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REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

SUPREME COURT

OF THE

UNITED STATES,

FEBRUARY TERM 1816.

By HENRY WHEATON,
COUNSELLOR AT LAW.

VOL. I.

FOURTH EDITION.

EDITED, WITH NOTES AND REFERENCES TO LATER DECISIONS,

BY

FREDERICK C. BRIGHTLY,
AUTHOR OF THE "FEDERAL DIGEST," ETC.

NEW YORK:
BANKS & BROTHERS, LAW PUBLISHERS,
No. 144 NASSAU STREET.
ALBANY: 475 BROADWAY.
1883.

PREFACE.

In presenting to the profession the first volume of the Reports, which the editor is pledged to continue, he feels how much he will stand in need of its indulgence, for the imperfections which may be discovered in a work, at once so important and difficult. It is not, however, with the view of deprecating the justice of criticism, that he offers a few remarks upon the nature of the undertaking, and the manner in which it has been executed.

Of the arguments of counsel, nothing more has been attempted than to give a faithful outline; to do justice to the learning and eloquence of the bar, would not be possible, within any reasonable limits: the reporter, therefore, trusts that his professional brethren will regard with candor the imperfections they may perceive, whilst the public will attribute them to the cause mentioned. It is possible, that some important illustrations may have been omitted; but it is believed, that the points and authorities have been faithfully recorded, where the cases either admitted of, or required, it.

The same discretion has been exercised in omitting to report cases turning on mere questions of fact, and from which no important principle, or general rule, could be extracted. Of these, an unusual number has recently occurred on the admiralty side of the court, attended with an infinite variety of circumstances, but inapplicable, as precedents, to future cases.

Some notes have been added, in order to illustrate the decisions by analogous authorities; and whilst gleaning in the rich field of prize jurisprudence, afforded by the late war, it was thought expedient to subjoin a more ample view of the practice in prize causes than has yet been presented to the public, which may possibly serve as a check to those irregularities that had crept in, from the want of experience in this branch of the administration of justice. Its doctrines have been developed by the court in a masterly manner; and we may contemplate with pride and satisfaction, the structure which has been built up in so short a time, and under circumstances so unpropitious to the development of the true principles of public law. On this occasion, we are compelled to lament the loss of an illustrious civilian, whose labors so eminently contributed to facilitate those of the court, and who has been removed, by the inexorable hand of death, from

this scene of active contention and generous emulation.[1] With how much dignity and usefulness he adorned the bar, and with what powers of analysis he unfolded the most intricate questions of jurisprudence, the records of this tribunal will attest. Less attentive to the graces of elocution, and the technical forms of law, than to the principles of equity, his mind was enlarged by a philosophical view of universal jurisprudence, and to him may be applied what Cicero says of his contemporary Sulpicius, "*Videtur in secunda arte primus esse maluisse, quam in prima secundus, id quod est adeptus, in jure ciciti esse princeps. Neque ille magis juris consultus, quam justitiæ fuit: ita ea quæ proficisebantur a legibus et a jure civili semper ad facilitatem equitatemque referebat.*" But it is higher praise, and equally well merited, that in him the character of the advocate seemed to borrow a new lustre from that of the philosopher and the patriot; that, like the illustrious Roman referred to, "in his political conduct, he was always the friend of peace and liberty; moderating the violence of opposite parties, and discouraging every step towards civil dissensions."

Should the annotations contained in this volume be favorably received by the public, the editor will hereafter continue this branch of his labor with a less timid hand, and, in the words of Lord Bacon, make it his aim, "to collect the rules and grounds dispersed throughout the body of the same laws, in order to see more profoundly into the reason of such judgments and ruled cases, and thereby to make more use of them for the decision of other cases more doubtful; so that the uncertainty of law, which is the principal and most just challenge that is made to the laws of our nation, at this time, will, by this new strength laid to the foundation, be somewhat the more settled and corrected." Such a commentary seems indeed, indispensable to the utility of reports of the proceedings in courts of justice. For, as Sir William Jones has observed, "if *law* be a science, and really deserves so sublime a name, it must be founded on principle, and claim an exalted rank in the empire of reason."

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[1] Mr. Dexter, who died during the vacation.

JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

DURING THE PERIOD OF THESE REPORTS.

Hon. JOHN MARSHALL, Chief Justice.

" BUSHROD WASHINGTON,
" WILLIAM JOHNSON,
" BROCKHOLST LIVINGSTON,
" THOMAS TODD,
" GABRIEL DUVALL,
" JOSEPH STORY,

} Associate Justices.

RICHARD RUSH, Esquire, Attorney-General.

A TABLE

OF THE

NAMES OF THE CASES REPORTED IN THIS VOLUME.

The references are to the STAR *pages.

A TABLE

OF THE

CASES CITED IN THIS VOLUME.

The references are to the STAR *pages.

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RULES AND ORDERS

OF THE

SUPREME COURT OF THE UNITED STATES.

I. February Term 1790. ORDERED, That the clerk of this court do reside and keep his office at the seat of the national government, and that he do not practice, either as an attorney or a counsellor, in this court, while he shall continue to be clerk of the same.

II. February Term 1790. ORDERED, That (until further order) it be requisite to the admission of attorneys or counsellors to practice in this court, that they shall have been such for three years past in the supreme courts of the state to which they respectively belong, and that their private and professional characters shall appear to be fair.

III. February Term 1790. ORDERED, That counsellors shall not practice as attorneys, nor attorneys as counsellors, in this court.

IV. February Term 1790. ORDERED, That they shall respectively take the following oath, viz: I, ———, do solemnly swear, that I will demean myself (as an attorney or counsellor of the court) uprightly, and according to law, and that I will support the constitution of the United States.

V. February Term 1790. ORDERED, That (unless and until it shall be otherwise provided by law) all process in this court shall be in the name of the President of the United States.

VI. February Term 1791. ORDERED, That the counsellors and attorneys, admitted to practice in this court, shall take either an oath, or, in proper cases, an affirmation, of the tenor prescribed by the rule of this court on this subject, made February term 1790, viz: I, ———, do solemnly swear (or affirm, as the case may be), that I will demean myself as attorney or counsellor of this court, uprightly, and according to law, and that I will support the constitution of the United States.

VII. August Term 1791. The Chief Justice in answer to the motion of the attorney-general, informs him and the bar, that this court consider the practice of the court of king's bench, and of chancery, in England, as

affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein as circumstances may render necessary.

VIII. February Term 1795. THE COURT give notice to the gentlemen of the bar that hereafter they will expect to be furnished with a statement of the material points of the case from the counsel on each side of the cause.

IX. February Term 1795. THE COURT declared, that all evidence on motions for a discharge upon bail, must be by way of deposition, and not *vivâ voce.*

X. August Term 1796. ORDERED, That process of *subpœna*, issuing out of this court in any suit in equity, shall be served on the defendant, sixty days before the return-day of the said process; and further, that if the defendant, on such service of the *subpœna*, should not appear at the return-day contained therein, the complainant shall be at liberty to proceed *ex parte.*

XI. February Term 1797. IT IS ORDERED by the Court, that the clerk of the court to which any writ of error shall be directed, may make return of the same, by transmitting a true copy of the record, and of all proceedings in the cause, under his hand and the seal of the court.

XII. August Term 1797. IT IS ORDERED by the the Court, that no record of the court be suffered by the clerk to be taken out of his office but by the consent of the court; otherwise, to be responsible for it.

XIII. August Term 1800. In the case of *Course* v. *Stead's Executors*, ORDERED, That the plaintiff in error be at liberty to show, to the satisfaction of this court, that the matter in dispute exceeds the sum or value of $2000, exclusive of costs; this to be made appear by affidavit, and ——— days' notice to the opposite party, or their counsel, in Georgia. Rule as to affidavits to be mutual.

XIV. August Term 1801. ORDERED, That counsellors may be admitted as attorneys in this court, on taking the usual oath.

XV. It is ORDERED, That in every cause when the defendant in error fails to appear, the plaintiff may proceed *ex parte.*

XVI. February Term 1803. IT IS ORDERED, That where the writ of error issues within 30 days before the meeting of the court, the defendant is at liberty to enter his appearance, and proceed to trial; otherwise, the cause must be continued.

XVII. In all cases where a writ of error shall delay the proceedings on the judgment of the circuit court, and shall appear to have been sued out merely for delay, damages shall be awarded at the rate of ten *per centum* per annum, on the amount of the judgment.

XVIII. In such cases, where there exists a real controversy, the damages shall be only at the rate of six *per centum* per annum. In both cases, the interest is to be computed as part of the damages.

XIX. February Term 1806. All causes, the records of which shall be delivered to the clerk on or before the sixth day of the term, shall be considered as for trial in the course of that term. Where the record shall be delivered after the sixth day of the term, either party will be entitled to a continuance.

In all cases where a writ of error shall be a *supersedeas* to a judgment, rendered in any court of the United States (except that for the district of Columbia), at least thirty days previous to the commencement of any term of this court, it shall be the duty of the plaintiff in error to lodge a copy of the record with the clerk of this court, within the first six days of the term, and if he shall fail so to do, the defendant in error shall be permitted, afterwards, to lodge a copy of the record with the clerk, and the cause shall stand for trial, in like manner as if the record had come up within the first six days ; or he may, on producing a certificate from the clerk, stating the cause, and that a writ of error has been sued out, which operates as a *supersedeas* to the judgment, have the said writ of error docketed and dismissed. This rule shall apply to all judgments rendered by the court for the district of Columbia, at any time prior to a session of this court.

In cases not put to issue at the August term, it shall be the duty of the plaintiff in error, if errors shall not have been assigned in the court below, to assign them in this court, at the commencement of the term, or so soon thereafter as the record shall be filed with the clerk, and the cause placed on the docket ; and if he shall fail to do so, and shall also fail to assign them, when the cause shall be called for trial, the writ of error may be dismissed, at his cost ; and if the defendant shall refuse to plead to issue, and the cause shall be called for trial, the court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the cause.

XX. February Term 1808. Ordered, That all parties in this court, not being residents of the United States, shall give security for the costs accruing in this court, to be entered on the record.

XXI. Ordered, That upon the clerk of this court producing satisfactory dence, by affidavit, or the acknowledgment of the parties, or their sureties, of having served a copy of the bill of costs, due by them respectively in this court, on such parties or their sureties, an attachment shall issue against such parties or sureties, respectively, to compel payment of the said costs.

XXII. February Term 1810. Ordered, That upon the reversal of a judgment or decree of the circuit court, the party in whose favor the reversal is, shall recover his costs in the circuit court.

XXIII. February Term 1812. Ordered, That only two counsel be permitted to argue for each party, plaintiff and defendant, in a cause.

XXIV. There having been two associate justices of the court appointed since its last session ; It is Ordered that the following allotment be made of the Chief Justice, and of the associate justices of the said Supreme Court among the circuits, agreeably to the act of congress in such case made and provided, and that such allotment be entered or ordered, viz :

For the first circuit, the Honorable Joseph Story: For the second circuit, the Honorable Brockholst Livingston: For the third circuit, the Honorable Bushrod Washington: For the fourth circuit, the Honorable Gabriel Duvall: For the fifth circuit, the Honorable John Marshall, Ch. J.: For the sixth circuit: the Honorable William Johnson: For the seventh circuit, the Honorable Thomas Todd.

XXV. February Term 1816. IT IS ORDERED by the Court, That in all cases where further proof is ordered by the court, the depositions which shall be taken, shall be by a commission to be issued from this court, or from any circuit court of the United States.

CASES DETERMINED

IN THE

SUPREME COURT OF THE UNITED STATES.

FEBRUARY TERM, 1816.

Negress Sally Henry, by William Henry, her father and next friend, *v.* Ball.

Slavery.

The act of assembly of Maryland, prohibiting the importation of slaves into that state, for sale or to reside, does not extend to a temporary residence, nor to an importation by a hirer or person other than the master or owner of such slave.

Error on judgment, rendered by the Circuit Court for the county of Washington, in the district of Columbia, against the plaintiff, who was, in that court, a petitioner for freedom.

The plaintiff, being a child, and the slave of the defendant, who resided in Virginia, was, some short *time before the month of May 1810, [*2
put to live with Mrs. Rankin, then residing also in Virginia, whose husband was an officer in the marine corps, stationed in the city of Washington. Mrs. Rankin was to keep the girl for a year, and was to give her victuals and clothes for her services. Some time in May 1810, Mrs. Rankin removed to Washington, and brought the petitioner with her, whether with or without the permission of Mr. Ball, was entirely uncertain. It was, probably, though not certainly, with his knowledge. In October 1810, Mr. Ball married, and soon after took the petitioner into his possession, and carried her home, he then residing in Virginia. Mrs. Rankin gave her up, being of opinion, though the girl had remained with her only seven or eight months, that she was bound to give her up, when required by her master. Mr. Ball afterwards removed, himself, into the city, and brought the petitioner with him.

Upon this testimony, the counsel for the petitioner prayed the court below to instruct the jury, that if they believed, from the evidence, that the defendant knew of the intended importation of the petitioner by Mrs. Rankin, and did not object to it, then such importation entitled the petitioner to her freedom; and further, that it was competent to the jury to infer, from his knowing of the importation, and not objecting to it, that such importa-

tion was made with his consent. This instruction the court refused to give; but did instruct the jury, that if they should be of opinion, that Mrs. Rankin was, at the time she brought the petitioner into the city of Washington, a
*3] citizen of the United States, coming into the city of Washington *with a *bonâ fide* intention of settling therein, then her importation of said slave was lawful, and did not entitle the petitioner to her freedom, whether the said importation were or were not made with the consent of the defendant. An exception was taken to this opinion, and the jury having found a verdict for the defendant, on which judgment was rendered by the court, the cause was brought into this court by writ of error.

Key, for the plaintiff in error, and petitioner, cited the act of the assembly of Maryland, of 1796, c. 67, § 1, 2, contending, that its true construction applied only to *bonâ fide* owners, and not to bailees or hirers.

Law, contrà, stated, that the domicil of the owner had been in Virginia, and that she was a *bonâ fide* emigrant from that state. Being a hirer of the slave, she was *pro hâc vice* owner. (2 Bl. Com. 254, and the civil law writers there cited.) The act of assembly must be construed to refer to both species of property, qualified and absolute. He referred to the 6th section of the act, to show that a property may be, in slaves, limited in point of time.

February 10th, 1816. MARSHALL, Ch. J., delivered the opinion of the court, and after stating the facts, proceeded as follows:—This cause depends on an act of the state of Maryland, which is in force in the county of Washington. The first section of that statute enacts, *"that it shall not
*4] be lawful to bring into this state any negro, mulatto or other slave, for sale, or to reside within this state; and any person brought into this state, contrary to this act, if a slave before, shall, thereupon, immediately cease to be the property of the person or persons so importing or bringing such slaves within this state, and shall be free." The 2d section contains a proviso in favor of citizens of the United States coming into this state with a *bonâ fide* intention of settling therein, and bringing slaves with them. The 4th section enacts, that "nothing in this act contained shall be construed or taken to affect the right of any person or persons travelling or sojourning with any slave or slaves, within this state, such slave or slaves not being sold or otherwise disposed of, in this state, but carried by the owner out of the state, or attempted to be carried."

This act appears to the court not to comprehend the case now under consideration. The expressions of that part of the first section which prohibits the importation of slaves, are restricted to cases of importation "for sale, or to reside in this state." The petitioner was obviously not imported for sale, nor is the court of opinion, that the short time for which she was to continue with Mrs. Rankin can satisfy the words, "to reside within this state." The legislature must have intended to prohibit a general residence, not a special limited residence, where the slave is to remain for that portion of the year, for which she was hired, that still remained.

If, on this point, the first section of the act could be thought doubtful, the fourth section seems to remove *that doubt. It declares, that
*5] "nothing in the act contained shall be construed or taken to affect

the right of any person travelling or sojourning with any slave or slaves, within this state, such slave or slaves not being sold or otherwise disposed of, in this state, but carried by the owner out of this state, or attempted to be carried."

This section sufficiently explains the residence contemplated by the legislature in the first section. The term *sojourning* means something more than "travelling," and applies to a temporary, as contra-distinguished from a permanent, residence. The court is also of opinion, that the act contemplates and punishes an importation or bringing into the state by the master or owner of the slave. This construction, in addition to its plain justice, is supported by the words of the first section. That section declares, that "a person brought into this state as a slave, contrary to this act, if a slave before, shall, thereupon, cease to be the property of the person or persons so importing or bringing such slave within this state, and shall be free." It is apparent, that the legislasture had in view the case of a slave brought by the owner, since it is the property of the person importing the slave which is forfeited.

Upon the best consideration we have been able to give this statute, the court is unanimously of opinion, that the petitioner acquired no right to freedom, by having been brought into the county of Washington, by Mrs. Rankin, for one year's service, she having been, in the course of the year, carried back to Virginia by her master.

*The circuit court appears to have considered the case as coming within the proviso of the 2d section. If, in this opinion, that court were even to be thought mistaken, the error does not injure the petitioner, and is, therefore, no cause for reversal. The court is unanimously of opinion, that the judgment ought to be affirmed. [*6

Judgment affirmed.

Negro John Davis *et al. v.* Wood.

Evidence.—Hearsay.— Verdict.

Evidence by hearsay and general reputation is admissible only as to pedigree, but not to establish the freedom of the petitioner's ancestor, and thence to deduce his or her own.

Verdicts are evidence between parties and privies only: and a record proving the ancestor's freedom to have been established in a suit against another party, by whom the petitioner was sold to the present defendant, is inadmissible evidence to prove the petitioner's freedom.

Mima Queen *v.* Hepburn, 7 Cr. 290, re-affirmed.

This case was similar to the preceding, in which the petitioners excepted to the opinion of the court below: 1st. That they had offered to prove, by competent witnesses, that they (the witnesses) had heard old persons, now dead, declare, that a certain Mary Davis, now dead, was a white woman, born in England, and such was the general report in the neighborhood where she lived; and also offered the same kind of testimony, to prove that Susan *Davis, mother of the petitioners, was lineally descended, in the female line, from the said Mary; and it was admitted, that said Susan was, at the time of petitioning, free, and acting, in all respects, as a free woman; which evidence, by hearsay and general reputation, the court refused to admit, except so far as it was applicable to the fact of the petitioners' pedigree. 2d. That they having proved, that the petitioners are [*7

the children of Susan Davis, and that she is the same person named in a certain record, in a cause wherein Susan Davis, and her daughter Ary, were petitioners, against Caleb Swan, and recovered their freedom, the plaintiffs offered to read said record in evidence to the jury, as *primâ facie* testimony that they are descendants in the female line from a free woman, who was born free, and are of free condition, connected with the fact, that the defendant in this cause sold said Susan to Swan, the defendant in said record, which the court refused to suffer the petitioners to read to the jury as evidence in this cause.

Lee, for the plaintiffs in error and petitioners, referred to the opinion of the court (DUVALL, J., dissenting) in the case of *Mima Queen and child* v. *Hepburn*, February term 1813 (7 Cr. 290), as to the admissibility of hearsay evidence, in a similar case, remarking that, unless the court was disposed to review its decision, it must be taken for law, and he could not deny its authority.

DUVALL, J.—The petitioners in that case were descended from a yellow
*8] woman, a native of South *America. In this case, they are descended from a white woman.

Lee cited the opinion of the Virginia court of appeals, in the case of *Pegram* v. *Isabel*, 2 Hen. & Munf. 193, as to the admissibility of the record, in which a record was admitted.

Key, contrà, contended, that both grounds were irrevocably closed against the other party. The first, certainly ; and the second, equally so ; as the evidence could not be admissible as *primâ facie* testimony merely, but if admitted, must be conclusive. The decisions in the state courts of Virginia are against the evidence of the parent's or other ancestor's freedom being conclusive in favor of a child. The case of *Pegram* v. *Isabel* is no authority here, for it was formerly considered and repudiated by this court in the decision alluded to.

Lee and *Law* replied, and cited 2 Wash. 64, and Swift's Law of Evidence 13.

March 12th, 1816. MARSHALL, Ch. J., delivered the opinion of the court, and stated, that, as to the first exception, the court had revised its opinion in the case of *Mima Queen and child* v. *Hepburn*, and confirmed it. As to the second exception, the record was not between the same parties. The rule is, that verdicts are evidence between parties and privies.[1] The
*9] court does *not feel inclined to enlarge the exceptions to this general rule, and therefore, the judgment of the court below is affirmed.

Judgment affirmed.

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[1] See Vigel *v.* Naylor, 24 How. 208, 212 ; Alexander *v.* Stokely, 7 S. & R. 299.

The Samuel: Pierce and Beach, Claimants.

Admiralty jurisdiction.—Pleading.—Depositions de bene esse.—Further proof.

Prosecutions under the non-importation laws, are causes of admiralty and maritime jurisdiction and the proceeding may be by libel in the admiralty.[1]

Technical nicety is not required in such proceedings; it is sufficient, if the offence be described in the words of the law, and so set forth, that, if the allegation be true, the case must be within the statute.[2]

That the deponent is a seaman on board a gun-boat, in a certain harbor, and liable to be ordered to some other place, and not to be able to attend the court, at the time of its sitting, is not a sufficient reason for taking his deposition *de bene esse*, under the judiciary act of 1789.

