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Statement of the case.

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ceeding to reverse the judgment, these irregularities are grounds of error.

For these reasons, in my opinion, the decree in this case should be reversed.

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## TYLER v. DEFREES.

1. The Congress of the United States, to which is intrusted all the great powers essential to a perpetual union, to wit: the power to make war, to suppress insurrection, to levy taxes, to make rules concerning captures on land and sea, is not deprived of those powers when the necessity for their exercise is called out by domestic insurrection and internal civil war.
2. The proceedings of the courts in the execution of laws made to suppress such civil rebellion, when brought before this court on review, should not be subjected to so strict a construction as to defeat the execution of the laws and render them a nullity.
3. The doctrine of the case of *Miller v. United States* (*supra*, 268), affirmed and held to govern the present case.
4. When under the act of July 17th, 1862, property intended for confiscation has been seized by the marshal, and the seizure is brought before the court by the filing of a libel for the forfeiture of the property, and is recognized and adopted by it, the property is subject to the control of the court in the hands of its officer; and it has jurisdiction of the case so far as a seizure of the *res* is essential to give it.
5. This is especially so of real estate lying within the territorial jurisdiction of the court, and which being incapable of removal will always be found to answer the orders and decrees of the court in the progress of the cause.

ERROR to the Supreme Court of the District of Columbia.

This was an action of ejectment to recover certain real property in the city of Washington. The defendant pleaded title from a purchaser at a sale of the property under a judicial decree, made in proceedings instituted under the Confiscation Act of July 17th, 1862. It was conceded that the plaintiff had a good title to the premises, unless that title had been divested by the sale under that decree. The issue involved was, therefore, the validity of the decree.

The provisions of the confiscation act just referred to, along with some facts in connection with it, are set out fully

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in the report of *Miller v. United States* (the leading one of the confiscation cases), immediately preceding this one; and to the part of the report of that case beginning on page 269, with the words (prefixed by an \*), "*The act of July 17th, 1862, contains fourteen sections,*" to the words (prefixed by a ‡) "*On the 24th November, 1863,*" on page 274, the reader must now please to turn. He will find there what but to avoid mere repetition would be given here; and that which makes a necessary part of the statement of the present case. After reading it, he may resume his reading here.

The facts of the present case were found by special verdict. It appeared that in June, 1863, the marshal of the District of Columbia, in pursuance of an order addressed to him by the district attorney of the United States, stating that proceedings were to be instituted for the condemnation of the same to the use of the United States, seized the property in question. His return stated that he had made seizure of the property and given notice to the tenants in possession, as directed, and accompanied his return with a copy of the notice served on the tenants, which stated that the property seized was "held subject to the order of the United States District Court, and the district attorney."

Shortly after this return the district attorney filed a libel of information for the forfeiture of the property, alleging against Tyler that since the 17th of July, 1862, he had held and exercised an office and agency, of honor, trust, and profit, under the Confederate government, and that he had given aid and comfort to the rebellion, and to those engaged in it, by acting as a soldier and as a non-commissioned officer in the army and navy of the Confederate States, and by contributing money and property to aid and encourage those engaged in the rebellion.

Upon this libel being filed, an order was made, that process issue, and that notice be given to the owner or owners of the property, and to all persons interested or claiming interest therein, to appear and answer the information on the first Monday of August then next (1863), and show cause, if any they had, why the property should not be condemned and

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Argument against the confiscation.

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sold; and that notice be given by posting a copy of the order upon the door of the court-house, and by publication in the National Republican, a newspaper of the District.

A monition was accordingly issued, commanding the marshal to attach the property, and to detain the same in his custody until the further order of the court, and to give notice to all persons having or claiming any interest in the property to show cause as above stated. This process was never served by the marshal, and the only return which he made to it was a certificate that he had made the publication of notice in the designated paper.

On the 29th of July, 1863, and not on the first Monday of August, which latter day was specified as the day for the claimants and others to appear and show cause against the condemnation of the property, the court, without evidence being taken in the case, upon the papers and pleadings filed, entered a decree that the property be forfeited and condemned to the United States.

Upon this decree process issued to the marshal, to sell the property, and under the said process the property was sold, and purchased by a person through whom the defendant claimed.

Upon the facts found by the jury, the court ordered judgment in favor of the defendant. From this judgment, the case was brought to this court on writ of error.

*Messrs. Brent and Merrick, for the plaintiff in error:*

I. The title of the plaintiff was not divested by the mere act of seizure made by the marshal. The act of Congress contemplates and directs the institution of judicial proceedings to accomplish a divestiture. The proceedings are indeed assimilated to proceedings in admiralty; but *judicial* proceedings of some kind are absolutely necessary in order to divest the title of the owner. Now, therefore, assuming that judicial proceedings were essentially necessary, the regularity of the proceedings in each particular instance becomes legitimate matter of inquiry, though in a collateral issue, like the present, we are restricted to the question of *jurisdiction*.



## Argument against the confiscation.

The act requires that "the proceedings should conform as nearly as possible to proceedings in admiralty and revenue cases."

