*United States, Plaintiffs in error, *v.* Tench Ringgold.

Special allocatur.—Marshal's poundage.—Liability of the United States for costs.

On the opening of the record for the argument of this case, it was found, that the sum in controversy was less than the amount which, according to the act of congress, authorizes a writ of error, except on a special *allocatur*, from the circuit court of the district of Columbia to this court. The provisions of the law permit writs of error to be sued out without such *allocatur*, when the sum in controversy amounts to $1000 and upwards.

On the application of the counsel, stating the questions in the case were of great public importance, and were required to be determined, in order to the final settlement of other accounts in which the same principles were involved, the court gave the special *allocatur*.

The marshal of the district of Columbia, upon the settlement of his accounts at the treasury, claimed an allowance and credit by the United States, for the sum of $1111.02, being the amount of his poundage fees on a *capias ad satisfaciendum*, against John Gates, at the suit of the United States, and upon which Gates was arrested by the defendant, as marshal, and committed to jail, and afterwards discharged by order of the United States.

Admitting the defendant in an execution to be liable for poundage, if the plaintiff releases or discharges him, and thereby deprives the marshal of all recourse to the defendant, there can be no doubt, that the plaintiff would thereby make himself responsible for the poundage.

By the statutes of Maryland, relative to poundage fees, in force in the county of Washington, in the district of Columbia, the marshal is entitled to poundage on an execution executed, and the fix the rate of allowance: those statutes do not designate which of the parties shall pay the poundage.

It is undoubtedly a general rule, that no court can give a direct judgment against the United States for costs, in a suit to which they are a party, either on behalf of any suitor, or any officer of the government; but it by no means follows, from this, that they are not liable for their own costs. No direct suit can be maintained against the United States; but when an action is brought by the United States, to recover money in the hands of a party, who has a legal claim against them for costs; it would be a very rigid principle, to deny to him the right of setting up such claim in a court of justice, and turn him round to an application to congress. If the right of the party is fixed by the existing law, there can be no necessity for an application to congress, except for the purpose of remedy; and no such necessity can exist, when this right can properly be set up by way of defence, to a suit by the United States.[1]

The discharge, in this case, is absolute and unconditional; and the marshal had no authority to hold the defendant in custody afterwards; admitting Gates to have been liable for these poundage fees, the marshal's power or right to compel payment from him, was taken away by authority of the United States, the plaintiff in the suit; and the right of the marshal to claim his poundage fees from them, is thereby clearly established.

*Error to the Circuit Court of the district of Columbia and county of Washington. [*151

This was an action of *assumpsit*, instituted by the United States, in the circuit court, to recover the sum of $345, money of the plaintiffs, alleged to have been received by the defendant, as marshal of the district of Columbia. The defendant pleaded *non assumpsit*, and issue was joined thereon. The

[1] United States *v.* Mann, 2 Brock. 9. In the case of The Siren, 7 Wall. 154, the court say, that "although direct suits cannot be maintained against the United States, or against their property, yet, when the United States institute a suit, they waive their exemption, so far as to allow a presentation by the defendant of set-offs, legal and equitable, to the extent of the demand made, or property claimed; and when they proceed *in rem*, they open to consideration all claims and equities in regard to the property libelled. They then stand, in such proceedings, with reference to the rights of defendants or claimants, precisely as private suitors, except that they are exempt from costs, and from affirmative relief against them, beyond the demand or property in controversy."

counsel for the plaintiffs and defendant, submitted the following statement, subject to the opinion of the court on the law and facts:

This is an action of *assumpsit*, brought to recover the sum of $345, money of the plaintiffs, which came to the hands of the defendant, as marshal of the district of Columbia. Upon the settlement of the defendant's accounts as marshal, with the treasury, he claimed an allowance and credit for the sum of $1111.02 (see account marked A), being the amount of his poundage fees on a *capias ad satisfaciendum* against John Gates, at the suit of the United States, and upon which Gates was arrested by the defendant as marshal, and committed to jail, and afterwards discharged by order of the president of the United States. (See statement marked B.) It is agreed, that this claim was presented to the accounting officers of the treasury, before the institution of this suit, and disallowed.

Account A.

United States, Dr. June term, 1819.

