The *caveat* entered by Wilson is, therefore, maintainable under the land-law of Virginia, since his title had accrued when it was entered. The court is of opinion, that the district court of Kentucky has erred, in deciding that the defendant in error hath the better right, and that their judgment ought to be reversed and annulled. In pursuance of this opinion, I am directed to deliver the following judgment.

Judgment of the Court.—"Whereupon, it is considered by the court, that the plaintiff, Wilson, hath by law the better right to the land in controversy, and that the judgment of the Court of the United States for the district of Kentucky be reversed and annulled; and that the register of the land-office in Kentucky do issue a grant to the said Wilson, upon his survey of 30,000 acres of land, registered in the said office, according to the metes and bounds thereof, and *that the said plaintiff do also recover his costs expended in this court, and in the said district court, all which *103]
is ordered to be certified to the said district court, and the said register of the land-office accordingly."

In the case of *Mason* v. *Wilson*, the judgment of the court was, "that the defendant Wilson hath by law the better right to the land in controversy, and that the judgment of the Court of the United States for the district of Kentucky be reversed and annulled; and that the said *caveat* be dismissed, and that the defendant Wilson recover his costs," &c.(*a*)

The Peggy.

United States *v.* The Schooner Peggy.

Definitive decree.—Judicial notice.—High seas.

A final condemnation in an inferior court of admiralty, where a right of appeal exists, and has been claimed, is not a definitive condemnation, within the meaning of the 4th article of the convention with France, signed September 30th, 1800.

The court is as much bound, as the executive, to take notice of a treaty, and will reverse the original decree of condemnation (although it was correct when made), and decree restoration of the property, under the treaty made since the original condemnation.

Quære? as to the extent of the term high seas?

Error to the Circuit Court for the district of Connecticut, on a question of prize. The facts found and stated by Judge Law, the district judge, were as follows:

"That the ship Trumbull, duly commissioned by the President of the United States, with instructions to take any armed French vessel or vessels, sailing under authority, or pretence of authority, from the French republic, which shall be found within the jurisdictional limits of the United States, or elsewhere on the high seas, &c., as set forth in said instructions; and said ship did, on the 24th day of April last (April 1800), capture the schooner Peggy, after running her ashore, a few miles to the westward of Port au Prince, within the dominions and territory of General Toussaint, and has brought her into port, as set forth in the libel; and it further appears, that

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(*a*) As to the necessity of giving notice in the form prescribed by law, see Evans's Essay on Bills, 67, 68, 69, 70, 71, and Nicholson *v.* Gouthit, 2 H. Black. 609.

all the facts contained in the claim are true;(a) whereupon, this court *are of opinion, that as it appears, that the said schooner was solely upon a trading voyage, and sailed under the permission of Toussaint, [*104 with dispatches for the French government, under a convoy furnished by Toussaint, with directions to touch at Leogane for supplies, and that the arms she had on board must be presumed to be only for self-defence; neither does it appear she had ever made, or attempted to make, any depredations, and that she was not such an armed vessel as was meant and intended by the laws of the United States should be subject to capture and condemnation; and that the situation she was in, at the time of capture, being aground within the territory and jurisdiction of Toussaint, she was not on the high seas, so as to be intended to be within the instructions given to the commanders of American ships of war: therefore, adjudge said schooner is not a lawful prize, and decree that said schooner with her cargo be restored to the claimant."

