer and terminer, presided over by Chief Justice McKean, for a libel on the king of Spain and his minister, Don Carlos Martinez de Yrujo, but the bill was ignored by the grand jury. This resulted in the publication of a pamphlet, entitled "The Democratic Judge, or the Equal Liberty of the Press," in which the Chief Justice was most severely handled by the writer. He had been bound over by the Chief Justice, in $2000, for his good behavior, and in a suit upon the recognisance, a forfeiture was declared, notwithstanding the defendant's effort to effect a removal into the circuit court. Respublica *v.* Cobbett, 3 Yeates 93. Chief Justice Shippen presided at the trial. In the same year, 1797, a civil action for libel was brought against Cobbett, by Dr. Benjamin Rush, which came to trial, on the 13th of December 1799, before Shippen, Yeates and Smith, Justices, and resulted in a verdict for $5000 damages. The libellous articles and the charge of Judge Shippen to the jury will be found in Carpenter's short-hand report of the trial, published at Philadelphia, in 1800. Cobbett, thereupon, returned to England, his native country, where he was several

*Camberling *v.* McCall.

This cause (see 2 Dall. 280) being again called on the list of arguments, The Court declared, that although they had proposed to the defendant's counsel to waive the objection to the form of bringing the action, before the expiration of three months from the time of proving the loss; yet, that on his refusal to do so, they meant to decide in favor of the objection.

Judgment was, accordingly, entered for the defendant.

Anonymous.[1]

Devise.

A devise of an improvement-right, held by warrant, passes a fee, without words of inheritance.

This was an ejectment, to be decided by the opinion of the court. It appeared, that the lessor of the plaintiff claimed as heir-at-law of James Graham, who made his will on the 8th of October 1745, "devising to my wife one-third part of all my effects, the improvements excepted. Also, I give to my son James, the improvement whereon I now live." The premises were held by warrant; and the only question was, whether an estate for life, or in fee, vested in the testator's son James, by the devise?

The Court decided the devisee took an estate in fee.(*a*)

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*Coxe *v.* McClenachan. [*478

Coxe *v.* Huston, special bail.

Privilege.

Judgment having been obtained against McClenachan, a *ca. sa.* issued, to September term last, and was returned *non est inventus.* The plaintiff then issued a *scire facias* against Huston, the special bail, which was returnable to the present term; and within the first four days of the term, McClenachan was surrendered in discharge of his bail, when a motion was made for leave to enter an *exoneretur.* But the defendant, being a member of the congress, which was in session at the time of his surrender, presented

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(*a*) I was favored with this memorandum by Mr. Duncan, of Carlisle, one of the counsel who argued the cause.

times fined for his political libels on members of the government, and in 1810, was sentenced to an imprisonment for two years. However, he was subsequently elected to Parliament for Oldham, in 1832, and re-elected in 1834. He died in 1835. The London Times says, the "style of Cobbett is the perfection of rough Saxon English, and a model of political writings for the People." Perhaps, his most obnoxious work, after his return home (taking with him the remains of the notorious Tom Paine), was his "History of the Protestant Reformation," published in 1824, in a series of letters addressed to the People of England, in which the subject was handled in his usual coarse and vigorous style; he says himself, in the concluding number, that he had sold 40,000 copies of the work, containing 640,000 numbers. The writer has before him a copy of the original edition, every page of which is filled with manuscript notes, by an opponent, who was evidently stung to the quick by Cobbett's incisive sentences.

[1] S. C. 2 Yeates 378, by the name of Green *v.* Creamer.

a memorial to the court, demanding, as his privilege, to be discharged from the custody of the sheriff; and it was agreed, that the motion for an *exoneretur*, on behalf of the bail, as well as the motion for a discharge, on behalf of the defendant, should be argued together, upon rules to show cause.

Ingersoll and *Dallas* contended, that both the rules ought to be made absolute. 1st. The defendant would be entitled to his privilege, even if he were in execution; and his being surrendered by his bail, places him in custody at the suit of the plaintiff. Had the defendant been arrested, before he was entitled to privilege, he could not have been held in custody, after his privilege; but, in the present case, he was never in custody until the session of congress had actually commenced. The following authorities were cited on this point: Const. Art. I., § 6; 1 Bl. Com. 64, 66; 11 Vin. Abr. 36; 12 & 13 Wm. III., c. 3; 11 Geo. II., c. 24; 10 Geo. III., c. 50; 3 Com. Dig. 310; 5 T. R. 686; 1 Jac. I., c. 13; 4 Com. Dig. 336.

2d. An *exoneretur* ought to be entered on the bail-piece. Indulgence is always shown to bail, where no injury is produced to the plaintiff. If the defendant had been taken on the *ca. sa.*, or if he had been surrendered, before congress assembled, he would now have been entitled to his privilege; so that the plaitiff has suffered nothing by the delay. *The general rule is, that the bail may surrender within the first four days of the term to which the *scire facias* is returnable. Sherid. Pr. 377, 381; 4 Burr. 2134. And if the bail is prevented from making a surrender, by any legal bar, even arising from matter *ex post facto*, he shall be entitled to an *exoneretur*. 1 Burr. 339, 340; Sell. 180; 2 Str. 1217; 1 Burr. 339, 340; Doug. 45; Sell. 183. Whether, therefore, the bail could, or could not, surrender the defendant, after the time that privilege had occurred, the present application is equally well founded. But to place the case on the fairest footing, the bail will consent on the principles recognised in 1 Str. 419, to remain responsible for surrendering the defendant, within four days after the sessions of congress, provided that time is allowed to make the surrender.

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E. Tilghman and *Ross*, the plaintiff's counsel, having considered the proposition, for allowing further time to make the surrender, agreed to it; and The Court declared their approbation of the compromise, as affording a good precedent for future cases of a similar kind.

Tilghman then acknowledged, that he thought the privilege of congress extended to arrests on judicial, as well as mesne, process; but controverted the doctrine, that a person arrested before he had privilege, was entitled to be discharged, in consequence of privilege afterwards acquired.

Pemberton's Lessee *v.* Hicks.[1]

Forfeiture.

The estate of a tenant by the curtesy initiate is not forfeited by an attainder for treason, during the lifetime of the wife; but her estate is discharged from the curtesy.

This ejectment was tried at Newtown, in Bucks county, May 1794, when the jury found the following special verdict:

"The jurors impanneled, tried, sworn and affirmed to try the issue joined in this cause, upon their respective oaths and affirmations say: That Laurence Grouden, being seised in fee of the premises in the declaration mentioned, by his last will in writing, duly made and executed, devised the same premises in fee-simple to his daughter Grace Galloway, then the wife of Joseph Galloway, and afterwards died seised thereof as aforesaid: *that the said Grace Galloway had issue by her said husband, one daughter, Elizabeth, who is still alive: that the said Joseph Galloway afterwards, by act of assembly, passed on the 6th of March 1778, was required to surrender himself under pain of being attainted of high treason; that the said Joseph Galloway did not surrender himself accordingly, and therefore, became and stood attainted of high treason, to all intents and purposes, and his estate forfeited to the commonwealth, the said Grace Galloway then being in full life: that the said premises were afterwards duly seized and sold by the agents for forfeited estates, and the same conveyed to the defendant by the commonwealth. That the said Joseph Galloway, so being attainted, departed out of the United States into parts beyond sea, and still continues there in full life: that the said Grace Galloway continued in the United States, and afterwards, to wit, on the 6th February 1782, died seised in fee simple of the premises aforesaid, having first, to wit, on the 20th December 1781, duly made and published her last will in writing, whereby she devised the said premises to Owen Jones and others: that the survivors of the said devisees afterwards, to wit, on the 6th of April 1790, conveyed the same premises to Thomas Rogers: that the said Thomas Rogers, on the 20th April 1790, conveyed the same premises to the lessor of the plaintiff, who demised the same premises to the same Richard Fenn: that the same Richard Fenn entered and was ousted by the said defendant. If, upon these facts, the law be with the plaintiff, they find for the plaintiff and assess six pence damages, besides the costs: but if for the defendant, they find for the defendant." [*480

The general question was, whether a tenant by the curtesy initiate, has an estate forfeitable upon his attainder for treason? And it was argued, at two several terms, by *E. Tilghman* and *Lewis*, for the lessor of the plaintiff; and by *Ingersoll* and *Dallas*, for the defendant.

For the lessor of the *plaintiff*, the subject was considered in three points of view: 1st. What the husband of a wife seised of real estate, gains by the marriage, before the birth of a child? 2d. What is the nature of the estate which he acquires after issue? And 3d. How, after issue, does a forfeiture upon attainder operate?

1st. By the marriage alone, a husband does not gain a freehold in his own

[1] S. C. 1 Binn. 1; 4 Dall. 168.

right, in the estate of his wife; though he is jointly seised with her, during their joint lives, and is entitled to receive the profits to his own use. The *481] freehold and inheritance *remain in her; and he must, in legal proceedings, declare himself to be seised in fee, in right of his wife. Doug. 315.

2d. On the birth of a child, the husband becomes only tenant by the curtesy initiate; and to complete his estate, the death of the wife is an indispensable requisite. The quality and reason of a tenancy by the curtesy do not depend merely on the marriage; but if the husband survives his wife, he obtains the custody of the estate, for the sake of the heir, as well as for his own immediate benefit. 1 Bac. Abr. 659. The requisites to constitute a tenancy by the curtesy, are stated in Co. Litt. 30 *a;* and they must all concur, before the estate can exist: so that until the estate is consummated by the death of the wife, the husband is not seised in his own right; he has only a possibility, depending on the contingency of his survivorship. Litt. § 35. To say, that his estate is consummate, before her death, is to say, that a thing exists before the fact which is necessary to its existence. But by attainder, the husband became civilly dead; and could not, in legal contemplation, survive his wife, nor take an estate by act of the law. 7 Co. 25 *a.* In Godb. 323, is the only *dictum*, which seems to have a direct relation to the present question; but it must be respected as the admission of Lord Keeper Coventry, when attorney-general. It is said, that curtesy is forfeited on attainder of the husband, by way of discharge; and the discharge there meant, must be a discharge of the estate, as to the husband's own future right against the heir. 1 Bac. Abr. 660; 2 Leon.