To *cepi ca. sa.* v. John Gates; released from jail by order of the president of the United States	50
Writ and return	14
Poundage fees on first $26.67, at 7½ per cent.	2.00
Ditto. on residue, $36,946 at 3 per cent.	1108.38
	$1111.02

T. Ringgold, M. D. C.

Statement B.

District of Columbia, County of Washington, Circuit Court, December term 1818. United States v. John Gates, Jun., January 5, 1819. Judg-
*152] ment for sixty-five thousand dollars, *current money, damages, to be released on payment of sixty-three thousand five hundred and ninety-seven dollars and seventy-three cents, or such other sum as may hereafter be certified by the accounting officers of the treasury—costs eleven dollars and eighty-two cents. Upon which judgment execution (*ca. sa.*) was issued, to June term, 1819, and returned by the marshal with the following indorsements thereon:

Certificate of Second Auditor of amount due.

Treasury department, second auditor's office, 27 March 1819. I certify, that on settlement of the account of John Gates, Jun., late paymaster of the United States light artillery, on the 29th Octobor 1818, a balance of thirty-six thousand nine hundred and sixty dollars was found due by him to the United States, which said balance is now standing against him on the books at this office. William Lee, 2d Auditor.

Return of Marshal.

Cepi: Released by order of the president of the United States, herewith returned. T. Ringgold.

President's order of discharge.

To the Marshal of the District of Columbia. Whereas, John Gates, Junior, of the county of Albany, in the district of New York, is confined

and held in custody in the prison aforesaid, in pursuance of a certain judgment and execution obtained at the suit of the United States; and whereas, it appears to my satisfaction, that the said John Gates, Junior, is unable to pay the said debt for which he is imprisoned: Now, therefore, by virtue of the power and authority invested in the president of the United States, by an act of congress, passed the 3d of March 1817, entitled "an act supplementary to an act for the relief of persons imprisoned for debts due the United States," I, James Monroe, president of the United States, do hereby authorize you to discharge from your custody, out of the prison aforesaid, the body of the said John Gates, Junior.

Given under my hand, in the city of Washington, this fifth day of March, one thousand eight hundred and nineteen, and forty-third year of the independence of the United States. JAMES MONROE.

*The circuit court gave judgment in favor of the defendant; and the United States prosecuted this writ of error. [*153

The case was argued by *Butler*, Attorney-General, for the United States; and by *Coxe*, for the defendant.

On the opening of the record, it was found, that the sum in controversy was less than the amount which, according to the act of congress, authorizes a writ of error, except on a special *allocatur*, from the circuit court of the district of Columbia to this court. The provisions of the law permit writs of error to be sued out without such *allocatur*, when the sum in controversy amounts to $1000, and upwards.

The attorney-general and Mr. Coxe requested the court to give a special *allocatur*, *nunc pro tunc*, as the questions in the case were of great public importance, and were required to be determined, in order to the final settlement of other accounts in which the same principles were involved. The court, on these representations, gave the special *allocatur*.

The *Attorney-General*, for the plaintiffs in error, contended, that the judgment of the circuit court was erroneous, for the following reasons. 1. By the laws of Maryland (to which the acts of congress refer), the defendant, and not the plaintiff, is liable to the sheriff or marshal for his poundage on the service of a *ca. sa.* 2. Whatever may be the rule in respect to individuals, the United States, under the general terms employed in the acts of congress and of the state of Maryland, are not liable to the officer.

1. The marshal of the district of Columbia is not entitled to poundage fees, under the acts of congress of 1801 and 1803. By those acts, the same fees are given to that officer, as are allowed for similar services by the laws of Maryland. No poundage fees are allowed in a case of this kind, by the Maryland law. It has been gravely questioned, whether the law of England, which gave poundage fees, was ever in force in Maryland; the best opinions are, that it never was in force in that state, and therefore, no right to such fees can exist. No case in which such fees have been allowed, is to be found. The sheriff (and *by this same rule, the marshal of this district) is not entitled, in Maryland, to any fees, as poundage, unless by the special provisions of some statute. [*154

The statutes of Maryland, in reference to the fees of the sheriff, are those

of 1753 and 1759. Upon those statutes, there have been contradictory decisions in the courts of Maryland. In 1805, it was decided, that the defendant, and not the plaintiff, was liable for the poundage fees of the sheriff; and under the authority of this decision, the circuit court of this district decided differently from their decision in this case. Afterwards, in the case of *Mason* v. *Muncaster*, decided in 1829, the circuit court of the district of Columbia adjudged that the plaintiff was liable to the marshal for such fees.(*a*)