Where the evidence is so contradictory and ambiguous as to render a decision difficult, the court will order further proof, in a revenue or instance cause.

Appeal from the Circuit Court for the Rhode Island district. The brig Samuel sailed from St. Bartholomews, an island belonging to his majesty the king of Sweden, in the month of November 1811, with a cargo consisting of rum, molasses and some other articles, and arrived in Newport, Rhode Island, on the 8th of the following December, where the vessel and cargo were seized and libelled in the district court, as being forfeited to the United States, under the act of congress prohibiting the importation *of articles the growth, produce or manufacture of Great Britain or [*10
France, their colonies or dependencies. The vessel and cargo were claimed by John Pierce and George Beach, both citizens of the United States. The district court condemned both vessel and cargo. The circuit court condemned the vessel and the rum, but restored the residue of the cargo. From the sentence of the circuit court, both the libellants and the claimants appealed to this court.

Daggett, for the claimants, made three points: 1st. The proceedings ought to have been at common law, and not in the admiralty. 2d. The information is insufficient. 3d. The testimony was insufficient to warrant a condemnation.

1. The act of the 1st of March 1809, on which this libel is founded, directs, that the penalties and forfeitures "shall be sued for, prosecuted and recovered, with the costs of suit, by action of debt, indictment or information." The cases under the authority of which this proceeding was brought are *The Vengeance*, 3 Dall. 297; *The Sally*, 2 Cr. 406, and *The Betsey and Charlotte*, 4 Ibid. 443. But the act under which the Vengeance was prosecuted was the same with the collection law of the 2d of March 1799, § 89, which prescribed a proceeding in the admiralty; the Sally was prosecuted under the slave-trade act of the 23d of March 1794, which indicates no particular proceeding; *whilst the Betsey and Charlotte was prosecuted [*11
under the act of non-intercourse with St. Domingo, of the 28th of February 1806, wherein no method of recovering the penalties was specified. Supposing this to be a civil cause of admiralty and maritime jurisdiction, and that the district court has jurisdiction of it as such, the proceedings may still be by information, as in the exchequer. Where a statute prescribes a

[1] The Sarah, 8 Wheat. 391.

[2] The Emily, 9 Wheat. 381; The Merino, Id. 391; The Palmyra, 12 Id. 12; The Caroline, 1 Brock. 384.

particular remedy, or particular remedies, no other can be pursued. *Rex* v. *Robinson*, 2 Burr. 803.

2. The statute is penal, and requires strictly accurate proceedings. The libel alleges, generally, that the cargo was laden on board in some foreign port. The cargo was stated to have belonged, in the alternative or disjunctive, to Pierce and Beach, or to one Stillman, or some other citizen, or consigned to one of said parties ; and it was alleged that the offence was committed with "the knowledge of the owner or of the master." *The Bolina*, 1 Gallis. 85.

3. The testimony of Oldham, a witness in the cause, was taken irregularly, and not used in the court below.

The vessel and cargo were condemned upon the testimony of tasters only, against all the oral and documentary evidence. This testimony is novel ; professional men and artists are credible witnesses in their own peculiar science or art ; but this is matter of speculative opinion only, not of known art or certain science. The witnesses can never be made responsible for perjury. Their evidence is contradicted.

*12] The *Attorney-General*, for the libellants.—1. The *cargo could not have been the produce of St. Bartholomews, a sterile and unproductive island, used as St. Eustatius was, during the war of the American revolution. It is more likely it was transshipped from a British than a Spanish colony ; and therefore, the claim is clouded with improbability. The case of *The Odin*, 1 Rob. 217, may be invoked from the law of prize, to show how little the fairest documentary evidence is to be regarded, in comparison with the *evidentia rei*. Strip off this veil, and the *onus* is thrown upon the claimants, from which they cannot relieve themselves but by the strongest positive testimony.

As to the evidence of the tasters, all our knowledge is derived through the senses. It is not unerring, but weighty ; and the revenue laws rely upon it, in collecting the duties on wines.

The spirit and equity of the judiciary act of the 24th of September 1789, were pursued in taking the deposition of Oldham ; he was a seaman serving in the flotilla of gun-boats, at Newport, and liable to be ordered to some other place.

2. It is novel doctrine, that this is a libel, as contra-distinguished from an information. It is a libel in the nature of an information ; and the process of information is used in the admiralty as well as in the exchequer. In alleging the offence, reasonable certainty only was necessary : the charge is sufficiently specific to have put the claimants on their guard ; and to require more, would be to prevent the conviction of offenders. The case of *The Bolina* does not apply to the present question.

*13] **Daggett*, in reply.—The deposition of Oldham cannot be admitted, unless it be authorized by statute or common law ; prize proceedings are peculiar : soldiers and sailors are not excepted by the letter of the judiciary act, and a class of exceptions cannot be implied. The burden of proof, in fiscal causes, is not thrown on the claimants, unless by positive law. There can be no difficulty in convicting offenders, as these proceedings are amendable. *Anon.*, 1 Gallis. 22.(*a*)

(*a*) The decision cited by the counsel applies only to the power of the circuit court

The Samuel.

February 12th, 1816. MARSHALL, Ch. J., delivered the opinion of the court:—On the part of the claimants, it is contended, 1st. That the proceedings ought to have been at common law, and not in the admiralty. 2d. That the information, if it be one, is insufficient. 3d. That the testimony is wholly insufficient to warrant a condemnation.

1. In arguing the first point, the counsel for the claimants endeavored to take this case out of the *principle laid down in *The Vengeance*, and in other cases resting on the authority of that decision, by urging a difference of phraseology in the acts of congress. In that part of the act on which this prosecution is founded, which gives the remedy, it is enacted, "that all penalties and forfeitures, arising under, or incurred by virtue of, this act, may be sued for, prosecuted and recovered, with costs of suit, by action of debt, in the name of the United States of America, or by indictment or information, in any court having competent jurisdiction to try the same." Debt, indictment and information, are said to be technical terms, designating common-law remedies, and consequently, marking out the courts of common law as the tribunals in which alone prosecutions under this act can be sustained. There would be much force in this argument, if the term "information" were exclusively applicable to a proceeding at common law; but the court is of opinion, that it has no such exclusive application. A libel, on a seizure, in its terms and in its essence, is an information. Consequently, where the cause is of admiralty jurisdiction, and the proceeding is by information, the suit is not withdrawn, by the nature of the remedy, from the jurisdiction to which it otherwise belongs. [*14

2. The second objection made by the claimants to these proceedings, is, that though the words of the act may be satisfied by a libel in the nature of an information, yet the same strictness which is required in an information at common law, will be necessary to sustain a libel in the nature of an information in the court of admiralty; and that, testing the libel by this rule, it is totally insufficient. The court *is not of opinion, that all those technical niceties which the astuteness of ancient judges and lawyers has introduced into criminal proceedings at common law, and which time and long usage have sanctioned, are to be engrafted into proceedings in the courts of admiralty. These niceties are not already established, and the principles of justice do not require their establishment. It is deemed sufficient, that the offence be described in the words of the law, and be so described, that if the allegation be true, the case must be within the statute. This libel does so describe the offence, and is, therefore, deemed sufficient. [*15

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to allow amendments in revenue causes or proceedings *in rem*, before appeal to the supreme court. But it may be interesting to the reader to be informed, that the supreme court may remand the cause to the court below, with instructions to amend the proceedings. Thus, in the cases of The Caroline and The Emily, at February term 1813 (7 Cr. 496, 500), which were informations *in rem*, on the slave-trade act of the 22d of March 1794, the opinion of the court was, that the evidence was sufficient to show a breach of the law, but that the libel was not sufficiently certain to authorize a decree of condemnation. The following decree was, therefore, entered: "It is the opinion of the court, that the libel is too imperfectly drawn to found a sentence of condemnation thereon. The sentence of the circuit court is, therefore, reversed, and the cause remanded to the said circuit court, with directions to admit the libel to be amended." See The Edward, *infra*, p. 261.

3. The third and material inquiry respects the evidence. Is this cargo of British origin? In the examination of this question, the first point to be decided is, the admissibility of the deposition of Thomas Oldham. That deposition is found in the record of the circuit court, with a certificate annexed to it, in these words: "N. B. The deposition of Thomas Oldham was filed, after the trial of the case, by order of the court." Some of the judges are of opinion, that this certificate of the clerk is to be disregarded, and that the deposition, being inserted in the record, must be considered as a part of it, and must be supposed to have formed a part of the evidence, when the decree was made: but the majority of the court is of a different opinion. The certificate of the clerk to the deposition is thought of equal validity, as if forming a part of his general certificate. It shows, that this deposition formed no part of the cause in the circuit court, and is, therefore,
*16] liable to *every exception which could be made to it, if it was not found in the record, and was now offered for the first time to this court.

On inspection, it appears to be a deposition, taken before a single magistrate, not on order of court, on a commission, with notice to the attorney of the claimant, who did not attend. It must be sustained by the act of congress, or it is inadmissible. The reason assigned for taking it is, "that the deponent is a seaman on board a gun-boat of the United States, in the harbor of Newport, and liable to be ordered to some other place, and not to be able to attend the court at the time of its sitting." The 30th section of the judiciary act directs, that "the mode of proof by oral testimony, and the examination of witnesses in open court, shall be the same in all the courts of the United States." The act then proceeds to enumerate cases in which depositions may be taken *de bene esse*. The liability of the witness to be ordered out of the reach of the court, is not one of the causes deemed sufficient by the law for taking a deposition *de bene esse*. In such case, there would seem to be a propriety in applying to the court for its aid.

But supposing this objection not to be so fatal as some of the judges think it, still the deposition is taken *de bene esse*, not in chief; and a deposition so taken can be read, only when the witness himself is unattainable. It does not appear in this case, that the witness was not within the reach of the court, and might not have given his testimony in open court, as is required by law. Had this deposition been offered in court, before or at the
*17] time of the trial, and used without objection, the inference *that the requisites of the law were complied with or waived, might have been justifiably drawn. But the party is not necessarily in court, after his cause is decided, and is not bound to know the fact that this deposition was ordered to be filed. For these reasons, it is the opinion of a majority of the court, that the deposition of Thomas Oldham ought not to be considered as forming any part of the testimony in this cause.

The deposition of Oldham being excluded, the prosecution rests chiefly on the depositions of Benjamin Fry and William S. Allen. These witnesses are both experienced dealers in rum; have both tasted and examined the rum of this cargo, are both of the opinion, that it is of British origin. In the opinion of all the judges, this testimony is entitled to great respect. The witnesses say, that there is a clear difference between the flavor of rum of the British and the Spanish islands, though they do not attempt to

describe that difference; and that their opinion is positive, that this is British rum.

To weaken the force of this testimony, the claimants have produced the depositions of several witnesses, also dealers in rum, who declare, that the difference in the flavor of the best Spanish rum, and that of the British islands, is inconsiderable, and that they cannot distinguish the one from the other; that they believe the best judges find great difficulty in making the discrimination. This testimony would, perhaps, have been entitled to more influence, had the persons giving it tasted the rum imported in the Samuel, and declared themselves incapable of deciding *on its origin: for [*18
although, in some cases, the difference may be nearly imperceptible, in others, it may be considerable. The testimony, however, on which the claimants most rely is found in the deposition of Samuel Marshall and of Andrew Furntrad. Samuel Marshall, the brother of John and Joseph Marshall, merchants, of St. Bartholomews, from whom the rum in question was purchased, deposes, that he has lived with them for two years, and had, at the time of giving his deposition, they being absent from the island, the care of their business. That the rum and molasses constituting the cargo of the Samuel were imported into St. Bartholomews from Laguayra, in vessels which he names, and are of the growth and produce of that place. Andrew Furntrad is the collector of the port of Gustavia, in St. Bartholomews, and deposes, that the quantity of rum and molasses which were laden on board the Samuel, and which cleared out regularly for New London, were regularly imported from Laguayra, in two vessels, which he names, whose masters he also names. They are the same that are mentioned by Samuel Marshall.

On this conflicting testimony, much contrariety of opinion has taken place. The omission of the claimants to furnish other testimony, supposed to have been within their reach, and of which the necessity would seem to have been suggested by the nature of the prosecution, impairs, in the opinion of several of the judges, the weight to which their positive testimony might otherwise be entitled. The court finds it very difficult to form an opinion satisfactory to itself. *So situated, and under the peculiar circum- [*19
stances attending Oldham's deposition, the majority of the court is of opinion, that the cause be continued to the next term for further proof, which each party is at liberty to produce.

Further proof ordered.(a)

(a) Revenue causes are, in their nature, causes of admiralty and maritime jurisdiction. In Great Britain, all appeals from the vice-admiralty courts, in those causes, are within the jurisdiction of the high court of admiralty, and not of the privy council, which is the appellate tribunal in other plantation causes. This point was determined so long ago as the year 1754, in the case of *The Vrouw Dorothea*, decided before the high court of delegates, which was an appeal from the vice-admiralty judge of South Carolina, to the high court of admiralty, and thence to the delegates. The appellate jurisdiction was contested, upon the ground that prosecutions for the breach of the navigation and other revenue laws were not, in their nature, causes civil and maritime, and under the ordinary jurisdiction of the court of admiralty, but that it was a jurisdiction specially given to the vice-admiralty courts by stat. 7 & 8 Wm. III., c. 22, § 6, which did not take any notice of the appellate jurisdiction of the high court of admiralty in such cases. The objection, however, was overruled by the delegates, and the determination has since received the unanimous concurrence of all the common-law judges,

*The Ship Octavia: Nicholls *et al.*, Claimants.

Burden of proof.

A question of fact under the non-intercourse act of the 28th June 1809. On an information for a forfeiture, where the claimants assume the *onus probandi*, the rule is, not to acquit, unless the defence be proved beyond a reasonable doubt.

Appeal from the decree of the Circuit Court for the Massachusetts district, affirming the decree of the district court, condemning said vessel.

This ship was seized in the port of Boston, in October 1810; and the information alleged, that the ship, in March 1810, departed from Charleston, South Carolina, bound for a foreign port, to wit, Liverpool, in Great Britain, with a cargo of merchandise on board, without a clearance, and without having given the bond required by the non-intercourse act of the 28th of June 1809, ch. 9, § 3. The claimants admitted, that the ship proceeded with her cargo (which consisted of cotton and rice) to Liverpool; but they alleged, that the ship originally sailed from Charleston, bound to Wiscasset, in the district of Maine, with an intention there to remain, until the non-intercourse act should be repealed, and then to proceed to Liverpool. That by reason of bad winds and weather, the ship was retarded in her voyage, and on the 10th of May 1810, while still bound to Wiscasset, she spoke with a ship from New York, and was informed of the expiration of the non-
*21] intercourse act, and thereupon, changed her course, and *proceeded to Liverpool. The manifest stated the cargo to have been shipped by sundries, consigned to Mr. P. Grant, Boston.

The *Attorney-General* and *Law* argued the case for the appellees, on the facts, and cited the case of *The Wasp*, 1 Gallis. 140, which was an information under the same section of the same act. They contended, that the burden of proof was thrown upon the claimant, inasmuch as the law requires a bond to be given, if the ship was bound to a port then permitted, conditioned that she should not go to a prohibited port.

Dexter, for the appellants and claimants, stated, that the suit was not founded on the same act with that in the case of *The Samuel* (*ante*, p. 9); but that the same objection existed as to the form of the process. It is true, the judiciary act of the 24th of September 1789, c. 20, § 9, has declared, that certain causes shall be causes of admiralty and maritime jurisdiction, but it does not, therefore, follow, that a forfeiture created by a new statute shall be enforced by the same process. The arguments urged against it in the cases subsequent to that of *The Vengeance*, 3 Dall. 297, have always been answered by the mere authority of that case. But the decision in that case ought to be re-examined, because it affects the right of trial by jury, and because the argument was very imperfect. The word "including," in the judiciary act, ought to be construed cumulatively. It
*22] provides, that the district *courts shall "have exclusive original cognisance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United

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on a reference to them from the privy council. The proceeding in this case is called "a libel of information;" showing, that libel and information in the admiralty are synonomous terms. The Fabius, 2 Rob. 245.

States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas," &c. The presumption arising from the collective use of debt, information and indictment, in the non-intercourse act, is, that they relate to a common-law jurisdiction. The word *information* cannot be synonymous with *libel*, because the first is a common-law, the second a civil-law proceeding. A common-law proceeding may be applied by statute to admiralty suits. The statute, 28 Hen. VIII., c. 15, prescribes a common-law process (indictment) for offences triable in the admiralty.

STORY, J.—That was the high commission court.

Dexter answered, that he was aware of it; but that a suit may be a cause of admiralty and maritime jurisdiction, and yet triable by common-law process. (*a*)

*STORY, J., delivered the opinion of the court.—This case depends on a mere question of fact. After a careful examination of the evi- [*23
dence, the majority of the court are of opinion, that the decree of the circuit court ought to be affirmed. It is deemed unnecessary to enter into a formal statement of the grounds of this opinion, as it is principally founded upon the same reasoning which was adopted by the circuit court, in the decree which is spread before us in the transcript of the record.

Decree affirmed, with costs. (*b*)

(*a*) Before the statute 28 Hen. VIII,, c. 15, the admiralty had a very extensive criminal jurisdiction, which seems to have been coeval with the very existence of the tribunal, in which it proceeded, not according to the civil law, and other its own peculiar codes, but by the process of indictment, found by a grand jury, and a *capias* thereupon delivered by the admiral or his lieutenant, to the marshal of the court or the sheriff. See Clerke's Praxis, Roughton's Articles, cited therein, 122, note c. 16, 17; Exton 32; Selden *de Dominio Maris*, lib. 2, c. 24, p. 209; The Rucker, 4 Rob. 73, note a. This criminal jurisdiction, independent of statutes, still exists; and all offences within it, which are not otherwise provided for by positive law, are punishable by fine and imprisonment. See 4 Black. Com. 263; Browne's Civ. & Adm. Law, App'x, No. 111. The statute 28 Hen. VIII., c. 15, provides, that all treasons, felonies, &c., on the seas, or where the admiral hath jurisdiction, &c., shall be tried, &c., in the realm, as if done on land; and commissions under the great seal shall be directed to the admiral, or his lieutenant, and three or four others, &c., to hear and determine such offences, after the course of the laws of this land for like offences done in the realm. And the jury shall be of the shire within the commission. Stat. 33 Geo. III., c. 66. Under this provision, the sessions at the Old Bailey are now held, at which the judge of the High Court of Admiralty presides, and common-law judges are included in the commission. But it is held, that this statute does not alter the nature of the offence, which shall still be determined by the civil law, but the manner of trial only. (Hale's P. C.; 3 Inst. 112.)

(*b*) As the opinion of the court below is referred to, for the grounds upon which its decree was affirmed, it may seem fit here to insert so much of that opinion as developes the principles and rules of evidence applied by the court in cases of this nature. After stating the facts of this case, the learned judge proceeds:

"Since I have had the honor to sit in this court I have prescribed to myself certain rules, by the application of which, my judgment, in cases of this nature, has been *uniformly governed. 1st. Where the claimants assume the *onus probandi* (as [*24
they do in this case), not to acquit the property, unless the defence be proved

*The Mary and Susan: G. & H. Van Wagenen, Claimants.

Capture as prize of war.

Goods, the property of merchants actually domiciled in the enemy's country at the breaking out of a war, are subject to capture and confiscation as prize.

The fact, that the commander of a private armed vessel was an alien enemy, at the time of the capture made by him, does not invalidate such capture.

The President's instructions of the 26th August 1812, prohibiting the interruption of vessels coming from Great Britain, in consequence of the supposed repeal of the British orders in council, must have been actually known to the commanders of vessels of war, at or before the seizure, in order to invalidate captures made contrary to the letter and spirit of the instructions.

Appeal from the Circuit Court for the district of New York. The goods in question were part of the cargo of the ship Mary and Susan, a merchant vessel of the United States, which was captured, on the 3d of September 1812, by the Tickler, a private armed vessel of the United States. The cargo was libelled as prize of war; this portion was claimed by Messrs G. & H. Van Wagenen, and condemned in the district court. In the circuit court, this sentence was reversed, and restitution to the claimants was ordered; from which decree, the captors appealed to this court.

The cause having been heard in both the courts below, on the documentary evidence found on board, the original order for the goods did
*26] not appear. That they were shipped in consequence of *orders, was however, sufficiently proved, by the letters addressed to the claimants, and the other papers which accompanied them. These were, 1. An invoice headed in the words following:

"Birmingham, 8th July 1812: say, 15th March 1811.

"Invoice of fourteen casks and four baskets of hardware, bought by

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beyond a reasonable doubt. 2d. If the evidence of the claimants be clear and precisely in point, not to indulge in vague and indeterminate suspicions, but to pronounce an acquittal, unless that evidence be clouded with incredibility, or encountered by strong presumptions of *mala fides*, from the other circumstances of the case." He also alludes to the absence of documentary evidence to support the defence set up by the clamants, as affording an example of the application of these rules, as well as of another rule equally important. "What strikes me as decisive against the defence, is the entire absence of all documents respecting the cargo. Bills of lading, letters of advice, or general orders must have existed. If the cargo had been destined for Boston only, there would not have been so much difficulty. But the defence shows its destination ultimately for Liverpool. Where, then, is the contract of affreightment, the bills of lading, the letters of advice, and the correspondence of the shippers, or of Mr. P. Grant? Can it be credible, that without any authority, the master, or part-owner of the ship, should, on their own responsibility, have gone to Liverpool, without orders or consignment? That from a mere vague knowledge of the wishes of the shippers, they should place at imminent risk the whole property, without written authority to color their proceedings? There must have been papers: they are not produced. The affidavits of the shippers, of Mr. Grant, of the consignees in England, are not produced. What must be the conclusion from this general silence? It must be, that if produced, they would not support the asserted defence. At least, such is the judgment that both the common law and the admiralty law pronounces, in cases of suppression of evidence."[1]

[1] For a further decision in this case, see 1 Mason 149.