3d. But the attainder, and consequent forfeiture, prevent the guilty person from being tenant by the curtesy. The law, which never does a useless thing, will not cast an estate upon an alien, or a felon (1 Vent. 412, 413); nor, by a parity of reason, will it cast an estate by the curtesy on a person, who is previously rendered incapable to take or enjoy it. "If a *feme* takes *baron*, who have issue, and after he is attainted of felony, and then the king pardons him, *per* Keble, he shall not be tenant by the curtesy, by the issue had before; *contrá*, if he had issue after." 7 Vin. Abr. 162, pl. 4, in note; s. c. Bro. tit. "Tenant by Curtesy," pl. 15, p. 250; s. c. 13 *Hen. VII.* 17; 3 Com. Dig. 244; s. c., Staundf. P. C. 196; s. c., 3 Inst. 19. So, in the present case, Mr. Galloway could not be tenant by the curtesy, in consequence of the issue before his attainder; the attainder destroys all relationship between the father and such issue, so that he can take no benefit from their birth; and the wife's estate being discharged of his right, descends, of course, to her heir-at-law, or devisee. Unless, in short, Mr. Galloway had an estate for life, at the time of the attainder, he could not forfeit it. A mere *482] right of action, or condition, shall not be forfeited *on attainder, by general words. (3 Co. p. 2, 3; 13 Vin. Abr. 441, pl. 14; 13 Inst. 19.) And the hardship of the case cannot be overlooked; for, as the attainder deprives the child of all rights of property, derived through the guilty father, it ought not, surely, to work a disinheritance, likewise, as to the estate of an innocent mother.

For the *defendant*, it was answered, that whether the subject was considered on general principles and authorities; or on the positive provisions

of the act of assembly; a tenant by the curtesy initiate possesses such an interest in the wife's estate, as is forfeitable upon an attainder for treason.

1st. On general principles and authorities. It seems a strange position, that the attainder of a traitor should, during his natural life, accelerate a descent to his child. But if the traitor had an estate in the premises, it cannot descend, it must be forfeited during the continuance of such estate; for all his estates are forfeited. (4 Bl. Com. 374; 2 Wood. Lect. 504.) The question is, therefore, simply, whether a tenant by the curtesy initiate his any estate in the premises, of which his wife is seised? Before issue, his interest is, indeed, merely in prospect, a contingency, an expectation, a possibility: but after issue, "he begins to have a permanent interest in the lands;" and nothing but his own natural death can defeat it. (2 Bl. Com. 126.) The contingency has then happened, which, by the act of the law, makes him as much tenant for life, as if he were tenant for life in reversion or remainder, *per formam doni*. The distinct use of the words, *initiate* and *consummate*, must not be regarded as creating a contingency, but as descriptive of a peculiar estate. While the wife lives, even before the birth of issue, the husband is seised of the land in fee in her right; and after the birth of issue, during her life, he cannot have a better estate; though his title to an estate, upon her death, is commenced, or *initiate*. Hence his estate by the curtesy is called *consummate*, on the death of the wife, in relation to the new and independent form by which he holds it; the seisin being then separate, that was before joint. (Co. Litt. 67 *a*.) But surely, when a man acquires a right to exercise acts of ownership, that the bare seisin in right of his wife would not authorize, he must be considered as possessed of some estate. Thus, we find, that a tenant by the curtesy *initiate* acquires the right to do homage to the lord alone. (Litt. § 9; Co. Litt. 30, 67; 2 Bl. Com. 126.) Avowry shall be made on him only, in the life of his wife. (Co. Litt. 30 *a*.) He may use the title of his wife's dignity. (Co. Litt. 29 *b*.) He may do many acts to charge the land. (2 Bl. Com. 128.) He may make a feoffment; and what he may grant, he surely, may forfeit. (Co. Litt. 30 *a*, *b*; 31 *a*.) If, besides, nothing but a man's own death (independent *of the punishment for crime) can prevent his enjoying an estate for life, has he no interest in the land? The death of the issue, [*483 or its arrival at full age, or the treason of the wife herself, cannot defeat the right acquired by a tenant by the curtesy initiate; and so far is Lord Coke from considering it as a mere expectancy, contingency or possibility, that he emphatically declares, the husband "having issue, is entitled to an estate for the term of his own life, in his own right, and yet is seised in fee in the right of his wife, so as he is not a bare tenant for life." (Co. Litt. 67 *a*.) On the very point of forfeiture, the dictum in Godb. 323, is strongly in favor of the defendant, if properly explained; for forfeiture on attainder for treason is always to the crown (4 Bl. Com. 376, 381); and that there should be a forfeiture merely to discharge the father's lien upon the estate, in favor of his children, is absurd. During the coverture, the whole estate is forfeited: and if the husband dies first, the estate is as much discharged by that event, as it can be by his attainder. But the analogy between the case of curtesy, and the case of dower, will assist in supplying the defect of positive authority. Dower is forfeitable at common law; and yet dower depends on the same contingency of survivorship as curtesy. (1 H. P. C. 253, 359; 2 Bl.

Com. 130–1.) The seisin of the husband gives an inchoate right to dower; as the birth of heritable issue gives a curtesy initiate. And when it is said, that he cannot forfeit his curtesy, by his wife's treason, there is great room to infer, that he may forfeit it for his own. (4 Bl. Com. 375.)

Suppose, an estate devised or conveyed to Galloway and his wife, and the survivor of them; or to him, during the life of his wife, with remainder to him, if he survived her—would not the whole estate be forfeited? Would not the forfeiture reach the right of survivorship? Again, suppose, an estate in fee-simple devised to him, with a double aspect—a devise for years, with a contingent remainder to him in fee—would not the remainder be forfeited? True, the tenancy by the curtesy was not consummate, until the death of the wife; but does this prove, that he had no estate, at the time of the attainder, nothing more than a possibility? Is homage done for a possibility? Can a right by possibility enable a man to do many acts to charge the land? Will a possibility make a man a member of the *pares curiæ?* Would a possibility give effect to a feoffment made during the life of the wife, in case he survived? And if so, what more could be effected by the feoffment of a joint-tenant?

There are four requisites necessary to make a tenancy by the curtesy; three had occurred at the time of the attainder; shall the fourth consummate or defeat the estate? In favor of the *husband, or a purchaser under him, as against the heir, it consummates: why not in favor of the commonwealth? It is urged, in answer, that the law does not cast an estate upon him who cannot hold it: but the rule is clearly otherwise, if the estate accrues by the happening of a contingency, by a limitation, by a condition, or by a purchase, in the legal sense, distinguished from descent.

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In Co. Litt. 67 *a*, the curtesy is considered as vested, liable to be defeated by the death of the husband, happening before the death of the wife; but when the husband is regarded by that authority as more than tenant for life, with a power to charge the lands, to sell them, to perform the feudal investiture, &c., can it be reasonable to say, that he has no estate? Is not this an interest beyond a right of action, a right of entry, or condition? all of which, it will be shown, are subjects of forfeiture under the act of assembly. But it is said, that tenancy by the curtesy is a future estate (Litt. § 35); and in some respects the assertion is true; yet, it is equally true, that in other respects, after the birth of issue, it is an interest, and not a contingency—an existing right, and not merely a possible benefit.

It is contended, however, that the forfeiture itself prevents the guilty person from being tenant by the curtesy (1 Bac. Abr. 660); but this authority evidently turns entirely upon the principle, that his title vests in the crown. In that case, too, if no office be found, the estate would return to the husband on a pardon; and even if an office be found, a pardon, with words of restitution, would restore it to him, provided no interest vested in the subject. (4 Bl. Com. 402; 2 Ibid. 128, 255; 3 Ibid. 259; 3 Bac. Abr. 810.)[1] It is true, if tenant by the curtesy acquires a new right, after the pardon, the estate would be his, of course; as, if he had no children before, or at the time of the attainder; in which

[1] A pardon, without words of restitution, does restore an estate forfeited for treason. Aldrich *v.* Jessup, 3 Grant 158.

case, no forfeiture of the curtesy could be incurred; but has issue after the pardon, in which case, he is a new man, capable of taking as if the attainder never had happened. After the attainder, and before the pardon, indeed, the estate will not vest even for the benefit of the crown, which explains 1 Bac. Abr. 660; but if the curtesy is initiate at the time of the attainder, the estate passes to the crown, with all the capacity of being enlarged and consummate, as well as being defeated, to which it was liable in the hands of the individual attainted.

It is not consistent with the authorities, to say, that a tenant by the curtesy initiate, cannot grant his right, living his wife; and whatever a man has in his own right, he may forfeit. (4 Leon. 112; Green's Bank. Law, 124.) The case cited from 7 Vin. Abr. 162, pl. 2, is contradicted by pl. 4; it is not supported by 13 Hen. VII., 17; *and it is at best a *dictum* of Keble, when a lawyer at the bar. It is to be found, likewise, in Noy 159; and there it appears, that it was a question turning on the corruption of blood. [*485

2d. But whatever doubt may be created on the English authorities, the positive provisions of the act of assembly cannot be obscured or evaded. By the original act, defining treason and prescribing its punishment, the forfeiture upon attainder it declared, in general terms, to be "the estate" of the delinquent. (1 Dall. Laws, 727–8, § 3.) And in the act for the attainder of divers traitors, including by name Mr. Galloway, it is declared, that unless they appear and conform to the law, "they shall suffer and forfeit as persons attaint of high treason." (Ibid. 751–2, § 2, 3, 4.) But when the same act enters into a specification of the subjects of forfeiture, it embraces, in express terms, "all and every the lands, tenements, hereditaments, debts or sums of money, or goods or chattels whatsoever, and generally the estates, real and personal, of what nature or kind soever they be, within this state, whereof the aforesaid Joseph Galloway, &c., shall have been possessed of, interested in, or entitled unto, on the 4th of July 1776, or at any time afterwards, in their own right, or to their use, or which any other person or persons, shall have been possessed of, interested in, or entitled unto, to the use of, or in trust for them, or any of them, shall, according to the respective estates and interests, which the persons aforesaid, or any in trust for them, or any of them, shall have had therein, stand and be forfeited to this state." Ibid. § 5, p. 752–3.

If tenancy by the curtesy initiate is an estate of any kind; if it gives any interest in the lands; if it gives any title to the tenant; then it is a subject of forfeiture, under the positive provisions of the act of assembly. It is evident, that the forfeiture under this act is more extensive, than by the common law, or statutes of England. (1 Hale H. P. C. 242.) In England, the forfeiture is of lands and tenements of inheritance, and rights of entry; and the profits of lands and tenements, which the attainted person had in his own right for life, or for years. (4 Bl. Com. 381.) But here, in addition to these objects, rights of entry touching lands, a right to reverse a judgment, and all conditions, uses and trusts, are forfeited. If, therefore, a tenancy by the curtesy initiate is forfeited by attainder, in England, *à fortiori*, it is forfeited in Pennsylvania.

Cur. adv. vult.[1]

[1] On the 23d December 1799, the opinion of the court was delivered, in favor of the plaintiff; thereby establishing that Mr. Galloway had no such interest in his wife's lands, as was

*McKee's Lessee *v.* Pfout. [486

Forfeiture.