(*a*) The reporter has great satisfaction in annexing to the report of this case, the opinion of Mr. Justice CRANCH, in the case of Mason *v.* Muncaster, delivered March 12th, 1829.[1]

This case comes before the court on a motion to quash two writs of *fieri facias*, levied on certain lands of the defendant, the sale of which was postponed by agreement of the parties, in order that the opinion of the court might be had, whether the marshal is entitled to poundage fees, on levying an execution upon lands which are not sold.

By the act of congress of 27th February 1801, § 9, the marshal was entitled to receive the same fees, perquisites and emoluments, as the marshal of the United States for the district of Maryland. By the act of 3d March 1807, the marshal, for services not enumerated in that or some other act of congress, is entitled to such fees as were, on the first Monday of December 1800, allowed, by the laws of Maryland, to a sheriff, for like services. The poundage fee is not expressly given or regulated by any act of congress. By the stat. Westm. I., c. 26, no officer shall take any reward to do his office, but of the king. And by the 29 Eliz., c. 4, no sheriff shall "receive or take of any person, for serving an execution on the body, lands, goods or chattels of any person, more or other consideration or recompense, than twelve pence of and for every twenty shillings that he shall levy or extend, and deliver in execution, or take the body in execution for, by virtue and force of any such extent or execution." This act does not contain the word poundage. The 3 Geo. I., c. 15, § 14, uses the word "poundage," allowed by that act; and (§ 16) "for ascertaining the fees for executing of writs of *elegit*, so far as the same relate to the extending of real estates and for executing writs of *hab. fac. poss. aut seisinam*," it is enacted, "that it shall not be lawful for any sheriff, by reason or color of office, or by reason or color of executing any writ or writs of *hab. fac. poss. aut seisinam*, to ask, demand or receive any other or greater consideration, fee, gratuity or reward, than twelve pence of every twenty shillings of the yearly value." By § 17, reciting that "it often happens, that small sums only remain due upon judgments, but upon executing writs of *ca. sa.*, the sheriff takes for his fees poundage for the whole money for which such judgments are ntered," it is enacted, that "poundage shall in no case be demanded or taken upon executing any writ of *ca. sa.* or upon charging any person in execution by virtue of such writ, for any greater sum than the real debt *bonâ fide* due and claimed by the plaintiff," under the penalty of treble damages to the party aggrieved; but the statute does not say, whether the party aggrieved be the plaintiff or defendant, nor which of them is bound to pay the poundage. The 8 Geo. I., c. 25, § 3, recites, that "by the 23 Hen. VIII., there was due to his majesty a fee of one halfpenny in the pound upon every recognisance, to be paid on sealing the first process, which is very heavy on every prosecutor on every such recognisance; and that the fees taken by sheriffs in getting an extent or execution on such recognisances are very expensive, and enacts, that the prosecutor shall mark the sum to be extended or levied, which sum the officer shall insert in the writ to be only extended or levied, and no more, and on which the poundage of one halfpenny shall be paid. And by the fifth section, the sheriff upon

[1] 3 Cr. C. C. 403.

United States v. Ringgold.

*If there is no decision of the courts of Maryland on the question, this court will examine the law of that state, and will *decide what it is. They will there find no warrant for the claim of the defendant. [*56

