But on the last day of the term, THE COURT gave the following general directions to the clerk. That in cases of reversal, costs do not go, of course, but in all cases of affirmance, they do. And, that when a judgment is reversed, for want of jurisdiction, it must be, without costs.

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*48] *UNITED STATES *v.* WILLINGS & FRANCIS.

Shipping.—Registry.

An American registered vessel, in part transferred by parol, while at sea, to an American citizen, and resold to her original owners, on her return into port, before her entry, does not, by that operation, lose her privileges as an American bottom, nor become subject to foreign duties.
United States *v.* Willings, 1 W. C. C. 125; s. c. 4 Dall. 374, affirmed.

THIS was an action of debt, brought originally in the District Court of the United States for the district of Pennsylvania, for the penalty of a bond, dated November 16th, 1802, conditioned to pay to the collector of the customs, "the sum of $7720.41, or the amount of the duties to be ascertained as due and arising on certain goods," &c., "entered by the above-bounden Willings & Francis, as imported in the ship Missouri, from Canton, as *per* entry, dated 16th November 1802."

The pleadings, which ended in a general demurrer to the surrejoinder, brought into view the question, whether the ship Missouri, at the time of her arrival and entry from Canton, was entitled to the privileges of a registered ship of the United States; for if she was, the sum mentioned in the condition of the bond (which had been calculated as if she had been a foreign bottom) was too large by the sum of $702.05.

The facts upon which this question arose, appeared, by the record, to be as follows: The ship Missouri, when she sailed from Philadelphia for Canton, was a duly registered ship of the United States, owned wholly by Willings & Francis, citizens of the United States. While at sea, and while the register of the ship was on board, in possession of the master, she was, in part, sold by Willings & Francis, in Philadelphia, to J. C. Koch and others, citizens of the United States, on the 12th of February 1801, but was not then registered anew, by her former name, nor was there an instrument in writing, in the nature of a bill of sale, reciting at length the certificate of registry. On the 15th of November 1802, after the arrival of the ship at Philadelphia, and before any report or entry, Koch and others, the vendees, made a parol resale of their part of the ship to Willings & Francis, whereby, the whole was revested in them. Afterwards, on the same 15th of November (it being the day of her arrival), the register *was de- *49] livered up, by the master of the ship, to the collector of the port of Philadelphia, and the vessel duly reported and entered; and T. W. Francis, one of the part-owners, resident at that port, upon the entry of the ship, offered to make oath that the register contained the names of all the persons who were then owners of the ship; that since the granting of the register, the ship had been in part sold, by Willings & Francis, to Koch and others, who had resold the same to Willings & Francis, and that no foreigner had any share or interest in the ship. On the 22d of December 1802, Willings & Francis made a bill of sale to Koch and others, reciting the register at length, in due form of law, whereupon, the ship was registered anew by her

former name as the property of Willings & Francis, and Koch and others, as joint-owners. On the 7th of January 1803, Koch and others, by a bill of sale, reciting the register at length, in due form of law, resold and reconveyed their part of the ship to Willings & Francis; whereupon, the register was delivered up, and the ship registered anew, by her former name, as the property of Willings & Francis.

By the 14th section of the act of congress of 31st December 1792 (1 U. S. Stat. 294), it is enacted, "that when any ship or vessel which shall have been registered pursuant to this act, or the act hereby in part repealed, shall, in whole or in part, be sold or transferred to a citizen or citizens of the United States, or shall be altered in form or burden," &c., "in every such case, the said ship or vessel shall be registered anew, by her former name, according to the directions herein before contained (otherwise she shall cease to be deemed a ship or vessel of the United States), and her former certificate of registry shall be delivered up to the collector, to whom application for such new registry shall be made, at the time that the same shall be made."