A conveyance in fee, by a tenant by the curtesy, does not work a forfeiture of the particular estate.[1]

This was an ejectment, tried at the *nisi prius* for Dauphin county, in October 1795, when a verdict was given for the lessor of the plaintiff, subject to the opinion of the court, on a case stating the following facts :

On the 3d of January 1794, a warrant had issued for the lands described in the declaration, in favor of James Chambers ; who, on the 6th of January 1758, made his will, and *inter alia*, devised, "that all his estate, after payment of his debts, be equally divided between his wife Sarah, and his children Rowland, Ann, Sarah, James, Elizabeth, Benjamin and Joseph, each one-eighth part." The lessor of the plaintiff claimed one-eighth part of the premises, under the testator's daughter Ann, who had intermarried, twenty years ago, with Oliver Ramsay, by whom she had issue, and died. Before her death, however, on the 22d of October 1779, she had joined with some of the other devisees in conveying their respective shares in the estate, for a valuable consideration, to Andrew Strout, the real defendant ; but at the time of executing the conveyance (touching which, she was separately examined by a judge of Dauphin county), she had been driven away by her husband, and lived separate from him—a fact with which the lessor of the plaintiff was well acquainted. On the 1st of October 1785, Oliver Ramsay (who was still living) executed an indenture between him and the lessor of the plaintiff, wherein it was set forth, "that the said Oliver hath granted, bargained, sold, aliened, released, enfeoffed and confirmed, and doth grant, bargain, sell, alien, release, enfeoff and confirm, unto Robert McKee, in his actual possession now being, by virtue of a bargain and sale to him made, by the said Oliver, as these presents, and by virtue of the statute for transferring uses into possession, and to his heirs and assigns, *my* undivided part and respective share and purpart of him the said Oliver Ramsay, of, in and to that certain piece or tract of land, before described, with all and singular
*487] ways, &c., and reversions and remainders, *and also all the estate, right, title, interest, claim and demand, whether at law or in equity, of him the said Oliver, of, in and to the same : to have and to hold the said respective share and purpart of, in and to the said plantation and tract of land, hereditaments and premises hereby granted, mentioned or intended to be, with the appurtenances, unto the said Robert McKee, to the only proper use, benefit and behoof of them the said Robert McKee, his heirs and assigns for ever. And the said Oliver Ramsay for himself, his heirs, executors and administrators, not jointly, do covenant, promise and grant to and with the

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forfeitable on his attainder. The opinions of the judges will be found in 1 Binn. 9–24. The case was decided by Shippen, C. J., and Yeates, J., against the dissent of Judge Smith ; and Chief Justice McKean, who had been elected governor of the state, had left the bench ; his opinion is said to have been in favor of the defendant. 4 Dall. 168 n. In Chancellor *v.* Phillips, at September term 1800, and several other cases, a like decision was given. But in United States *v.* Cunningham, in the circuit court of the United States, before Tilghman, Basset and Griffith, JJ., where the subject was fully discussed, the court adhered to the common-law rule, notwithstanding the decisions of the state court.

[1] Dunwoodie *v.* Reed, 3 S. & R. 445–454 ; Griffin *v.* Fellows, 32 P. F. Smith 122.

said Robert McKee, his heirs and assigns, that he the said Oliver Ramsay hath not done or committed any act, matter, deed or thing whatsoever, whereby or wherewith his said and respective share and purpart of, in and to the said piece or tract of land, hereditaments and premises, are or shall or may be impeached, charged or incumbered, in title, charge, estate or otherwise howsoever. And the said Oliver, for himself, his heirs, executors and administrators, not jointly, do covenant, promise and grant to and with the said Robert McKee, his heirs and assigns, that the said Oliver, his heirs, executors and administrators, his share and purpart of him the said Oliver Ramsay, of, in and to the piece or tract of land aforesaid, hereditaments and premises, against them, their, and each and every of his heirs and assigns, and all and every person and persons whatsoever, lawfully claiming, or to claim, by, from or under him, or either of them, his or any of his heirs or assigns, shall and will warrant, and for ever defend, by these presents. And that said Oliver, and his heirs, not jointly, do further covenant, promise and grant, to and with the said Robert, that they, him, her or any of them, shall and will, at any time or times hereafter, at and upon the reasonable request, proper costs and charges in law, of the said Robert McKee, his heirs or assigns, make, execute and acknowledge, or cause so to be, all and every such further and other reasonable act or acts, deed or deeds, device or devices in the law whatsoever, either by fine or recovery, or otherwise howsoever, for the further and better conveyance, assurance and confirmation of his respective share and purpart of him the said Oliver, of, in and to the said piece or tract of land aforesaid, hereditaments and premises, unto the said Robert, his heirs and assigns, as by him or them, or his or their counsel learned in the law, shall be reasonably advised, devised or required."

There was no consideration mentioned in this deed; but there was a separate receipt for 60*l.*, given by Oliver Ramsay to *Robert McKee; and the deed was acknowledged and recorded on the day of its date. [*488

The general question submitted to the court, was—whether a conveyance in fee, by a tenant by the curtesy, is not a forfeiture of his estate? And it was argued by *Ingersoll*, for the lessor of the plaintiff, and by *Duncan* and *C. Smith*, for the defendant.

For the lessor of the *plaintiff*.—The special warranty shows the intention of the party; it secures the grantee against any previous incumbrances by the grantor, and against persons claiming under him, his heirs or assigns; but there is no covenant, not even a declaration, that he is seised in fee; and in effect, he simply conveys his own right, whatever that may be. A freehold, though not a fee, may be made descendible to heirs; and the nature of the conveyance under the statutes, and with the clause of warranty under the act of assembly (1 Dall. Laws 111), conveys only such estate as the vendor might lawfully part with. If a tenant for his own life aliens by feoffment or fine, for the life of another, or in tail, or in fee, it is a forfeiture (2 Black. Com. 274; Co. Litt. 251; Litt. § 415); but the reason is, that such an alienation tends to defeat and divest the remainder. In a feoffment, by the word *dedi*, since the statute *Quia emptores*, the feoffor only is bound to the implied warranty; and in other forms of alienation, no warrant whatsoever is implied. (2 Bl. Com. 300–1; Co. Litt. 384; Ibid. 102; Litt. § 733.)

The present deed is a bargain and sale—a contract to convey for a valuable consideration (2 Bl. Com. 338); and it has its force and operation by the statute of uses. (2 Bl. Com. 327, 337.) The force and operation of the words "grant, bargain and sell," under the act of assembly (1 Dall. Laws, 111), do not apply, where a special warranty is introduced into the deed; and the previous section of the act only gives to deeds acknowledged and recorded the effect of a feoffment, or a deed enrolled in England, to perfect the title and seisin of the grantee; a mere bargain and sale not being before so strong a conveyance, as livery. (Shep. T. 219, note 1.)

For the *defendant*.—The act of assembly declares, that deeds recorded shall be of the same force and effect here, for the giving possession and seisin, and making good the title and assurance of lands, tenements and hereditaments, as deeds of feoffment with livery of seisin, or deeds enrolled in any of the courts of record at Westminster, are or shall be, in the kingdom of Great Britain. (1 Dall. Laws 111.) The present deed is, therefore, an absolute and efficient conveyance in fee, whereas, the grantor had only an estate for life, as tenant by the curtesy in the premises. But if tenant for life or years, conveys a *greater estate than he can lawfully do, whereby the reversion or remainder is divested, it will be a forfeiture of his estate; as if he makes a feoffment. (Co. Litt. 251 *a*, *b*.) The law is the same in the case of an alienation by a tenant by the curtesy. (Ibid. 252 *a*.) The recording a deed is made, by the act of assembly, equal in solemnity to livery of seisin, as public and notorious, and as operative to pass and vest the estate. So, if tenant for life bargains and sells his lands by deed enrolled, although no fee passes, yet it is a forfeiture, and that by reason of the enrollment, which is matter of record. (2 Leon. 64–5.) In Pennsylvania, the deed on record is itself a record, and a copy of it is evidence. So, if a tenant for years makes a feoffment, it is a forfeiture of his estate (3 Mod. 151); and when it is said, in the case cited, that if he makes a lease and release, though it is of the same operation, it will not amount to a forfeiture; the reason is assigned in 1 T. R. 744, that a lease and release is a lawful conveyance, and passes no more than a man may lawfully part with. (2 Bl. Com. 274–5.) The particular tenant, by granting a larger estate than his own, has, by his own act, determined and put an end to his original interest; and on such determination, the next taker is entitled to enter regularly, as in his remainder or reversion. The criterion of the forfeiture is the actual passing an estate, which the grantor has no right to pass, to the prejudice of him in remainder—it amounts to a disseisin. Feoffment, without livery, is said to pass no interest, which is the reason why such a feoffment is not a forfeiture; but by the act of assembly, a deed recorded is equal to a feoffment with livery; and it is the matter of record, that makes the forfeiture. (Harg. Co. Litt. 59 *a*, note 3).

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The Court stopped *Ingersoll*, when he was about to reply, and delivered their opinion as follows:

McKean, Chief Justice.—We entertain no doubt on the present question. The legislature has, at various periods, and on a variety of subjects, departed from feudal ceremonies and principles, in relation to the transfer and descent of property; but in the present instance, the act of assembly meant only to give to a grant of lands, a greater effect upon the estate, on

recording the deed, than could previously have been enjoyed, without livery of seisin. It never contemplated that circumstance, as an instrument to work a forfeiture, on the common-law doctrine of alienation by tenant for life or years.

Shippen, Justice. From the words of the act of assembly, it is plain, I think, that the legislature did not mean to work the forfeiture of a particular estate, by the provision for recording deeds. In allowing to deeds recorded the same force and effect, as feoffments with livery, the intention is expressly restricted *to "giving possession and seisin, and making good the title and assurance of lands, tenements and hereditaments." [*490
It is, therefore, merely a facility and benefit extended to the grantee.

Yeates and Smith, Justices, concurred.

Judgment for the plaintiff.

MARCH TERM, 1799.

Respublica *v.* Wray.[1]

Information.

An information in the nature of a *quo warranto* is not prohibited by the constitution.

The defendant, on the 1st of June 1798, had been appointed treasurer for the county of Cumberland, "for three years, to commence on the 5th of June following;" but upon a suggestion of improper practices in procuring the appointment, the attorney-general obtained a rule to show cause, why an information in the nature of a writ of *quo warranto* should not be filed against him.