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such recognisances shall take only the same fees as are appointed by the 3 Geo. I. By the act of Maryland of 12th October 1753, c. 22, it is enacted, "that no officer, by reason or color of his office, shall have, receive or take of any person, any other or greater fees than by this act are allowed; to the sheriff serving an attachment or execution, seven pounds of tobacco; and if any execution be for above one hundred, and under five hundred pounds of tobacco, then thirty-seven pounds of tobacco; if it exceed five hundred pounds, then fifty-seven pounds, and so on; and if any execution be for money, the sheriff to have at the rate of seven per centum for the first five pounds, and three per centum for the residue, in the same specie the execution is issued for. The act of 1779, c. 25, gives "to the sheriff the same fees on a *fieri facias* or replevin, as upon attachments;" "for all goods and chattels which he shall attach and take into his possession, or wherewith he shall be chargeable, the same fees as on execution." And by § 5, "on the service of any execution for money or tobacco, the sheriff, for the service of the same, shall charge and receive on the same, at the rate of ten per centum for the first five pounds, &c., and five per centum for the residue; and no sheriff shall be chargeable in any action of escape, for more than the sum of money really due or indorsed to be received on the execution in discharge thereof. By the act of 1790, c. 59, § 2, "instead of the poundage fees to the sheriff by the first-mentioned act (1779, c. 25), he be allowed only at the rate of seven and a half per centum for the first ten pounds, and at the rate of three per centum for the residue; and where execution or attachment shall be made on lands held for years or a greater estate, only half of the poundage fees; but if the estate be not chargeable by appraisement and delivered to the plaintiff, or by sale of the sheriff, one quarter part of the poundage fees only shall be chargeable."

If the defendant be taken on a *ca. sa.*, who is, in the first place, liable to the marshal for his poundage—the plaintiff or the defendant? Les Viscount de London *v.* Mitchell, 1 Roll. 404 (1616), was debt by the sheriff against the plaintiff in the execution, for his poundage fees upon a *ca. sa.* Lord Coke said, "if he has not an action of debt, he has no remedy; and therefore, forasmuch as the words are, that he shall have, receive and take, this makes it a duty in him, and so the action lies: *quod fuit concessum per curiam.*" Welden *v.* Vesey, Poph. 173, debt by the sheriff against the creditor, for seven pounds and six pence, for poundage on one hundred and eighty-one pounds, for which the debtor was taken on a *ca. sa.* It was decided, that the sheriff should have five per centum on the first one hundred pounds, and two and a-half on the residue: and Whitelocke, J., was of opinion, that the sheriff may refuse to do execution, until the levying money be paid to him: but that point was not decided. The sheriff recovered his poundage against the plaintiff in the following cases. Brockwell *v.* Lock, 5 Mod. 97; Peacock *v.* Harris, 1 Salk. 331; Jayson *v.* Rash, Ibid. 209; Lyster *v.* Bromley, Cro. Car. 286; Earl *v.* Plummer, 12 Mod. 124; Tyson *v.* Paske, 1 Salk. 333; Pope *v.* Hayman, Holt 317; Suliard *v.* Stampe, Moore 468; Gurney and Somes' Case, Cro. Eliz. 336. In all these cases, the action was against the original plaintiff in the execution; and there is no case in which the marshal or sheriff brought his action for poundage against the original debtor, in the execution. In Earl *v.* Plummer, the action was brought by the sheriff, for his poundage on executing an erroneous writ, and the court said, "that if the party himself will take out such an erroneous writ, he shall not, under pretence thereof, cheat the sheriff of his fees." Woodgate *v.* Knatchbull, 2 T. R. 148, was an action on the case, under the 29 Eliz. c. 4, by the defendant in a *fi. fa.*, against the sheriff, for damages, for taking more than his poundage, for levying the *fi. fa.*; verdict for the plaintiff, for fifty-four pounds and fourteen shillings; rule to show cause why the verdict should not be set aside. The

*2. But whatever may be the law as to individuals, the government is not liable, unless specially declared to be so by statute. *The acts of congress do not profess to give the marshal fees of this description. They are entirely silent in reference to them; and