The Mary and Susan.

Daniel Cross & Co., by order, and for account and risk, of G. & H. Van Wagenen, merchants, New York, marked and numbered as per margin, and forwarded on the 4th March 1811, to care of Martin, Hope & Thornley, Liverpool, and by them afterwards transferred to the care of T. & W. Earle & Co., of Liverpool; which goods are now the property of Messrs. Spooner, Attwood & Co., bankers, of Birmingham, to whom you will please to remit the amount of this invoice."

And containing at the foot, after the enumeration of the articles and their prices, in the usual form, the following charges:

Amount of invoice,				£1041	0	11½
Commission, 5 per cent.				52	1	0½
				1093	2	0
Freight to Liverpool	£12	18	0			
Entry and town dues		6	0			
Cartage, porterage and cooperage	4	15	0			
Bill of lading		3	6			
Export duty, 4 per cent.	40	4	0			
Broker's commission, forwarding	4	3	0			
	62	9	6			
Commission, 5 per cent.	3	2	6			
				65	12	0
Insurance on the Mary and Susan. Amount and premium covered by £1300, at 2½ guineas per cent. and policy 78 shillings	38	0	6			
Commission for effecting insurance at ½ per cent.	6	10	0			
				44	10	6
*Canal insurance to Liverpool, ½ per cent. on £1041 0 11½	5	4	0			[*27
Insurance against fire	6	15	0			
Warehouse rent in Liverpool	15	0	0			
Twelve months' interest on £1041 0 11½, at 5 per cent	52	1	0			
				79	0	0
				£1282	4	6

2. A bill of lading, in the usual form, stating that the goods were shipped by Thomas & William Earle & Co., of Liverpool, to be delivered to the claimants, or to their assigns, in New-York.

3. The two following letters:

"Birmingham, 8th July 1812.

"Messrs. G. & H. Van Wagenen.

"Gentlemen:—In consequence of the revocation of the British orders in council, on the first day of August next, we have lost no time in shipping the goods sent to Liverpool so long since, agreeable to your kind order. They are in the Mary and Susan, a most beautiful new vessel, to sail in all this week; the freights are very high, 70*s.* for measurement, to New-York, and 80*s.* to Philadelphia, and at this moment nothing less will be taken.

We, therefore, thought you would prefer to have the goods at this rate, rather than wait for a reduction in the freight, which, we doubt not, will soon take place. By the letter of our friends, Messrs. Spooner, Attwood & Co., herewith, you will perceive the interruption to commerce has been an inconvenience to us as young merchants; but the unneighborly conduct of the old house will only serve to prompt us to new exertion for our friends in the States, for whose interest nothing shall be omitted within our power. We shall certainly serve them as well, if not on better terms, than heretofore. We will not be undersold. In a few days, we shall send Mr. Oakley, for the use of our friends, a new and complete set of patterns, which, we trust, will meet with their approbation. Mr. O., and Messrs. B. W. Rogers & Co. will be able to give you more particulars respecting what has passed on this side. The amount of invoice herewith to your debt is 820*l.* 2*s.* 1*d.*, which, agreeable to the letter of Messrs. Spooner, Attwood & Co., you will please to remit to them, on arrival of the goods; *but hereafter things will move in the usual channel. Waiting your further favors, we remain, gentlemen, your most obedient servants,

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DANIEL CROSS & Co."

"Birmingham, 9th July 1812.

"Messrs. G. & H. Van Wagenen, Merchants, New-York.

"Gentlemen:—In consequence of the late unfortunate state of affairs between this country and the United States of America, great inconvenience and distress have naturally been experienced by the merchants and manufacturers here. Among others, our friends Messrs. Daniel Cross & Co. have been considerably embarrassed, and have received great relief and assistance from our house. We were induced to extend this assistance, as bankers, from motives of friendship and regard, and under the hope that the unnatural state of affairs between the two countries could not possibly last long; but as it was necessary that our assistance should be very considerable, we thought it right to obtain from them an assignment of certain quantities of goods, which they had provided on account of your house, and of several others in the United States, previous to the 2d of February 1811. We are thus introduced to your acquaintance, and we beg leave to send you herewith an invoice of the goods which Messrs. Daniel Cross & Co. had purchased for your account, and which are now forwarded to you, requesting that you will remit the amount, 820*l.* 2*s.* 2*d.*, to us, at your earliest convenience. We cannot conclude this letter, without expressing our satisfaction at the services we have had the opportunity of rendering to Messrs. Daniel Cross & Co., whom we consider to be persons of the greatest integrity and knowledge of business, and without earnestly recommending them to your future attention. We are convinced, that their late difficulties will not at all affect their future proceedings, and that they will henceforth be enabled to carry on their business in the same regular and punctual way as they have formerly done; and we cannot but flatter ourselves, that as the orders in council are now revoked, and the British government has become alive to the true interest of the British people, the natural relations between the two countries will long continue, and that the connection between your respectable house and Messrs. Daniel Cross & Co. will be productive of permanent and mutual advantages. With best wishes for your prosperity

and happiness, and that of your country, we, are, respectfully, gentlemen, your obedient humble servants,

SPOONER, ATTWOOD & Co.
Bankers, Birmingham."

"Messrs. G. & H. Van Wagenen, Merchants, New-York."

*_Hoffman_, for the appellants and captors.—1st. Probably, a delivery from Cross & Co. to the ship-master would have been, in contemplation of law, a delivery to the claimants. But Attwood & Co. were the shippers, between whom and the claimants there was no privity. There is no proof that Cross & Co. ever accepted the order or commission sent to them by the claimants. There was a sale and delivery of the goods from Cross & Co., to Attwood & Co., and the order was executed by strangers to the claimants. Could any action have been maintained by the claimants against Attwood & Co.? None could have been maintained, even against Cross & Co. Possibly, if they had agreed to accept the commission, a special action on the case might have been brought against them as factors. But by the assignment of the bankers, they disabled themselves from executing the order. The bankers did not acquire the mere lien; they would not have been secure, without the absolute dominion of property. They were not obliged to ship, nor the claimants to receive; both parties might, or not, according to their interest. Suppose, the goods had been lost in their transit, could Attwood & Co. have maintained an action for the price against the consignees? I anticipate the unanimous answer of the court in the negative. Suppose, the goods should be condemned as prize of war, could the bankers recover against the claimants? No: neither in consequence of a physical nor legal loss. The case of _Dunham & Randolph_ (_The Frances_, 8 Cr. 354; 9 Ibid. 183), is conclusive of the present. Attwood & Co. *exercised acts of ownership on the goods, after the transfer to them, and until the lading on board. The claimants could not have received the goods, without paying Attwood & Co. They may have had an interest in paying Cross & Co., their correspondents, who may have had their funds in possession—who may have been their debtors. They had an election, precisely as the claimants in _The Frances_ had. [*29 [*30

Dexter, for the respondents and claimants.—The possession of the goods was continued in Cross & Co., by their agents at Liverpool, Earle & Co., who shipped as _their_, and consequently, as _our_ agents, on board a general ship, to us, for our account and risk. When the goods were first put in motion, their transit to New York began, and they were, in effect, delivered to the consignees at that port. Some act of the correspondent in Europe may be necessary to show that he elects to consider the goods, after being purchased of the manufacturer, as the property of the merchant in America. But such an act existed in this case; and the property changed, when the goods were delivered to the common carrier, on the canal from Birmingham to Liverpool, _i. e._, in 1811. The carrier was the bailee of the consignees, in law, and the goods were at their risk, from that time. It may be true, that the bankers cannot maintain a suit against us; but it may be true, that the property, nevertheless, vests in us. The only doubt whether such a suit could be maintained, is, that the debt due to Cross & Co., being a _chose in action_, could not be transferred. Still, the right to it subsists in them,

*who may sue the claimants on account of the advances made by order from them. It is, therefore, immaterial, which of the two parties in England may maintain the action. Except for the intervention of the capture and prize proceedings, the goods are delivered, and the claimants are debtors for the price. A bill of lading, drawn in consequence of an order to ship goods, transfers the property to the consignee. There is no copy of what is termed the assignment; but it is easy to see, that its object was not to defeat the arrangement, or the substituting relations of creditor and debtor between Cross & Co. and the claimants; but merely to enable the bankers to receive their money from the consignees. Either the assignment was a sale, or a mere naked authority to receive payment from the claimants. If a sale, then was it invalid, for want of delivery; if an authority only, then the right of property remains where it was, though it is possible, the bankers would have been entitled, in equity, to receive the money. The expression in the heading of the invoice, "which goods are now the property of Messrs. Spooner, Attwood & Co.," only proves them to be bad lawyers and bad logicians. Probably, they are ignorant of the distinction between general and special property. The *res gestæ* do not warrant a pretension of general property in them, and we deny the conclusion they have drawn. Nothing passed but a right to receive the price of the goods. They had not even a lien, or other legal right, because they never had the possession; and in whatever way they might have enforced their claim,
*32] they meant nothing more by it, than a *confident expectation, founded on mercantile courtesy, that the claimants would pay them. The original arrangement was to subsist, and Cross & Co. were, in fact, the shippers. Even supposing they have not fulfilled our order literally and strictly; suppose a right of election in the consignees to receive or reject the goods; are we not to wait for this election? Can they lose the property, before this election is made? An irregularity or defect in the execution of their order, may give them a right of action against their correspondents, in a court of municipal law, for damages; but if the rule of the prize court be, that the property must be vested in the claimants, at the time of shipment, they are entitled to restitution in the present case.

Pinkney, for the appellants and captors, in reply.—The question is, in whom did the property vest at the time of shipment, or at the time of capture? The claimants could not make an efficacious election, after capture, because the rights of the captors interposed, before any election could be made. If these rights had not thus interposed, then the power of election might be exerted. Therefore, the question stated is the only controversy in the cause. Take the transaction by its stages; break it up into its constituent parts: at what epoch—through the instrumentality of what circumstances—did the property pass to the claimants? If it did not so pass, it was, on the ocean, the property of an enemy, and therefore, liable to capture and confiscation. The orders are not here; but will the documentary evi-
*33] dence, now before the *court, justify restitution?

1. Did, then, the first purchase vest the property in the claimants? In *The Frances*, it was determined, that it had no such effect; and the doctrine is upheld by all principle and all analogy.

2. The goods were sent to Liverpool, and they still remained the prop-

erty of Cross & Co. The delivery in the vehicle on the canal was inland, and preparatory to the maritime delivery. The agents of Cross & Co., at the outport, were not agents of the claimants, nor liable to them in an action. The claimants were not bound, nor could they take possession at this epoch. Suppose, Cross & Co. had become bankrupt, would the goods have vested in them? or would they have been obliged to ship?

3. Consider the legal effect and circumstances of the assignment. Cross & Co. were the complete proprietors of the goods, and the present claimants could not have shown themselves in a court of justice. The parties considered the transfer to have changed the property, and they knew better what they had done, than the court can know. It must, therefore, have been calculated and adapted to change the property; the bankers could have had no indemnity otherwise. They must have had a discretion to dispose of the goods; and had they become bankrupts, their assignees must have had the same discretion. There is always a *locus pœnitentiæ* in the vendor, before delivery (as to the right of property, I mean, not as to the right of action in the vendee); the caprice of the vendor may influence him to change the direction of the property. Had the right of the claimants been a vested right, the vendor in England might *have brought an action against them, at any stage of the transaction. At what epoch could either he or the bankers have brought such an action? [*34

The remaining question is, as to the concurrent acts of both. Did those acts vest a right to the price in either? or was it in the election of the claimants to receive the commodities? The intervening assignment to the bankers sundered the merchants in England from the claimants; it deprived them of their ability to obey the original order; all privity of contract between the principal and agent was gone. There was no obligation on the part of Attwood & Co. to ship; no authority; no power; no right! How is it, that the rights of war on the property are to be defeated? By showing an authority to ship? It exists not. The question is *stricti juris;* the claimants are not bound to acquiesce in the new state of this transaction; they have an election to do so or not. Had the goooods arrived, without interruption, at their port of destination, the claimants might have accepted them, and thus adopted the new state of the transaction, and the new parties to it. But the rights of war intercept transfer. The consignees are not liable for the retrospective charges at the foot of the invoice, unless the goods had been shipped by the agent, and received by the principal. The usage of trade is, that the factor always charges these expenses; were it otherwise, it would follow, that the property would always be transferred, on the first purchase, contrary to the express authority of *The Frances*, with which the present case coincides in principle.

*February 13th, 1816. Marshall, Ch. J., delivered the opinion of the court, and, after reciting the documentary evidence, proceeded as follows:— [*35

Upon these papers, it is contended by the captors, that the goods remained the property of Daniel Cross & Co., until the transfer to Spooner, Attwood & Co., when they became the property of the assignees; that this change of property so operates upon the subsequent shipment, as to make it a shipment without order, and to leave it in the election of G. & H. Van

Wagenen, to accept or reject the goods; and that this right of election is terminated by the intervening right of the captors.

On the part of the claimants, it is contented, that their right commenced with the purchase, which was made by their order, and for their account and risk, and was completed, when the goods were forwarded to Liverpool: that if this point be determined against them, still the whole transaction evidences an intention to assign the claim of Daniel Cross & Co., to Spooner, Atwood & Co., so as to give them a right to receive the money, but not in any manner to affect the interests of G. & H. Van Wagenen.

Whether Messrs. G. & H. Van Wagenen became the owners of the goods, on their being sent from Birmingham to Liverpool, must depend on the orders under which Daniel Cross & Co. acted. If their authority was general, to ship to G. & H. Van Wagenen, the goods might, according to the circumstances of the purchase, remain the property of Daniel Cross & Co., until they were delivered to the master of the vessel, for the purpose of
*36] transportation. *If they were directed to purchase the goods, and to store them in Liverpool, as the goods of G. &. H. Van Wagenen, to be afterwards shipped to the United States, it appears to the court, that the property changed, on being sent to Liverpool, and immediately vested in the American merchants, for whom they were purchased. The testimony respecting the orders is found in the letter from Daniel Cross & Co. to G. & H. Van Wagenen. The words of that letter which bear particularly on this point are, "In consequence of the revocation of the British orders in council, on the first day of August next, we have lost no time in shipping the goods sent to Liverpool so long since, agreeable to your kind order." This language is not equivocal. It imports, in terms not to be misunderstood, that the goods were sent from Birmingham to Liverpool, in consequence of the orders of Messrs. G. & H. Van Wagenen. This letter is addressed to the house which had given the order, and was written without an existing motive for misrepresenting that order. There is certainly nothing in the circumstances of the transaction, which would render it probable, that the order must be represented in this letter, either carelessly or intentionally, in any manner different from that which was really given.

The situation of this country, during what has been termed our restrictive system, was notoriously such as to render it an object with every importing merchant to use the utmost dispatch in bringing in his goods, so soon as they should be legally admissible. Nothing, therefore, can be more
*37] probable, than that orders for making purchases *which were to be executed at an inland place, by a house residing at such place, would be accompanied with orders directing them to be conveyed to a seaport, there to be held in perfect readiness for exportation. In the usual course of trade, if the purchasing and shipping merchant be the same, there would rarely be any actual change of property between the purchase and the shipment of the articles, nor could we expect to find any extrinsic evidence of ownership, other than the mere possession; but in the state of trade which existed at the time of this transaction, such change, and the evidence of it, may be reasonably expected. In the common state of things, the whole order respecting purchase and shipment, where the same agent is employed, is executed with expedition, and is, in appearance, one transaction. In the actual state of things, the purchase was to be made immediately, but the

shipment was to take place, at some future indefinite period. It would depend on an event which might be very near or very remote. It became a divided transaction, or, rather, two distinct operations. We look for some intervening evidence of ownership in the person for whom the purchase was made, and are not surprised at finding it. If, in such a state of things, the goods were procured, under a general order to purchase, but not to ship, until some future uncertain event should occur, and were, in the meantime, to remain the property, and at the risk of the agent, they would probably be retained at the place of purchase, under his immediate control and inspection. Their conveyance to a seaport, there to be stored, until their importation *into the United States should be allowed, was such a fact as would [*38
scarcely have taken place, without special orders, in the course of which an actual investment of the property in the person by whose order, and for whose use, the goods were purchased and stored at a seaport, is not unreasonably to be expected.

The court considers this letter, then, as proving incontestibly, that the goods were conveyed to Liverpool, and there stored, to be shipped on the happening of some future event, which it was supposed would restore the commercial intercourse between the two countries, in pursuance of specific orders from the claimants; and is further of opinion, that the transaction itself furnishes strong intrinsic evidence that the goods, when stored in Liverpool, were the goods of the claimants, subject to that control over them which Daniel Cross & Co. would have as the purchasers, and intended shippers, who had advanced the money with which they were purchased. However this control and lien might be used for their own security, it could not be wantonly used to the destruction of the property of G. & H. Van Wagenen, and any conveyance to a person having notice of their rights ought to operate, and be considered as intended to operate, consistently with them, so far as the two rights could consist with each other.

The words, then, in the invoice, which represent the goods as the property of Spooner, Attwood & Co., are introduced with no other object than to secure the payment of the purchase-money to them. The invoice made out by Spooner, Attwood & Co., themselves, states the merchandise [*39
it specifies, to have *been purchased by Daniel Cross & Co., by order, and on account and risk of Messrs. G. & H. Van Wagenen, and to have been forwarded to Liverpool, more than twelve months anterior to the date of the shipment. Goods thus purchased, and thus conveyed to a seaport, and stored under the orders of the American merchant, may well be considered as leaving in the purchasing agent, only the lien which a factor has, to secure the payment of the money which is due to him. If this was the true state of the property, at the time of the assignment to Spooner, Attwood & Co., they having full notice that the assignment could only operate as an order for G. & H. Van Wagenen to pay the money to them (Spooner, Attwood & Co.), and would probably, in its form and expressions, manifest this idea.

The court is much inclined to the opinion, that these goods became the property of the claimants, on being stored in Liverpool, if not at an antecedent time. The question, however, would, undoubtedly, be affected by the order under which Daniel Cross & Co. acted; by the deed of assignment to Spooner, Attwood & Co.; and by other papers which are attainable. If, therefore, the case depended entirely upon this point, further proof might

be required. But, in the opinion of the majority of the court, the case does not depend on this point alone.

If the goods were shipped in pursuance of the orders given by G. & H. Van Wagenen, the delivery on board the ship was a delivery to them ; the property was vested in them by that act, and they had no election to accept or reject it.

*40] *In pursuing this inquiry, the legal effect of the transaction must depend, in a considerable degree, on the intent of the parties, and that intent is, in this case, to be collected chiefly from their letters, and from the circumstances in which they stood. G. & H. Van Wagenen were American merchants, desirous of receiving the goods they had ordered, as soon as the importation of those goods should be allowed. Daniel Cross & Co. were commision-merchants, of Birmingham, engaged in the American business. Spooner, Attwood & Co. were bankers, friendly to Daniel Cross & Co. ; were desirous of promoting their interests, and recommending them to business, and had advanced them money, while embarrassed by the difficulties consequent on the state of trade between the United States and Great Britain. Spooner, Attwood & Co. were desirous, not of purchasing the goods stored at Liverpool by Cross & Co. for the claimants ; not of interrupting the shipment of those goods, or the connection between Daniel Cross & Co. and G. & H. Van Wagenen ; but of permitting the shipment to proceed, and of receiving, themselves, the money to which Cross & Co. were entitled. Such was the situation, and such the objects of all the parties : keeping this situation and these objects in view, let the testimony be examined.