In support of the rule, affidavits and office-papers were produced, with a view to show that the defendant was in embarrassed circumstances; and that he had procured the vote of one of the county commissioners, under an assurance, that he would soon resign the office of treasurer, as he only wished to be appointed to it in order to promote his election as sheriff of the county. There was, likewise, an ineffectual attempt to prove that the commissioner, who had thus voted, and the defendant, were not citizens of the United States: And in point of law, it was objected, that the appointment was void *ab initio*, being made to commence *in futuro*.

The rule was opposed by *Dallas* and *McKean;* and the opinion of the court, in the absence of the Chief Justice, was delivered by—

Shippen, Justice.—The present is the first instance, that we recollect, of an application of this kind in Pennsylvania; and on opening the case, it struck us to be within the 10th section of the 9th article of the constitution, which declares, "that no person shall, for any indictable offence, be proceeded against criminally by information," except in cases that are not involved *in the present motion. But on consideration, it is evident, that the [*491
constitution refers to informations, as a form of prosecution, to

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[1] S. C. 2 Yeates, 429.

punish an offender, without the intervention of a grand jury; whereas, an information in the nature of a writ of *quo warranto*, is applied to the mere purposes of trying a civil right and ousting the wrongful possessor of an office. (*a*)

Since, therefore, there is some evidence (however slight) of improper conduct, we do not think, that it would be right to refuse an opportunity for a jury (who are the legal judges of the weight of evidence) to determine, whether it is sufficient to vitiate the defendant's appointment of county treasurer. And, at the same time, the points of law, that have been suggested, may be maturely considered and decided.

The rule made absolute. (*b*)

Murgatroyd *v.* Crawford.[1]

Sale of vessel.

An agreement for the sale of a ship, at a future day, the purchase-money being secured, does not effect an immediate change of the property.

This was an action against an underwriter, on a policy of insurance upon the ship Mount Vernon, warranted to be American property. The ship was captured by a French privateer, carried into Porto Rico, and there condemned as prize. The cause was tried at the present term; and Shippen, Justice, delivered the following charge, in which all the material facts and arguments were, substantially, set forth. (*c*)

Shippen, Justice.—On this policy, the assured has engaged to prove in any court of Pennsylvania, that the Mount Vernon was American property; and it is also incumbent on him to prove, that the ship sailed upon the voyage insured; that she has been captured and condemned. On the question
*492] of property, the American register was produced, which contains *the oath of the plaintiff, an American citizen, that he was the sole owner of the Mount Vernon; and on the other points, there is full proof of the sailing, capture and condemnation of the ship. She is not, however, condemned by the final decree as British property; nor, indeed, are any of the five causes assigned in the proceedings, legitimate causes of condemnation.

The plaintiff was disposed, on general principles, to leave his cause on this evidence; but in order to repel the defendant's allegation, that the property of the ship, though apparently American, was, in reality, British, a variety of facts have been adduced, to explain the nature of a transaction, which occurred between him and Mr. Duncanson, in relation to a sale and transfer of the Mount Vernon. The result seems, briefly, to be this: Mr.

(*a*) See 3 Bl. Com. 263.

(*b*) For the laws relating to county treasurers, which were cited in the course of the argument, see 1 Dall. Laws, 221, 807; 2 Id. 441; 3 Id. 750.

(*c*) The Chief Justice, who had presided at the opening, was obliged, by indisposition, to be absent during the rest of the trial.

[1] S. C. 2 Yeates 420; overruled in Duncanson v. McLure, 4 Dall. 308. And see Murgatroyd v. McLure, Id. 342; Ohl v. Eagle Ins. Co., 4 Mason 394.

Duncanson was an English gentleman, who came hither with a view to settle; and in order to manifest his intention, took an oath of allegiance to the state of Pennsylvania, though he had not been long enough in the country to entitle himself to naturalization, under the act of congress. Contemplating a circuitous voyage from America to England, and thence to the East Indies, he applied to Messrs. Willings & Francis, to procure a ship for him; and those gentlemen agreed absolutely with the plaintiff for the purchase of the Mount Vernon, the bill of sale being made out by him, and sent to them, upon terms of payment precisely ascertained. It then, however, occurred to Mr. Duncanson, that as he had not yet acquired the rights of American citizenship, he could not enjoy the advantages which he proposed to derive from his projected voyage. For the trade from England to the East Indies is, by the law of that kingdom, a monopoly; no British subject can, individually, embark in it, without incurring a forfeiture of his vessel and cargo: though it has recently been adjudged in England, that an American citizen is entitled to carry on the trade, by virtue of express stipulations in the treaty of amity and commerce between the United States and Great Britain. Hence, it was deemed necessary to enter upon another operation; the bill of sale was sent back; and a new contract was formed between the parties, upon these principles: that the plaintiff should remain the owner of the ship, and as such retain the register and make the insurance; that she should, however, be delivered to Mr. Duncanson, or his agents, and that Messrs. Willings & Francis should procure a freight for her on Mr. Duncanson's account; that the plaintiff should empower Mr. Skirrow (a gentleman who sailed as a passenger in her) to assign and transfer the ship to Mr. Duncanson, in England, on the 1st of September ensuing, at which time, Mr. Duncanson would be duly naturalized as an American citizen; [*493 *and that the consideration money should be secured by the notes of Messrs. Willings & Francis, payable, at all events, in certain instalments. The essential point in this agreement was, obviously, therefore, that the property should remain the plaintiff's, until the day fixed for the transfer in Europe; and, accordingly, the register was continued in his name, and the present insurance was effected by him, as owner of the ship.

On these facts, some important questions arise. It is true, that the first bill of sale was cancelled and done away; but the defendant urges, that there were many subsequent acts of the parties, which show an absolute change of property, under the second agreement; particularly, as the ship was delivered to Mr. Duncanson, to be loaded for his use; and the consideration money was payable at all events. A fair and legal contract should, however, be carried into effect, according to its true intention; and whether the form of proceeding is, or is not, strictly correct, there can be no doubt, that the true intention of this contract was, to continue the property of the ship in the plaintiff, for a specified period. If an immediate sale had been contemplated, the contract, payment of the price, and delivery of the ship, would, unquestionably, be sufficient to divest the property of the original owner, and vest it in the purchaser; but if the parties could legally contract, not for a present sale and transfer, but for a sale and transfer at a future day, under a power of attorney, to be given for the purpose; and if such is the nature of the present contract, then the payment and delivery must have relation to the terms and conditions on which they were made;

and of which the most important was, that the plaintiff should continue the owner of the ship, until the 1st of September.

The only objects for inquiry, then, are: 1st, whether the contract was a fair one? and 2d, whether it was a lawful one? That it was a fair contract, has not been denied: but it has been contended to be an illegal contract, violating the positive provisions of an act of congress; as well as militating against the duties of a neutral nation, by affording a ready cover to the property of a belligerent power. The registering act is expressed in such strong terms, that when it was first read, we thought it decisive upon the case; for it seemed generally to require an oath, "that there is no subject or citizen of any foreign prince or state, directly or indirectly, by way of trust, confidence or otherwise, interested in the ship or vessel, or in the profits or issues thereof." (1 U. S. Stat. 289, § 4.) But upon examining the act, we found, that this oath was only exacted, "where an owner resides in a foreign
*494] country, in the capacity of a consul of the United *States, or as an agent for, and a partner in, a house or copartnership, consisting of citizens of the United States." (Ibid.) The terms of the provision do not, therefore embrace the present case, the case of an American citizen, residing, and registering his vessel in an American port; and its policy may reasonably be confined to American residents abroad, who are so much exposed to the temptation of covering belligerent property, and so little exposed to the dangers of detection. (*a*)

Considering all the circumstances, therefore, it does not appear to us, that there was an actual sale; and if a future sale was only intended, we have no right to contradict or modify the contract of the parties. But while this opinion is expressed, it cannot be denied, that there are strong facts in support of the defence. Mr. Duncanson would have been the absolute unqualified owner of the ship, under the first bill of sale; and even under the subsequent agreement, he obtained possession of her, loaded her, received the freight, and exercised other acts of superintendence and ownership. Though the plaintiff effected the insurance, he was reimbursed the premium; and though he issued the sailing orders to the master, it is said to have been done at the instance of Mr. Duncanson. On the weight of these facts, therefore, the jury must decide: and if, after all, you should think, that there was an actual and immediate sale to Mr. Duncanson, an alien, there must be a verdict for the defendant, notwithstanding the register and oath of

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(*a*) The judge did not expressly refer in his charge to another section of the registering act, which was cited by the defendant's counsel, as proof that the vessel was forfeited, if the sale was an absolute one. The words of the section are: "That if any ship or vessel, heretofore registered, or which shall hereafter be registered, as a ship or vessel of the United States, shall be sold or transferred, in whole or in part, by way of trust, confidence or otherwise, to a subject or citizen of any foreign prince or state, and such sale or transfer shall not be made known, in manner herein before directed, such ship or vessel, together with her tackle, apparel and furniture, shall be forfeited." (1 U. S. Stat. 295, § 16.) I presume, the judge, having adopted the reasoning of the plaintiff's counsel, that there was no actual and immediate sale and transfer of the Mount Vernon, or, in other words, that the contract was executory, not executed, did not think the section applicable to the present case. For the manner of making known the sale and transfer here alluded to, see § 7, p. 291.

the plaintiff; which are *primâ facie*, but not conclusive evidence of the American property of the ship.

But another question has been agitated in the cause, which is entitled to consideration. It was insisted, that an underwriter is discharged from the obligations of the policy, if anything material to the risk is not disclosed to him, at the time of effecting the insurance. Though there was an attempt to encounter this position, by evidence of the general notoriety of *the contract between the plaintiff and Mr. Duncanson; yet that circumstance is too vague to be confirmed into notice, either to the defendant, or the insurance broker. Notice, however, is a matter of fact; but whether notice is necessary, is partly a matter of fact, and partly a matter of law. Now, the plaintiff warranted the ship to be an American bottom, which of itself superseded, in our opinion, the necessity of making any communication on the subject of the property. But, still, if in the opinion of the jury, a knowledge of the circumstances that were suppressed, would have induced the insurer to demand a higher premium, or to refuse altogether to underwrite, it will be sufficient, on commercial principles, to invalidate the policy. A respectable witness (an underwriter) has declared, however, that a disclosure of these circumstances would not have prevented his underwriting the risk at the same premium. [*495

If, upon the whole, the contract was a fair one, with a view to a lawful purpose—a voyage to India; and not with a view to aid one belligerent power at the expense of another, by a fraudulent cover of property (which would certainly be fatal to the plaintiff's demand), we think, that the ship remained an American bottom, at the time of the capture and condemnation; and therefore, that the verdict should be in favor of the plaintiff. But if there was an actual and immediate sale of the ship to Mr. Duncanson; or if there was any concealment which ought to invalidate the policy, we think, the verdict should be in favor of the defendant.