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counsel, in arguing in support of the rule, said, "the mischief intended to be remedied by the act of Eliz., was the negligence of sheriffs in executing process; persons who have recovered judgments, being obliged to pay money to sheriffs, to induce them to do their duty properly, in levying the sums recovered. This was to be remedied, by allowing the sheriff so much in the pound, for the sum levied, as a stimulus to him; but to prevent him from charging the plaintiff in the original suits, with more than was allowed, the act gave the two remedies therein specified. They, therefore, were the only persons intended to be benefited by such pecuniary compensations, and not the defendants." BULLER, J., says, "if the plaintiff choose to have an auction, he must defray the expenses out of his own debt to be levied; for there is no color to charge the defendant with it. The sheriff can only levy on the defendant, that sum which is given by the judgment of the court." The judgment was for two hundred pounds; but the *fi. fa.* was indorsed to levy one hundred and sixteen pounds, besides the costs of levying and sheriff's fees. He said further, "then the only remaining question is, whether, in this case, it appears, that the plaintiff is the party grieved? The first execution was what struck me as a ground for this doubt. The judgment there was for two hundred pounds. The sheriff was at liberty, by the judgment of this court, to raise two hundred pounds, but no more; and the expenses of levying must have been paid out of the debt. For, in actions on simple contract, and judgment for a debt certain, the expenses of levying must be paid by the plaintiff, and not by the defendant; so that, if the sheriff overcharge, the plaintiff is the sufferer. But if the judgment be for a penalty, the plaintiff has a right to receive the whole of his debt, independent of the expenses of the execution, and in those cases, the defendant is the party injured by the sheriff's taking more than he ought." GROSE, J., said, "at common law, no fee whatever was allowed to the sheriff; then, if he be entitled to receive any, it must be by act of parliament. Now, by looking into the act, it appears clearly to have been the intention of the legislature, that the sheriff should be paid in proportion to the sum levied, out of the sum levied, and that the sheriff should only levy what was really due." In Bonafous *v.* Walker, 2 T. R. 126, which was debt against the sheriff for an escape, the court decided, that the plaintiff was entitled to recover against the sheriff all that he had a right to receive from the debtor who had escaped, including the poundage; and BULLER, J., said, "for poundage is part of the debt, and the prisoner could not have been discharged out of the execution, without paying the poundage, and therefore, if the plaintiff was entitled to recover at all, he was entitled to recover the poundage as well as the debt." Lake *v.* Turner, 4 Burr. 1981, was debt by the sheriff for poundage on a *ca. sa.* in favor of defendant against Gibbs, who was arrested by plaintiff. The only ground of defence was, that the *ca. sa.*, was prosecuted at the instance and for the benefit of the king, who, not being named in the stat. 29 Eliz. c. 4, is not bound by it, and not liable for poundage. But this defence was, upon demurrer, adjudged bad, and the plaintiff had judgment. In Alchin *v.* Wells, 5 T. R. 470, it is held, that if the sheriff levy under a *fi. fa.* he is entitled to poundage, though the parties compromise before he sells any of the defendant's goods; and if the sheriff, notwithstanding the compromise, satisfy himself for the poundage on the debt, the court will not rule him to return the writ. Fisher *v.* Beatty, 3 Har. & McHen. 148, was an action of replevin for goods taken by the defendant, as sheriff, to satisfy his poundage and other fees due on a writ of *fi. fa.* and a *venditioni exponas*, which last writ was countermanded before execution, and so returned by the sheriff, before he took the goods in execution for his poundage. The general court decided, that the sheriff could not execute, in that case, for his poundage, and that the defendant in an execution is not liable to the sheriff for his pound-

therefore, no right to them exists. They cannot then be set off in an account with the United States. The government is not included in any general statute, but there must be an express provision in a statute, to make it operate upon the United States. *The Antelope*, 12 Wheat. 550. No costs can be awarded against the United States. *United States* v. *Hooe*, 3 Cranch 73. Also, 1 Salk. 331 ; 4 Burr. 1981. The defendant should have applied to the legislature for relief. If the services were such as to entitle him to compensation, and this is not denied, they would have been allowed to him by congress. This was done on the application of the marshal of the district of Maine, in a similar case.

Coxe, for the defendant, contended, that the law of Maryland was, that poundage should be paid to the sheriff, in case of the discharge of the defendant ; and that the adjudged cases upon this point, were conclusive. He referred to the opinion of the circuit court, in the case of *Mason* v. *Muncaster*, *for the authorities on the point, both in Maryland and in England. [*159

On the second point presented by the attorney-general, he argued, that the construction of the acts of congress contended for in behalf of the defendant, was of equal importance to all the officers of the courts of the United States. No costs could be allowed to the clerks, if none were to be allowed to the marshal. The exception in favor of the United States, as to