The general jurisdiction in admiralty and revenue cases is regulated by the Judiciary Act of September 24th, 1789. Various decisions, in which this act has received a judicial construction, show that the *seizure* ascertains and determines the *forum* wherein judicial proceedings were to be instituted, but does not of itself subject the property to the judgment of the court.\*

After the forum is ascertained, what is to be done? The act of Congress of March 2d, 1799,† provides that "all goods, &c., &c., seized by virtue of this act, shall be put into and remain in the custody of the collector, or such other person as he shall appoint for that purpose, until such proceedings shall be had as by this act are required to ascertain whether the same have been forfeited or not." And the same act‡ goes on to provide that "the collector within whose district the seizure shall be made, or the forfeiture incurred, is hereby enjoined to cause suits for the same to be commenced without delay, and prosecuted to effect, &c., &c., &c."

These sections contemplate a second seizure of the property by the marshal as an officer of the court. The act provides that the collector shall retain it *only until the institution of proceedings in court*. As soon as these proceedings are instituted, the marshal, in virtue of the process and monition of the court, must take it out of the hands of the collector and into his own custody. For "as soon as the marshal seizes the same goods under the proper process of the court, the marshal is entitled to the sole and exclusive custody thereof, subject to the future orders of the court."§

The admiralty rules have been framed under this view of the law. Rule twenty-two requires that "all informations

\* See *The Little Ann*, 1 Paine, 41; *The Washington*, 4 Blatchford, 102; *Keene v. The United States*, 5 Cranch, 304; *The Brig Ann*, 9 Id. 289, 291.

† § 69; 1 Stat. at Large, p. 678.

‡ § 89.

§ *Ex parte Hoyt*, 13 Peters, 290.

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and libels of information, upon seizure, &c., shall conclude with a prayer of due process, &c." And rule nine prescribes, that "in all cases of seizure, and in other suits and proceedings *in rem*, the process, unless otherwise provided for by statute, shall be by a warrant of arrest of the ships, goods, or other things to be arrested; and the marshal thereupon shall arrest and take the ships, goods, or other things, into his possession, &c."

What need of a warrant of arrest, if the property was already in the custody of the court and subject to its judgment? The office of the process was to bring it into the court. The duty of the marshal in executing the process "*is to arrest the property seized by taking it into his custody;*" and his return is to be, that he has arrested the thing, and cited all persons interested, &c., &c., as he was by the warrant ordered to do. Then, and not till then, the jurisdiction of the court attaches.

A court acquires jurisdiction only by either one of two modes: 1. As against the person, by service of process. 2. *In rem*, by arresting the thing under the order or writ of the court.\*

In a proceeding either *in personam* or *in rem*, the process must be the process of the court. Now the seizure made here by the order of the district attorney was simply an executive act, not a judicial notice. The marshal, in making that seizure, acted as the agent of the district attorney, or of the executive branch of the government, not as the officer of the court. In a suit by the United States, could a court obtain jurisdiction *in personam* by an executive mandate, without any process from the court directing the defendant to appear?

Again, the object of process, either *in personam* or *in rem*, is to give notice of a pending case. Did this seizure, under the act of July 17th, 1862, give such notice? The President may seize for the purpose of *using*, and if he *chooses* he may take proceedings to condemn. Under the revenue acts,

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\* ~~The Propeller Commerce~~, 1 Black, 580, 581.

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the person making the seizure is required to proceed at once. Under this act the President may never proceed.

The evidence of seizure is the marshal's return—a jurisdictional fact which must appear in the record. But conceding that the *fact* of seizure by the officer of the court might be proved, in the absence of a return, from other sources, there is *no* proof of such seizure here. And what appears in this record?

1. A writ, and no return upon it.

2. No finding by the jury of the fact of seizure.

There is nothing to show that the marshal, as an officer of the court, ever had this property in his custody, nothing, that that was done which could give the court jurisdiction.

That the person who at one time seized this property was the same person who was marshal of the court when the monition issued, can make no difference. There is nothing to prevent that person from acting in two or more different capacities, and he did not act as the officer of the court, or in obedience to any process issuing from it, when he made this seizure.

II. The decree of sale was passed 29th July, 1863, prior to the first Monday in August, on which last day the monition and attachment were returnable, so that the legal notice prescribed was disregarded and the decree rendered without either actual or constructive notice. Of course such a sale is not judicial, but void to all intents, and in whatever way it may be presented to a court as a muniment of title.

The libel does not on its face show that the plaintiff in error had not within sixty days after public warning and proclamation by the President ceased to aid, &c., in the rebellion, as required by the sixth section of the act of 17th July, 1862.\*

III. The decree of condemnation does not find the essential fact, that the property belonged to a person engaged in the rebellion. The seventh section† only authorizes the condemnation of the property seized "*if it shall be found to*

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\* See *supra*, p. 271.† *Ib.* p. 271.



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have belonged to a person engaged in rebellion, or who has given aid and comfort thereto." The libel alleges that the "said accused is and was on the 17th day of July, and previously thereto had been the owner" of the property seized in this case, and that the accused had engaged in the rebellion and given aid and comfort thereto. But there is no finding in regard to these facts by the court.