"And in every such case of sale or transfer, there shall be some instrument of writing, in the nature of a bill of sale, which shall recite at length the said certificate; otherwise, the said ship or vessel shall be incapable of being so registered anew. And in every case in which a ship or vessel is hereby required to be registered anew, if she shall not be so registered anew, she shall not be entitled to any of the privileges or benefits of ship or vessel *of the United States. And further, if her said former certificate of registry shall not be delivered up as aforesaid, except the same may have been lost," &c., "the owner or owners of such ship or vessel shall forfeit and pay the sum of $500, to be recovered with costs of suit." [*50

And by the 17th section, it is enacted, "that upon the entry of every ship or vessel of the United States from any foreign port or place, if the same shall be at the port or place at which the owner or any of the part-owners reside, such owner or part-owners shall make oath or affirmation, that the register of such ship or vessel contains the name or names of all the persons who are then owners of the said ship or vessel; or if any part of such ship or vessel has been sold or transferred, since the granting of such register, that such is the case, and that no foreign subject or citizen hath, to the best of his knowledge and belief, any share, by way of trust, confidence or otherwise, in such ship or vessel." "And if the owner," &c., "shall refuse to swear or affirm as aforesaid, such ship or vessel shall not be entitled to the privileges of a ship or vessel of the United States."

The judgment of the district court, upon the demurrer, was in favor of the United States, but it was reversed upon a writ of error, in the circuit court, and the United States brought the case up, by writ of error, to this court.

Rodney (Attorney-General), for the plaintiffs in error, cited *Priestman* v. *United States*, 4 Dall. 28, and 1 Bos. & Pul. 263, 267, to show the great degree of strictness with which the revenue laws had been construed, both in this country and England. He contended, that the word "when" (in the 14th section of the act), means, at that time, viz., when the ship shall be sold, she shall be registered anew. She was sold on the 12th of February

1801, and ought then to have been registered anew, but was not. The consequence, according *to the act, is, that from that time, she ceased to be deemed a ship or vessel of the United States. The want of a new register did not annul the sale ; nor was it vacated, by the want of an instrument of writing, in the nature of a bill of sale, reciting at length the certificate of registry. But the want of such an instrument was a bar to the obtaining a new register, and a sale, without a new register, causes a forfeiture of all her privileges as a ship or vessel of the United States. The impossibility of delivering up the old register, while it was at sea, so as to obtain a new register, is no excuse for the defendant's neglect to comply with that part of the act which requires an instrument in writing, in the nature of a bill of sale, which shall recite at length the certificate of the registry ; because the registry is a matter of record, and a copy might have been had to insert in the bill of sale. *Rolston* v. *Hibbert*, 3 T. R. 406.

*51]

Lewis, contrà.—The letter and the spirit of the act are in favor of the defendants. It is a general rule of law, that every act which creates a penalty or forfeiture, is to be construed strictly against the United States. The forfeiture of the privileges of a ship of the United States is a very heavy penalty, and although this penalty is inserted in a revenue law, yet that can make no difference in the rule of construction.

The construction contended for by the United States, would put it in the power of the owner of the vessel, to subject the owner of the goods to this penalty, without any fault of his own. This could not have been the intention of the legislature, in the case of a sale from one citizen of the United States to another, when they have taken care, in the 16th section, to provide, that where there are several citizens of the United States part-owners of a vessel, and one of them sells his share to an alien, it shall not forfeit the shares of the other citizens of the United States, who were ignorant of such transfer.

*52] *The act for registering vessels was intended to protect American ship-owners, and American navigation, by giving them exclusive privileges. The true construction, therefore, of the act must be that which will best carry the intention into effect. But if the opposite construction prevail, no person will dare to freight the vessel, or to become a part-owner, lest he subject himself to the caprice of the other owners, and after calculating the probable event of his adventure, upon the expectation of paying only domestic duties, he find himself defeated by an unforeseen imposition of foreign duties, to the utter ruin of his enterprise.

But the great question is, when is she to be registered anew? The words of the act are, "that when any ship" "shall be sold," "in every such case, the said ship" "shall be registered anew," "and her former certificate of registry shall be delivered up to the collector, to whom application for such new registry shall be made, at the time that the same shall be made." "And in every such case of sale or transfer, there shall be some instrument of writing, in the nature of a bill of sale, which shall recite at length the said certificate, otherwise, the said ship or vessel shall be incapable of being so registered anew." "And in every case in which a ship or vessel is hereby required to be registered anew, if she shall not be so

registered anew, she shall not be entitled to any of the privileges or benefits of a ship or vessel of the United States.

The whole tenor of this section shows that she is not to be registered anew, until her return, The law requires that the register should be on board the ship, while at sea, and no new register can be granted, until the old one is delivered up, which cannot be, until the vessel returns to port. The only effect of the want of a bill of sale in writing is, to prevent the issuing of a new register ; until, therefore, a new register can be applied for, and the old register given up, no bill of sale in writiny is necessary.