Verdict for the plaintiff.

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*Breckbill *v.* Lancaster Turnpike Company. [*496

Corporation.

An action of *indebitatus assumpsit* will not lie against a corporation; to recover, the plaintiff must show an *express* promise.[1]

This was an action of *indebitatus assumpsit.* The cause was tried at Lancaster, and the jury found a special verdict in the following terms:

"The jury find, that B. Breckbill, the plaintiff, was seised in his demesne as of fee, in 216 acres of land, &c. That the president, managers, &c. (the defendants), by and with their superintendents, surveyors, engineers, artists and chain-bearers, workmen and laborers, with their tools, &c., entered in and upon the said tract of land, and laid out a road in, through and over the same, 50 feet wide, and about 150 perches in length, and caused 21 feet thereof to be bedded with pounded stone, well compacted together, a sufficient depth to secure a solid foundation to the same, and an even surface thereon, between the turnpike road, agreeably to the act, &c. That no express contract or agreement respecting the said entry, or any promise

[1] Overruled, in Chestnut Hill and Spring-House Turnpike Co. *v.* Rutter, 4 S. & R. 6, 16.

or engagement to make compensation for such entry, and for the land so taken and occupied by the said road, was made by, or ever existed between, the said plaintiff, and the said president, managers, &c. (the defendants). That all the roads heretofore laid out, or at present being in, upon, over or through the said tract of 216 acres of land, or any part thereof, including the said road so laid and made by the president, managers, &c., do not occupy, take up, or waste six acres in every hundred of the said tract.

"But whether, on the whole matter, by the jurors aforesaid, in form aforesaid found, the said plaintiff ought to recover his judgment and damages against the said president, managers, &c., the jurors aforesaid are entirely ignorant, and thereon pray the advice of the judges of the supreme court. And if upon the whole matter aforesaid, by the jurors aforesaid, in form aforesaid, found, it shall appear to the judges of the supreme court, sitting in bank, that the said plaintiff is entitled to recover against the said president and managers, &c., then they find for the plaintiff, and assess damages to the *said plaintiff in the sum of $600, besides his costs and charges by him about his suit in this behalf expended, and for those costs and charges, 6*d.* But if upon the whole matter aforesaid, by the jurors aforesaid, found, it shall appear to the said judges, that the said plaintiff is not entitled in point of law to recover against the said president, managers, &c., then the said jurors aforesaid, on their oaths, &c., do say, that they find for the defendant."

*497]

Three questions arose on this special verdict: 1st. What is the nature and operation of the proprietary grants of land, with an allowance of six per cent. for roads, &c.? 2d. Is the power vested in the turnpike company, to enter upon, take and possess lands, consistent with such original grants, and the constitution, unless compensation is made? 3d. And can an action of *indebitatus assumpsit*, upon an implied promise, be maintained against a corporation?

For the *plaintiff*, it was contended: 1st. That whenever lands were granted by patent, the allowance of six per cent. passed as absolutely as the rest of the tract, to the grantee, the whole being alike subject to the easement for roads. A mere right of passage, therefore, was all that remained with the government. It remained too for public use, and could not be transferred by the government to an individual occupant for private purposes. The government might claim it, and might enjoy it for ever; but until it was claimed for the public, and whenever it should cease to be enjoyed by the public, the freehold and occupancy of the grantee were perfect and exclusive. (1 Burr. 143, 146.) This being the original nature of the contract, neither party can ever enlarge, abridge or impair its operation; and as, on the one hand, the grantee could never deny the right of passage to the public: so, on the other hand, the public could never convey more than a right of passage to any body politic or corporate.

2d. But the act of assembly does grant to the turnpike company, more than the public right of passage. (3 Dall. Laws, 248.) It gives them, in effect, the fee, and extinguishes the grantee's right of occupancy, which could only be suspended, on the principles of the original grant, when, and so long, as the public should use the premises as a road. Again, it changes the character of the contract, which was, simply, formed between the grantor and the grantee, by introducing a third party, without the grantee's

consent. And finally, what was, by the original contract, a public reservation, is made an instrument of private emolument; so that the benefit of passage, which then was contemplated as a matter of common right, is now only to be enjoyed by those who will and can pay for it. *But the constitution says, that no man's property shall be taken or applied to [*498 public use, without just compensation. If, therefore, even a public benefit is intended, by the transfer of the rights of the grantee, together with the rights of the government, to the turnpike company, it can only be done upon the condition of an adequate indemnity. (2 Dall. 310.) The act of incorporation empowers the company to purchase, take and hold, in fee-simple, all such lands, &c., as shall be necessary to them in the prosecution of their works, not merely the lands over which the road actually runs: and, in every similar instance of a canal, the legislature has expressly imposed the obligation of paying for whatever lands were appropriated to the work. (3 Dall. Laws, 136, 275, 362; 4 Ibid. 251.) The uniform principles of justice, as well as the positive provision of the constitution, are as strong to entitle the plaintiff to an equivalent for his property, as an act of the legislature.

3d. The plaintiff is entitled to recover in the present form of action. *Indebitatus assumpsit* is an extensive and equitable remedy, and ought to be applied, whenever an obligation is raised upon moral principles or natural justice. The authority given to the turnpike company, to take private property for their use, accepted and exercised by them, creates a moral obligation to pay a reasonable equivalent to the individuals whose property is so taken; and the plaintiff, by bringing this action, waives the *tort*, on which he might otherwise have relied. A corporation acts, certainly, under the same moral obligations as an individual; and to decide, that they are never liable upon an implied promise, would work infinite mischief and injustice; since they could not be made responsible for the personal trespasses of their servants; and it is impossible to compel a contract with the solemnity of the corporate seal. The power of the legislature itself did not extend further than to grant the property, on condition that it was paid for; and if it is not paid for, the law is unconstitutional and void. But the law is the cause of action; and the company's acceptance of the law, forms on their part the contract, or *assumpsit*, to pay the value of the land.

For the *defendants*, it was contended: 1st. That so far as the six per cent. allowance for roads, the grantees of land were mere trustees for the public. It is immaterial, on what principles roads were originally laid out in England; though, at present, it is known, that they can only be laid out by private grants, or by acts of parliament, with a clause for making compensation. It has, however, been at all times the policy of Pennsylvania, that the goverment should be at the *expense of establishing the public roads and highways. The very first article of the conditions and [*499 concessions agreed upon between William Penn and the original adventurers, contains a provision that the public roads should be laid out at the proprietary's charge (1 Dall. Laws, app'x, p. 6); but as it also contemplated the establishment of cities and towns, to which the roads should lead, a supplementary provision became necessary, to correspond better with the unimproved state of the country, and the allowance of six per cent. was made by the proprietary. (1 Dall. Laws, app'x, 37, 39.) For this additional quantity

of land, the grantee never paid any price or rent: it was not even subject to taxation. These facts cannot be otherwise accounted for, than by the admission of another fact, that, although the possession was transferred, the government reserved the right to resume it at will, and without paying a compensation. The early laws of the province bear the same inflexible aspect. There was no provision made for compensating any damages in establishing a highway, or public road; and with respect to private roads leading into the highway, provision was only made for compensating the damages done to improved land. (1 Dall. Laws, 16, 289, 290.) It is, likewise, a circumstance greatly corroborative of this construction (though it has been differently used), that in the case of canals, for which no property had been designated or reserved in the public grants, the late laws contain an express clause for making compensation to the owners of lands taken for public use; though such clauses are never inserted in any laws for establishing public roads or highways.

2d. If, then, the right of soil remained in the public, the government might either lay out the road itself, or it might contract with others to do it; and no stipulation of the original grant, nor any provision of the constitution, can fairly be said to be violated. Nothing more is transferred to the turnpike company, than the public previously possessed, the right of establishing a permanent road; and the right of passage remains a common right, notwithstanding the toll; for that is only a beneficial species of taxation, which relieves the townships from the expense of repairs, and charges it upon those who immediately enjoy the benefit of the road. (1 Bl. Com. 357.)

3d. But at all events, the present action cannot be maintained. The idea of an express contract with the turnpike company, is repelled by the finding of the special verdict; and an implied *assumpsit* cannot be maintained; for a corporation can only contract by deed under the corporate seal. (1 Bl. Com. 475; 6 Vin. Abr. 268; 3 Salk. 103; 6 Vin. Abr. 292, *500] 287–8; Kyd *on Corporations, 1 Vol. 449, 450, 259, 468.) Indeed, the court could not infer an implied promise from the facts stated; as the assumption, whether express or implied, must be found by the jury; and the proper remedy, if the plaintiff had suffered any injury, was an action of trespass against the aggressors.

The Court, on the day succeeding the argument, delivered an unanimous opinion, that on this special verdict, the plaintiff could not recover, in the present form of action, against the defendants, as a corporation: and therefore, they deemed it unnecessary to decide the other questions in the cause.

Judgment for the defendants.

E Tilghman and *Hopkins*, for the plaintiff. *Lewis*, *Ingersoll*, *McKean* and *C. Smith*, for the defendants.

Dallas, Secretary of the Commonwealth, *v.* Chaloner's Executors.

Auctioneer's bond.

In an action on an auctioneer's bond, the commonwealth is entitled to recover all arrears of duties, though accruing more than three months previously.

The person who first sues and obtains judgment on an official bond, is entitled to the whole penalty, if his claim be so much.[1]

This was an action of debt, instituted in the name of the secretary of the commonwealth, on an official bond, which the testator had given, with two sureties, for the faithful discharge of his duty as a public auctioneer, and for well and duly performing the terms and payment imposed by law. (2 Dall. Laws, 777.) At the time of Chaloner's death, a considerable sum was due to the public, for duties on sales at auction; nor had he accounted to many of his creditors, for the proceeds of the goods, which they respectively deposited with him. The action, however, was instituted by the attorney-general, for the state; and judgment was entered for the penalty, by consent of all parties, to satisfy the amount of the duties, reserving the subsequent claim of the creditors.