IV. The act of 17th July, 1862, is entitled "an act to suppress insurrection, to punish treason and rebellion, &c." Its character as a penal act is proclaimed in its title; its provisions are in harmony with its title. They are throughout punitive and highly penal; they punish with death or with imprisonment almost as bad as death, the crime of treason; they create a new crime, that of rebellion, and punish it with imprisonment or fine, or with both, at the discretion of the court, and, to all these penalties superadd those of confiscation and of civil disability, heretofore unknown to our penal code. No one can doubt, that this is a penal statute designed to punish treason and rebellion. If such be the fact, every proceeding having for its object to inflict that punishment, is in effect, and should be in form, a criminal prosecution. The proceedings in the present case fulfil none of the requirements of the Constitution for a criminal prosecution in a crime of this magnitude. The accusation is preferred not by the indictment of the grand jury, but by a libel of information filed by the district attorney. The accused was not "informed" of his accusation, unless an advertisement in a newspaper be considered such information. Finally, he was not confronted with the witnesses against him, but was tried in his absence, and the trial was by the judge, not by a jury. If it be said that this is not a criminal prosecution, because it is in the form of a civil process, we answer: 1st, that this is precisely what we complain of, and that the nature of a proceeding does not depend on its form, but, on the contrary, its form on its nature.

The conclusion is therefore inevitable, that the present case involved a criminal prosecution disguised under the

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forms of a civil process. Consequently that this was not "due process of law" in the sense of the Constitution.

How will the defendant seek to escape from these unanswerable arguments?

He will say: 1st. That property may be confiscated for crime, by proceedings *in rem*, without conviction of the owner.

2d. That property confiscated under the act of July 17th, 1862, is confiscated, not for crime, but as enemy's property.

Both these propositions are incorrect. In support of the first, the defendant would doubtless rely on the decisions of this court in various cases of maritime seizure, for breaches of navigation laws,\* in which it was held that the prohibition contained in the fifth amendment to the Constitution did not apply to confiscations by proceedings *in rem*, for violation of the laws of *impost, navigation, and trade*.

An examination of the principles on which these decisions are founded will show that they do not sustain the proposition for which they are cited.

Proceedings *in rem* have, from time immemorial, been employed in courts of admiralty, as means of enforcing a *jus in re*, that is a *claim* or right (such as a privilege, or lien, or an hypothecation), in the specific thing proceeded against. At a later period it was adopted in England for enforcing the forfeiture of vessels or merchandise for breaches of revenue or navigation laws; but, of course, always confined to property that was directly connected with the alleged violation of law, either as the subject of it or as the means with which it was committed. This practice existed both in the mother country and in the colonies when the Constitution was adopted, and the Supreme Court, in the cases above referred to, decided that the prohibition contained in the fifth amendment to the Constitution did not apply to this class of cases. But why did it not apply to them? For two reasons: 1st. Because they were not of a criminal nature.

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\* *La Vengeance*, 3 Dallas, 297; *The Sally*, 2 Cranch, 406; *The Betsey*, 4 Id. 443; *The Samuel*, 1 Wheaton, 9; *The Octavia*, Ib. 20; *The Sarah*, 8 Id. 391; *The Palmyra*, 12 Id. 1, and others of more recent date.



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2d. Because the words "due process of law," in that amendment, must be understood with reference to the laws in force at the time it was adopted; and as the confiscation of property by proceedings *in rem* against it for violations of laws of impost, navigation, and trade was a process in use at that time, it was included in the words "due process of law."

*The Palmyra*, one of the cases referred to, illustrates the principles on which these decisions are founded. This vessel was libelled for the violation of a special statute which declared that any vessel violating its provisions should be forfeited, but affixed no *personal* penalty to the offence. The defence set up was a want of a previous conviction of her owner. She was condemned on the grounds: 1st, that the law created no crime of which the owner *could* be convicted; 2d, that "this doctrine had never (in England) been applied to seizures or forfeitures created by statute *in rem*, *cognizable* on the revenue side of the Exchequer." That, in these cases "*the thing is primarily considered as the offender*, or rather the offence is primarily attached to the thing." "Many cases exist where the forfeiture is solely *in rem*, there is no penalty *in personam*," &c. The court adds, however, that "if the objection was presented *at common law* it must prevail."

Now, in the present case the law *does* impose a personal penalty on the owner. There *is* a crime, of which he can be convicted, and he is charged with that crime, and the law expressly declares, that the property cannot be condemned, unless that crime shall have been committed by the owner. 2d. In the present case the objection of a want of conviction of the crime, *is* presented in a case at common law. But the point to which the attention of the court is particularly called, is the care with which the right to confiscate property, by proceedings *in rem*, is confined to cases "*on the revenue side of the Exchequer*," in which "*the thing is considered as primarily the offender*." In the present case it is not pretended that the houses and lots seized, have committed the offence for which their forfeiture is demanded, or have been in any manner instrumental in, or connected

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with, the said offence. On the contrary, the owner thereof is alone charged with the offence. It is evident, therefore, that these decisions afford no countenance whatever, to the novel doctrine that Congress may authorize the confiscation of property for crime, without a previous conviction of the owner, by proceeding against the property itself.

Chancellor Kent,\* in commenting on these decisions, says that "it may now be considered as the settled law of this country, that all seizures under laws of impost, navigation, and trade, if made upon tide waters, navigable from the sea, are *civil cases* of admiralty jurisdiction." So far, therefore, from supposing that these decisions afford any ground for extending this mode of proceeding to any other class of cases than those of "impost, navigation, and trade," he regrets that the Supreme Court should have gone as far as they had in sustaining them, and doubts the correctness of those decisions, which permit a resort to this mode of proceeding in seizures, even of this class, which were not made on *navigable waters*, inasmuch as, in England, such seizures, when made on land, were cognizable only in the Court of Exchequer, where the trial of all facts is by jury.