The letter of Daniel Cross & Co., dated the 8th of July 1812, is in the language of men who were themselves the shippers of the goods. "We have lost no time," they say, "in shipping the goods, sent to Liverpool so long since, agreeable to your kind order." They speak of the vessel and of

*41] the freight, *as if the vessel were selected, and the contract made, by themselves. "We thought you would prefer to have the goods at this rate, rather than wait for a reduction in the freight." They next refer to the letter of their friends, Spooner, Attwood & Co., to show the inconvenience they had sustained as young merchants, but without any indication of an interference of that house in the shipment, and conclude with saying, "the amount of invoice, herewith, to your debit, is 820*l.* 2*s.* 1*d.*, which, agreeable to the letter of Spooner, Attwood & Co., you will please to remit to them, on arrival of the goods." This is the letter of an agent who has executed, completely, the order which had been given him ; but who, having been compelled to borrow money, had transferred his pecuniary claims to his creditor. The letter of Spooner, Attwood & Co. will next be considered. It is dated the day after that written by Daniel Cross & Co. After stating their friendship for Daniel Cross & Co., and the aid afforded that house, they add : "but as it was necessary that our assistance should be very considerable, we thought it right to obtain from them an assignment of certain quantities of goods which they had provided on account of your house, and of several others in the United States, previous to the 2d of February 1811. We are thus introduced to your acquaintance, and we beg leave to send you herewith an invoice of the goods Daniel Cross & Co. had purchased for your account, and which we now forward to you, requesting that you will

remit the amount of 830*l.* 2*s.* 1*d.* to us, at your earliest convenience." *Nothing is said in this letter respecting the vessel by which the goods were sent; nothing indicating the exercise of any judgment by [*42 Spooner, Attwood & Co., respecting the time or manner of sending them; nor anything which would lead to the opinion, that they interfered, in any manner whatever, in the transaction of the business. On comparing the two letters, the inference is inevitable, that Daniel Cross & Co. continued to execute the order of G. & H. Wagenen, in like manner as if their affairs had never been embarrassed. The contents of the two letters, in conformity with the situation and views of the parties, prove, that Daniel Cross & Co. had only transferred to Spooner, Attwood & Co. their right to receive payment for the goods, and that the arrangements between them were intended only to secure that object. The assignment of the goods mentioned in the letter of Spooner, Attwood & Co. does not appear from the context, and from the nature of the transaction, to be intended to convey the idea of a sale, but to be used in rather a different sense, as an assignment of the adventure, or of the right to the debt due from G. & H. Van Wagenen. Whatever may have been the form of this assignment, it is apparent, that it could not have been made, and certainly was not made, with the intention of enabling Spooner, Attwood & Co. to defeat the shipment to G. & H. Van Wagenen, or to control the proceedings of Daniel Cross & Co., under the order they had received.

Why, then, are the goods, when put on board the Mary and Susan, in pursuance of the orders of the claimants, *to be considered not their property, but as the property of Spooner, Attwood & Co.? It is said, [*43 that they were shipped by Spooner, Attwood & Co., not by Daniel Cross & Co.; that the confidence implied in the order for purchase and shipment was personal, and could not be transferred or executed by another. Allow to this argument all the weight which is claimed for it by the counsel for the captors; what part of this personal trust was transferred? What part of the order was executed by any other than Daniel Cross & Co.? The goods were purchased, sent to Liverpool, stored, and afterwards shipped by them. Every other auxiliary part of the transaction was performed by them. Nothing appears to have been done in pursuance of orders from Spooner, Attwood & Co., but everything in pursuance of their own judgment, acting under the order received from G. & H. Van Wagenen.

On this ground, the claimants could raise no objections to the conduct of Daniel Cross & Co. But it is said, that Daniel Cross & Co. might have had the funds of G. & H. Van Wagenen in their hands, in which case, the claimants would have been compelled, by receiving the goods, to pay their amount to Spooner, Attwood & Co.; consequently, this assignment must be considered as creating in Spooner, Attwood & Co. new rights, which released G. & H. Van Wagenen from the obligation to receive the cargo. But Daniel Cross & Co. did not purchase with the funds of the claimants. They purchased with their own funds. They inflicted, therefore, no injury on the claimants, by transferring their right to the money *to [*44 Spooner, Attwood & Co. The effect of the transaction is precisely the same as if they had drawn a bill in favor of Spooner, Attwood & Co., for the amount of the invoice.

It is said, that the assignment gave Spooner, Attwood & Co. an election

to ship the goods, or to dispose of them otherwise, and that the necesary consequence of this power of election, is a correspondent right of election in G. & H. Van Wagenen, to receive or reject them. The court does not view the transaction in this light. The assignment to Spooner, Attwood & Co. is understood by the court, from the evidence furnished by the letters, and the circumstances and objects of the parties, to have been subject to the right of Daniel Cross & Co. to execute, completely, the order of the claimants. The interests of all parties were best promoted, by pursuing this course, and they appear to have pursued it. The court perceives nothing which can justify the opinion, that Spooner, Attwood & Co. had a right, or would have been permitted, to intercept the shipment. Certainly, it was neither their wish, nor their interest, to interrupt it. It is not reasonable, therefore, to suppose, that they would have created any difficulty in obtaining a right to claim the amount of the invoice from G. & H. Van Wagenen, by insisting on such an assignment as Daniel Cross & Co. would have been unwilling to make, because it might have proved injurious to them, without benefiting the house they meant to secure.

It has also been argued, that the orders, most probably, directed a shipment of the goods, when the non-intercourse should be removed, *and that a shipment before that time was without orders, and at the risk of the shipper. The court does not think this probable. It is well known, that the continuance of the laws of non-intercourse was considered as depending on the continuance of the orders in council. It is also perfectly clear, that the American merchant, who should permit his goods to remain in Great Britian, until intelligence of the repeal of the non-intercourse laws could be conveyed from this country to that, would be anticipated by all others, and would bring them to a market already supplied. Nothing, therefore, would be more reasonable, than to order them to be shipped, on the revocation of the orders in council. This idea is supported by the letter of Daniel Cross & Co. That letter indicates no doubt of the propriety of the shipment.

*45]

Upon a view of the whole case, the majority of the court is of opinion, that this is not a case in which further proof ought to be required, and that the goods by the Mary and Susan were shipped in pursuance of the orders of the claimants, and became their property, when delivered, for their use, to the master of the vessel, if not at an earlier period.

Sentence of the circuit court affirmed, with costs.

*The Mary and Susan: Richardson, Claimant.

Prize of war.

Where goods where shipped in the enemy's country, in pursuance of orders from this country, received before the declaration of war, but previous to the execution of the orders, the shippers became embarrassed, and assigned the goods to certain bankers, to secure advances made by them, with a request to the consignees to remit the amount to them (the bankers), and they also repeated the same request, the invoice being for account and risk of the consignees, but stating the goods to be then the property of the bankers, it was *held*, that the goods having been purchased and shipped in pursuance of orders from the consignees, the property was originally vested in them, and was not divested by the intermediate assignment, which was merely intended to transfer the right to the debt due from the consignees.

Appeal from the Circuit Court for the district of New York. This was a claim by Mr. Richardson for a portion of the cargo of the same ship mentioned in the preceding cause, which portion was condemned in the district and circuit courts.

The claimant, a native of Great Britain, and a naturalized citizen of the United States, was a resident merchant of Liverpool, at the breaking out of the late war, but returned to this country, in the month of May 1813, after knowledge of the capture, and pending the proceedings in the district court. The capture was made on the 3d of September 1812, within eighteen miles of Sandy Hook, in thirteen fathoms of water, where vessels are frequently passing and anchoring, and the privateer had previously spoken at sea another privateer and a pilot-boat schooner from Philadelphia. *There was also contradictory testimony as to whether the commander of [*47 the privateer had knowledge of the president's additional instructions of the 26th of August 1812, before the capture, which, as it is noticed in the opinion of the court, it is unnecessary to state. By those instructions, the public and private armed vessels of the United States were not to interrupt any vessels belonging to citizens of the United States, coming from British ports to the United States, laden with British merchandise, in consequence of the alleged repeal of the British orders in council, but were, on the contrary, to give aid and assistance to the same, in order that such vessels and their cargoes might be dealt with, on their arrival, as might be decided by the competent authorities.

Stockton, for the appellant and claimant, stated, that this was a case of *summum jus*, where the property of a citizen, shipped without knowledge of the war, upon the repeal of the British orders in council, was condemned upon the authority of *The Venus* (8 Cr. 253), and the doctrine of domicil. There is here no question of proprietary interest, or of national character, independent of this particular transaction. But unless the court thinks proper to review his decisions upon the effect of commercial domicil, the appellant is confined to three points in support of his claim: 1st. That the capture was made after the commander of the privateer had knowledge of the instructions of the 26th of August 1812. *2d. That if he had not [*48 such knowledge, condemnation cannot take place, as the capture was made subsequent to the issuing of the instructions. 3d. That the commander of the privateer is, and was, at the time of the capture, an alien enemy, and consequently, his commission is void.

1. This is a question of fact, to be determined by the weight of testimony.

2. The instructions were certainly communicated to the commander, before prize proceedings were commenced, and it was the duty of the captors, to have relinquished the property, subject to the decision of government, under the non-importation act. Capture does not vest the property of the goods in the captors, but merely authorizes them to carry in for adjudication. The prize act of the 26th of June 1812, § 6, shows that the property is not vested in them, until after condemnation. All laws take effect from their enactment, as to rights of property; and at common law, statutes take effect, by a fiction, from the first day of the session at which they are passed. The instructions, issued under the 8th section of the prize act, are legislative in their nature. Captors are the mere delegates and substitutes of the sovereign; their authority is derived from him, and must be exercised in conformity with the will of the state. 2 Azuni, pt. 2, c. 5, art. 3, § 4, 5, 7, 10. The power of the president to issue these instructions, has already been recognised by the court. The rights of war and peace depend
*49] upon the fact of the existence of a state of war and peace, *not upon the knowledge of that fact. A prize made after a declaration of war without knowledge of its existence, is good; and a prize made after the cessation of hostilities is bad, without regard to the circumstance of knowledge; unless, indeed, there be a stipulation in the treaty of peace to prolong hostilities at sea. 2 Azuni, pt. 2, c. 4, art. 1, § 9, 11.

3. The commission to Johnson, the commander of the privateer, is null. The president has been deceived in his grant; for he could never have intended to commissionate a person to commit treason against his own country. The acts of congress, during the late war, put alien enemies under restraints which are altogether opposed to the idea of the executive being authorized to delegate to them such a power as letters of marque and reprisal import.

Hoffman, for the respondents and captors. It is supposed, that the question, as to the application of the law of domicil to this case, is at rest.

Marshall, Ch. J.—The court considers that question completely settled, and not open for argument.

Hoffman.—1. As to the instructions. It is admitted, that the former decisions of the court make them obligatory. The instructions could not, in fact, have been communicated to the commander of the privateer, previous to the capture; and they are not, *ipso facto*, and *per se*, revocatory of
*50] the right to capture. *The instructions must either have been actually communicated, or the privateer must have been in port, after they were promulgated, in order to affect the right to capture. Such is the spirit of the former decisions. (Wheaton on Captures 43.) Cruisers are not to act upon informal information at sea, as they might be deceived by their rivals and competitors; in port, knowledge must be implied, in law, from the certainty, publicity and notoriety of the fact. The right of property does vest, by capture, to be subsequently consummated by condemnation; *quoad*, the belligerents, the right vests; the property of the enemy is divested as to his rights. The claimant is an enemy, *pro hâc vice.*

2. The affidavits to prove the commander of the privateer an alien enemy, were irregularly taken. The cause was open, as it were, to plea and

proof; but the further proof was confined to the communication of the instructions; and the simplicity of the prize proceedings forbids going out of the limits prescribed in the order for further proof.

Pinkney, on the same side.—The court will not regard the particular hardship of the case, but will only be anxious to administer the law of nations and of the land, as they are applicable to the rights of the parties.

1. Knowledge of the instructions was communicated to the captor, before the *deductio infra præsidia;* before the prize proceedings were commenced; before condemnation; but after the seizure, which vested an inchoate right in the captor. It is said, the written law prohibited him from making it; *but that is settled, and the court have said, the instructions were not to be likened to statutes. They are merely directory from a [*51 superior to a person in a subordinate capacity; and they must be received by him, or they cannot have the binding force of instructions; they were not law, until communicated; then only, they rise into law. It is also said, that the capture was well made, but subsequent knowledge shall overreach and vitiate it. In every case of capture of goods, in their transit to this country, after the repeal of the British orders in council, the same fact must have been known, before condemnation. The instructions inhibited the capture and interruption of American vessels coming from British ports; but the president could have no authority to divest rights once vested; and there is nothing in the instructions, to prohibit bringing in for adjudication, after the capture was made, nor to prohibit prize proceedings, after bringing in for adjudication. By the 4th section of the prize act, it is provided, "that all captures and prizes of vessels and property, shall be forfeited, and shall accrue to the owners, officers and crews of the vessels by whom such captures and prizes shall be made; and, on due condemnation had, shall be distributed," &c.; by which an inchoate right vested on the capture, to be consummated by condemnation. The prize law of France and Spain vests the property immediately; other countries require bringing *infra præsidium* and condemnation. Capture gives, everywhere, a right to privateers, though it may not give an indefeasible right to public ships. A qualified and provisional *property is vested; and it is held, both in France and England, that the crown cannot interfere to stop prize proceedings, where private [*52 parties have an interest. Admit, that no right of property is acquired, is no right acquired? Most certainly, an incipient right is acquired, to be afterwards consummated; and the instructions cannot have the effect, retroactively, to defeat the right of the captors to proceed to adjudication. The case of a treaty of peace, stated on the other side, illustrates this idea. Belief is nothing; fact is everything. The captor exercises a belligerent right; the treaty repeals his commission, and abrogates his right. Suppose, a capture made the day before the treaty is signed, does it prevent his going on and perfecting his right? Certainly not; and the same is the case with the instructions: if they do not stand in the way of the capture, they do not stand in the way of condemnation. They did not stand in the way of capture, because they were unknown; they do not stand in the way of condemnation, because that is a mere consummation of the incipient right acquired by capture.

2. The court have no right to look beyond the president's commission;

the captor stands everywhere upon it, especially, in the prize courts of the power by whom it is issued; and there is no case where the contrary was ever maintained.

Dexter, for the appellant and claimant.—1. It is said, the claimant must either prove that the privateer had been in port, or that the instructions
*53] were *actually communicated to the commander. If it were intended to make him a wrongdoer, strict proof of knowledge might be essential; without such proof, he would be excusable from paying costs and damages; but he does not thereby acquire any indefeasible right to the thing captured; and restitution must be ordered. The claimant seeks restitution only, and the first question is, whether the captor had knowledge of the issuing of the instructions, no matter how it came to him.

2. But supposing that he had not this knowledge before the seizure; it was communicated to the prize-master, while he was carrying in the ship for adjudication. He was bound by the instructions, "not to interrupt, but on the contrary, to give aid and assistance" to the ship he captured. Does the right to proceed contrary to the instructions vest at the time of boarding, or manning? It undoubtedly vested, when the ship was completely brought *infra præsidia*. But the acts done in the intermediate time between that, and the taking possession, constituted an interruption contrary to the letter and spirit of the instructions. The right acquired by the seizure was inchoate, and was sought to be consummated, after the rule of conduct prescribed by the president became known to the captor. The rule as to capture vesting the property is various and fluctuating, in different times and nations. The distinction here is, that an inchoate right may be defeated by a knowledge of the instructions subsequently communicated; but a consummated right cannot. The president has authority, both by our municipal constitu-
*54] tion and public law, to prosecute *a war lawfully declared; he may exempt this or that thing from attack or capture, by land or by sea. Suppose, an enterprise commenced, before knowledge of an order from him countermanding it, could the blockade or siege, or expedition, be continued, after such revocation became known? The captor has acquired, in the present case, no private right, which the instructions cannot defeat. Government may, by compact with foreign nations, divest inchoate rights; in a treaty of peace, restitution of captures on both sides may be stipulated.(*a*)

3. The order for further proof justifies the admission of testimony as to the alien enemy character of the commander. The president's commission is, doubtless, conclusive, wherever he acts within the authority confided to him by the laws; but he cannot commission an alien enemy, whose sovereign would have a right to punish him as a traitor; and even a naturalized citizen has no right to cruise against his native country.

February 13th, 1816. Johnson, J., delivered the opinion of the court.—It is not necessary to go into a consideration of the national character or future designs of the claimant in this case. It has been solemnly settled, and must henceforth be considered as the positive law of this court, that

(*a*) *Vide* Convention of 1800, between the United States and the French Republic; by the 30th article of which, restitution of public ships captured on both sides was stipulated.

shipments made by merchants, actually domiciled in the enemy's country, at the breaking out of a war, partake of the nature of *enemy trade, and, as such, are subject to belligerent capture. Whatever doubts may have once been entertained on this bench, with regard to the necessity or propriety of adopting the principle into the jurisprudence of this country, they are now either dissipated or discarded; and the character, views and even the subsequent acts of such a shipper, cannot vary the conclusion of law upon his claim.(a) [*55

(a) The effect of domicil, or commercial inhabitancy, upon national character, was recognised by the continental court of appeals in prize causes, during the war of the revolution. (2 Dall. 42, *Claim of Mr. Vantylengen.*) It was determined by the supreme court, during the hostilities with France, that a citizen residing in a foreign neutral country, acquired the commercial privileges attached to his domicil, and was, consequently, exempt from the operation of the law of his own country, suspending the intercourse with the French dominions. (*Murray* v. *The Charming Betsey*, 2 Cr. 65.) The national legislature have adopted the same principle in the act of the 3d of March, 1800, applying the rule of reciprocity in cases of salvage to "the vessels or goods of persons permanently resident within the territory, and under the protection, of any foreign government," &c.; and finally, before the case of *The Venus*, the supreme court applied the same principle to the law of insurance, and held a warranty of neutrality to be satisfied by the residence of the party as a merchant, in a neutral country. (*Livingston* v. *Maryland Insurance Company*, 7 Cr. 506.) This was an action on a policy of insurance, containing a warranty that the property was neutral. That warranty was determined to be satisfied, by the emigration of the party, a Spanish subject, to the United States, and residing there, before the breaking out of the war in 1804, between Great Britain and Spain, the property having been captured by a British cruiser, and condemned in the prize court at Halifax, as Spanish property. A majority of the court were of opinion, that the assured was to be considered as a merchant of the United States, whether he carried on trade generally, or confined himself to a trade from the United States to the Spanish provinces. See also, *Arnold* v. *United Insurance Co.*, 1 Johns. Cas. 363; *Jenks* v. *Hallett*, 1 Caines 60; *Johnston* v. *Ludlow*, 2 Johns Cas. 481; s. c. 1 Caines' Cas. 29; *Duguet* v. *Rhinelander*, 2 Johns. Cas. 476.

It is much to be lamented, that we have not printed reports of the decisions in the British supreme court of prize, as many interesting points have been decided before the Lords of Appeal, of which we have no other account than occasional loose references to them. Among these is the case of Mr. Dutilh, mentioned by Dr. Robinson in *The Indian Chief*, 3 Rob. 21, which is more particularly stated by Sir John Nicholl, in a manuscript report, in the possession of the editor, of the hearing of the case of the *The Harmony*, before the Lords, 7th of July 1803. "The case of Dutilh also illustrates the present. He came over to Europe, as it is stated, in 1793, about the end of July, a time when there was a great deal of alarm on account of the state of commerce in Europe. He went to Holland, then not only in a state of amity, but also of alliance with this country; he continued there, until the French entered. During the whole time he was there, he was without any establishment. He had no counting-house; he had no contracts nor dealings with contractors there. He employed merchants there, to sell his property, paying them a commission. Upon the French entering into Holland, he applied for advice, to know what was left for him to do, under the circumstances, having remained there on account of the doubtful state of mercantile credit, which not only affected Dutch and American, but English houses, who were all looking after the state of credit in that country. In 1794, when the French came there, Mr. Dutilh applied to Mr. Adams, who advised him to stay, until he could get a passport. He continued there, until the latter end of that year, and having wound up his concerns he came away. Some part of his property was captured, before he came there. That part which was taken, before he came there, was restored to him (*The Fair American*,

*Stress has been laid, in the argument before this court, on the fact that Charles Johnson, the commander of the Tickler, is an alien enemy; but on this point we are unanimous, that it makes no difference
*57] *in the case. Admitting, that this circumstance should bear at all upon the decision of the court, the utmost that could result from it would be, the condemnation of his interest to the government as a *droit* of admiralty. The owners and crew of the Tickler are as much parties in this court as the commander, and his national character can in nowise affect their rights. But this court can see no reason why an alien enemy should not be commissioned as commander of a privateer. There is no positive law prohibiting it; and it has been the universal practice of nations to employ foreigners, and even deserters, to fight their battles. Such an individual knows his fate, should he fall into the hands of the enemy; and the right to punish in such case is acquiesced in by all nations. But, unrestrained by positive law, we can see no reason why this government should be incapacitated to delegate the exercise of the rights of war to any individual who may command its confidence, whatever may be his national character.

The only grounds, then, on which the right of restitution can be contended for in this case, arise out of the president's instructions of the 28th of August 1812. On these, three points are made: 1st. That Johnson had, in fact, or ought, from circumstances, to be presumed to have had, notice of those instructions. 2d. If he had not, at the time of the capture, yet, having received them, before the arrival of the prize in port, he was bound then to have discharged her. 3d. That notice of the instructions was, in fact,
*58] unnecessary, as the instructions of the president had, *as to the conduct of privateers, all the operation of laws.