But *Lewis* and *Rawle*, on behalf of James Yard, one of the creditors, now contended, that the state was not entitled to *recover more than the duties accruing during a term of three months; and that the judgment rendered upon an official bond must inure to the benefit of those who shall prove themselves injured and entitled.(*a*) By the first act of assembly, imposing a tax on sales at auction, it is expressly declared, that if an auctioneer does not, once in every three months, account for, and pay into the treasury, the duties arising from his sales, he shall be discharged from his place, and his official bond shall be put immediately in suit. (1 Dall. Laws, 865.) And this regulation is recognised and confirmed by every subsequent law on the subject. (2 Ibid. 55, 680, 777.) At the expiration of three months, therefore, the testator, failing in his public payments, ought to have been removed and sued; the lien of the state on the bond then ceased; and if she afterwards suffered, it was by her own *laches*. On the other hand, there is no fault imputable to the creditors; the law compelled them to sell their goods by a public auctioneer; and the testator's continuance in office, was *primâ facie* evidence, that he had faithfully accounted to the treasurer. It is a plain principle in equity, that whenever a man, who had originally a legal remedy, impairs it by his own neglect or omission, he shall be postponed to another more vigilant claimant: and that the legislature entertained the same equitable sentiment, may be collected from the relief, which they afforded to the sureties of an auctioneer, under similar circumstances. (3 Dall. Laws, 131.) Deducting, therefore, the amount of the duties that were payable during the three months in which the testator became first a defaulter, the residue of the penalty and judgment belongs to the creditors; if they [*501

(*a*) McKean, Chief Justice.—It is an established principle, that the person who first sues, and obtains judgment on an official bond, is entitled to take the whole of the penalty, if his demand amounts to so much, in exclusion of every other claimant.

[1] Dallas *v.* Hazlehurst, 4 Dall. 106 n.; McKean *v.* Shannon, 1 Binn. 390; Christman *v.* Commonwealth, 17 S. & R. 381. And the plaintiff may recover to the extent of the penalty, and interest thereon. Commonwealth *v.* Lynd, 9 W. N. C. 510.

can prove themselves, at all, entitled to the indemnity of the official bond, which is a question now *sub judice*, in another action, between them and the executors of one of Chaloner's sureties.

The *Attorney-General* observed, that whatever might be the ground of equity in favor of a surety, who complained that the principal had not been compelled to account, agreeable to the strict rule of the law; there, surely, could be no pretence for such a plea, in favor of the principal himself. This is a suit to recover from the estate of the delinquent; and the only doubt that occurred was, in what form it ought to be instituted, by action of debt on the bond, or by a general *indebitatus assumpsit*. Either course, however, is available; and it does *not lie with a third party to say, that in the course which is pursued, the state shall not recover from her debtor.

*502]

McKean, Chief Justice.—This is an action brought upon the official bond of a public auctioneer, to recover the amount of the duties payable to the state. It is true, that the law directs auctioneers to be displaced, and their bonds to be put in suit, if they do not, once in three months, pay the duties into the treasury: but there is no provision for annulling the bonds, or forfeiting the remedy of the state upon them, in case that direction should not be complied with. As to the delinquent himself, such a provision would have been absurd; and as to his sureties, it is enough to observe, that their case is not at present before the court; nor is the objection made with a view to their relief.

Let the judgment be entered in favor of the commonwealth for the amount of the duties, with interest from the time when the money ought to have been paid into the treasury.[1]

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*503] *JUNE NISI PRIUS, 1799.(*a*)

Wharton *et al.*, executors, *v.* Fitzgerald.

Use and occupation.

An action for use and occupation will not lie against a *bonâ fide* purchaser, for a valuable consideration, from the heirs of a disseiser, after a descent cast, and without notice of the disseisin.

Indebitatus assumpsit. The action was founded on the following facts: On the 15th day of July 1749, Joseph Ogden, being seised in his demesne as of fee, of and in a certain messuage and lot of ground, situate in the city of Philadelphia, made his last will and testament, by which he devised the premises to his mother, Hannah Wharton, the testatrix, by the name of Hannah Ogden, in fee; and died in the same month, unmarried and without issue.

(*a*) This court of *nisi prius* was held at Philadelphia, before McKean, Chief Justice, and Shippen and Smith, Justices.

[1] Affirmed by the high court of errors and appeals, in 4 Dall. 95.

From the 3d of February 1752, the rents and profits of the premises had been received by John Cox and Sarah, his wife, formerly Sarah Edgehill, who claimed one moiety in her right; and by Samuel Mifflin and Rebecca, his wife, formerly Rebecca Edgehill, who in her right claimed the other moiety, by descent from the said Joseph Ogden. As a foundation for this claim, they alleged that the said Joseph Ogden died intestate, being under age at the time of making his said will; that in consequence thereof, the fee-simple of the premises descended to Rebecca Edgehill, the sister of the said Hannah Wharton, the testatrix, and heir-at-law, as to the premises, of the said Joseph Ogden; that the said Rebecca Edgehill was the mother of the said Sarah Cox and Rebecca Mifflin; and that all her right and interest in the premises descended to them.

Samuel Mifflin died; and afterwards, on the 26th of August 1782, the said Rebecca Mifflin, John Cox and Esther, his then wife, by indenture, bargained and sold the premises to Thomas Fitzgerald, the defendant; who thereupon entered into possession, *and took and received the rents, [*504 until the —— of ——— 1792.

On the 28th of November 1786, the said Hannah Wharton, the testatrix, and devisee of Joseph Ogden, made her last will, by which she devised the premises to her son, William Ogden, in fee; appointed the plaintiffs her executors; and afterwards (on the 24th of January 1791) died.

After the death of his mother (at March term 1791), William Ogden instituted an ejectment against the defendant, to recover the premises; and obtained a verdict and judgment, in November 1792: and the rent accruing from the time of the said Hannah Wharton's death, until the —— of ——— 1792, when possession was delivered to the said William Ogden, was duly paid to him by the defendant.

But the present action was brought to recover a compensation for the use and occupation of the premises, and the rents received therefrom, from the 26th of August 1782, when the conveyance was made to the defendant, until the death of Hannah Wharton, the testatrix, on the 24th of January 1791.

The case being thus opened, the court called on the counsel for the plaintiffs to show on what ground they could maintain such an action; when they cited and relied on *Haldane* v. *Duche's Executors*, 2 Dall. 176. But—

By the Court.—This is the case of a *bonâ fide* purchaser, for a valuable consideration, from the heirs of a disseiser, after a descent cast, and without notice of the disseisin. It is impossible, that any precedent can be produced, that any principle can be suggested, to authorize such an action. There was an acquiescence of more than forty years, and all the facts were equally in the knowledge of both the parties. This circumstance makes the essential distinction between the present case, and the case of *Haldane* v. *Duche's Executors*, where the facts were in the knowledge of the testator only; and the action was brought against the representatives of the person himself, who had suppressed, if not misrepresented, the truth.

Nonsuit.

Rawle and *M. Levy*, for the plaintiff: *Ingersoll* and *McKean*, for the defendant.

*Reed *v.* Ingraham.

Parties.—Chose in action.

The transferee of a bought-note, by which the defendant promises to receive certain stock from A. *or order*, and to pay for the same, may sue thereon in his own name.

This was an action brought by the assignee of a stock-contract, to recover the amount of the difference, due on the contract, which was expressed in these words:

"On the 18th of April 1792, I promise to receive from Joseph Boggs, or order, ten thousand dollars, six per cents., and pay him for the same, at the rate of 23 shillings and 7 pence 3-4 per pound.

(Signed) Francis Ingraham."

The assignment was indorsed in these words:

"I do hereby authorize William Reed, or his order, to tender or deliver the stock within mentioned, and the said William Reed, or his order, to receive for the same, the sums of money due and payable therefor, at the rates within expressed.

April 7, 1792. (Signed) Joseph Boggs."

The plaintiff gave notice of the assignment to the defendant, a short time before the day fixed for executing the contract; and it was admitted, that the stock was tendered in due form. But the defence, on the trial, turned upon the question—whether the stock-contract was negotiable, so as to enable the assignee to bring an action in his own name? For the defendant insisted, that Boggs was indebted to him, and that he ought not to be precluded from the benefit of a set-off, by the form of the present suit. It appeared, however, that the debt referred to, arose from a note, which the defendant had indorsed to accommodate Boggs; but which had not been paid, nor had it, indeed, become due, for a long time after this action was commenced: and several experienced brokers proved, that stock-contracts of the present description had always been considered as assignable in Philadelphia, vesting the interest completely in the assignees, and authorizing them, in case of default, to proceed in their own names against the defaulters.

By the Court.—The action is well brought, as it is founded on a contract, in which the defendant expressly stipulates, that he will receive the stock from, and pay the price to, *Joseph Boggs, *or his order.* On general principles of law, stock-contracts cannot be regarded as negotiable; but a contractor may certainly make himself liable, as if they were so; and the maxim, *modus et conventio vincunt leges,* applies forcibly to the case.

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With respect to the alleged inconvenience, that in the present form of action, the defendant is debarred from the benefit of a set-off, it would be enough to answer, that as this is the consequence of his own act and agreement, he has no reasonable cause of complaint. But it is also obvious, that when the contract was assigned, and the present action was instituted, there did not exist between him and Boggs any mutual debt or demand, which could be the subject of defalcation, upon the principles of the act of assembly.

Verdict for the plaintiff.

Roberts *v.* Wheeler *et al.*

Copmutation of interest.

Where a judgment is given as security, interest is only to be computed on the original cause of action—not on the judgment.

The plaintiff had obtained a verdict; but a new trial was granted, upon condition, that a judgment should be entered as a security, for whatever might be ultimately recovered.

On the second trial, The Court instructed the jury, that where a judgment was given merely as a security, the interest ought not to be calculated on the amount of the judgment (which included principal and interest), but only on the sum originally due.

Peterson *v.* Willing *et al.*

Parol evidence.—Subrogation.

Parol evidence is admissible, to show the purpose for which a mortgage was given, though absolute in its terms.

A security taken by an indorser merely for his own indemnity, does not inure to the benefit of the indorsee.

This was an action for money had and received to the plaintiff's use, founded on the following facts:

On the 17th of December 1796, Levinus Clarkson executed a mortgage *to Samuel Clarkson, on certain stores and lots of ground in Philadel- [*507
phia, to secure the payment of $8000, with interest. Before the execution of the mortgage, Samuel Clarkson had advanced or secured a considerable sum of money, to accommodate Levinus Clarkson (who was in very embarrassed circumstances), and had taken a bill of sale of a ship, &c., as an indemnity; which, however, he thought was insufficient for the purpose, and had repeatedly pressed for an additional security. About this time, Levinus Clarkson, being indebted by note to the plaintiff, and having deposited a considerable amount of Morris & Nicholson's notes, by way of collateral security, proposed to the plaintiff to release the deposit, and accept, in lieu of it, a note indorsed by Samuel Clarkson, who was then in good credit. The plaintiff acceded to the proposition; and Levinus Clarkson, in order to induce Samuel Clarkson to indorse the note, promised to execute the mortgage above mentioned, not only as a security in this transaction, but as an auxiliary to the fund, for indemnifying Samuel Clarkson, on account of his previous advances and engagements. Accordingly, on the 13th of December 1796, the note drawn by Levinus Clarkson, and indorsed by Samuel Clarkson, was delivered to the plaintiff; the notes of Morris & Nicholson were restored to Levinus Clarkson, and the mortgage was executed a few days afterwards. Both the Clarksons failed, before the debt due to the plaintiff was paid: Levinus Clarkson was discharged under the insolvent laws; and Samuel Clarkson assigned his property in trust for the benefit of all his creditors, to the defendants; who, by virtue of the assignment, had received a considerable sum arising from the sale of the mortgaged premises, which had been enforced by a creditor having a previous lien.