He concludes his remarks on this subject by the following reflections apposite to the present case:

"These proceedings for the forfeiture of large and valuable portions of property under revenue and navigation laws, are highly penal in their consequences, and the government and its officers are always parties, and deeply concerned in the conviction and forfeiture; and if, by act of Congress, or judicial construction, the prosecution can be turned over to the admiralty side of the District Court, as being neither a criminal prosecution nor a civil suit at common law, the trial of a cause is transferred from a jury of the country to the breast of a single judge."

The second ground on which these proceedings are sought to be sustained, is equally untenable.

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\* 1 Commentaries, 375.

## Argument against the confiscation.

Before we discuss this point, however, we ask a question. If it be true that property confiscated under the act of 1862, is confiscated on the ground that it is the property of an enemy, why in the present case was it not alleged to be the property of an enemy? Why was not its condemnation asked for, and the decree of condemnation based on that ground? There is nothing in all the proceedings looking to the condemnation of the property as that of an enemy; on the contrary, it is demanded on the ground that the owner has committed acts of treason and rebellion, crimes which cannot be committed by an enemy. If then, it be true that the property can only be condemned on the ground that it is enemy's property, the decree, for that reason alone, if for no other, would be void. But supposing the sentence of condemnation to have been based on the ground that the property belonged to an enemy, have Congress declared, or could Congress declare, the property of a citizen to be that of an enemy?

The word enemy in its legal sense has a different meaning from that in which it is ordinarily used. It has no reference to the feelings or conduct of a person, but simply to his nationality. On the other hand, no citizen, however inimical his feelings or his conduct towards his own country may be, can claim the immunities or incur the liabilities of an enemy. The word is therefore synonymous with *alien enemy*, and this is the sense in which it is used by all legal writers. To call a rebel an enemy, therefore, would be a contradiction in terms.

The act of 1862 is chargeable with no such contradiction.

The whole argument for the contrary rests upon a single ambiguous expression in the 7th section, to wit: that which declares that the property shall be condemned "as enemy's property." The defendant assumes that the words "as enemy's property," here mean, "because it is enemy's property," or "on the ground that it is enemy's property;" but how could that be, when previous sections of the act had declared the very parties whose property is thus to be condemned, to be "*traitors*" and "*rebels*," and punishes



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them as such? The expression means, simply that the property shall be condemned *as if it was enemy's property*, or, *in the same manner as if it was enemy's property*.

*Messrs. A. G. Riddle, S. L. Phillips, and L. Madison Day,*  
*for the defendant in error :*

I. The District Court had jurisdiction in the confiscation of the property in question, both under the statute of the 17th July, 1862, and by the general law of proceedings *in rem*, the moment of seizure and institution of proceedings.

The 5th section of the Confiscation Act of 1862 declares :

"To insure the speedy termination of the present rebellion, it shall be the duty of the President to cause seizure of all the estate," &c.

And in the 7th section :

"To secure the condemnation and sale of any such property, after the same shall have been seized, so that it may be available for the purpose aforesaid, proceedings *in rem* shall be instituted in the name of the United States, in any District Court thereof, or in the United States District Court for the District of Columbia, within which the property above described may be found."

Here is the legislative declaration of what shall give jurisdiction to a court for the purposes of condemnation and sale. Seizure, and the institution of proceedings—a libel, according to the form of the admiralty—both of which are found by the special verdict.

But, independently of any statutory regulation, in all proceedings *in rem* a court of admiralty, whether as a prize or instance court, has jurisdiction and absolute control over the thing as soon as seized and libelled.\* The District Court does not derive its jurisdiction from any possession, actual or supposed, of its officers, but from the act and place of the seizure for the forfeiture; and if it at once acquires juris-

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\* Jennings v. Carson, 4 Cranch, 23.

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diction, it is not avoided by any subsequent irregularity.\* In a case of seizure on land, it was held nothing more was necessary to give jurisdiction in cases of this nature, than that seizure should be made within the district.† And where it was held,‡ for the first time, that seizures made on land were cases at common law and triable by jury, it was still held that a libel stating the fact of seizure on land would give jurisdiction.

In order to institute and perfect proceedings *in rem*, it is necessary that the thing should be actually and constructively within the reach of the court. It is actually within its possession, when it is submitted to the process of the court; it is constructively so when, by a seizure, it is held to ascertain and enforce a right or forfeiture which can alone be decided by a judicial decree *in rem*.§

II. The court having had jurisdiction over *the thing*, can such an irregularity as entry of final decree before return day of monition, be relied upon in this collateral action?

It is a rule without exception, that the judgment of a court of competent jurisdiction while unreversed concludes the subject-matter as between the said parties. They cannot again bring it into litigation.|| In *Blaine v. The Charles Carter*,¶ a ship had been sold under executions issued within ten days after judgment, contrary to the express provision of the 22d section of the Judiciary Act, but no writ of error was taken out. The court declared that if the executions were irregular "the court from which they issued ought to have been moved to set them aside. They were not void, because the marshal could have justified under them; and if voidable, the proper means of destroying their efficacy had not been pursued."