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age. In Maddox *v.* Cranch, 4 Har. & McHen. 343, the general court decided, that the plaintiff in an attachment was liable for poundage. In Stewart *v.* Dorsey, 3 Har. & McHen. 401, the defendant had been taken in execution by the plaintiff (the sheriff), at the suit of the state, who agreed to release the defendant, on his paying all legal costs, and the defendant promised to pay the poundage to the sheriff, who thereupon discharged him. The court gave judgment for the sheriff, in an action against the defendant upon that promise. A manuscript report of the case of Howard *v.* Justices of the Levy Court of Ann Arundel, in 1805, was cited in this court, in April 1821, in the case of Ringgold *v.* Nicholls; in which, the general court, after full argument, decided, that the defendant, and not the plaintiff, is liable to the sheriff for poundage. And upon that decision, this court (Morsell, J., absent, and the other jndges doubting), decided the case of Ringgold *v.* Nicholls. Letters were read by the counsel in that cause, from Mr. Harris and Mr. Taney, stating that the question was still open in Maryland, and from Mr. Williams, that the court of appeals had decided that the plaintiff is not liable to the sheriff when the defendant is discharged under the insolvent law.

By the consideration of all these cases, we are led to the conclusion : 1. That the plaintiff in a *ca. sa.* is liable to the marshal for his poundage, as soon as he has taken the body of the defendant in execution upon that writ. 2. That the plaintiff in a *fi. fa.* is also liable to the marshal for his whole poundage on the debt, if he levy goods to the value of the debt, whether they be sold or not. If sold, and they produce less than the debt, he can claim poundage only on the amount made. 3. The original defendant is not liable, in any form of action, to the marshal, nor to the original plaintiff, for the poundage, nor is he, or his property, liable for poundage, unless the judgment be for a sum larger than the debt due from the defendant, to be released on payment of the amount really due, with costs, for the marshal cannot, on a *fi. fa.*, make more than the amount of the judgment, nor can he detain the debtor, upon a *ca. sa.*, for more than that amount. 4. In the present case, the marshal, not having returned the *fi. fa.* may proceed to execute it for his poundage; and in this way only has the marshal a legal claim on the defendant in this cause, for the poundage; unless he shall have promised to pay it, upon a good consideration.

costs, is, that they are not liable to pay the defendant's costs. This is a hardship; but it is admitted to be the law. The claim in this case is not affected by that rule. By the provisions of the acts of congress, the costs of the marshal are required to be taxed by the circuit court, before they are submitted to the treasury. The court is, by the law, the judge of the legality of the allowances; and not the officers of the treasury, as has been asserted in the present case. It is denied, that such a right exists in the officers of the treasury; and the court has now to determine the question. During forty years, the marshals of the United States have been allowed fees for services rendered to the United States; and it is now attempted to distinguish the process for which poundage is claimed, from those which have hitherto been always allowed on the certificate of the court.

It is admitted, that the marshal must have a compensation for his services on the execution. The responsibilities are great, and they entitle him to fees. From whom was he to obtain them? Not from the defendant; he was discharged by the president, by an order for his discharge directed to the marshal. Could the marshal have detained the defendant for his fees, after this order? If, after this order, that right ceased, the United States stands in the same relation to the officer, as does any plaintiff.

An application was made to congress, by the marshal of Maine, for poundage fees, in a case similar to this now before the court, and the same were allowed by law, the law of Maine giving those fees to the sheriff. This shows the views of the legislature upon the matter.

*160] *Thompson, Justice, delivered the opinion of the court.—The United States brought a suit against the defendant, in the circuit court for the county of Washington, in the district of Columbia; and upon the trial of the cause, the following statement of facts was, by the agreement of the parties, submitted to the court for its opinion of the law thereupon.

"This is an action of *assumpsit*, brought to recover the sum of $345, money of the plaintiffs, which came to the hands of the defendant, as marshal of the district of Columbia. Upon the settlement of the defendant's accounts, as marshal, with the treasury, he claimed an allowance and credit for the sum of $1111.02, being the amount of his poundage fees on a *capias ad satisfaciendum*, against John Gates, at the suit of the United States, and upon which Gates was arrested by the defendant, as marshal, and committed to the jail, and afterwards discharged by order of the United States. It is agreed, that this claim was presented to the accounting officers of the treasury, before the institution of this suit, and disallowed." Upon this statement of facts, the circuit court gave judgment for the defendant.

The matter in dispute, in this case, being under the value of $1000, a writ of error has been specially allowed, according to the provisions of the act of congress of April 2d, 1816 (3 U. S. Stat. 261), and the cause comes here for revision.