From this decree, the attorney for the United States, in behalf of the United States and the commander, officers and crew of the Trumbull, appealed to the circuit court, in which Judge CUSHING sat alone, as the district judge declined sitting in the cause, on account of the interest of his son, who was one of the officers on board the Trumbull, at the time of capture, and who, if the schooner should be condemned, would be entitled to a share of the prize-money. The circuit court, on the appeal, found the following facts, and gave the following opinion and decree:

* "That David Jewitt, commander of the said public armed vessel, called the Trumbull, being duly commissioned, and instructed by [*105 the President of the United States, as set forth in the said libel, did, on or about the 23d of April last, capture the said schooner Peggy, after running her aground, about pistol-shot from the shore, a few miles to the westward of Port au Prince, called also Port Republican, on the coast of the island of St. Domingo, and afterwards bring her into port, as set forth in the libel. That at the time of the capture of the said schooner, there were ten persons aboard her. That she was then armed with four carriage-guns, being four-pounders, with four swivel-guns, six muskets, four pistols, four cutlasses, two axes, some boarding-hatchets, tomahawks and handcuffs. That she was a trading French vessel of about a hundred tons, then laden with coffee,

(a) The material facts stated in the claim are, that the schooner was the property of citizens of the French republic; that she was permitted by Toussaint to receive on board the cargo, which was on board at the time of capture; that she had dispatches from Toussaint to France; that she sailed by his authority, on the 23d of April, for France, navigated by ten men, including Buisson, the claimant, and Gillibert, the commander, and having on board four small three-pound carriage-guns, solely for defence against piratical assaults, and being under convoy of a tender, furnished by Toussaint. That on the 23d of April, she was run ashore, a few miles to the westward of Port au Prince, within the dominion, jurisdiction and territory of General Toussaint, so that she was fast and tight aground; at which time, and in which situation, the boats and crew of the Trumbull attacked and took possession of her, and got her off. That Toussaint then was, and still is, on terms of amity, commerce and friendship with the United States, duly entered into and ratified by treaty. That the schooner was on a lawful voyage, for the sole purpose of trade; and not commissioned, or in a condition to annoy or injure the trade or commerce of the United States.

sugar and other merchandise. That she had come from Bordeaux to Port au Prince, where the claimant had taken in said cargo, and from whence he sailed, on or about the said 23d day of April, with said schooner and cargo, having dispatches from General Toussaint for the French government. That the said Buisson sailed from Port au Prince as aforesaid, with the permission and direction of General Toussaint, to proceed to Bordeaux; that said schooner so sailed from Port au Prince, under convoy of an armed vessel, by order of said Toussaint, without a passport from Mr. Stevens, consul-general of the United States at St. Domingo, but that Buisson had been promised by Toussaint's brother, that one should be obtained and sent him, which, however, was not done; that said schooner had sailed from Bordeaux for Port au Prince, with fifteen men, besides eight passengers (according to the roll of equipage), armed with some guns, swivels and muskets; that said Captain Buisson was without any commission as for a vessel of war, and alleges that he was armed only for self-defence. That at the time of said capture, the guns of said schooner were loaded with canister-shot, one of which being fired, the shot fell near the bow of the Trumbull; but the said Buisson declares that said gun was fired only as a signal to his convoy. That the said Captain Buisson appeared to be in a disposition, and was prepared with
*106] force, to resist the boats which were sent from the Trumbull, to board him, a little *previous to the capture, in case of their atempting it; and that the said schooner and cargo are French property.

"Upon these facts, the court is of opinion, as follows, viz.: However compassion may be moved in favor of the claimant by some circumstances; such as that he was charged with dispatches from General Toussaint, between whom and the United States there were some friendly arrangements respecting commerce; that he was not in a capacity of greatly annoying trade, from the fewness of his men; and his allegation that he was armed only in defence; yet as the court is bound by law, which makes no such distinctions; as armed French vessels are not protected by any treaty or convention; particularly, not by the regulations between General Toussaint and the American consul; and as the said schooner Peggy was in a condition capable of annoying, and even of capturing single unarmed trading vessels, unattended with convoy; the court cannot avoid being of opinion, that she falls within the description and general design of the expression of the law, an armed French vessel.