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\* *Bolina and Cargo*, 1 Gallison, 81, 83; 2 Parsons on Maritime Law, 535.

† *Keene v. United States*, 5 Cranch, 304.

‡ *The Sarah*, 8 Wheaton, 391.

§ *The Brig Ann*, 9 Cranch, 289, 291.

|| *United States v. Nourse*, 9 Peters, 8; *Voorhees v. Bank of the United States*, 10 Peters, 449.

¶ 4 Cranch, 328-333.

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Opinion of the court.

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Mr. Justice MILLER delivered the opinion of the court.

The question for our consideration is, whether the confiscation proceedings, as found in the special verdict, divested the title of the plaintiff in the lot?

These proceedings do not come before us on a writ of error to correct any irregularities or mere errors of law in the court which rendered the judgment, but they come before us collaterally as the foundation of the defendant's title.

According to the well-settled doctrine in such cases, no error can be regarded here, or could have been considered in the court below on the trial, that does not go to the extent of showing a want of jurisdiction in the court which rendered the judgment condemning the property.\*

Counsel for the plaintiff in error recognize this principle, but it is remarkable what a number of supposed errors in the proceedings are found by them to be jurisdictional. Almost every point that has been urged in the cases of *Garnet v. The United States*, and *Miller v. The Same*, on writ of error directly to those confiscation proceedings, is here relied on as sufficient to defeat the jurisdiction. Looking to the errors alleged, it may safely be said that if half that has been so earnestly urged by counsel in these cases be well founded, the confiscation acts would be nugatory from the difficulty of putting them judicially in force, though their constitutionality were conceded.

Undoubtedly, by the individual, whose property is thus seized and condemned for acts of hostility to his government, the course pursued would be scrutinized with an eye quick to detect errors, and it is not strange that this critical spirit should affect the argument here. When to this is added the belief, long inculcated, that the Federal government, however strong in a conflict with a foreign foe, lies manacled by the Constitution and helpless at the feet of a domestic enemy, we need not be surprised that both the power of Congress to pass such a law as the one in question,

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\* See *Cooper v. Reynolds*, 10 Wallace, 308, and the numerous cases there cited.



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and the capacities of the courts to enforce it, should meet with a stout denial.

But we do not believe that the Congress of the United States, to which is confided all the great powers essential to a perpetual union—the power to make war, to suppress insurrection, to levy taxes, to make rules concerning captures on land and on sea—is deprived of these powers when the necessity for their exercise is called out by domestic insurrection and internal civil war—when States, forgetting their constitutional obligations, make war against the nation, and confederate together for its destruction.

And we are further of opinion that where, the constitutionality of the confiscation acts being established, we are called upon to sit in review on the judicial proceedings of the inferior courts in the enforcement of these statutes, we are to be governed by the reasonable and sound rules applicable to analogous cases in the courts, and not by a system of procedure so captious, so narrow, so difficult to understand or to execute, as to amount to a nullification of the statute.

The framers of the act of July 17th, 1862, appear to have anticipated much of what has been since urged in regard to the mode of proceeding in the execution of that statute. Seeing very clearly that the cases of seizure under the law would be mainly on land, and would not, in that case, be cognizable as admiralty cases, and that being founded on the principle of confiscating enemy property, they were not strictly revenue cases; their attention was called to the proper mode of procedure in the enforcement of the law.

As the act was designed to introduce the principle of confiscating enemy property seized on land, like that seized on water, applying the confiscation, however, to the property of a limited class of enemies, instead of to all enemies, it was conceived that the proceeding should be, in its essential features, analogous to those which the courts of admiralty were accustomed to use in property captured at sea. The same courts were to have jurisdiction, the same officers were to administer the law, and, as those courts were

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already in possession of jurisdiction in revenue and admiralty cases, and as the analogies of those cases to the new jurisdiction conferred were supposed to present a mode of enforcing the law adapted to the latter in their main features, it was enacted that the proceedings under the statute should conform, as near as might be, to proceedings in admiralty or revenue cases; and, foreseeing also that in some respects they could not be strictly so conformed, the statute authorized the courts to make such orders, establish such forms of decrees and sale, and direct such deeds, when real estate shall be the subject of sale, as shall fitly and efficiently effect the purposes of the act.

Unquestionably, it was within the power of Congress to provide a full code of procedure for these cases, but it chose to give a direction on the subject which, adopting, as a general rule, a well-established system of administering the law of capture, looked to the fact that departures from that system might be necessary, and invested the courts with a discretion in that regard.

Five or six cases arising under this statute were argued before us at the last term, and, appreciating both the difficulty and the importance of some of the points raised in argument, they were all ordered to be argued again at this term, and have, under that order, been ably and fully reargued. They have all been disposed of but this, and the court have not hesitated, where there was a substantial departure from the mode of proceeding directed by the statute, to reverse the decree of the courts below in the cases which were here on error to those proceedings. And when we have found the proceedings to be conformable to the course of procedure of revenue and admiralty cases, we have held the decrees to be valid. The cases thus decided, and especially the case of *Miller v. United States*, in effect dispose of all the objections taken to the action of the court in this case, even if that action were here for review directly, instead of being presented collaterally in another suit.