On the second and third of these points, there exists but one opinion in this court. Although some doubt may be entertained relative to the form or nature of the notice necessary, yet we all agree, that some notice is necessary, and that notice must precede the capture. Instruction, *ex vi termini*, is individual. Instruction to A., independent of legal privity or identification, is not instruction to B. Not so with laws: their power floats on the atmosphere we breathe. Necessity, or convention, or power, has given them a legal ubiquity, co-extensive with the legislative power of the government that enacts them. Notice here is altogether unnecessary, unless made so by the law itself. It is the *sic volo, sic jubeo*, of sovereign power, of which every individual subject to its jurisdiction is presumed to have notice, though time and distance stamp absurdity on the supposition. Unquestionably, the same operation might by law have been given to instructions emanating from the president; but this has not been done: on the contrary, the clause itself which vests the power in the executive, holds out the idea of the necessity of notice. That this notice must necessarily precede or accompany capture, we are induced to infer, from this consideration. By capture, the individual acquires an inchoate statutory right, an interest which can only be defeated by the supreme legislative power of the Union. Condemnation does nothing more than ascertain that each individual case is within

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Adm. 1796) but that part which was taken, while he was there, was condemned, and that because he was in Holland at the time of the capture." (*The Hannibal and Pomona*, Lords, 1800.)

the prize act, and thus throws the individual upon his right acquired by *belligerent capture. Should the prize act, in the *interim*, be repealed, or its operation be suspended by the provisions of a treaty, there no [*59 longer exists a law to empower the courts to adjudge the prize to the individual captor. We can see nothing in the objects of the law, authorizing the president to issue his instructions, nor in the instructions themselves, which can support the idea, that that which was lawfully prize of war, at the time of capture, should cease to be so, upon subsequent notice of the instructions. Both the act itself, and the instructions, in their plain and obvious sense, may well be construed so as to arrest the arm of hostility before it has given the blow. But not only is there nothing either in the act or instructions, to which an ulterior operation can be given, but the policy of the country, as well as the fair claims of the prowess, perseverance and expenses of the individual, forbid our giving an effect either to the act or the instructions, which will deprive the captor of the just fruits of his bravery and enterprise.

The fact of notice, then, alone remains to be considered: and this must either be inferred from circumstances, or received upon the evidence of confession. On this point, computation of time becomes material. The capture was made, as we collect from the officers and crew, on the 3d of September; but as the nautical calculation of time commences at noon, this may mean on the morning of the 4th of September. The additional instructions bear date the 28th of August, and were, probably, forwarded by the mail of the 29th. It cannot, therefore, be supposed, that they were published in Philadelphia, before the 31st *of August, nor in New York [*60 before the 2d; at any rate, not before the 1st of September. This certainly leaves time enough for the information to have been communicated from New York, but renders it impossible, that it could have been received, either from the Eagle, or the pilot-boat, as they were both spoken off Charleston, and the latter was seven days out; whereas, the Tickler left St. Mary's, in Georgia, on the 24th. Whether such information was not in fact communicated off New York, is a point on which the evidence would leave us little room for a contrariety of opinion, were it not for the loss of the log-book and journal. For this circumstance, taken in conjunction with the evidence of confession, some of the court are inclined to entertain an unfavorable idea of the captor's cause. But the majority are of opinion, that they cannot attach so much importance to it. The evidence of Paine, Ferris and Warren, all officers of the privateer, and at the time of testifying, divested of all interest in the capture, positively negatives the only fact from which notice could be implied, to wit, the speaking of any vessel besides the Eagle and the pilot-boat, previous to the capture of the Mary and Susan. And this, we think, is supported by probability, when it is considered, how very few vessels, at that time, could venture to leave our ports; that there is no probability the Tickler could have ventured to lie off and on the port of New York, any length of time; and that, from her leaving the port of St. Mary's, to her arrival at New York, there elapsed no more than the ordinary time of performing that voyage. In addition to which considerations, *we cannot but think, that a copy of the journal of [*61 this voyage was, as it ought to have been, deposited in the custom-house; and this circumstance, whilst it was calculated to make the captor

less careful in preserving the original, enabled the claimant to avail himself of every advantage which could have been derived from the original.

On the evidence of confession, we are not inclined to enter into the considerations of the depositions, intended on the one hand to support, and on the other to impugn, the credibility of Waldron and Garnsey. Nothing can be more painful than the necessity of entering upon such investigations; nothing more unsatisfactory, than to found a legal decision as to the credibility of a witness upon oral testimony, unsupported by the *evidentia rei*. In this case, we are induced to conclude, that these witnesses misunderstood Johnson; that the knowledge of which the latter spoke, was that acquired subsequent to the capture; that it could not have related to any other knowledge, we think incontestible, from the single consideration that the evidence in the case proves it to have been inconsistent with the fact. It was not possible, under the circumstances of the case, that such knowledge could have been communicated, for want of the means of communication, and that it was not, is positively sworn to by three witnesses, whose testimony stands wholly unimpeached.

Sentence of the circuit court affirmed, with costs.

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*62] *The Rugen: Buhring, Claimant.

Prize.

A question of proprietary interest, and of trading with the enemy. The possession of neutral papers, however formal and regular, if colorable only, cannot affect belligerent rights.

Appeal from the Circuit Court for the district of Georgia. The Schooner Rugen and cargo were libelled in the district court for that district, as prize of war, either as belonging to the enemies of the United States, or as the property of citizens who had been trading with the enemy.

A claim was interposed by Mr. Buhring, a subject of the king of Sweden, on the ground, that both vessel and cargo belonging to him, and were *bonâ fide* neutral property. This claim was rejected by the district court; which sentence was affirmed by the circuit court, and thereupon, the claimant appealed to this court.

Charlton, for the appellant and claimant, stated, that the ship was formerly British, had been captured, condemned as prize of war, in the djstrict court, and sold by the marshal to one Bixby, who sold to Buhring, the present claimant.

1. He cited the case of *The Sisters*, 5 Rob. 141, as to the proprietary interest, and argued, that the regularity of the papers was *primâ facie* evidence of neutrality, and conclusive, unless rebutted by contradictory proof. The primitive *national character of the ship was changed by condemnation, and the sale to a neutral was legal. *The Welvaart*, 1 Rob. 104. Testimony was irregularly admitted, which was neither taken in *præparatorio*, nor found on board, nor invoked from any other captured vessel.

*63]

2. The voyage was strictly within the range of neutral rights. If the neutral character of the ship and cargo was established, the destination was immaterial, whether to an enemy or neutral port. But the ship was, in

fact, destined to a neutral port, and diverted from her course by the enemy's vessel La Decouverte. False papers may be used, if not to cover enemy's property, or evade belligerent rights (*The Vrouw*, Rob. 139; *The Floraat Commercium*, 3 Ibid. 147; *The Covenientia*, 4 Ibid. 166; *The Caroline*, Ibid. 87, and this court is not bound to take notice of, or enforce, the revenue laws of other countries.

3. The property ought to be restored, with costs and damages, because the documentary evidence proclaimed the neutral character of the ship and cargo.

The *Attorney-General* and *Pinkney*, for the respondents and captors, stated, that this was one of the plainest cases for condemnation that ever came into a court of prize, upon two grounds: 1st. That the real property was not in the claimant, but in a citizen of the United States. 2d. That it was taken trading with the enemy.

1. In *The Odin*, 1 Rob. 208, where the papers were complete, and the *res gestæ* similar to the transactions in this *case, confiscation was decreed. The conduct and resources of the claimant were the same [*64 as those of Krefting, the Dane. According to the doctrine of Sir William Scott, exercising ownership by the same master is conclusive (Ibid. 217): but here, the former owner continued to exercise dominion over the thing pretended to be transferred, in his own proper person. The ship also continued in her originally intended employment, which was another badge of fraud. *The Omnibus*, 6 Rob. 71; *The Jemmy*, 4 Ibid. 26. The cases cited were of a transfer by the enemy to a neutral, and the former master continued: but here, the citizen wishing to trade with the enemy takes a foreign garb, to deceive, not a foreign, but his own government, This case is to be arranged under that branch of public law which depends upon the municipal law of allegiance; and the presumption is more irresistible than in the other, where the property is taken and proceeded against as enemy's property. The *vis major*, by which it is alleged the ship was compelled to enter an enemy's port, on the outward voyage, is not such as would be admitted as an excuse for deviation, even in a fiscal case, or in an action on a policy of insurance. The indorsement of the ship's papers by the enemy's vessel, might have produced a certain effect; but in the view of the law of nations, a parol order could have no effect, tending to confiscation in a prize court, or even detention for trial. The falsification and spoliation of papers, in this case, would alone be sufficient to justify condemnation. *The Two Brothers*, 1 Rob. 111, 131. *Spoliation of papers may be explained by the preparatory examinations, so as to affect the question of *costs* [*65 only; but here, taken in connection with the simulated papers, the false destination, and the other circumstances of *mala fides*, it is conclusive. Much of the evidence in the case, according to the strict regularity of prize practice, is inadmissible; but the proceedings may be considered as equivalent to an order for further proof. The case of *The Sisters* was before the court of admiralty as an instance court; an equitable title, conflicting with a legal, and there being no *constat* of property, the court, according to the notions which prevail in England, could not interfere.

2. Supposing the property to be in the claimant, it cannot be restored; he was a resident in the United States, and carried on a trade with the

enemy, contrary to the obligations of his temporary allegiance.(a) And supposing the ship to have been compelled to enter the enemy's port by *vis major*, the purchase of a return-cargo would impose confiscation, being a voluntary act of trading with the enemy. Costs and damages ought to be
*66] *awarded to the captors, it being a fraudulent case, and the property delivered to the appellant upon bail.

Charlton, for the appellant and claimant, in reply.—A national character is impressed by the flag and pass. If the property be neutral, the master had a right to clear out with a false destination, according to the authority of *The Neptunus*, since it is not usual to clear out from one hostile port to another. The simulated papers were not intended for the purpose, and could not have the effect, of defrauding this country of its rights as a power at war. The destruction of papers was accidental, and the circumstances of the case are not like those of *The Odin*.

February 20th, 1816. Livingston, J., delivered the opinion of the court. —It has been contended, that this vessel and cargo were *bonâ fide* the property of the appellant, a subject of Sweden, who had a right to trade with the enemy of the United States; and that, having done nothing to forfeit his neutral character, both the sentences below were erroneous, and ought to be reversed. To entitle himself to such reversal, the claimant has undertaken to show, and insists that he has shown, that at the time of, and previous to, the departure of the Rugen from the United States, she, as well as the cargo on board, was his property, and that he was then, and still is, a subject of the king of Sweden, with whom the United States were at peace.

*67] The court will now proceed to inquire, how far Mr. *Buhring has succeeded in establishing the facts on which he relies for a restitution of this property. In pursuing this inquiry, it may become unnecessary to decide, whether the papers which were on board, were sufficient to entitle the Rugen to the privileges or national character of a Swedish vessel; because, whatever may be their regularity and effect, yet, if the court shall be of opinion, that they were only colorable, and that an American citizen, and not the claimant, was owner of the vessel and cargo, it will not be pretended, that belligerent rights can be eluded in this way; or that the subject of a state at war can, under cover of neutral muniments, however regularly procured, or formal they may be, violate, with impunity, his duty and allegiance to his own country. So far from such documents, when intended only as a cover, affording any protection to the property, they render the party resorting to them doubly criminal, by the scene of fraud

(a) A neutral subject, domiciled in the belligerent state, is considered as a merchant of that country, so as to render his property, taken in trade with the enemy, liable to capture and confiscation, in the same manner as that of persons owing permanent allegiance to the state. *The Indian Chief*, 3 Rob. 26. The converse of the rule is also applied to subjects or citizens of the belligerent state, resident in a neutral country, whose trade with the enemy is considered as lawful; except in contraband of war, which is deemed inconsistent with their permanent allegiance, and, it may be added, is equally prohibited to them in their character of neutral merchants. See *The Neptunus*, 6 Rob. 408.

and perjury which must be waded through, in order to obtain them; and then, in case of disaster, to make a court believe that such papers disclose nothing but the real truth of the case. The whole controversy will then be resolved into the single question, whether, in point of fact, Mr. Buhring, or Messrs. Samuel & Charles Howard, who are citizens of the United States, were owners of the Rugen and her cargo, at the time of her sailing from Savanah, and on her return to the United States? It must ever be a painful task to investigate testimony, where a result unfavorable to the claimant can only proceed from a conviction, that the principal agents in the transaction *have acted either fraudulently, or contrary to their known duty as good citizens. Such is the duty now imposed on the court. [*68

The claimant is said to be a Swede. If this be admitted, and it seems not to be denied, we are compelled, by the very suspicious circumstances of this case, to look beyond his national character, and to inquire very particularly into his situation, at the time he embarked, or became connected with this adventure. Had he ever been a merchant in his own country, or elsewhere? Had he ever resided in any of our seaports, or carried on business of any kind there, or in any other place? Had he, at any time, means to purchase this vessel and cargo? or was he sufficiently known, to have acquired a credit to that extent? These questions were all asked by the advocate of the captors, to which no satisfactory answer was given on the argument; and it is in vain that the proceedings are searched for a solution of either of them, at all favorable to the present claim. On the contrary, easily as every difficulty on these points might have been dispelled, if this were a fair proceeding, no attempt of the kind has been made, or if it has, it has terminated in establishing that Mr. Buhring's situation and circumstances were such as preclude all reasonable doubt of his being any other than the ostensible owner of the vessel and carro. He was a young man only twenty-one years old, residing, as well as his brother William, in South Carolina, with Mr. Scarborough, vice-commercial agent of the king of Sweden, for the state of Georgia. From this retirement he is drawn, and for the *first time, introduced to the notice of the mercantile world, by the Messrs. Howards, who appear to be merchants of considerable property and credit, residing at Savannah, in the state of Georgia. [*69 Between these gentlemen and Mr. Buhring, there could have been but very little previous acquaintance; for the latter arrived at Savannah, from Europe, only two or three months before we find him engaged in the concerns of the Rugen; and after remaining not more than three or four days in that city, he went to reside in the country of South Carolina, whence he did not return to Savannah, until he came back with Mr. C. Howard, a very few days before the Rugen sailed. It is not, then, harsh to presume, that the strongest and only recommendation of Mr. Buhring, was his national character. The Messrs. Howards appear, at the time, to have been in search of a Swede, and were not long in meeting with one, whose youth and inexperience well fitted him for the purposes for which, there is so much reason to believe, he was wanted. A feeble attempt, however, has been made to show that Mr. Buhring was not without credit as well as funds. To the former point, one witness has been examined, and to establish that he was not entirely destitute of property, it has been shown, that he actually gave two notes, amounting, together, to about $4300, for the Rugen and her cargo, in the month

of May 1813, payable in four months after date; that these notes, as they became due, were taken up by him, with great punctuality, at one of the banks in Savannah. Whether these notes were really made at the time
*70] when they bear date, may *well be doubtful; but it admits of no doubt, that they were discharged with the proper moneys of the Messrs. Howards, which had, almost the moment before, been drawn by one of them out of the bank, and put into the hands of Mr. Buhring for that purpose. With the funds, then, of Mr. Howard, and not with those of Mr. Buhring, were these notes taken up; and a contrivance, which was intended to make Mr. Buhring appear as a man of property, has not only altogether failed, but has added very considerable weight to the suggestion of the captors, that he was a young man, totally destitute of the means of purchasing and paying for the property which, it is now alleged, belonged to him.

But we now find Mr. Buhring at Savannah; and what is done with him? or what does he do with himself, on his arrival there? Does he go about to purchase a vessel? Does he, when he is told, that the Rugen belongs to him, take any measures to fit her out? Does he provide a crew? Does he agree for their wages? Does he purchase a cargo? Does he see to its being put on board? Does he effect insurance? or is he found doing any one act which might naturally be expected from an owner? All this trouble had already been most kindly taken off his hands by his new friend and acquaintance, Mr. Howard. This gentleman had already (if we are to believe the history of this transaction as it is narrated by the claimant) provided him with a vessel and cargo, although it does not appear that he had instructions or funds of Mr. Buhring for the purpose. It is true, that with
*71] a caution that was very excusable, considering *the circumstances of Mr. Buhring, the bill of sale which had been executed by the marshal, with a blank for the name of the vendee, was not put into the possession of Mr. Buhring, but carefully retained by the Messrs. Howards, they executing to him one in their own names, although they now say, they never were the owners of the vessel. And even this bill of sale, it is very probable, remained in the custody of Mr. Samuel Howard, during the whole of the voyage to Jamaica and back to the United States.

Everything being now in readiness for their departure from Savannah, Mr. Buhring appears on board, and is introduced to the mate and crew, not merely as owner of vessel and cargo, but as master for the voyage. Whether any surprise were excited on board, by the new character in which the claimant appeared, or whether they expressed any reluctance at placing themselves under his command, we know not; nor is it a fact very necessary to ascertain, because they must soon have discovered, that Mr. Samuel Howard, whose friendship for Mr. Buhring seems to have had no limit, and in whose seamanship they may have had full confidence, intended to go with the vessel, and relieve Mr. Buhring from the troublesome task, if he were equal to it, of navigating the Rugen. For this conduct on the part of Mr. Howard, no other reasonable motive can be assigned, than an interest in the vessel and cargo. The allegation of his going after certain funds in Carthagena, is not at all made out.

The Rugen leaves Savannah, on the 5th or 6th of May, bound, as is
*72] alleged, for Carthagena, but arrives at Kingston, in *the island of

Jamaica. The court is not at all satisfied with the excuses which have been made for her going there. It does not appear, that a *vis major* of any kind existed. She was neither forced in by adverse winds, nor was she under any restraint from capture. When within only four leagues of the island, she was boarded by a British brig of war, called La Decouverte, whose commander ordered her into Kingston. He put no prize-master on board; nor did he indorse any of her papers; nor did he keep company with her: and yet we find her doing exactly what she was verbally directed to do. It is faintly pretended, that if she had attempted, after that, to go to Carthagena, she could not have escaped the British cruisers which swarmed about the island. But what greater danger, if the property were neutral, would ensue, on a capture by any other British vessel, than by her going to a British port as prize to the Decouverte, or by her orders? It is believed, then, that her going to Jamaica was voluntary, and formed part of the original plan; which opinion derives considerable support, from the fact of insurance having been made, not only for Carthagena, but also for a port in the West Indies; from the nature of the outward cargo; from the readiness with which they consented to dispose of it at that place, and procured another for this country, promising a much greater profit than any which at that time could have been imported from Carthagena.

There is yet a still stronger circumstance to prove that the destination of the Rugen to Carthagena was fictitious; and that is, her meeting at Kingston a ship called the Wanschop, *which had sailed from Savannah but a little before the Rugen. On board of that vessel, we find Mr. William Buhring, a brother of the claimant, and we have every reason to believe, that she belonged, with her cargo, to the same concern. The Wanschop, it is also said, was destined for Porto Bello, on the Spanish Main; but by a strange coincidence of events, which can scarcely have been the effect of chance alone, she also gets out of her course, falls in with the same British vessel of war which afterwards boarded the Rugen; receives the like order to proceed to Kingston, which she also very promptly, and without any apparent reluctance, complied with. The business of these two vessels is managed by the same house in Kingston, and the proceeds of both of their cargoes are invested in molasses, rum, &c., which composed the return-cargo of the Rugen. If the property claimed were *bonâ fide* Swedish, it would be superfluous to inquire, whether the Rugen's going to Jamaica were voluntary, or by coercion, a subject of Sweden having, for aught that appears, as good right to trade there as at Carthagena. But if it belonged to the American gentlemen, who have had an agency so conspicuous in the whole of this business (and that it did, is our unanimous opinion), it will not be pretended, that they could go to Kingston, unless by compulsion, or that they had any right, during the late war, to purchase and bring a cargo from any British port to this or any other country. [*73

The court having already expressed its opinion, that this vessel and cargo did not belong to the *claimant, but to citizens of the United States, the latter having been purchased at Kingston, as is believed, with their funds; it becomes quite unnecessary to inquire, what was the real destination of the Rugen, on her leaving Kingston; whether she were bound, in fact, to Amelia Island, or to the United States; although it might not be very difficult to come to a satisfactory conclusion, that Hardwicke, in [*74

Georgia, was her real port of destination. But this examination is unnecessary; for the owners, being American citizens, are equally guilty of trading with the enemy, whether that trade were carried on between a British port and the United States, or between such port and any foreign nation; and in the present case, if the court be correct in the view which it has taken of the evidence, the offence of trading with the enemy was complete, the moment the Rugen sailed from Savannah, with an intention to carry her cargo to Kingston, in Jamaica. Upon the whole, without taking notice of many of the arguments urged by the advocates of the captors, in favor of condemnation, and which are entitled to great consideration, the court is unanimously of opinion, that the decree of the circuit court, rejecting the claim of Mr. Buhring, was correct, and must, in all things, be affirmed.

Sentence affirmed, with costs.

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*75] *THOMPSON *v.* GRAY.

Title to lottery tickets.—Contract of sale.

R. G. agreed with the managers of a lottery, to take 2500 tickets, giving approved security on the delivery of the tickets, which were specified in a schedule, and deposited in books of 100 tickets each, thirteen of which books were received and paid for by him, and the remaining twelve were superscribed by him, with his name, in his own handwriting, and indorsed by the agent of the managers, "Purchased and to be taken by Robert Gray," and on the envelope covering the whole, "Robert Gray, 12 books;" on the second day's drawing of the lottery, one of the last-designated tickets was drawn a prize of $20,000, and between the third and fourth day's drawing, R. G. tendered sufficient security, and demanded the last 1200 tickets, and the managers refused to deliver the prize ticket: *Held*, that the property in the tickets changed, when the selection was made and assented to; that they remained in the possession of the vendors, merely as collateral security, and that the vendee was entitled to recover the amount of the prize.

ERROR to the Circuit Court for the county of Alexandria. This was an action of trover, instituted by the defendant in error, against Jonah Thompson, agent for the managers of the Potomac and Shenandoah navigation lotteries, to recover a ticket in the 2d class of said lotteries, against which had been drawn a prize of $20,000.