Upon the argument here, it has been contended by the attorney-general, on the part of the United States: 1. That by the laws of the state of Maryland, to which the acts of congress refer, the defendant, and not the plaintiff, is liable to the sheriff or marshal, for his poundage, on the service of a

capias ad satisfaciendum. 2. That whatever may by the rule in respect to individuals, the United States, under the general terms employed in the acts of congress and of the state of Maryland, are not liable to the officer.

That the defendant is legally entitled to the fees claimed by him as poundage, upon the execution served upon Gates, cannot be denied. By the act of congress of the 27th of February 1801, § 9 *(2 U. S. Stat. 106), it is declared, that the marshal shall be entitled to receive, for his services, [*161 the same fees, perquisites and emoluments, which are by law allowed to the marshal of the United States for the district of Maryland. And by the act of congress of the 3d of March 1807 (2 U. S. Stat. 430), provision is made for certain specified services by the marshal, not, however, including poundage fees, but containing this general provision, "that for such services as are not enumerated in this or some other act of congress, the marshal shall receive, for for services performed in the county of Washington, the like fees and compensation as, by the laws of Maryland in force on the first Monday in December 1800, were allowed to a sheriff of a county of Maryland for the like services."

By the Maryland law of 1799, ch. 25, § 5, the sheriff, on the service of any execution for money or tobacco, shall charge and receive on the same at the rate of ten per centum for the first five pounds, and at the rate of five per centum for the residue; and no sheriff shall be chargeable for any action of escape for more than the sum of money really due, or indorsed to be received on the execution in discharge thereof. If any doubt could exist whether an execution against the body was included, or intended to be included, under the general term "*any* execution for money or tobacco;" that doubt is removed, by the provision in relation to escapes, which can apply only to cases where the party was held under an execution against the body. This provision as to poundage, is modified by a subsequent act of 1790, ch. 59, § 2, which declares, that instead of the poundage fees to the sheriff, by the act of 1779, he be allowed only at the rate of seven and a half per centum for the first ten pounds, and at the rate of three per centum for the residue; and this is the rate at which the marshal has charged his poundage in the present case.

Although the right of the marshal to poundage on a *capias ad satisfaciendum*, is clearly established by these laws; yet they are silent with respect to the party who is liable to him for the payment thereof. In the case of *Fisher* v. *Beatty*, 3 Har. & McHen. 148, in the court of appeals of Maryland, the question was made, whether, on an execution, the defendant is liable to the sheriff *for his fees; and the court decided, that he was [*162 not; the grounds upon which that decision rested are not stated. And in two other cases in the same court, *Stewart* v. *Dorsey*, 3 Har. & McHen. 401; and *Maddox* v. *Cranch*, 4 Ibid. 343, the same question arose, but accompanied with circumstances that did not call for a direct decision upon the point, though, in the latter case, the court say, the fees must be paid by the person who issues the attachment. From these cases, it would seem reasonable to conclude, that, in the courts in Maryland, it is held, that the plaintiff in the execution, and not the defendant, is liable to the sheriff for his poundage.

If there is no statute making the defendant responsible for such poundage, it follows, as matter of course, that it must be paid by the plaintiff;

and if the defendant is liable, and cannot pay, the plaintiff will be responsible. By the common law, costs are not recoverable against the opposite party; and he who requires the service to be performed, must pay all legal charges for such service. It may not, however, be amiss to observe, that, although, from the cases referred to in the court of appeals in Maryland, it is fairly to be inferred, that, according to the construction there given to the statutes of that state on this subject, the plaintiff, and not the defendant, is liable to the sheriff for the poundage fees on a *capias ad satisfaciendum;* yet a contrary conclusion may well be drawn, if not necessarily implied, in the provision contained in the 4th section of the act of 1779, ch. 25, which declares, that where any writ of *capias ad satisfaciendum* shall issue, poundage shall in no case be demanded or taken, upon execution of such writ, or upon charging any person in execution by virtue of such writ, for any greater sum than the real debt *bonâ fide* due and claimed by the plaintiff, amounts to; which sum the clerk, or the plaintiff, his agent or attorney, shall and are hereby obliged to make and specify, on the back of such writ, and no sheriff shall be obliged to execute such writ, before such indorsement; and that the defendant in the execution is liable for such poundage, is strongly fortified by the recital in this section: "whereas, it often happens that small sums only remain due upon judgments given for great sums and penalties, and, nevertheless, in these cases, upon executing of writs of *capias ad satisfaciendum*, the sheriff demands and takes for his fee poundage for *163] *the whole money for which such judgments are entered; for remedy whereof, be it enacted, &c."