But, as one point was much and earnestly pressed as peculiar to this case, and as conclusive against the validity of

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the confiscation proceedings, that point will be further considered.

It is argued that there was no such judicial seizure of the land which was condemned and sold as to bring it within the jurisdiction of the court.

The record shows that the marshal of the District of Columbia, in which court the proceeding was had, and within the territorial jurisdiction of which court the land was situated, did seize the land under the instruction of the attorney of the United States for the district. No objection is made that this seizure was not full and complete. The order of the district attorney was directed to the marshal of the District of Columbia and described the property to be seized, and stated that the seizure was to be made for the purpose of instituting proceedings for its condemnation under the act of July 17th, 1862. The marshal returned on this paper that he had seized the property and given notice to the tenants in possession, and he makes a part of this return the notice served on the occupants of the premises, in which he states that it is to be held subject to the order of the United States District Court for the District of Columbia. After this the libel was duly filed in that court, and a monition was issued from it to the same marshal, ordering him to give due notice and to attach the property and to detain the same in his custody until the further order of the court in the premises. To this monition no return was made by the marshal except a certificate of publication of notice.

The proposition of the plaintiff's counsel is, that because no return of the marshal was made that he seized the property under this monition, the court had no jurisdiction of the case, and its subsequent condemnation and sale were void.

When we consider that it was the same officer and the same individual who had already seized the property, and had it in his control and possession, and that his statement to that effect was before the court, with the addition that he held it subject to the order of the court, that he was the only executive officer of the court who could make the



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seizure, the point raised seems to be as narrow and unsubstantial as the second seizure would be useless.

The argument is based upon the analogy of revenue seizures, which are always of personal and movable property, and which are always made in the first instance by some other officer or individual than the marshal, and which must be taken possession of by the marshal as the representative of the court. This is usually done under a process of the court for the purpose of bringing the property under its recognized control. And this is at once the reason, and suggests the limit of the two seizures in revenue cases so much relied on by counsel.

Now, suppose the property in this case had been personal property, how could the marshal make a seizure of that which was already in his manual possession? Whose possession would he displace? Could one hand represent the seizure under the monition and the other the seizure under the act of Congress? And can it be seriously contended that this must be done to give the court jurisdiction, when the officer of the court held the property already for condemnation or discharge as the court might order?

It may, however, be said that he should have made return of the writ, that he had seized and held the property under that. Such a return as to seizure would have been false, because he had seized it before and could make no second seizure, in fact, by taking it from his own possession. And he had already informed the court that he detained the property subject to its order.

The proceeding inaugurated by the district attorney is designed to bring the property before the court. It can have no other purpose or end, unless it is released by his order. The district attorney and the marshal are both officers of the court, and for that reason are selected to institute the proceeding by which the power of the court is called into exercise. When, therefore, the property is in the course of this proceeding seized by the marshal, and when with the filing of the libel all that has been done is brought before the court and it adopts and recognizes this seizure, the property

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is held by him subject to the order of the court, and is under its control, and no second seizure by the same officer can be necessary.

In regard to real estate, the argument is still more forcible. The remarks of this court in *Cooper v. Reynolds*, already cited, are directly in point. Speaking of the various modes of acquiring jurisdiction, it was there said, that "while the general rule in regard to jurisdiction in *rem* requires the actual seizure and possession of the *res* by the officer of the court, such jurisdiction may be acquired by acts which are of equivalent import, and which stand for and represent the dominion of the court over the thing, and in effect subject it to the control of the court. Among this latter class is the levy of a writ of attachment or seizure of real estate, which being incapable of removal, and being within the territorial jurisdiction of the court, is for all practical purposes brought under the jurisdiction of the court by the officer's levy of the writ and return of that fact in the court."

When, therefore, the officer, as in this case, had seized the property for condemnation, and had made known that fact to the court, it was quite certain that it would be within reach of its process when condemned for sale, and when it became necessary to put the purchaser in possession of it. No change of the title or possession could be made, pending the judicial proceedings, which would defeat the final decree. The seizure was therefore, in our judgment, sufficient to subject the land to the jurisdiction of the court.

The judgment of the Supreme Court of the District of Columbia is therefore

AFFIRMED.

Mr. Justice DAVIS expressed his concurrence in the judgment, though he stated that he had not been able to concur in all that was said by the court in the preceding opinion.

Mr. Justice FIELD, with whom concurred Mr. Justice CLIFFORD, dissenting.

I am compelled to dissent from the judgment of the court in this case.

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I agree with the majority that as the decree of confiscation, under which the defendant asserts title to the demanded premises, comes before us collaterally, it cannot be attacked for mere errors or irregularities committed in the progress of the cause in which it was rendered. It can be only attacked for defects which go to the jurisdiction of the court, either over the subject-matter or the parties, or to render the particular decree. It is not strictly correct to say that, if the jurisdiction over the subject-matter and the parties exists in a particular case, any defect in the decree rendered can only be taken advantage of on appeal or by direct proceedings. That jurisdiction may exist and yet the decree may be so variant from that which the court was authorized to pronounce as to be void on its face. If the law, for example, authorize a pecuniary fine, the court cannot award imprisonment. If the law directs only damages to be assessed, the court cannot decree a specific performance. If the law declares that only a life estate shall be confiscated, the court cannot disregard its limitation and condemn the fee. The judgments in such cases would be void in whole or part, notwithstanding complete jurisdiction was had over the subject and the parties in controversy. There are certain limitations to the action of courts even after they have acquired jurisdiction which they cannot transcend without opening their judgments to collateral attack. In other words, jurisdiction over the subject-matter and parties does not authorize a judgment in the case of any and every kind.