On the trial, evidence was offered to prove that the president and managers of the Potomac company had been created a corporation, under that corporate name; that they had been authorized by law to raise the sum of $300,000 by lotteries, under which authority, they had drawn one class,
*76] *and had arranged and published a scheme of a second class. That the plaintiff below, and one Joseph Milligan, projected another scheme, which they sent in to the president and managers, accompanied by a proposition in writing, in the words and figures following:

"If this scheme is adopted, we engage to take 2500 tickets each, in the 2d class of the P. and S. navigation lottery: provided, the ten-dollar prizes we now hold, and may hereafter receive, deducting 15 per cent., shall be taken in liquidation of our joint bond; and we engage to place in the hands of Mr. Carlton all the funds we receive for new tickets, until it amounts to a sum equal to that which we now owe the company, as fast as we receive them; on the balance, we shall expect the usual credit. It is understood,

that the discount of 5 per cent. is to be made from the above 5000 tickets; approved security to be given on the delivery of the tickets.

(Signed) JOSEPH MILLIGAN.
R. GRAY."

It was admitted, that this scheme was approved of and adopted by the president and managers, and their own scheme was abandoned; that the proposition of the plaintiff and Milligan was accepted by them, and became a binding contract between the parties. Evidence was also offered, to prove, that under the contract, a schedule, specifying the numbers of certain tickets, by books, containing one hundred *each, to the extent of [*77
2500, selected by the plaintiff, and to be set apart for his use, had been delivered by him, to the former agent of the lottery; that two of the books mentioned in the said schedule having been disposed of, or put out of the reach of the agent, another schedule was handed in by the plaintiff to the defendant, then, and at present, agent, in which two other books, containing the same number of tickets, were substituted, in lieu of the two last mentioned, the schedule, in respect to the others, being the same as the first. That the plaintiff had, at different times, received 13 books, of 100 tickets each, part of those specified in the schedule, and that he had paid for the 13 books, partly in certain promissory notes, received and approved of by the agent, and partly in cash, and had afterwards paid $108.80, on account of tickets in the 2d class, over and above the said 13 books. On the requisition of the plaintiff, the defendant produced on the trial, a bundle containing twelve books of tickets, of one hundred each (the residue of the numbers specified in the schedule), and amongst others, the ticket in the declaration mentioned. On each of which books, the name of the plaintiff was superscribed, in his own handwriting; and on one of them (not that containing the ticket in the declaration claimed) was indorsed in the defendant's handwriting—"Purchased and to be taken by Robert Gray." And on the envelope covering the whole twelve books in one bundle, was superscribed, in the hand and figures of the defendant, the words and figures following: "Robert Gray, 12 Books."

*Similar proceedings took place as to W. Milligan, to whom only [*78
a part of the tickets selected by him had been delivered.

That the drawing of the lottery was commenced on the 17th day of November 1812, and that, on the 27th of that month, the second day's drawing, a prize of $20,000 was drawn against the number in the declaration mentioned. The plaintiff also offered evidence, to prove that on the 4th day of December 1812, subsequent to the third, and before the fourth day's drawing, the plaintiff tendered to the defendant a bond for the payment of ——— dollars, executed by himself and two sureties, who were fully sufficient for that sum, and demanded from him the twelve books of tickets which had been selected and set apart for him. To which the defendant replied, that he was ready to deliver 1200 of any undrawn tickets, but would not deliver the high prize. The drawing of the lottery had been continued only fifteen days. On which, the counsel for the defendant below moved the court to instruct the jury:

1st. That it is not competent for the jury to find, from the evidence so produced as aforesaid, that the twelve books of tickets, including the said

prize ticket, had been, prior to the commencement of the drawing of the said lottery, appropriated by plaintiff and defendant, to the satisfaction of said contract, and delivered to plaintiff under and in fulfilment of said contract, and deposited by the plaintiff with the defendant, as collateral security for the payment of the purchase-money, until other security should be
*79] *given, as was contended and insisted upon by the plaintiff's counsel to the jury; which instruction the court refused to give.

2d. That the facts so given in evidence by the plaintiff as aforesaid, do not import an absolute sale and delivery of the twelve books of tickets, including the prize ticket, but a selection and setting apart of such tickets as were to be delivered to the plaintiff, when he should comply with his contract in giving the stipulated security. Which instruction the court gave, but also directed the jury, that such selection and setting apart as aforesaid, was sufficient delivery to the plaintiff to vest the property of the said tickets in him, upon his giving or tendering approved security, according to the terms of the contract, in a reasonable time thereafter; and that the tender of the security, as before stated, was in reasonable time.

3d. That the selection and laying apart of the twelve books of tickets, as aforesaid, and the said indorsements upon the said books, and upon the envelope of the same, did not vest in the plaintiff the property of said tickets, under the said contract, so as to entitle plaintiff to prizes drawn against those tickets, before any security was given or offered, and whilst said tickets remained in the hands of defendant, awaiting the completion of said contract on the part of the plaintiff in respect of the stipulated security. Which instruction the court gave, but also instructed the jury, "that upon tendering the security, as before stated, if the jury should find such security
*80] to be sufficient, such selection and laying *apart of the said tickets did, under the said contract, entitle the plaintiff to all the prizes drawn by such tickets, in the intermediate time between such selection and the tender of security, as aforesaid." To which refusal and several instructions, the defendant excepted, and a verdict and judgment having been rendered for the plaintiff below, the defendant in the circuit court brought the cause into this court by a writ of error.

Jones, for the plaintiff in error.—1. The ticket was at the risk of the vendors, and drawing the prize is equivalent to any physical change in the thing. It was not left in the hands of the vendors, as collateral security, for the pledge of the ticket would have thrown upon the vendors the whole risk of the drawing of these tickets, the essence of their value consisting in the chance. On the contrary, the thing was to remain in the vendors' possession, and as their property, until a condition of the sale had been accomplished. 2. There is a repugnancy between refusing the first instruction and granting the second. The court below admit that the right of property was not complete in Gray, until the security stipulated; and that, when given, it would retroactively vest the property. The title was then clearly incomplete. *Hanson* v. *Meyer*, 6 East 614; *Paine* v. *Shadbolt*, 1 Camp. 427.

Swann, contrà.—The contract was consummated and binding on both
*81] parties. Gray's proposition *was accepted, some of the tickets were actually delivered; there was a payment of what may be considered as earnest. The thing sold was specifically designated by the vendors. The

vendee had the right of property, and the right of possession. All he wanted was the actual possession. The thing sold may be designated in various ways. 2 Black. Com. 447 ; 1 Salk. 113. Property is transferred by the contract of sale, without delivery, if the article is specifically designated. *Phillemore* v. *Barry*, 1 Camp. 513 ; *Hinde* v. *Whitehouse*, 7 East 558.

Jones, in reply.—There is a distinction between this case and the authorities relied upon by the other side. The question is, whether the contract be executory or executed. It was not executed, by specifying the particular ticket; the security to be given by Gray was a condition which preserved the original executory nature of the contract. Delivery, either actual or symbolical, is essential to a sale ; and neither took place here. The cases cited are of contracts self-executory, and where the parties stipulated to waive delivery.

February 27th, 1816. MARSHALL, Ch. J., delivered the opinion of the court, and, after stating the facts, proceeded as follows :—The question on which the correctness of the opinions given by the circuit court depends, is this : Was the purchase and sale of the twelve books, not delivered, so complete, that the tickets had become the property, and were at the risk of Robert Gray?

*In pursuing this inquiry, it becomes necessary to decide, whether [*82
the clause respecting security forms a condition *precedent*, on which the sale is made to depend, or a condition *subsequent*, the performance of which may be suspended, until it shall be convenient to the vendee, or required by the vendor. It is apparent, that a contract for the sale of 5000 tickets was one of very considerable interest to the managers of the lottery. This is not only self-evident, from the nature of the transaction, but is also proved by the fact, that they changed the scheme of the lottery for the purpose of securing it. As the time of commencing the drawing must necesarily have depended on the sale of the tickets, it is reasonable to suppose, that in the calculcations made on this subject, they must have considered the books selected and set apart for Mr. Gray, either as sold or unsold. The indorsements on the books selected lead strongly to the opinion, that they were considered as sold. If the proposition which forms the basis of the contract be inspected, it will be perceived, that the contract was intended to be entire, not divisible. The scheme of the lottery was changed, not for the purpose of inducing Gray and Milligan to take any number of tickets less than 5000, but on their engaging to take 5000 absolutely ; and the clause respecting the security is annexed to the delivery of the tickets. The delivery of some of the books was an execution in part of an entire contract. All the circumstances show, that the obligation of the contract was complete ; but the examination of these circumstances *is dispensed with, by the admission on record, [*83
that it "became a binding contract between the parties."

What, then, was this binding contract? That the scheme proposed by Milligan and Gray should be adopted, and certain facilities of payment allowed, on their bond to the company for tickets taken in the first class. That they should, on their part, take 2500 tickets each, in the second class, and that approved security should be given on their delivery. Certainly, Milligan and Gray were absolutely bound to take 2500 tickets each.

A refusal to do so, would have been a breach of contract, for which they would have been responsible in damages. When the parties proceed one step further; when the vendee, in execution of this contract, selects the number of tickets he has agreed to purchase, and the vendor assents to that selection; when they are separated from the mass of tickets, and those not actually delivered, are set apart and marked as the property of the vendee; what, then, is the state of the contract? It certainly stands as if the selection had been previously made and inserted in the contract itself. An article purchased, in general terms, from many of the same description, if afterwards selected and set apart, with the assent of the parties, as the thing purchased, is as completely identified, and as completely sold, as if it had been selected previous to the sale, and specified in the contract. After this selection, the parties stood in the same relation to these tickets, as if the 25 books, afterwards agreed upon, had been named in the contract as containing the numbers purchased by Gray.

*84] The *contract, then, amounts to this: The managers agree to sell Gray 2500 tickets, which are specified, and he agrees to give approved security for the purchase-money, on the delivery; in the meantime, the tickets remain in possession of the vendors, who proceed to draw the lottery, without having received or required security for the whole number of tickets sold. The stipulation respecting security could not, in such a case, be considered as a condition precedent, on the performance of which the sale depended. Certainly, the managers could have required, and have insisted on this security; but they might waive it, without dissolving the contract. They were, themselves, the judges, whether they would consider the contract of Robert Gray, with the collateral security furnished by the possession of the tickets, as sufficient for their protection; and their conduct shows that they thought it sufficient.

The majority of the court is of opinion, that the property in the tickets changed, when the selection was made and assented to; and that they remained in possession of the vendors, merely as collateral security. Had the tickets been all blanks, Gray was compellable to take them.

Judgment affirmed, with costs.(*a*)

(*a*) When commodities are sold by the bulk, for a gross price, the sale is perfect, for it is known with certainty what is sold; but if the price is regulated at the rate of so much for every piece, pound or measure, the sale is not perfect, except only as to so much as is actually counted, weighed or measured; for, till then, it is not known with certainty what is sold. *Coit* v. *Houston*, 3 Johns. Cas. 254; Domat, lib. 1, tit. 2, § 4, art. 7; Code

*85] Napoleon, liv. 3, tit. 6, ch. 1, art. 1585; *2 Erskine's Inst. 480–81. This distinction is recognised by Pothier, who remarks, that the contract of sale is usually perfected by the agreement as to the price; and that this rule applies, where the sale is of a specific article, for a gross price. *Si id quod venierit appareat quid quale quantumve sit, et pretium, et pure venit; perfecta est emptio.* Lib. 8, Dig. *de peric. et comm. R. vend.* But, if the commodity be of that description of articles, which consist in *quantitate*, and which are sold by the weight, number or measure, the sale is imperfect, until it is weighed, counted or measured. In the first case, the goods sold are at the risk of the vendee, from the moment the contract is made: in the last case, they remain at the risk of the vendor, until they are designated by the act of weighing, counting or measuring. But, in both cases, the contract is so far completed, from the time of its being entered into, as to give the vendee a right of action for the delivery

Anderson *v.* Longden.

Action against sureties in official bond.

Where a bond was given by the agent of an unincorporated joint-stock company, to the directors for the time being, for the faithful performance of his duties, &c., and the directors were appointed annually, and changed, before a breach of the condition of the bond, the agent and his sureties were held liable to an action brought by the obligees, after they had ceased to be directors.

Error from the Circuit Court for the county of Alexandria. This was an action of debt, instituted by the defendants in error (plaintiffs in the circuit court), as directors of the Domestic Manufacture Company of Alexandria, against Robert Anderson (the plaintiff *in error), on a bond given by him and others, as sureties for John MacLeod, agent of the [*86 said company, to the said directors, to recover the amount of money and merchandise which the said agent had received for the use of the company, and for which he had failed to account.

On the 17th of November 1809, a number of persons in Alexandria associated together, and formed a company, for the purpose of encouraging the manufacture and use of domestic merchandise ; they entered into articles for their government, of which the following extracts are all that are material in this case :

"Art. 2. As soon as the whole, or 1000 shares of the said capital stock, shall have been subscribed for, and the first payment made thereon, a meeting of the stockholders shall be called, by public notice in the Alexandria and Washington newspapers, to meet in the court-house of Alexandria, either in person or by proxy duly authorized, at which meeting the stockholders, either personally or by proxy, shall elect by ballot, seven of their own body, to act as directors of the said company for one year."

"Art. 3. The affairs of the said company shall be carried on in the town of Alexandria, under the superintendence and control of the said directors, of whom any four shall form a board or quorum. They shall choose a chairman from among themselves, and in case of vacancy by death, resignation or otherwise, such vacancy shall be immediately filled by themselves from among the stockholders. And the said directors shall in no case whatever contract debts *or engagements, by bill, bond or otherwise, for or on account of, the company, but all dealings under their superintendence [*87 and control aforesaid, shall be for cash or barter, except goods on deposit, which may be sold by the direction of the consignor. The said directors shall also exhibit, at the annual meeting of stockholders, for their inspection, a statement of the affairs of the company for the year preceding."

"Art. 4. The directors, when elected, shall proceed, without delay, to appoint an agent, and such other officers as may be requisite, all of whom shall hold their offices during the pleasure of the board, and who shall, before they enter upon their functions, give bond, with sufficient security, to the said directors, and their successors in office, for the faithful discharge of their duties, as prescribed by the board of directors."

The company having proceeded to elect directors, John MacLeod was

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of the thing, on tendering the price, and the vendor an action for the price, on tendering a delivery of the thing sold. *Contrat de Vente*, No. 308. See also 6 East 625.

appointed agent by them ; and on the 13th of February 1810, the said agent, with the plaintiff in error and others, his sureties, executed and delivered to the defendants in error, directors of the said company, their joint and several bond, in the penalty of $10,000, the condition of which was, " that the said John MacLeod, should, in all respects, faithfully execute and perform the duties assigned to him as agent, according to the terms and meaning of the articles of association, and also such other duties as are, or from time to time should be, assigned to the office of agent, by the board of directors, and should, from time to time, when called upon, render a just and true account
*88] of all money, *goods, &c., of the said company, which should come to his hands, and should apply the same as he should be directed ; and should, in all respects, whilst he held the office, conduct himself with honesty and fidelity, and attention to the interest of the company."

The said agent continued in the service of the company, without any new appointment, until June 1812, when he was dismissed ; and having gone out, in arrears to the company, this suit was brought against the plaintiff in error, to recover the amount due to the company. To this suit, the defendant in the circuit court, taking *oyer* of the bond, pleaded, 1st. " Conditions performed ;" to which the plaintiff replied, specially setting forth, as the breaches relied on, " that money and merchandise, the property of the company, had come to the hands of J. MacLeod, as agent, &c., to the amount of $4000, for which he had failed to account, though required by the directors, and which he did not deliver over to his successor, as ordered by the directors. On this replication, issue was taken.

The defendant in the circuit court pleaded, 2d. That the plaintiffs (Longden and others) ceased to be directors, at the expiration of one year from the time of their appointment, and were not directors when the suit was brought ; to this plea, the plaintiffs demurred generally.

In his third plea, the defendant stated that John MacLeod was appointed agent, on the 13th of February 1810 ; and that for one year from the time
*89] of such appointment, and during the time the plaintiffs acted as directors, he had faithfully executed and performed his duty, &c. *To which, the plaintiffs (protesting that he had not faithfully performed his duties for one year) replied, that J. MacLeod had continued in office for more than one year from the 13th of February 1810, under the said appointment, and after the plaintiffs ceased to be directors ; during which time, merchandise, &c., to the amount of $4000 came to his hands, &c., which he had failed to account for ; to which the defendant demurred.

The defendant pleaded, 4th, that the plaintiff had not instituted any suit at law against MacLeod for the breach of the condition of the bond ; to which, the plaintiff demurred generally.

The law on the demurrers was adjudged by the court for the plaintiffs (Longden and others) ; and on the trial of the issue, the jury found for the plaintiff, and assessed damages, &c.

The record presented a bill of exception, which stated that the defendant offered in evidence to the jury, the books of the company, from which it appeared, that the agent had been in the habit of selling merchandise on credit, from the month of January 1810, until June 1812 ; which books were open to the examination of the directors ; that it appeared from the books, that sales on credit had been made to three of the directors, plaintiffs in this

suit; that the defendant also offered a copy of the report of a committee of directors made on the 19th of September 1812, in pursuance of an order of the 6th of June, preceding. Evidence was also offered, to prove that the directors, to the number required by the articles, held *meetings, at which they gave directions for the management of the affairs of the company; that their proceedings were regularly reduced to writing, and signed by the chairman. [*90

On which evidence, the defendant's counsel moved the court to instruct the jury, "that if, from the evidence aforesaid, they should be of opinion, that the directors of the company had permitted the said credits to be given, and had acquiesced in the same, the defendant would not be liable for the merchandise sold on credit, and appearing on the books of the company;" which instruction the court refused, and instructed the jury, "that the evidence did not, in law, justify an inference that the directors, acting as a board under the articles, had authorized the agent to sell the merchandise aforesaid, on credit, and that the agent could not, in law, be justified in selling on credit, by any direction of the directors, individually made, when not acting as a board under the articles;" to which opinion and instruction, the counsel for defendant excepted.

Swann, for the plaintiff in error, argued, that the bond must conform to the articles of association, which was not incorporated. He cited the case of the *Commonwealth* v. *Fairfax*, 14 Hen. & Munf. 208, where the words "so long as he shall continue in office," in the condition of a sheriff's bond, were construed not to extend to a second and new appointment.

Lee, for the defendant in error, was stopped by the court.

*Marshall, Ch. J.—The case of the sheriff's bond is very different. The commission of sheriff, in Virginia, is annual; of course, his sureties are bound for one year only. It is true, the directors of this company are elected annually; but the company has not said, that the agent shall be for one year only; his appointment is during pleasure. The sureties do not become sureties in consequence of their confidence in the directors, but of their confidence in the agent whose sureties they are. The court is unanimously of the opinion, that the judgment of the circuit court ought to be affirmed. [*91

Judgment affirmed.

Corporation of New Orleans *v.* Winter *et al.*

Jurisdiction.

A citizen of a territory cannot sue a citizen of a state, in the courts of the United States, nor can those courts take jurisdiction, by other parties being joined, who are capable of suing.[1] All the parties on each side must be subject to the jurisdiction, or the suit will be dismissed.

Error from the District Court for the district of Louisiana. The defendants in error commenced their suit in the said court, to recover the possession and property of certain lands in the city of New *Orleans; claiming title as the heirs of Elisha Winter, deceased, under an alleged grant [*92

[1] See Scott *v.* Jones, 5 How. 377; Barney *v.* Baltimore, 6 Wall. 280, 287.

from the Spanish government, in 1791; which lands, it was stated, were afterwards reclaimed by the Baron de Carondelet, governor of the province of Louisiana, for the use of fortifications. One of the parties, petitioners in the court below, was described in the record as a citizen of the state of Kentucky; and the other as a citizen of the Mississippi territory. The petitioners recovered a judgment in the court below, from which a writ of error was brought.

Winder, for the plaintiffs in error.—The court below had no jurisdiction of the cause. The case of *Hepburn & Dundas* v. *Ellzey*, 2 Cr. 445, determined that a citizen of the district of Columbia could not sue a citizen of the state of Virginia, in the courts of the United States. The subsequent case of *Strawbridge* v. *Curtis*, 3 Ibid. 262, shows that all the parties on the one side, and all the parties on the other, must be authorized to sue and be sued in those courts, or there is a defect of jurisdiction. The right of action was joint, but they might have severed it, which they did not, and they are incompetent to join, in point of jurisdiction.

Key, contrà.—A citizen of the Mississippi territory has a right to sue in the courts of the United States. This point was left open in the decision
*93] of *the case of *Serré* v. *Pitot*, 6 Cr. 336. There is a manifest distinction, in this respect, between the right of a citizen of the district of Columbia, and of the Mississippi territory. The jurisdiction of the district court of Louisiana, is the same with that of Kentucky. The several territories are "members of the American confederacy." The constitution puts the citizens of the district of Columbia on the same footing with inhabitants of lands ceded for the use of dock-yards, &c.; they are not "members of the American confederacy." The district has no legislative, executive nor judicative authority, power or privileges. The territories have them all. They are in a sort of minority and pupilage; have the present right of sending delegates to congress, and of being hereafter admitted to all the immunities of states, in the peculiar sense of the constitution. In this case, each party takes an undivided interest, and has a right to a separate action, whether the inheritance be of movable or of real property.