The plaintiff claimed so much of the money thus received by the defendants, as would be sufficient to satisfy his debt: and his counsel offered Levinus Clarkson as a witness, to prove that the mortgage, although expressed in absolute terms to be for the use of Samuel Clarkson himself, was, in fact, given in consideration of the indorsement of the note delivered to the plaintiff; and on a positive promise, that the note should be paid out of the proceeds of the mortgaged premises, the surplus only being destined to exonerate Samuel Clarkson from his other engagements for Levinus Clarkson. Hence, it was intended to argue, that an implied trust was created for the benefit of the plaintiff to the amount of his debt.

The *defendant's* counsel objected to the competency of the proposed witness, on these grounds: 1st. That parol testimony cannot be admitted to contradict, alter, modify or explain a solemn instrument under seal. 2d. That if parol testimony *were at all admissible, Levinus Clarkson was *508] not competent to give it; because its effect would be to invalidate an instrument to which he himself had given sanction; and though the evidence might not totally destroy the deed, it would communicate a new direction and operation to it, equally within the mischief, which the rule of the law was intended to guard against. (1 T. R. 296.) 3d. That Levinus Clarkson was excluded, by his interest in the event of the cause; for the tendency of his evidence would be, to enable the plaintiff to recover out of the fund in the hands of the defendants, and so discharge the witness from the responsibility on his note of hand. But—

By the Court.—It cannot be agreeable to be called on thus suddenly to give a judicial opinion, on an important question: and therefore, in the present, as well as in every other case, we shall be ready to listen to any motion, which will introduce a reconsideration and revision of the decisions pronounced in the course of a trial.

The objections, however, do not appear to be sufficiently cogent to exclude the witness. The evidence will not contradict the deed, though it may enable the jury to apply the property to the uses originally intended by the parties. Nor is the evidence calculated to invalidate the deed; but to support and direct it to the purposes for which it was given. As to the interest of the witness, it does not seem to be affected by the event of this cause: and the laudable liberality of courts of justice, in modern times, has set us the example, for referring all such objections of doubtful and distant interests, to the credit, rather than to the competency, of the party. The objections are, therefore, overruled.

On examining the witnesses, it appeared, that at the time the mortgage was promised and executed, and for some time afterwards, the plaintiff did not know of the transaction; that he surrendered Morris & Nicholson's notes, in consideration of Samuel Clarkson's indorsement, without reference to any other security; and that the amount due from Levinus Clarkson to Samuel Clarkson exceeded the proceeds of all the securities placed in the hands of the latter. In a written statement made by Samuel Clarkson, at the time, however, he had set forth the engagements for which the mortgage and other securities had been given, inserting, among the rest, the note held *509] by the plaintiff; but this seemed merely to be descriptive *of the engagements against which Samuel Clarkson was to be indemnified,

and not an appropriation of the securities, as a fund for paying the persons to whom he was bound.

The Court expressed a decided opinion, that under such circumstances, there was no express trust, nor any ground for an implied trust, in favor of the plaintiff. He had made his bargain simply on the credit of Samuel Clarkson's indorsement, without contemplating any other security. The mortgage was taken by Samuel Clarkson for his own indemnification. The transactions were, therefore, substantive and unconnected: and no trust being declared or contemplated, at the time, a court of law cannot, on the suggestions of humanity, undertake to create one, in opposition to other legal and meritorious claims.

The plaintiff suffered a nonsuit.

E. Tilghman and *M. Levy*, for the plaintiff: *Lewis* and *Hallowell*, for the defendant.

CIRCUIT COURT OF THE UNITED STATES,

PENNSYLVANIA DISTRICT.

APRIL TERM, 1799.

Present—IREDELL and PETERS, Justices.

POLLOCK *et al. v.* DONALDSON.

Premium of insurance.

Where insurance is effected on the cargo of a vessel, in port and at sea, for a certain term, *as interest shall appear*, the amount of the premium is to be regulated by the actual value of the cargo on board, from time to time, during the term insured.

THIS was an action brought by the underwriters, to recover a premium of fifteen per cent. on a policy of insurance, upon the cargo of the brig Pilgrim.

The policy was dated the 17th of November 1794, and contained the following clauses, to wit, "lost or not lost, in port and at sea, and at all times and places, for the space of six calendar months, from the 8th day of September 1794, to the 8th day of March 1795, &c."—"beginning the adventure upon the said goods and merchandises from the loading thereof on board the said vessel, the 8th of September 1794, and so shall continue and endure until the 8th of March 1795, and continue at the same rate of premium, until her next arrival at Philadelphia, &c."—"The said goods and merchandises for so much as concerns the assured and assurers in this policy, are and shall be valued *as interest shall appear*."—"The vessel and cargo warranted American property."

The facts were these: The brig was loaded at Hamburg, on the 8th of September 1794, with a cargo valued at $5333, and sailed for the port of Philadelphia. On her passage, *about the 14th of September, she [*511
was stopped by a French privateer and carried into Dunkirk, where the supercargo was permitted to sell the cargo, and to receive the proceeds on account of the owner. She then took on board a small cargo, valued at about $1500, and in the beginning of October, sailed from Dunkirk, bound to Hamburg, but was taken on the passage by a British privateer, and carried into Falmouth, where an average loss was suffered, to the amount of 90*l.* sterling. After a few days' detention and examination, the brig was discharged, pursued her course to Hamburg, and arrived there towards the

end of October. Having discharged her lading at Hamburg, she took on board another cargo to the amount of $2500; and sailed from that port, in December, bound to Philadelphia; and arrived here in February 1795.

The cause was tried by a special jury; when the plaintiffs contended, that they were entitled to the premium of fifteen per cent., on the first cargo shipped at Hamburg, valued at $5333, under the words of the policy, insuring "in port and at sea, and at all times and places, for the space of six calendar months, &c.," without regard to any change or diminution of the value of the corgo, during the term of the insurance. But the defendant insisted, that those words were controlled by the provision, that the cargo should be valued "*as interest shall appear;*" and as he, in case of a loss, would only have been entitled to recover an indemnity co-extensive with the value of the cargo actually lost, the underwriters could not recover a premium for more than the amount of their risk.

The testimony of Mr. Isaac Wharton, an experienced insurance-broker, proved, that the defendant's construction of the policy was conformable to the general sense and usage of merchants: And it was accordingly adopted by THE COURT and jury—the verdict allowing the premium of fifteen per cent. upon the value of the different carges, for the time that they were respectively on board the brig; and deducting the amount of the average loss.

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*HURST *v.* HURST.

Continuance.

A cause will be continued, where the plaintiff has not answered a bill of discovery, filed against him by the defendant.

THIS cause being marked for trial, *Ingersoll* moved for a continuance, on the ground, that a bill in equity had been filed by his client, the defendant, in the circuit court for the New York district, calling for a discovery and account, in relation to the matters in controversy in the present suit; but that the plaintiff here had refused to file an answer to the bill, in consequence of which, an attachment had issued against him. After some remarks by *Rawle*, in opposition to the continuance—

IREDELL, Justice.—Though, on general grounds, I should be very reluctant to agree to the continuance of a cause of this description, which, in a variety of shapes, has been long depending, I think, the particular circumstances that have been stated, call for the interposition of the court. The disclosure of certain facts that depend on the knowledge of the plaintiff, is deemed essential to a fair decision; if the disclosure will not injure him, he can have no reason for refusing to make it; while his refusal to answer the bill in equity filed in New York, at the same time that he presses for a trial of the common-law suit here, raises a strong presumption against him. Under this impression, therefore, the continuance is now allowed; and we shall be disposed to hear favorably every future application to postpone a trial, until the plaintiff has filed a satisfactory answer to the bill in equity.

*United States v. The Insurgents of Pennsylvania.

Special courts.

The judges have power to hold a special court, in capital cases, in the county in which the offence was committed; but they have a legal discretion on the subject.

Several indictments were found against persons charged with high treason, by levying war against the United States, in the counties of Northampton and Bucks, in the state of Pennsylvania; and the prisoners having pleaded "not guilty," *Lewis* and *Dallas*, their counsel, filed a suggestion, that all the offences were charged to have been committed either in Northampton or Bucks, and moved for a trial of each indictment in the proper county, on the provision contained in the 29th section of the judicial act (1 U. S. Stat. 88, § 29), "That in cases punishable with death, the trial shall be had in the county where the offence was committed, or where that cannot be done, without great inconvenience, twelve petit jurors at least shall be summoned from thence." The motion was opposed by *Rawle* (the attorney of the district) and *Sitgreaves*. And after argument, The Court delivered an opinion to the following effect:

By the Court.—The mere circumstance of delay, in trials of so much expectation and importance, though entitled to some consideration, would not be sufficient of itself to prevent a compliance with the present application: and we think, that the 29th section of the judicial act ought to be so construed, as to vest in the judges a power of holding a special court, in the proper county, if in other respects they do not deem it greatly inconvenient. The act of congress, passed the 2d of March 1793 (1 U. S. Stat. 334, § 3), empowers the judges to "direct a special session of the circuit court to be holden for the trial of criminal cases, at any convenient place within the district, nearer to the place where the offences may be said to be committed, than the place or places appointed by law for the ordinary sessions;" but this provision does not expressly discriminate between cases of a capital, and of an inferior nature, and a provision having been previously made for capital cases, it would be justifiable to apply this to *inferior cases. At all events, any criticism upon the word *nearer* (considering the whole state as a district or county, in relation to the United States), would not prevent our appointing a special court in the proper county, if such an appointment was otherwise eligible. [*514

The truth is, that the act gives to the court a legal discretion upon the subject. A trial in the proper county might have been ordered, when the offences were committed; but no candid man will say, that, at that time, such an order would have been justifiable. The next step, therefore, was to bind the offenders over to this court, having complete jurisdiction of the case; and now, the only questions are, whether it is practicable to refer the trials to the counties, respectively, in which the offences were committed? And, if practicable, whether it can be done without great inconvenience?

On the question of practicability, two difficulties occur: 1st. Whether the indictments found at this court, can be transferred to a special court?(*a*)

(*a*) 3 Dall. 17, 18, was cited on this point.