The only use of a bill of sale in writing, and of the oath required by the 17th section, is to ascertain, at the time of entry, whether any foreigners are interested, so *as to give the exclusive privileges to American citizens [*53 only. While the vessel is at sea, there is no use in giving new evidence of her American character. It is only at her return and entry, that it becomes necessary to discriminate.

A bill of sale in writing is necessary, but is not of itself sufficient to obtain a new register. It must also be accompanied by an actual delivering up of the old register ; and until the latter can be done, the former is useless.

The law did not intend to prevent the sale of a vessel at sea, and as the transfer cannot be complete, until her return, it is not necessary, that even the bill of sale in writing should be made, until her return. Indeed, the act, by requiring that the certificate of registry should be recited at length in the bill of sale, and by requiring also that the certificate itself should remain on board the vessel, while at sea, strongly implies that the bill of sale in writing can be made only while the vessel is in port. Both the sale and resale by parol, are admitted by the pleadings, to be valid and effectual in passing and repassing the property, so that Willings & Francis, at the time of the entry of the ship, could safely take the oath required by the 17th section ; and it is evident, that that oath contains an averment of all the facts necessary to entitle the ship to the privileges of a vessel of the United States, at the time of entry, if she had been before duly registered as such. This is apparent, by comparing the 17th section with the 1st, which declares that vessels registered pursuant to the act shall be entitled to the privileges of vessels of the United States, so long as they shall continue to be wholly owned and commanded by citizens of the United States.

The oath in the 17th section is, that the register contains the names of all the persons who are then owners of the ship ; or, if any part has been sold or transferred, since the granting the register, that such is the case ; and that no foreign subject or citizen hath, to the best of his knowledge and belief, any share, by way of trust, confidence or otherwise, in such ship or vessel. And the section provides, that if the owner shall refuse to take *such oath, the vessel shall not be entitled to the privileges of a vessel [*54 of the United States, which strongly implies, that if the owner does not refuse, but offers (as in the present case) to take the oath, the vessel shall be entitled to those privileges.

Again, the oath in the 17th section shows that the owner is not bound to give notice of the sale, until the vessel has arrived and is about to be entered. The whole argument on the part of the United States is built upon a particular construction, or meaning, applied to the word "when," in the

beginning of the 14th section. It is said, that "when" means, at that time. But this is not the only meaning of the word. It is often used for if, or in case. And in this sense, it is used in that section ; and in the same sentence, the idea intended to be expressed by the word "when" is repeated and explained by the expression "in every such case." The words are not "when any ship shall be sold," "she shall be registered anew ;" but, "when any ship shall be sold," "in every such case," "she shall be registered anew," thereby excluding the idea, that the registering anew was to be at the moment of sale, and negativing the construction which might otherwise be raised upon the equivocal meaning of the word "when."

The 7th section of the act provides, that if the vessel shall be transferred, while at sea, the master shall, within eight days after his arrival within any district of the United States, deliver up the certificate of registry to the collector of such district ; and the 14th section shows that no new register can be had, until the old one is delivered up. By the 11th section, if the vessel shall arrive in a district other than that in which the new owner usually resides, she may obtain a temporary register, which shall be given up, on her arrival at the port to which she belongs. By no clause of the act is it required, that notice of sale should be given to any officer of government, until the vessel arrives in port, and is about to be entered at the customhouse.

The words of the 14th section are in the future tense. If she shall not be registered anew, she shall cease to be deemed a ship or vessel of the United States. *The whole tenor and spirit of the act show that none of the forms are to be complied with, while the vessel is at sea. [*55]

February 14th, 1807. MARSHALL, Ch. J., delivered the opinion of the court.(a)—The single question in this case is, whether an American registered vessel, in part transferred by parol, while at sea, to an American citizen, and resold to the original owners, on her return into port, before her entry, does, by that operation, lose her privileges as an American bottom, and become subject to foreign duties?

This question depends on the "act concerning the registering and recording of ships and vessels," and more particularly on the 14th and 17th sections of that act. In construing the 14th section, much depends on the true legislative meaning of the word "when." The plaintiffs in error contend, that it designates the precise time when a particular act must be performed, in order to save a forfeiture ; the defendants insist, that it describes the occurrence which shall render that particular act necessary. That the term may be used, and, either in law or in common parlance, is frequently used, in the one or the other of these senses, cannot be controverted ; and, of course, the context must decide in which sense it is used in the law under consideration.