Harper, in reply.—There is no distinction, in this particular, between the district of Columbia and the territories. Congress might give to the district a delegate, with the same privileges as the delegates from the territories. The United States are the common sovereign of all these communities; and may grant or refuse this, or any other privilege, at their pleasure. The action is brought jointly, not each claiming his several part;
*94] and the court cannot *disconnect the parties. The petitioners complain, under the civil law, by the rules of which it is not competent for them to sever. Spanish law, which prevailed in Louisiana before its acquisition by this country, is a modification of the Roman. By the civil law, inheritances of real, as well as personal property, are joint. What is the mode of proceeding? Though ambiguous and mixed, it is chiefly the civil law process, like our chancery proceedings. All parties must, therefore, regularly have been before the court.

February 28th, 1816. Marshall, Ch. J., delivered the opinion of the court, and after stating the facts, proceeded as follows:—The proceedings

of the court, therefore, are arrested *in limine*, by a question respecting its jurisdiction. In the case of *Hepburn & Dundas* v. *Ellzey*, this court determined, on mature consideration, that a citizen of the district of Columbia could not maintain a suit in the circuit court of the United States. That opinion is still retained. It has been attempted to distinguish a territory from the district of Columbia; but the court is of opinion, that this distinction cannot be maintained. They may differ in many respects, but neither of them is a state, in the sense in which that term is used in the constitution. Every reason assigned for the opinion of the court, that a citizen of Columbia was not capable of suing in the courts of the United States, under the judiciary act, is equally applicable to a citizen of a territory.

Gabriel Winter, then, *being a citizen of the Mississippi territory, [*95
was incapable of maintaining a suit alone in the district court of Louisiana. Is his case mended, by being associated with others who are capable of suing in that court? In the case of *Strawbridge* v. *Curtis*, it was decided, that where a joint interest is prosecuted, the jurisdiction cannot be sustained, unless each individual be entitled to claim that jurisdiction. In this case, it has been doubted, whether the parties might elect to sue jointly or severally. However this may be, having elected to sue jointly, the court is incapable of distinguishing their case, so far as respects jurisdiction, from one in which they were compelled to unite. The district court of Louisiana, therefore, had no jurisdiction of the cause, and their judgment must, on that account, be reversed, and the petition dismissed.

Judgment reversed.

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*The Aurora: Walden *et al.*, Claimants. [*96

Bottomry.

An hypothecation of the ship by the master is invalid, unless it is shown by the creditor, that the advances were necessary to effectuate the objects of the voyage, or the safety of the ship; and the supplies could not be procured upon the owner's credit, or with his funds, at the place.[1]

A bottomry-bond, given to pay off a former bond, must stand or fall with the first hypothecation, and the subsequent lenders can only claim upon the same ground with the preceding, of whom they are virtually the assignees.

Walden *v.* Chamberlain, 3 W. C. C. 290, affirmed.

Appeal from the Circuit Court for the district of Pennsylvania. The brig Aurora, commanded by Captain Owen F. Smith, and owned by the claimants, sailed in July 1809, from New York, on a trading voyage to the Brazils, and from thence to the South Sea islands, for the purpose of procuring a cargo for the market of Canton or Manilla; with liberty, after completing this adventure, to continue in this trade, or engage in that between Canton and the northwest coast of America. The brig duly arrived at Rio Janeiro, where the principal part of her outward cargo was sold, and from thence proceeded to Port Jackson, in New Holland. At this

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[1] The Draco, 2 Sumn. 157; The Fortitude, 3 Id. 228; The Lavinia, 1 W. C. C. 49; The John and Alice, Id. 293; The William Penn, 3 Id. 485; Selden *v.* Hendrickson, 1 Brock. 396; The Mary, Bee 120; Rucker *v.* Conyngham, 2 Pet. Adm. 295; The Randolph, Gilp. 457; The Magown, Olcott 55; The M. P. Rich, 1 Cliff. 308; Naylor *v.* Baltzell, Taney's Dec. 55; The Grapeshot, 9 Wall. 129. And see The Lulu, 10 Id. 192; Insurance Co. *v.* Gossler, 96 U. S. 649.

port, the brig underwent considerable repairs; on account of which, advances and supplies were furnished by Messrs. Lord & Williams, who were merchants there.

*97] The original objects of the voyage seem here to have *been lost sight of, and the brig was chartered by the master, to Messrs. Lord & Williams, for a voyage of discovery, and was actually retained in their service for about a year, under this engagement. At the end of this time, the brig had returned to Port Jackson, and Captain Smith was here put in jail, by some persons whose names are unknown, for debts contracted, as it was asserted or supposed, on account of the vessel, and was relieved from imprisonment by Messrs. Lord & Williams. About this time, viz., in July 1811, the brig was again chartered to Messrs. Lord & Williams, for a voyage from Port Jackson to Calcutta, and back to Port Jackson; and a bottomry-bond was executed for the same voyage, by Captain Smith, in favor of Messrs. Lord & Williams, for the sum of 1482*l.* 6*s.* 1*d.*, and interest at nine per cent., being the amount, as the bond expresses it, of "charges incurred for necessaries and stores, found and provided by Messrs. Lord & Williams, of, &c., at various times and places, for the use of the said brig." The vessel duly proceeded to Calcutta, and landed her cargo there; but being prevented, as it was alleged, by the British government in Calcutta, from returning to Port Jackson, the voyage was broken up.

In December 1811, Captain Smith entered into a contract with the libellants, Messrs. Chamberlain & Co., at Calcutta, by which he engaged to charter the brig to them, to carry a cargo on their account to Philadelphia, for the gross freight of 12,000 sicca rupees, to be paid to him in advance, in Calcutta; and also to give the charterers the appointment of the master for

*98] the voyage. *He further agreed, in consideration of the libellants paying the bottomry-bond of Messrs. Lord & Williams, and advancing any sums necessary for the repairs and supplies of the ship, to execute a bottomry-bond to them, for the same voyge, for the principal sum thus paid and expended, and twenty per cent. interest. In pursuance of this agreement, on the 17th of December, a certain Captain George Lee, with the assent of Smith, was appointed by the libellants to superintend the repairs, equipments and loading of the brig, and afterwards sailed as master on the voyage. A bottomry-bond, for 18,000 sicca rupees, was formally executed by Captain Smith on the 23d, and a charter-party on the 26th December. In the latter part of January 1812, Captain Smith resigned his nominal command of the ship to Captain Lee, and delivered to him the ship's papers, and letters for the owners. The ship duly sailed on the voyage, and arrived at Philadelphia, and there safely delivered her cargo. The advance freight was paid to Captain Smith, according to the contract, and he remained behind, at Calcutta, under the pretence, that, with this advance freight, it was his intention to prosecute the plan of his original voyage, and to endeavor to repair the losses sustained by his former conduct. It also appeared in evidence, that Captain Smith was, during the whole voyage, much addicted to intoxication, both at sea and on shore; and Messrs. Lord & Williams and the libellants, seemed to have been fully apprised of his incapacity to manage the concerns of the voyage.

The owners refused to pay the bottomry-bond executed at Calcutta, and

*99] the *present libel was brought to enforce it. The district court, at

the hearing, decreed the full amount of the principal and interest of the bond, deducting the 12,000 sicca rupees advanced at Calcutta. Upon an appeal, the circuit court reversed this decree, and upon the merits, dismissed the libel.

Harper, for the appellants and libellants.—1. As to the first hypothecation at Port Jackson: a bottomry-bond may be taken, after debts are incurred necessarily, in order to secure the person advancing the moneys. 2. The hypothecation at Calcutta was to discharge the first loan, and for further repairs. The master was not, in effect, changed, before the second bond was executed. But, suppose he was, how is that to affect the first hypothecation? It attached, until discharged by the new loan. The instrument passes by delivery, and the new lenders became invested with all the rights of the former holders of the bond. The present holders ought, at least, to receive so much of their money. All that lenders upon bottomry are bound to do, is, to see that a necessity actually exists at the time. How came the ship enabled to prosecute her voyage and earn freight? By the loan. The payment of the freight in advance to the master, subsequently, could not, by relation back, affect the lien acquired by a previous loan.

Sergeant, for the respondents and claimants.—The power of a master to hypothecate the vessel, though necessary for the purposes of commerce, would, *without limitations, be ruinous to the owner, and destructive of the purposes it was intended to subserve. It is conferred by no express delegation, but is the offspring of necessity. This necessity must be shown, to warrant the master's conduct. The owner's interest is the object of the power; the master has no authority to bind the owner or his property, contrary to his orders and his interest. [*100

1. The master can hypothecate only in cases of clear necessity, which must be clearly shown. *Ross* v. *The Active*, 2 W. C. C. 226; *Putnam* v. *The Polly*, Bee 159; *The Lavinia*, 1 W. C. C. 49. It is incumbent upon the party who claims to have a right under the bond, to show this necessity. A contrary doctrine would make the bond, which is nothing, unless the master has the power, evidence of that power. To allow it the force even of *primâ facie* evidence, would be to invert the law; for then, instead of saying, that the state of necessity must be clearly shown, we should be obliged to say, the absence of necessity must be shown.

2. The master can hypothecate only when the hypothecation is the condition of the loan. The money ought to be advanced solely on the faith of the bond, and the hypothetation cannot be taken, after the advances are made, without stipulating for such security. If the loan has been once made, on personal credit, for the use of the ship, it cannot be afterwards secured by hypothecation; for there is, then, no existing necessity. A menace against the master, or the power of *attaching the ship, by the creditor, will not legalize such a contract. *Leibart* v. *The Emperor*, Bee 339; *Rucker* v. *Conyngham*, 2 Pet. Adm. 295. If the master can obtain funds by any means, he is not authorized to hypothecate. The master can hypothecate only for the interest of the owner, and for the purpose of prosecuting the voyage. *Ross* v. *The Active*, 2 W. C. C. 226; Park on Ins. 413. This is a case which requires the application of the strictest principles of law; and, at the same time, illustrates the wisdom [*101

and policy of those principles, as essential to the security of trade. The hypothecation at Calcutta, as far as it is founded upon that at Port Jackson, was given, in part at least, for a pre-existing debt; and it is not for us to separate what the obligees have confounded and mixed together. As to the expenditures at Calcutta, the freight received ought to have been applied to pay them.

Harper, in reply.—The principles advanced on the other side are too narrow to subserve the interests of trade; and the authorities cited do not warrant them. Any condition of a ship, disabling her from performing her usual service to the owner, if money cannot be raised in any other way to refit her, creates such a necessity as will justify an hypothecation by the master. Do not the claims of material-men, of tradesmen who have furnished supplies upon the credit of the ship, of merchants who have advanced
*102] moneys for her repair, and who may all proceed **in rem*, or by process of attachment, imply such a condition of the ship? By the universal law of the civilized world, the master is the agent of the owner, unless notice of his special instructions to the party contracting with him, can be proved. The lenders in this case had no such notice.

February 29th, 1816. Story, J., delivered the opinion of the court, and after stating the facts, proceeded as follows:—Such are the material facts of the case, and the question to be decided is, whether, under all circumstances, the bottomry-bond executed at Calcutta constitutes a valid lien upon the ship.

The law in respect to maritime hypothecations is, in general, well settled. The master of the ship is the confidential servant or agent of the owners, and they are bound to the performance of all lawful contracts made by him, relative to the usual employment of the ship, and the repairs and other necessaries furnished for her use. This rule is established as well upon the implied assent of the owners, as with a view to the convenience of the commercial world. As, therefore, the master may contract for repairs and supplies, and thereby, indirectly, bind the owners to the value of the ship and freight, so, it is held, that he may, for the like purposes, expressly pledge and hypothecate the ship and freight, and thereby create a direct lien on the same, for the security of the creditor.

But the authority of the master is limited to objects connected with the voyage, and, if he transcend the prescribed limits, his acts become, in legal
*103] contemplation, mere nullities. Hence, to make *a bottomry-bond executed by the master a valid hypothecation of the ship, it must be shown by the creditor, that the master acted within the scope of his authority; or, in other words, it must be shown, that the advances were made for repairs and supplies necessary for effectuating the objects of the voyage, or the safety and security of the ship; and no presumption should arise, that such repairs and supplies could be procured upon any reasonable terms, with the credit of the owner, independent of such hypothecation. If, therefore, the master have sufficient funds of the owner, within his control, or can procure them, upon the general credit of the owner, he is not at liberty to subject the ship to the expensive and disadvantageous lien of an hypothecatory instrument.

Let us now, with these principles in view, proceed to the consideration

of the validity of the bottomry-bond executed at Port Jackson, which enters so materially into the subsequent one executed at Calcutta. This bond purports, on its face, to have been given for advances or supplies, furnished for the ship's use, not immediately before its date, but at various times and places; and, from the other evidence in the case, it distinctly appears, that the greater part was furnished before and during the voyage of discovery in which she was engaged, under the contract with Messrs. Lord & Williams, and for their immediate benefit. Not the slightest account is given of the earnings of the ship, during this long voyage of a year, nor of the terms or stipulations of the charter. This silence would be wholly unaccountable, *if it were not in proof, that Captain Smith was guilty of the most [*104
shameful misconduct, and either fraudulently sacrificed, or grossly neglected, the interests of his owner.

The advances made by Messrs. Lord & Williams do not appear to have been originally made, upon a stipulation for an hypothecation of the ship. On the contrary, there is the strongest reason to believe, that they were originally made upon the general credit of the owner, or master, or both. If there had been a stipulation for an hypothecation, it must have been carried into effect by the parties, on the next ensuing voyage; and as this was not done, there arises an almost irresistible presumption, that Messrs. Lord & Williams looked for their reimbursements out of the freight of the voyage in which the ship was then engaged by them. If, indeed, there had been a stipulation, originally, for an hypothecation, it must be deemed, in point of law, to have been waived, by the omission to have had it attached to the first voyage then next to be prosecuted; and the party who thus waives his right cannot be permitted, at a subsequent time, and under a change of circumstances, to reinstate himself in his former condition, to the injury of the owner.

It is said, that the ship might have been arrested for these advances; and that, in point of fact, the master was put in jail on account of debts contracted for the ship, and was relieved from imprisonment by Messrs. Lord & Williams. That Captain Smith was imprisoned on account of some debts, appears in the evidence, but it is by no means clear, that these [*105
*debts were contracted for the use of the ship. The presumption is repelled by the consideration, that the necessaries and supplies are expressly stated in the bond to have been furnished by Messrs. Lord & Williams; and the only other creditors who are alleged to have furnished stores, are admitted not to have instituted any suits. It is undoubtedly true, that material-men and others, who furnish supplies to a foreign ship, have a lien on the ship, and may proceed in the admiralty to enforce that right. And it must be admitted, that in such a case, a *bonâ fide* creditor, who advances his money to relieve the ship from an actual arrest on account of such debts, may stipulate for a bottomry interest, and the necessity of the occasion will justify the master in giving it, if he have no other sufficient funds or credit, to redeem the ship from such arrest. But it would be too much to hold, as was contended for by the counsel for the appellants, that a mere threat to arrest the ship, for a pre-existing debt, would be a sufficient necessity to justify the master in giving a bottomry interest, since it might be an idle threat, which the creditor might never enforce; and until enforced, the peril would not act upon the ship itself. And even supposing a just debt

might, in such a case, be a valid consideration to sustain a bottomry interest in favor of a third person, such an effect never could be attributed to a debt manifestly founded in fraud or injustice. Nor does it by any means follow, because a debt sought to be enforced by an arrest of the ship, might uphold an hypothecation in favor of a third person, that a general creditor would
*106] be entitled *to acquire a like interest. It would seem against the policy of the law, to permit a party, in this manner, to obtain advantages from his contract for which he had not originally stipulated. It would hold out temptations to fraud and imposition, and enable creditors to practise gross oppressions, against which even the vigilance and good faith of an intelligent master might not always be a sufficient safeguard in a foreign country.

These are not the only difficulties which press upon the claim of Messrs. Lord & Williams. The terms of the charter-party, entered into by them on the voyage to Calcutta, as well as on the voyage of discovery, are nowhere explained. It was certainly their duty, in the first instance, to apply the freight in their hands, earned in these voyages, to the discharge of the debt due to them for advances. What was the amount of this freight, and what was the manner in which it was to be paid, and how, in fact, it was paid or appropriated, are inquiries which have never been answered. These inquiries are, at all times, and in all cases, important, but are emphatically so, in a case where there is but too much reason to suspect, that the interests of the owner were wilfully abandoned by the fraud or the folly of the master.

It is incumbent upon the creditor who claims an hypothecation, to prove the actual existence of the necessity of those things which give rise to his demand ; and if, from his own showing, or otherwise, it appears that he has had funds of the owners in his possession which might have been applied to
*107] the demand, *and he has neglected or refused so to do, he must fail in his claim. So, if various demands are mixed up in his bond, some of which would sustain an hypothecation and some not, it is his duty so to exhibit them to the court, that they may be separately weighed and considered. And it would be perilous, indeed, if a court were called upon to grope its way through the darkness and intricacies of a long account, without a guide, and decide upon the interests of the ship-owner by obscure and doubtful lights which here and there might cross the path.[1]

Upon the whole, it is the opinion of the court, that the bottomry-bond of Messrs. Lord & Williams cannot be sustained, as a valid hypothecation, upon the proofs now before the court. It appears to have been founded, to a very large amount, upon advances made by Messrs. Lord & Williams, in previous voyages ; and if some portion of the debt might have been immediately applicable to the necessities of the ship, at the time of the voyage to Calcutta, that portion is not distinctly shown, and no reason as yet appears, why the freight in their hands, if the transactions were *bonâ fide*, might not have been applied in discharge of these necessities.

As the bottomry-bond of Messrs. Lord & Williams has not been established, the subsequent bottomry-bond, executed at Calcutta, so far as it

[1] See The Grapeshot, 9 Wall. 129 ; The Lulu, 10 Id. 192 ; Insurance Co. *v.* Gossler, 96 U. S. 649.

includes and covers the sum due on the first bond, cannot be sustained. The plaintiffs, in this respect, can claim only as the virtual assignees of Messrs. Lord & Williams, with the assent of the master, and the same defects which infected the original title pass along *with the muni- [*108
ments of that title, under the assignment.

And this observation leads to the consideration of the validity of the bottomry-bond, executed at Calcutta, as to the sum remaining, after deducting the amount of the first bond. Notwithstanding some obscurity in the testimony, it must be taken as true, from the express acknowledgments of Captain Smith, that the whole sum expended in repairs and supplies of the ship in Calcutta, including the sum of 10,713 sicca rupees, paid on account of the first bottomry-bond, did not exceed the sum of 18,000 sicca rupees. It follows, therefore, that a sum, a little more than 6000 rupees, was expended in these supplies and repairs. By their charter-party with the master, the plaintiffs agreed to pay an advance freight to Captain Smith of 12,000 sicca rupees, for the voyage to Philadelphia. There was, therefore, within their own knowledge, an ample fund provided for all the repairs and supplies necessary for the voyage; and this fund absolutely within their own control, if they were disposed to act for the interest of the owners, instead of lending their aid, still further involve them in difficulty and distress. There is, therefore, but too much reason to believe, that the plaintiffs were not unwilling to derive undue advantages from the intemperance and negligence of the master, whatever might be the sacrifices brought upon the owners. The plaintiffs expressly stipulated, in their charter-party, for the right to appoint a new master for the voyage, obviously *from a total want of [*109
confidence in Captain Smith. They would not even suffer the repairs and loading of the ship to be made, except under a master specially in their own confidence. They retained Captain Smith in the nominal command of the ship, until all their own purposes were answered, and then discarded him, with as little ceremony as any indifferent personage. Yet, at the very moment that they were withdrawing their whole confidence from him, they advanced the whole freight of the voyage, to be applied, at his own pleasure, to any objects disconnected with the voyage. They could not be ignorant, that the master was not about to return to the home of the owner, and that the ship was; and the argument which imputes to them a collusive combination with the master, is certainly not without considerable weight. At all events, here funds are shown to exist sufficient to meet the necessities of the ship, and consequently, a resort to the extraordinary expedient of an hypothecation was not justified in point of law.

On the whole, it is the opinion of the court, that the decree of the circuit court ought to be affirmed, with costs.