And 2d. Whether the motion is not too late? for as "the indictment ought to be considered as inseparably incident to the trial, and in truth a part of it" (Fost. C. L. 235–9), can the trial be commenced here, and be terminated elsewhere?

But even if it were practicable, on legal principles, to direct a special court, can it be thought convenient or safe, in the present state of Northampton and Bucks counties, to do so? It is evident, that nothing but an armed force has recently been sufficient to quell the insurrection, and to arrest the insurgents; and we hope, that it will never be expected from the exercise of a judicial discretion, that a court of justice shall be voluntarily placed in a situation, where the execution of its functions, and the maintenance of its authority, must depend on the same military auxiliary. Upon both grounds, however, we think the motion ought to be rejected.

Motion refused.

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*515] *United States *v.* Fries.

Jury.—New trial.

The court may direct any number of jurors to be summoned, in view of the particular circumstances under which the *venire* is issued.

A new trial was granted, in a capital case, on the ground, that one of the jurors had, before the trial, made declarations manifesting a bias against the prisoner, which was not known to him at the time the jury was impannelled.[1]

Indictment for treason, by levying war against the United States, at Bethlehem, in the county of Northampton. The prisoner, after a trial that lasted fifteen days,(*a*) was convicted: whereupon, *Lewis* and *Dallas*, his counsel, moved for a new trial, on two general grounds. 1st. That there had been a mis-trial. 2d. That there had not been an unbiassed and impartial trial.

I. The facts, on the first ground, appeared to be these: A *venire*, tested the 11th of October 1798, and returnable the 11th of April 1799, had issued, by which the marshal was commanded to summon twenty-four grand jurors, and "a number of honest and lawful men of your said district, not less than forty-eight, and not exceeding sixty, to serve as petit-jurors." Annexed to

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(*a*) The length of the trial introduced the question, how far the court could order an adjournment in a capital case? The principle of necessity, and the recent precedents in England, in the cases of Rex *v.* Hardy and Rex *v.* Tooke, were considered by the court, and acted upon. The jury were, however, kept together in the same room at a tavern, during the times of adjournment; and once (on Sunday) were taken for recreation, in a carriage, into the country; but still remaining under the charge of an officer and within the jurisdiction of the court.

[1] See United States *v.* Gibert, 2 Sumn. 48; wherein Judge Story says, that there were circumstances in this case, which greatly weaken, if they do not impugn its authority. It will be found, upon examination, that not a single one of the citations justifies the doctrine contended for. The counsel for the government admitted the power of the court to grant a new trial, in capital cases; so that the point, in fact, was not argued; and the judges were divided in opinion as to the propriety of granting it, for the cause shown. But the power is asserted, nevertheless, in subsequent cases. United States *v.* Harding, 1 Wall. Jr. C. C. 127; United States *v.* Keen, 1 McLean 429; United States *v.* Conner, 3 Id. 573; United States *v.* Macomb, 5 Id. 286.

this *venire*, the marshal, in due form, made a return of the whole number of sixty jurors, all of whom were summoned from the city and county of Philadelphia: and on a separate paper, signed by him, he returned an additional number of seventeen jurors, summoned from the county of Northampton, and of twelve jurors, summoned from the county of Bucks; making, in the whole, eighty-nine jurors. For this latter return, however, *no *venire* had issued, nor did any special award appear on the record; and the jury that tried the prisoner, was composed of jurors from Philadelphia, Northampton and Bucks. [*516

On these facts, the *prisoner's* counsel made the following points: That although it was not usual to grant a new trial in a capital case, it was, unquestionably, in the power of the court to do it. (3 Bl. Com. 391; 1 Burr. 394; 2 Str. 968; 6 Co. 14.) That before any process for the trial issued, the act of congress contemplates a decision of the court on the place of trial, the number of jurors to be summoned from the proper county, and the other parts of the district from which the rest of the jurors shall be summoned. That the *venire* had issued before the decision of the court on these preliminaries; that the authority of the *venire* went no further than to summon sixty jurors; and that sixty jurors being actually summoned and returned from Philadelphia county alone, the authority of the writ was executed. That neither the act of assembly of Pennsylvania, nor the common law of England, would furnish a power or precedent for returning a greater number of jurors than the *venire*, or an order of the judges, authorized. (2 State Laws, 262, § 4, 5; 3 Bac. Abr. 739; Co. Litt. 155 *a*; 2 Hale H. P. C. 263; Kelyng 16; 2 Dall. 340; 4 Bl. Com. 344; 3 Ibid. 352; Co. Litt. 155 *a*; 21 Vin. Abr. 472; 6 Co. 14.) That, therefore, a greater number of jurors have been returned than the *venire* directed, or the judges ordered; and that there was no authority at all for summoning the jurors from the counties of Bucks and Northampton.

That even supposing the 29th section of the judicial act could have the effect of a *venire*, that effect could extend no further, than to authorize the marshal to summons jurors from the county, in which the crime of the particular offender under trial is charged to have been committed; but the marshal had summoned the jurors from other counties; and in fact, the prisoner had been tried by jurors from the three counties. See 4 Hawk. P. C. c. 27, p. 136; 2 Hale 260; 2 Hawk. c. 41, § 2, p. 376; 4 Hawk. 171; 3 Bac. Abr. 754; Doug. 591.

That criminal prosecutions are not within the statutes of *jeoffaille*; the exception appears on the record; it may be taken advantage of, at any time; and for any mis-trial, on account of jury process, as well as on any other account, the verdict must be set aside. 4 Bl. Com. 369; 2 Hawk. c. 27; 1 Ld. Raym. 141; 4 Hawk. c. 31, § 4, p. 240; Ibid. c. 47, § 12, p. 464–5; Ibid. c. 27, § 104, p. 175–6; Law of Errors, 65; 4 Hawk. c. 25, § 24, p. 16; Ibid. c. 35, § 28, p. 17.

*That the *venire* for summoning the jurors on the trials in the year 1794, did not restrict the marshal, as the present does, not to exceed sixty; but required him, generally, to return "a number of honest and lawful men of your said district, not less than forty-eight (whereof twelve shall be of the said county of Allegheny) to serve as petit jurors;" and this mandate gave [*517

the marshal the discretion referred to by Judge PATERSON, as having been properly exercised. 2 Dall. 335.

II. The facts on the second ground in support of the motion for a new trial were, that Rhodes, one of the jurors, after he had been summoned as a juror, declared at several places, at several times, and to several persons, in substance, as follows: "That he was not safe at home for these people (meaning the insurgents); that they ought all to be hung, and particularly, that Fries must be hung." The juror was confronted with the witnesses who attested these declarations, and denied them,(*a*) as pointed particularly at Fries; but admitted that he had made use of general expressions, indicative of his disapprobation of the conduct of the insurgents.

On these facts, the counsel for the prisoner admitted, that the proper time for taking this objection, would have been, when the juror was called to be sworn, had they been apprised of it; but they insisted, that what would have been good cause of principal challenge, if known, is good cause to set aside a verdict, if not known; and that the previous hostile declarations of a juror would be a good cause of challenge. 11 Mod. 119; Salk. 645; 3 Bac. Abr. 258–9; *Cooke's case*, 4 St. Trials 743.

The answers given by *Rawle*, the attorney of the district, and *Sitgreaves*, in support of the verdict, were to the following effect:

I. That the *venire* and act of congress, furnished a sufficient authority to the marshal for both returns of jurors: and that, in fact, the district judge had given a verbal order, subsequent to the *venire*, for returning those additional jurors, who were summoned from the counties of Bucks and Northampton.(*b*)

That after having challenged the poll, the party was too late to challenge the array. (Co. Litt. 158; 12 Mod. 567; Ld. Raym. 884.)

*518] That the *venire*, on the English authorities, is in itself a *limitation, directing 24 to be returned; and yet for convenience, a greater number is always summoned. (3 Bac. Abr. 245, 276; Cro. Jac. 467; 2 Trials per Pais 599; *Lord Russell's case*, 3 St. Trials 707; *United States* v. *The Insurgents*, 2 Dall. 335.)

That if a person, not summoned at all, gives the verdict, the verdict will be bad; but where the whole of the jurors have been summoned by the marshal, an exception, even before trial, ought not to prevail. There were, in fact, only 50 of the 89 persons who were summoned, that did attend; and the *venire* is not exceeded by that number. (4 Hawk. c. 41; 1 Vol. Acts of Congress 58; Doug. 591.)

That there is, in substance, an award of the jury by the court, after issue was joined between the United States and the prisoner, as appears by the clerk's indorsement on the indictment; and the names of the twelve jurors who tried the indictment, were duly notified to the prisoner.

(*a*) It was doubted, whether the juror was a competent witness on this question; but the Court thought, that though he could not be compelled to give testimony, he might give it, if he pleased; and, accordingly, he was admitted, at his own request. On the examination, however, he appeared very incorrect in his recollection of facts, though it was agreed, on all hands, that he was an upright man.

(*b*) The district judge certified this fact, during the argument.

II. That although the power of the court to grant a new trial in a capital case could not be denied, such a new trial had been seldom, if ever, granted; and cause of challenge to a juror ought to be very cautiously received as a ground for setting aside a verdict. That, in this case, if the court thought there was no injustice, there ought to be no new trial. 2 Burr. 936.

That the declarations of the juror related to the general transaction; they were not applied to the issue he was sworn to try; and they were not personally vindictive as to Fries. 21 Vin. Abr. "Juries"; Co. Litt. 157 *b*; Trials per Pais 189; 2 Roll. Abr. 657; 4 St. Trials 748; 21 Vin. Abr. "Trial" 266; 1 Salk. 153; *Respublica* v. *Clifton*, in the Supreme Court of Pennsylvania, Pamphlet.

After a solemn consideration of the subject, IREDELL, Justice, delivered his opinion in favor of a new trial, on the second ground of objection, that one of the jurors had made declarations, as well in relation to the prisoner personally, as to the general question of the insurrection, which manifested a bias, or pre-determination, that ought never to be felt by a juror. He added, that he did not regard the first ground of objection as insurmountable; but deemed it unnecessary to give a decisive opinion on it.

PETERS, District Judge, did not think that either objection ought to prevail. He thought, that the *venire* and returns of the jurors, were authorized by principle and precedent; and that the declarations of Rhodes were such as might naturally be made in relation to the insurrection, without manifesting a particular hostility towards the prisoner, or leading to a conviction in spite of any evidence or argument, that might *occur on [*519
the trial. As, however, the consequence of dividing the court, would be a rejection of the motion; and as the interests of public justice, and the influence of public example, would not be impaired by the delay of a new trial, the district judge determined to acquiesce in the opinion of Judge IREDELL.

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