"2d. That she was captured on the high seas: the argument taken by the claimant's counsel, from the extent of national jurisdiction on sea-coasts bordering on the country, not applying to this case, so as to acquit the said schooner; the sea-coast of St. Domingo not being neutral; not made so by any treaty or convention; but to be considered as hostile, upon our present plan of laws of defence with respect to France; as much so as any part of the coast of France, as far as regards French armed vessels; the court is, therefore, of opinion, that the said schooner Peggy and cargo are lawful prize:

"It is, therefore, considered, decreed and adjudged by this court, that the decree of the district court respecting the same, so far as regards their acquittal, be and the same is hereby reversed; and that the said schooner,
*107] *with her apparel, guns and appurtenances, and the goods and effects which were found on board of her at the time of capture, and brought

into port as aforesaid, be and the same are hereby condemned as forfeited to the use of the United States, and of the officers and men of the said armed vessel called the Trumbull, one-half thereof to the United States, the other half to the officers and men, to be divided according to law; the said schooner Peggy being of inferior force to the said armed vessel called the Trumbull." This sentence and decree were pronounced on the 23d day of September 1800.

During the present term, and before the court gave judgment upon this writ of error, viz., on the 21st of December 1801, the convention with France was finally ratified by the president; the fourth article of which convention has these words: "Property captured, and not yet *definitively* condemned, or which may be captured before the exchange of ratifications (contraband goods destined to an enemy's port excepted), shall be mutually restored." "This article shall take effect from the date of the signature of the present convention. And if, from the date of the said signature, any property shall be condemned, contrary to the intent of the said convention, before the knowledge of this stipulation shall be obtained, the property so condemned shall, without delay, be restored or paid for."

On the 30th of September 1800, this convention was signed by the respective plenipotentaries of the two nations, at Paris. On the 18th of February 1801, it was ratified by the President of the United States, with the advice and consent of the senate, excepting the 2d article, and with a limitation of the duration of the convention to the term of eight years. On the 31st of July 1801, the ratifications were exchanged at Paris, with a proviso that the expunging of the 2d article should be considered as a renunciation of the respective pretensions which were the object of that article.

*This proviso being considered by the president as requiring a renewal of the assent of the senate, he sent it to them for their advice. [*108
They returned it, with a resolve that they considered the convention as fully ratified. Whereupon, on the 21st of December 1801, it was promulged by a proclamation of the president.

The controversy turned principally upon two points: 1st. Whether the capture could be considered as made on the high seas, according to the import of that term, as used in the act of congress of July 9th, 1798 (1 U. S. Stat. 578). 2d. Whether, by the sentence of condemnation, by the circuit court, on the 23d of September 1800, the schooner Peggy could be considered as *definitively* condemned, within the meaning of the 4th article of the convention with France, signed at Paris, on the 30th of September 1800. The writ of error was dated on the 2d of October 1800.

Griswold and *Bayard*, for the captors.

Mason, for the claimant.(*a*)

The Chief Justice delivered the opinion of the court.—In this case, the court is of opinion, that the schooner Peggy is within the provisions of the treaty entered into with France, and ought to be restored. This vessel is not considered as being *definitively* condemned. The argument at the bar which

(*a*) I regret that not having the notes of this case, I am unable to report the very ingenious arguments of the learned counsel.

contends that because the sentence of the circuit court is denominated a final sentence, therefore, its condemnation is definitive, in the sense in which that term is used in the treaty, is not deemed a correct argument. A decree or sentence may be interlocutory or final, in the court which pronounces it, and
*109] receives its *appellation from its determining the power of that particular court over the subject to which it applies, or being only an intermediate order, subject to the future control of the same court. The last decree of an inferior court is final, in relation to the power of that court, but not in relation to the property itself, unless it be acquiesced under. The terms used in the treaty seem to apply to the actual condition of the property, and to direct a restoration of that which is still in controversy between the parties. On any other construction, the word *definitive* would be rendered useless and inoperative. Vessels are seldom, if ever, condemned, but by a final sentence: an interlocutory order for a sale is not a condemnation. A stipulation, then, for the restoration of vessels, not yet condemned, would, on this construction, comprehend as many cases as a stipulation for the restoration of such as are not yet definitively condemned. Every condemnation is final as to the court which pronounces it, and no other difference is perceived between a condemnation and a final condemnation, than that the one terminates definitively the controversy between the parties, and the other leaves that controversy still depending. In this case, the sentence of condemnation was appealed from; it might have been reversed, and therefore, was not such a sentence as, in the contemplation of the contracting parties, on a fair and honest construction of the contract, was designated as a definitive condemnation.