All reasonable presumptions are indulged in support of judgments when collaterally attacked. So large are these presumptions that they generally answer as an explanation for the absence of all matters in the record, which are required to be taken before the judgment can be lawfully entered. As the presumptions are indulged to supply the absence of averments of the particular facts presumed, they cease to be received when the contrary of the particular supposed facts appears. Thus when a record of a judgment, rendered in an action at law upon an issue joined between



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the parties, is produced, in which no verdict of a jury or finding of the court appears, upon the existence of which alone the judgment could be entered, it will be presumed that such verdict or finding was had. But, on the other hand, if it affirmatively appear in the record that no such proceeding was had, the judgment may be attacked as having been rendered without authority. It is of no avail, then, to invoke the doctrine that a judgment cannot be collaterally assailed. The doctrine does not apply to a case of this kind, for the record itself establishes the invalidity of the judgment produced.

The objections which I make to the decree, upon which the defendant asserts title, go to the jurisdiction of the court over the property condemned, to its jurisdiction to enter the decree rendered, and to the validity of the act of July 17th, 1862. Similar objections were taken by me in a dissenting opinion to the decree in the case of *Miller v. United States*, recently decided, but the importance I attach to them justifies their further elucidation.

First; as to the jurisdiction of the court over the property. The executive seizure of the property required by the act of Congress is preliminary to the commencement of judicial proceedings for its forfeiture. "After the same shall have been seized," says the statute, proceedings shall be instituted. Now, when the executive seizure in this case was made, what was the condition of the property before judicial proceedings were taken? Was it in the custody of the court? Clearly not. As yet the court had nothing to do with it—no more than, before suit, it has to do with a vessel seized by the collector for a violation of the revenue laws, or brought into port by a prize crew for an attempted breach of blockade. The fact that the marshal was employed as the agent of the President in making the seizure, did not change the position of the property. The President might have selected any other person as his agent with the same result. He might, at this stage, have released the property from seizure upon his own volition, without interfering with the authority of, or coming in collision with the court. As yet

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no relations were established between the court and the property seized. Whatever the marshal, in making the preliminary seizure, may have said to the occupants of the premises seized, or whatever notice he may have given to them, whether it was that he held the property subject to the directions of the President, or to the order of the District Court or district attorney, in no wise affected the condition of the property, or created any relation between it and the court. The existence of any such relation did not depend upon the declaration of that officer, who, as yet, was not acting under any judicial process.

The next proceeding was the filing of the libel of information; but that did not change the relation between the court and the property. The libel was the foundation for the issue of the process of the court to bring the property within its custody; but, of itself, without such process, it worked no change in the condition of things. When was it ever pretended that the mere filing of a libel, without the issue of process, brought person or thing into the custody of the court? When the libel was filed process was ordered, and process was issued, commanding the marshal to attach the property and detain the same in his custody. By attachment under this judicial process, had it been made, the court would have acquired jurisdiction over the property, for it is by seizure under judicial process, and that alone, that the court takes the *res* into its custody. But the process thus issued was never served, and the jurisdiction of the court over the property rested upon the preliminary seizure alone. And yet we are told by the majority of the court that the objection that this preliminary seizure was insufficient to give the requisite jurisdiction, and that a new seizure, under judicial process, was necessary, is a very narrow and unsubstantial objection. I answer, that no objection is narrow or unsubstantial which goes to the jurisdiction of the court to forfeit the property of a citizen upon *ex parte* proceedings, without a hearing, for alleged public offences of which he is assumed to be guilty, because he did not appear to a citation, which the law prohibited from being commu-

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nicated to him. This court has repeatedly dismissed writs of error because tested by a wrong officer, or made returnable on a day other than the first day of the term, or because they did not embrace all the parties to the record; and when it has been urged that the objections taken to them were extremely narrow and unsubstantial, the answer has been that nothing could be treated as narrow and unsubstantial, and for that reason disregarded, which was prescribed by law as the mode of exercising the appellate jurisdiction of the court. So, here, nothing can justly be considered as either narrow or unsubstantial which is required by law to give jurisdiction to a court to enforce penal statutes, in the absence of the alleged offenders against their provisions.

Second; as to the jurisdiction of the court to render the decree in the confiscation case. The act of Congress, as already stated, is highly penal in its consequences, and by all established canons of interpretation should be strictly construed.\* Its every requirement should be rigidly exacted. What, then, are its requirements? It declares that the proceedings instituted for the condemnation of the property seized shall conform as nearly as may be to proceedings in admiralty or revenue cases, and if the property shall be found to have belonged to a person engaged in the rebellion, or who has given aid and comfort thereto, the same shall be condemned.

As the proceedings in the case upon which the defendant relies related to land, they should have conformed, according to those provisions, as nearly as practicable to proceedings in revenue cases. Now the statute of 1799 prescribes the proceedings in these cases, and declares that after default is made in one of them, "the court shall proceed to hear and determine the cause according to law," a clause which has been judicially held, and in my opinion correctly held, to make it imperative upon the court that there shall be some hearing before a decree of forfeiture is rendered, and "the

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\* 1 Kent's Commentaries, 376.