But it is not necessary, in the present case, to decide whether in any, and in what cases, the defendant in the execution would be liable to the marshal for his poundage fees. For, admitting the defendant to be liable; if the plaintiff releases or discharges him, and thereby deprives the marshal of all recourse to the defendant, there can be no doubt, that the plaintiff would thereby make himself responsible for the poundage.

2. The next inquiry is, whether the United States, in this respect, stands upon a different footing than private parties. It is said, the United States are not included in any general statute; but that express provision must be made, or the statute cannot apply to them. But a sufficient answer to this is, that the statutes of Maryland do not, in terms, apply to individuals or private parties, or designate which of the parties is liable for the marshal's poundage. They only settle, that the marshal is entitled to poundage; and fix the rate of allowance. It is, undoubtedly, a general rule, that no court can give a direct judgment against the United States for costs, in a suit to which they are a party, either on behalf of any suitor, or any officer of the government. 12 Wheat. 550. But it by no means follows from this, that they are liable for their own costs. No direct suit can be maintained against the United States; but when an action is brought by the United States, to recover money in the hands of a party, who has a legal claim against them, it would be a very rigid principle, to deny to him the right of setting up such claim in a court of justice, and turn him round to an application to congress. If the right of the party is fixed by the existing law, there can be no necessity for an application to congress, except for the purpose of remedy. And no such necessity can exist, when this right can properly be set up by way of defence, to a suit by the United States.

This rule is fully recognised by this court in the case of the *United States* v. *Macdaniel*, 7 Pet. 16. That was, like this, an action brought to recover a balance, certified at the treasury, against the defendant, and he set up, by way of defence, a claim which had been rejected at the treasury, for services as agent for the payment of the navy pension fund; and to which claim this *court thought him equitably entitled. It is there [*164 said by the court, that this action is for a sum of money which happens to be in the hands of the defendant, and the question is, whether he shall be required to surrender it to the government, and then petition congress on the subject. The government seeks to recover money from the defendant, to which he is equitably entitled for services rendered. This court cannot see any right, either legal or equitable, in the government, to the money, for the recovery of which this action is brought.

If anything more could be wanted to show how entirely unsupported the present suit is, it will be found in the discharge given by the president of the United States, of Gates, who was held in custody by the marshal, under the execution upon which the poundage is now claimed. This discharge, directed to the marshal, after reciting that Gates had complied with the requisites of the act of the 3d of March 1817, authorized him to discharge the said Gates from his custody, and out of the prison. This law (3 U. S. Stat. 399) gives to the president full power to order such discharge, upon such terms and conditions as he may think proper, and the party shall not be imprisoned again for the same debt. The discharge in this case is absolute and unconditional, and the marshal had no authority to hold him in custody afterwards. So that, admitting Gates to have been liable for these poundage fees, the marshal's power or right to compel payment from him, was taken away by authority of the United States, the plaintiff in the suit. And the right of the marshal to claim his poundage fees from them, is thereby clearly established. The judgment of the circuit court is accordingly affirmed.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed.

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*John Lutz, Plaintiff in error, *v.* Otho M. Linthicum. [*165

Award.—Responsibility of agent.—Presumption.

In the circuit court of the county of Washington, Linthicum instituted an action of covenant, on articles of agreement, by which Lutz covenanted that Linthicum should have peaceable possession of a certain house in Georgetown, and retain and keep the same for five years; Linthicum was evicted by Lutz, before the time expired. The articles were spread upon record, by which it appeared, that they were made "by and between John Lutz, of, &c., and agent for John McPherson, of Fredericktown, in the state of Maryland, of the one part, and Otho M. Linthicum, of Georgetown, &c., of the other part;" and it is witnessed, "that the said John Lutz, agent as aforesaid, has rented and leased," &c., the premises to Linthicum; and on the other hand, Linthicum covenants to pay the rent, &c., as stated in the declaration; there was no covenant in the lease, by Lutz, for quiet enjoyment, as stated in the declaration; but the latter was founded upon the covenant implied by law, in case of demises. The articles concluded with