The particular act to be performed, in order to save the forfeiture of the American character, and the privileges attached to it, is the obtaining a new register ; and the first inquiry is, whether this new register must be obtained, at the time of transfer, or at some other convenient time, on the event of a

(a) Present, MARSHALL, Chief Justice, WASHINGTON, JOHNSON and LIVINGSTON, Justices.

transfer. This would seem to the court scarcely to admit of a doubt. It has been correctly argued, that the precise *time to register the vessel [*56 anew cannot be prescribed by the word "when," because the direction does not follow that word in the sentence, so as to be limited by it with respect to time. It is not said, that when a registered vessel shall be transferred or altered, she shall obtain a new register, or cease to be an American vessel, but the continuity of the sentence is broken, by interposing the words "in every such case," thereby clearly making the forfeiture to depend on the failure to register, on the event described, not on the failure to register at the precise time when the event described occurs. This observation also applies to a subsequent part of the section, where the forfeiture is repeated, and depends on the failure to register, not on the failure to register at the precise time of transfer.

But this construction, which is the fair and natural exposition of the words themselves, is rendered still more obviously necessary, by the nature of the case, and by the context. No man will contend, that the transfer or the change in a vessel, and the obtaining a new register, are to be simultaneous. The one must precede the other, and unless the transfer, or the repairs and alterations of the hulk or rigging are, in all cases, to be made in the office from which the new register is to be obtained, a reasonable interval between these acts must be allowed. This reasonable interval will depend on the nature of the case.

When must a new register be obtained for a vessel which has been altered, or partially transferred to a citizen while at sea? The act answers, at the time of delivering up her former certificate of registry. And when can this former certificate be delivered up? Certainly, not until the return of the vessel, for the certificate is a paper necessary to the vessel, and is, therefore, always retained on board, while at sea. This construction is really so obvious and inevitable, that the endeavor to make it more clear, would seem to be a total misapplication of time.

*The question, at what time the new register is to be obtained, [*57 and at what time the vessel shall be affected by the failure to obtain it? is susceptible of rather more doubt. There is no impossibility in obtaining a new register, before entry, and the necessity of doing so, must depend upon the words of the act, and upon the nature of the case. It is obvious, that on her arrival in port, the Missouri was an American vessel, and her cargo, when imported into the United States, was liable to the duties imposed on American, not on foreign bottoms. This is the clear consequence of establishing that a new register was not required, before the arrival of the vessel. If, then, the cargo, when imported, was liable only to the duties on goods imported in an American bottom, it would certainly require plain words, to charge them, on any subsequent failure, with higher duties.

If the words of the section be examined, they are, as has been stated at the bar, prospective, not retrospective. They operate on future, not on past transactions. "The vessel shall be registered anew, otherwise she shall cease to be deemed a ship or vessel of the United States:" that is, she shall cease, after the lapse of the time when she ought to have been registered anew. But before that time had elapsed, she had, as an American vessel, actually imported a cargo whose liability to duties had commenced. So, in the subsequent clause: "And in every case in which a ship or vessel is

hereby required to be registered anew, if she shall not be so registered anew, she shall not be entitled to any of the privileges or benefits of a ship or vessel of the United States." That is, her future earnings shall not be attended with the advantages annexed to American bottoms.

This construction derives some corroboration from the 17th section. This section provides for the oath which is to be taken by an owner, on the entry of an American vessel. "That upon the entry of every ship," &c. *58] *If, upon the entry, the owner shall refuse to take this oath, the vessel loses the privileges of an American bottom. If he takes it, and the oath discloses no fact which has already forfeited those privileges, she retains them. It is observable, that in order to retain them, she is not required to take out a new register, if an alienation has been made, and this strengthens the idea that if such an alienation be not in itself a forfeiture, a new register cannot be requisite, so far as respects the voyage already concluded.

In the case of alienation to a foreigner, the privileges of an American bottom are *ipso facto* forfeited ; but in the case of an alienation to a citizen, they are not forfeited, until after she ought to have been registered anew, and the oath which entitles her to enter as an American bottom does not require such new register.

But it has been argued, that the omission to execute a bill of sale in writing, at the time of sale, is in itself a forfeiture of the American character. The words of the act are, "and in every such case of sale or transfer," &c. These words attach to the omission the penalty which the law annexes to it, and no other can be inflicted. This is not that the vessel shall lose her American character, but that she shall be incapable of being registered anew. The bill of sale, therefore, can only be required, when the new register is to be obtained, and if it be then produced, the new register cannot be refused.