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court will require," says Mr. Justice Sprague, in such cases, "the prosecutor to introduce full proof of the allegations in the libel whenever the circumstances shall make it reasonable."\*

If we consider the provision of the law of 1799, and the provision of the act of 1862, for a finding, it seems impossible to escape the conclusion, that a finding upon hearing is an essential prerequisite to any decree of forfeiture in these confiscation cases. The authority to render the decree is in express terms made conditional upon a particular fact being found. If the fact designated be found, says the statute, the property shall be condemned, which is equivalent to declaring that if such fact be not found, no condemnation shall be decreed. As the record produced in the case, upon which the defendant relies, shows that no hearing was had and no finding was made, the decree of forfeiture rendered therein appears to me to be an act of judicial usurpation.

Third; as to the validity of the clauses of the act of 1862, providing for the seizure and confiscation of the property of rebels. This point I have already considered at length in the dissenting opinion in *Miller v. United States*, and I shall only add a few words. In that dissenting opinion I expressly stated that it had been held that, when the late rebellion assumed the proportions of a territorial civil war, the inhabitants of the Confederate States and the inhabitants of the loyal States became reciprocally enemies to each other, and that the inhabitants of the Confederate States engaged in the rebellion, or giving aid and comfort thereto, were at the same time amenable to the municipal law as rebels, and that the correctness of this determination was not disputed; that the question was, not as to the right of Congress to adopt either of these courses, but what course had Congress, by its legislation, authorized. It is indisputable, that whatever Congress may authorize to be done, by the law of nations, in the prosecution of war against an independent nation, it may authorize to be done when engaged in the prosecution

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\* *United States v. Schooner Lion*, 1 Sprague, 490.

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of a territorial civil war against the domestic enemies of the United States. I contend only that the limitations, which the law of nations has imposed in the conduct of war between independent nations, should apply and govern the United States in whatever war they may prosecute. I do not doubt, and never have doubted for a moment, that the United States possess all the power necessary to suppress all insurrections, however formidable, and to make their authority respected and obeyed throughout the limits of the republic. But this recognition of the power of the government cannot be permitted to preclude a comparison of all legislation, adopted to uphold its authority, with the Constitution. And in so comparing the act of July 17th, 1862, I am unable to find in that great instrument any sanction for the clauses in the act providing for the seizure and confiscation of the property of persons charged with particular criminal acts. I do not find it in the war powers of the government, for they sanction only the confiscation of the property of public enemies. I do not find it in the municipal power of the government to legislate for the punishment of crimes, for that is subject to limitations, which secure to the accused a trial by a jury of his peers, and the right to be confronted with the witnesses against him.

It is true, as already stated, that enemies participating in the rebellion, or giving aid and comfort thereto, might have been treated as rebels and held amenable to the municipal law. Yet the terms, enemies and rebels, are not synonymous, even though the rebellion attained the proportions of a territorial civil war. A permanent resident of the Confederacy was an enemy, although he may always have opposed the rebellion and remained loyal in his feeling and action to the National government. His position as an enemy was determined by his residence, and had nothing to do with his personal disposition or conduct. But he was not a rebel, and could not have been prosecuted as such unless he was personally guilty of treasonable acts.

Congress well understood the distinction between enemies and rebels, and we are not justified in supposing that it in-

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Statement of the case.

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tended to disregard this distinction in its legislation, even were that practicable, as it was not.

My conclusion is that the judgment of the court below was erroneous, and should be reversed.

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• THE DISTILLED SPIRITS.

1. The acceptance by the collector of a false and fraudulent bond given for the removal of distilled spirits from a bonded warehouse, will not prevent a forfeiture of such spirits under the 45th section of the Internal Revenue Act of July 13th, 1866, which forfeits "distilled spirits found elsewhere than in a bonded warehouse, not having been removed therefrom according to law."
2. The removal will be illegal if effected by means of a false and fraudulent bond.
3. The 48th section of the Internal Revenue Act of June 30th, 1864, as amended by the act of 1866, which forfeits "all goods, wares, merchandise, articles or objects," if found in possession of any person in fraud of the internal revenue laws, &c., is applicable to distilled spirits notwithstanding the forfeiture of spirits is provided for in a distinct series of sections relating thereto in the same law, or in a supplementary law.
4. All the sections can stand together; and where that is the case one does not repeal or supersede the other, as repeals by implication are not favored.
5. The rule that notice to the agent is notice to the principal applies not only to knowledge acquired by the agent in the particular transaction, but to knowledge acquired by him in a prior transaction and present to his mind at the time he is acting as such agent, provided it be of such a character as he may communicate to his principal without breach of professional confidence.
6. Where distilled spirits forfeited to the United States are mixed with other distilled spirits belonging to the same person (ignorant of the forfeiture) they are not lost to the government by such mixture, either on the principle of confusion of goods, or transmutation of species, even though subsequently run through leaches for the purpose of rectification. The government will be entitled to its proportion of the result.

IN error to the Circuit Court for the District of Massachusetts; the case being this:

The 48th section of the Internal Revenue Act of June