It has been urged, that the court can take no notice of the stipulation for the restoration of property not yet definitely condemned; that the judges can only inquire whether the sentence was erroneous, when delivered, and that if the judgment was correct, it cannot be made otherwise, by anything subsequent to its rendition. The constitution of the United States declares a treaty to be the supreme law of the land. Of consequence, its obligation on the courts of the United States must be admitted. It is certainly true, that the execution of a contract between nations is to be demanded from, and in the general, superintended by, the executive of each nation; and therefore, whatever the decision of this court may be, relative to the rights of parties litigating before it, the claim upon the nation, if unsatisfied,
*110] may still be asserted. *But yet, where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights, and is as much to be regarded by the court, as an act of congress; and although restoration may be an executive, when viewed as a substantive act, independent of, and unconnected with, other circumstances, yet to condemn a vessel, the restoration of which is directed by a law of the land, would be a direct infraction of that law, and of consequence, improper.

It is, in the general, true, that the province of an appellate court is only to inquire whether a judgment, when rendered, was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt, in the present case, has been expressed, I know of no

court which can contest its obligation. It is true, that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns, where individual rights, acquired by war, are sacrificed for national purposes, the contract making the sacrifice ought always to receive a construction conforming to its manifest import; and if the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation. In such a case, the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed, but in violation of law, the judgment must be set aside.[1]

Jacob Resler *v.* James Shehee.

Practice.—Opening of default.

After the first term next following an office-judgment, in Virginia, it is a matter of mere discretion in the court, whether they will admit a special plea to be filed, to set aside that judgment. Sheehee *v.* Resler, 1 Cr. C. C. 42, affirmed.

This was a writ of error upon a judgment of the Circuit Court of the district of Columbia, sitting at Alexandria, in an action for a malicious prosecution, brought by *Shehee* v. *Resler*, originally in the court of hustings for the town of Alexandria, and transferred by act of *congress of the 27th of February 1801, concerning the district of Columbia to the circuit court of that district. (Reported below, 1 Cr. C. C. 42.) [*111

The declaration stated, that on the 26th of December 1799, Resler, without reasonable cause, procured a certain false, scandalous and malicious warrant to be issued against Shehee, by F. Peyton, Esq., then mayor of the town of Alexandria, charging Shehee with having received from a certain negro slave, called ——, the property of Baldwin Dade, certain stolen goods, viz., one box of tallow, knowing the same to be stolen; which warrant was executed upon the said Shehee, who, by means of the false and malicious representations of Resler, was recognised to appear before the court of hustings of Alexandria, at April term 1800, to answer to the charges contained in the warrant, at which court, Shehee was acquitted.

At the rules, held at the clerk's office, on the 2d February 1801, an office-judgment was entered against Resler, for want of a plea, and a writ of inquiry awarded, returnable to the court of hustings, which by law would have been held on the first Monday of April 1801. But the act of congress of 27th February 1801, which provides for the government of the district of Columbia, erected a circuit court for the district, to which it transferred all the causes then pending in the court of hustings; and enacted, that the circuit court should hold four sessions a year, in Alexandria, viz., on the 2d Mondays of January, April and July, and the 1st Monday of October.

Two terms of the circuit court, viz., April and July, having elapsed, without the writ of inquiry being set aside, the defendant Resler, by his counsel, at October term 1801, on the 9th day of the month, appeared and

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[1] See Hartung *v.* People, 22 N. Y. 95.