An opinion has already been indicated, that in the case of a transfer or alienation at sea, a new register is not necessary to protect from alien duties the vessel which arrives, and the cargo which was actually imported, while the old register was in full force. But it is the opinion of the court, that in the case under consideration, no new register was requisite. The new register must be in everything but its date a precise copy of the old one. The oath to be administered on the entry could be truly and fairly taken. The *59] *names of all the persons who were, at the time, owners of the vessel were in the old register. The intermediate alienation and repurchase of part of the vessel had worked no forfeiture, and had created no necessity for a new register. The parties to whom the alienation had been made, not having property in the vessel at the time of entry, could not have taken the oath prescribed by law, which is in the present tense, and refers to the actual state of the property at the time of entry ; nor could a new register have issued to them, in order to be delivered up, for the purpose of making out another register for the original owners, who had become the present owners, without departing from the truth of the case, because the register also speaks in the present tense, and must recite the names of those who are the real owners at its date. Any new register which could have issued must have been, except in date, a duplicate of the old one, and must have been perfectly useless. Suppose, the ship had been

altered in a foreign port, but before her arrival and entry, had resumed the form and dimensions mentioned in her old register, would it be pretended that a new register was necessary? What would such new register be but a copy of the old one? It is believed, that in such a case, it would not be suspected, that any forfeiture of the old register, or any necessity for a new one, was produced, and between the two cases there appears to be no difference made by the letter or the spirit of the act.

The court is, therefore, unanimously of opinion, that sentence of the circuit court be affirmed.

Judgment affirmed.

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*O'NEALE *v.* LONG. [*60

Bond.—Alteration.—Surety.

If a bond be executed by O., as a surety for S., to obtain an appeal from the judgment of a justice of the peace, in Maryland, and the bond is rejected by the justice, and afterwards, without the knowledge of O., the name of W. be interlined as an obligor, who executes the bond, and the justice then accepts it, it is void as to O.[1]

Long *v.* O'Neale, 1 Cr. C. C. 233, reversed.

ERROR to the Circuit Court of the district of Columbia, sitting in Washington, in an action of debt upon four joint and several bonds, signed and sealed by Mary Sweeny, as principal, and William O'Neale, I. T. Frost and Lund Washington, as sureties, conditioned that she should prosecute her appeal upon four several judgments rendered against her by a justice of peace, in Maryland. William O'Neale, the defendant below, pleaded *non est factum*, and upon the trial of that issue, took a bill of exceptions, because the court below (two judges only being present, and divided in opinion) did not, at his request, instruct the jury, "that if they should be satisfied by the evidence, that the bonds were signed, sealed and delivered by Mary Sweeny, as principal, and I. T. Frost and the defendant, as her sureties, and were afterwards presented to C. C. (the justice who had rendered the judgments) for his approbation and acceptance of the securities, and were by him refused and rejected, and after such rejection, were interlined, without the license, privity and knowledge of the defendant, by inserting the name of Lund Washington, as a co-obligor, who, on the succeeding day, without the privity, knowledge and consent of the defendant, signed, sealed and delivered the bonds, which were afterwards approved of by the justice, that then such interlineation and execution of said bonds, by Lund Washington, rendered them void as to the defendant, and the plaintiff cannot recover in this suit."

By the act of Maryland, 1791, c. 68, § 5, no execution upon a judgment of a justice of peace shall be stayed by an appeal, unless the person appealing, or some other in his behalf, "shall, immediately upon making such appeal, enter into bond, with sufficient sureties, such as the justice by whom

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[1] Harper *v.* State, 7 Blackf. (Ind.) 61. The law has been held to be the same as to negotiable instruments. Gardner *v.* Walsh, 5 Ellis & Bl. 83; Chappell *v.* Spencer, 23 Barb. 584; Barton *v.* Baker, 31 Id. 241; McVean *v.* Scott, 46 Id. 379; Lunt *v.* Silver, 5 Mo. App. 186. But the decisions on this question are not harmonious. See McCaughey *v.* Smith, 27 N. Y. 39; Brownell *v.* Winnie, 29 Id. 400; Bingham *v.* Reddy, 5 Ben. 266.