Decree affirmed.(*a*)

(*a*) It is stated by Blackstone, in the Commentaries, vol. 2, p. 457, that the contracts of bottomry and *respondentia* took their rise from the practice of allowing the master to hypothecate the ship in a foreign country, in order to raise money to refit. This opinion is doubted by Mr. Abbott, in his Law of Shipping, part 2, c. 3, § 15, p. 163 (Story's ed.), who remarks, that there is no mention in the text of the civil law, of this contract entered into by the master of the ship in that character. This remark does not appear to *have been made with the usual accuracy of that excellent [*110
writer; for, in the law, *De exercitoria actione*, in the Pandects, the master is

authorized to take up money upon the credit of the ship, when necessary; and Bynkershoek attributes the origin of maritime hypothecation to the Roman law, and states, that it was originally confined to hypothecation by the master, from necessity, in foreign parts, and by degrees came to be entered into by the owners of the ship and cargo for more general purposes. Q. J. Priv. lib. 3, c. 15, *De Contractu qui dicitur, Bodemery*. The same great jurist also states in his Q. J. Pub. c. 19, p. 151, of Du Ponceau's translation, that the lender is entitled to the benefit of his security, even if the moneys advanced be misapplied by the master, and not laid out in the refitting the ship. This, however, must be understood of a *bonâ fide* case, where there is no fraud on the part of the lender, nor collusion between him and the master. Roccus lays down the following rules on this subject: "*Verum adverte, quia quatuor requiruntur, ut dominus navis teneatur ad restitutionem pecuniæ minutuatæ. Primum, ut causa sit verâ, et in illam causam pecunia sit versa, licet precise creditor non teneatur habere curam, ut in illam causam pecunia expendatur. Secundo, quod mutuans sciat magistrum ad id esse propositum. Tertio, ut non plus mutuetur, quam sit navi necessarium dictæ refectioni, vel causæ. Quarto, ut in eo loco comparari possint res illæ necessariæ, ubi mutuum fuit factum.*" He adds, that if the master deceive the lender, either in the repairs, or the price of the articles purchased, the owner is responsible, and also for money borrowed to repay other moneys advanced to refit the ship; nor is he discharged, even if the master converts the money to his own use. *Notabilia de Nav. et Naut.* note 23, 24. The Consolato del Mare recognises the power of the master to bind the owners in this manner, excepting in cases of frand and misconduct, c. 245. By the ancient law of France, the master might hypothecate the ship, when abroad, with the consent of the mate and pilot, who were required to certify upon the ship's journal, the necessity of the loan, and its application. *Ordonnance de la Marine*, liv. 2, tit. 1, *du Capitaine*, art. 19. Usage also required that a *proces verbal* of the transaction should be copied from the journal, and signed by the parties, whose consent was necessary. But Valin informs us, that these formalities were merely required in order to disculpate the master; that they were not of the essence of the contract, and the omission of them did not invalidate the security of the lender, who was not obliged to prove that the sums advanced had been appropriated to the use of the vessel; and he
*111] cites a sentence of *the tribunal at Marseilles, of the 9th of August 1748, in support of his exposition, which decision (he states) is founded upon the first law, § 9, Dig. *de exercitoria actione*. He remarks, that Loccenius, *de Jure Maritimo*, lib. 3, c. 8, n. 7 and 8, Vinnius in Peckium, fol. 183, n. A; and Casaregis, Disc. 71, n. 15, 33 and 34, hold, that the lender should prove the necessity of the loan, in order to prevent ship-owners from being the victims of the frauds and malversations of masters. But Valin alleges, that this rule has been rejected, by the usage of trade, as too refined and subtle; and that, to enable the lender to enforce his claim, it is sufficient to show that he had acted with good faith; that is to say, that there is no proof or sufficient presumption of collusion between him and the master. Valin *sur l' Ordonnance*, tom. 1, p. 442. See also Pothier, *de Pret a la Grosse*, n. 52. In the new Commercial Code of France, the further precaution is added, of requiring that the master should obtain the consent of a tribunal of commerce, or justice of the peace, if the loan be made in France; if abroad, by the French cousul, or if there be no consul, by the magistrate of the place. Code de Commerce, liv. 2, tit. 4, *Du Capitaine*, art. 234. This amendment to the ancient law was made upon the suggestion of the tribunal and chamber of commerce of Caen, who remarked, in their observations upon the original plan of the code, that it but too often happened, that ship-masters, in the course of their voyage, put into port upon the most frivolous pretexts, and incurred expenses ruinous to the owners: which required the interposition of judicial authorities, who would certainly authorize no other expenses than those really urgent and necessary to the prosecution of the voyage. Esprit du Code de Commerce, par J. G. Locre, tom. 3, p. 112.

*The Venus: Jademerowsky, Claimant.

Prize.

A case of further proof.

Appeal from the decree of the Circuit Court for the district of Georgia. This ship having taken in a cargo, at London, proceeded to Portsmouth, and from thence, on the 12th of April, 1814, sailed for St. Bartholomews, under convoy of a British ship of war. From St. Bartholomews, she sailed for the Havana, but on her passage thither, was captured and sent into the island of St. Thomas, for adjudication, by a British cruiser. Upon being released from this detention, she abandoned her destination for the Havana, and was proceeding to Amelia Island, when she was captured by the flotilla under the command of Commodore Campbell, and sent into the port of Savannah, where the vessel and cargo were libelled as prize. The ship was restored by consent, in the court below, as Russian property; the cargo was condemned as prize of war, and an appeal entered from that sentence by the claimant.

The proofs of property consisted: 1. Of a recital in a power of attorney, from one Jones, the alleged agent, in London, of the claimant (who was stated to be a Russian merchant, domiciled at St. Petersburgh) to Mr. Diamond, the supercargo. 2. A certificate of property from the Russian counsul-general, in *London. 3. The testimony of Mr. Diamond, and other witnesses, taken *in præparatorio*, expressing their belief that [*113 the property was as claimed.

Charlton, for the appellant and claimant, offered to read affidavits in the nature of further proof.

Story, J.—Until the cause is heard, further proof cannot be admitted.

Marshall, Ch. J.—If, upon the opening, it appears to be a case for further proof, then it may be admitted *instanter*, unless, indeed, the court should be of the opinion, that the captors ought to be allowed to produce further proof also. The cause is before us, as if in the inferior court.

Charlton.—We contend, that it is a case entitled to further proof, and that there is no circumstance of fraud or *mala fides* to preclude it.

The *Attorney-General*, contrà.—It is incumbent upon the claimant, to make out his title by competent testimony, according to the rules of the prize court; and if the court should be of opinion, that the property does not belong as claimed, the captors will be entitled to condemnation, without specifically proving to whom it does belong. *The Odin*, 1 Rob. 227; *The Neptunus*, 3 Ibid. 68. The recital in the power from Jones to Diamond, cannot be sufficient to show the interest of Mr. Jademerowsky. *The [*114 recital in a deed binds only the parties, and those claiming under it: we are entitled to the production of the original power, duly authenticated. *The Argo*, 1 Rob. 133. The certificate of the Russian counsul-general is no proof of the real property. *The Endraught*, 1 Rob. 19. The failure on the part of the supercargo to testify, positively, as to the property, is, in the prize court, always held strongly against the title of the claimant. *The Neptunus*, 3 Rob. 68. The cargo was purchased and loaded in a British

port, and the ship had an alternative destination to a British colony. The voyage is different from that authorized in the original power from Mr. Jademerowsky to Jones; and therefore, such power either never existed, or it is falsified by the evidence, and must be repudiated by the court.

Pinkney, in reply, agreed, that in a suspicious case, restitution could not be demanded upon the original evidence; but this is a case of further proof, and there is no evidence of fraud, or unneutral conduct, to preclude it. The documentary evidence expresses neutral account and risk. By the law of nations, the papers must be supported by the examinations *in præparatorio;* but there is no determination which warrants the position, that the supercargo must swear to anything more than *belief*. He is, in this respect, in the same predicament with the master. In both cases, it is matter, not of positive knowledge, but of inference from the circumstances which *115] *come to his knowledge. The consular certificate is a part of the ship's papers, and, as such, is necessarily a part of the documentary evidence in the cause. The recital of the procuration is said not to be admissible at common law; but this court is now sitting as a court of prize.

March 2d, 1816.—The cause was this day ordered to further proof, on the part of the captors and claimants.

Further proof ordered.

Preston *v.* Browder.

Land law of North Carolina.

The act of assembly of North Carolina, of November 1777, establishing offices for receiving entries of claims for lands in the several counties of the state, did not authorize entries for lands within the Indian boundary, as defined by the treaty of the Long Island of Holston, of the 20th of July 1777. The act of April 1778, is a legislative declaration explaining and amending the former act, and no title is acquired by an entry contrary to these laws.

Error to the Circuit Court for the district of East Tennessee. This was an action of ejectment, commenced by the plaintiff in error, in that court.

On the trial of the cause, the plaintiff produced and read in evidence an *116] entry made on the 25th of February *1778, in the name of Ephraim Dunlap, for 400 acres of land in the point between Tennessee and Holston rivers. Also a grant to said Dunlap, issued in virtue of, and fonnded upon, said entry, under the great seal of the state of North Carolina, dated the 29th of July 1793; which grant was duly registered. The plaintiff also produced and read in evidence, a deed of conveyance, with the certificates of probate and registration indorsed, from Dunlap, the grantee, to John Rhea. Also a deed of conveyance from said Rhea to the lessor of the plaintiff.

It was also proved, that the land lies within the boundaries of what was the state of North Carolina, at the time of making said entry, and within the county of Washington; likewise, within the territory ceded by the state of North Carolina to the United States, in 1789, and within the now county of Blount, in the district of East Tennessee; that it lies on the south side of Holston river, and between Big Pigeon and Tennessee river, and west of a line described in the 5th section of the act of the general assembly of North Carolina, passed in April 1778, ch. 3. Also, within the tract of country

secured to the Indians in 1791, by the treaty of Holston, and that the Indian title thereto was relinquished in 1798, by the treaty of Tellico.

The defendant produced and gave in evidence, a grant from the state of Tennessee to himself, made out and authenticated in the manner prescribed by the laws of Tennessee, and dated the 18th of May 1810, which covers and includes the whole of the land in his possession, and for which this suit was brought.

The *plaintiff, by his counsel, moved the court to charge and instruct the jury, "that an entry was actually made with the entry-taker of Washington county, within which the land lay; that the entry was evidence that the consideration-money was paid as required by law; that paying the consideration-money, and making the entry, created a contract between the state of North Carolina and the said Dunlap, which vested a right in him to the land in dispute, and that it was not in the power of the legislature, at a subsequent period, to destroy the right thus vested, or rescind said contract, without the consent of the said Dunlap. That having the same land afterwards surveyed and granted, in the manner prescribed by the laws of North Carolina, vested in the said Dunlap and his heirs, a complete title, both at law and in equity; and that the conveyance from Dunlap to Rhea, and from Rhea to the lessor of the plaintiff, vested a complete legal title in him, and, therefore, he was entitled to a verdict." [*117

Which charge and instruction, the court refused to give to the jury; but on the contrary, charged and instructed them, "that the said entry and grant were both null and void, and vested no title whatever in the said Dunlap, because, at the time of making said entry, and obtaining said grant, the land included therein lay in a part of the country where the laws of North Carolina had not authorized their officers to permit lands to be entered, or to issue grants therefor; and although the entry and grant might have been made in the form required *by law, yet no interest whatever passed from the state of North Carolina to Dunlap thereby, and therefore, they ought to find a verdict for the defendant." A verdict was rendered accordingly, and a judgment pronounced thereon. To which charge and instruction, the plaintiff's counsel excepted, and the cause was brought into this court by writ of error. [*118

Key, for the plaintiff in error.—The question in this cause turns upon the validity of an act of assembly of North Carolina, of April 1778, repealing a former act of November 1777, c. 1, § 3, under which the plaintiff's entry was authorized. It is an *ex post facto* law, which the state is incompetent to pass; its own courts have decided, that a law, depriving a university of its lands, was unconstitutional and void. *Trustees of the University* v. *Foy*, 2 Hayw. 310. This court has determined, that a law in the nature of a convention or contract, cannot be so repealed as to divest rights of property previously acquired under it. *Fletcher* v. *Peck*, 6 Cr. 87. As to the Indian title, the usufruct only of this waste land was reserved to them; and the legislature might grant lands, subject to the extinguishment of their title to the domain of property. This was a mere temporary arrangement, and the title of the natives was extinguished by the treaty of Tellico. There was, therefore, nothing to prevent an entry of lands anywhere within the territorial limits of North Carolina.

*Pickens and *Jones*, contra.—1. The correct mode of ascertaining the nature and effect of the contract (as it has been called) between the state and the plaintiffs, is by a reference to the plain interpretation of the act of 1777, connected with the local history of that period, and the circumstances of the entry. The law provides, that entries may be made in the several counties of the state, of all lands therein, not previously granted, and which shall have accrued to the state by treaty or conquest; most manifestly implying the necessity of a previous extinguishment of the Indian title. By the treaty of the Long Island of Holston, of the 20th of July 1777, art. 5, a boundary between the Indians and the whites is defined; and, by art. 6, the Indians are guarantied against all intrusion. The whole system of local laws establishes a police over the territory in question, with the express view of preventing the natives from being disturbed in the enjoyment of their rights. In 1778, finding that individuals, in the situation of the plaintiff, either wilfully or through mistake, had made entries within the Indian reservation, the legislature passed an act recognising the limits fixed by the treaty of the year preceding, prohibiting future entries, and avoiding those already made within those limits.

2. But, supposing the entry to have been valid as a claim, or right of pre-emption, against other citizens, it was not lawfully consummated by a subsequent survey and patent. Is the entry of such stern, unbending authority, as, by relation back, to dispense with the necessity of subsequent
*120] steps? Certainly not. By the act of 1783, the Indian *boundary was changed, in conformity with the treaty of Hopewell, and the issuing of grants for lands within the reservation was prohibited. The land in question continued by that treaty, and by a subsequent treaty, made in 1791, between the United States and the Cherokees, within the limits of the latter. The survey and grant were made in opposition to all these treaties and laws; and in 1789, North Carolina ceded to the United States this territory, in which the state of Tennessee was erected. In 1791, the treaty of Holston once more guarantied the Indians against intrusion. So that the plaintiff's counsel has to bear up, not only against the municipal laws of the country, but against the most solemn pacts and conventions. *Fletcher* v. *Peck*, 6 Cr. 87.

Key, in reply.—The plaintiff's right, commenced by a valid entry, could never be impaired by subsequent laws and treaties. The primitive Indian title was merely subordinate, and subject to extinction. If, by the payment of the fees upon his entry, the plaintiff acquired an incipient right, under the law then in force, it cannot be affected by any subsequent act. His grant is dated 1793, and a presumption thence arises, that he had complied with all preceding requisites. The cession of 1789 contains a reservation for perfecting titles where entries had been made. The act of 1778 shows, that the former law had allowed and countenanced entries in Washington county;
*121] it is not a declaratory, but a repealing *statute, showing that the first law had not been mistaken nor misconstrued.

Todd, J., delivered the opinion of the court, and after stating the facts, proceeded as follows:—The question now to be decided by the court is, whether the charge and instructions required by the plaintiff's counsel ought to have been given, and whether the one given was correct?

In the construction of the statutory or local laws of a state, it is frequently necessary to recur to the history and situation of the country, in order to ascertain the reason, as well as the meaning, of many of the provisions in them, to enable a court to apply, with propriety, the different rules for construing statutes.[1] It will be found, by a recurrence to the history of North Carolina, at the time of passing this act, that she had, but a short time before, shaken off her colonial government, and assumed a sovereign independent one of her own choice; that during the colonial system, by instructions and proclamations of the governor, the citizens were restrained and prohibited from extending their settlements to the westward, so as to encroach on lands set apart for the Indian tribes; that these encroachments had produced hostilities; and that, on the 20th of July 1777, a treaty of peace had been concluded at Fort Henry, on Holston river, near the Long Island, between commissioners from the state of North Carolina and the chiefs of that part of the Cherokee nation called the Overhill Indians; and that a boundary between the state and the said Indians was *established. When the legislature of North Carolina were passing the act of November 1777, establishing offices for receiving entries of [*122 claims for lands in the several counties within the state, it is improbable, that the foregoing circumstances were not contemplated by them; and hence must have arisen the restriction in the act, as to lands "which have accrued, or shall accrue, to this state, by treaty or conquest."

If this be not the ground or reason of the provision, it will be difficult to find one on which it can operate. It may be asked, where was the land which was to accrue by treaty or conquest, if not within the chartered limits of that state? If it was in a foreign country, or from a sister state, the restriction was unnecessary, because, in either case, it was not within the limits of any county within that state, and of course, not subject to be entered for. The restriction must apply, then, to lands within the chartered limits of the state, which it contemplated would be acquired, by treaty or conquest, from the Indian tribes, for none other can be imagined. It is not to be presumed, that the legislature intended, so shortly after making the treaty, to violate it, by permitting entries to be made west of the line fixed by the treaty. From the preamble of the act, as well as other parts of it, it is clearly discernable, that the legislature intended "to parcel out their vacant lands to industrious people, for the settlement thereof, and increasing the strength and number of the people of the country, and affording a comfortable and easy subsistence for families." Would these objects be attained, by permitting settlements *encroaching on the lands [*123 lately set apart, by treaty, for the use of the Indian tribes? by provoking hostilities with these tribes, and diminishing the strength of the country by a cruel, unnecessary and unprofitable warfare with them? Surely not. However broad and extensive the words of the act may be, authorizing the entry-takers of any county to receive claims for any lands lying in such county, under certain restrictions, yet, from the whole extent of the act, the legislative intention, to prohibit and restrict entries from being made on lands reserved for Indian tribes, may be discerned. And this construction is fortified and supported by the act of April 1778, passed to amend

[1] Aldridge *v.* Williams, 3 How. 24; United States *v.* Union Pacific Railroad Co., 91 U. S. 79.

and explain the act of November 1777; the 5th section of which expressly forbids the entering or surveying any lands within the Indian hunting-grounds, recognises the western boundary as fixed by the above-mentioned treaty, and declares void all entries and surveys which have been, or shall thereafter be made within the Indian boundary.

It is objected, that the act of April 1778, so far as it relates to entries made before its passage, is unconstitutional and void. If the reasoning in the previous part of this opinion be correct, that objection is not well founded. That reasoning is founded upon the act of 1777, and the history and situation of the country at that time. The act of 1778, is referred to, as a legislative declaration, explaining and amending the act of 1777. It is
*124] argued, that there is no recital in the act of 1778, declaring, that the act of 1777 had been misconstrued *or mistaken by the citizens of the state; or that entries had been made on lands, contrary to the meaning and intention of that act; and that the 5th section is an exercise of legislative will, declaring null and void rights which had been acquired under a previous law. Although the legislature may not have made the recital and declaration in the precise terms mentioned, nor used the most appropriate expressions to communicate their meaning, yet it will be seen, by a careful perusal of the act, that they profess to explain, as well as to amend, the act of 1777.

Upon a full review of all the acts of the legislature of North Carolina, respecting the manner of appropriating their vacant lands, and construing them *in pari materia*, there is a uniform intention manifested, to prohibit and restrict entries from being made on lands included within the Indian boundaries. Therefore, this court unanimously affirms the decision of the circuit court, with costs.

Judgment affirmed.

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*125] *The Astrea.

Prize.—Re-capture.

An enemy's vessel was captured by a privateer, re-captured by another enemy's vessel, and again re-captured by another privateer, and brought in for adjudication. It was held, that the prize vested in the last captor; an interest acquired in war, by possession, is divested by the loss of possession.

Appeal from the Circuit Court for the district of Georgia. This was an enemy's vessel, captured by the privateer Ultor, in sight of Surinam, on the 17th of May 1813; and on the 13th of June 1813, re-captured by an enemy's vessel of war, about two leagues from the coast of Georgia, and on the same day, re-captured by the privateer Midas, and brought into the port of Savannah, for adjudication. The prize was adjudged to the last captors, by the decree of the court below, from which the first captors appealed to this court.

Charlton, for the appellants, contended, that the prize interest vested in the first captors. He argued, that the opinions of eminent civilians, and the practice of the continental nations of Europe, ought to prevail, rather than the decisions of the British courts of prize; which last are founded on
*126] reasons of commercial and naval policy, peculiar to England. Sir William Scott himself admitted, that there is no *general rule. *The*

Santa Cruz, 1 Rob. 50, but adopted the rule of condemnation, as most convenient for his own country; because, by protracting the period for the divesture of British interests, it places the property of British subjects upon a better and more secure footing than the rule adopted by any other nation. It gives a wider range to the *jus postliminii*, and enlarges the probability of re-capture; a probability, which is converted almost into a certainty, by the maritime strength of Great Britain. Other nations, not having the same means of giving protection and security to captors, have adopted rules requiring a less firm and shorter possession, in order to divest the property. These rules are, 1st. That of immediate possession. 2d. That of pernoctation and twenty-four hours' possession. 3. The bringing *infra præsidia*. Wheaton on Captures, c. 8, §§ 14, 15, 17, 18. The first is held sufficient by Azuni (2 Azuni 236), and though his own opinion is entitled to but little weight, it deserves consideration how far he is supported by authorities. It is the maxim of the civil law, that things taken from the enemy immediately become the property of the captors. *Quæ ex hostibus capientur statim capientium fiunt.* Grotius and Vattel are guilty of great inconsistencies in expounding the rule in question. Burlamaqui is clear and explicit, that mere possession immediately vests a title. Burlam. Nat. and Pol. Law, 222. Bynkershoek does not require a sentence of condemnation; *and he enumerates "fleets" among the *præsidia*, under the protec- [*127 tion of which the thing taken may be considered as safe (Bynk. Q. J. Pub. c. 3, p. 29, of Du Ponceau's translation); so that a bringing into the territorial limits is not indispensable, because the fleet into which the captor brings his prize may be remote from the coasts of his country. It results, then, that the loss of the *spes recuperandi* is the true foundation of the rule established by jurists: it is this which consummates the title of the captors, and destroys the *jus postliminii* of the law of nations; it is the municipal code of England alone which requires a sentence of condemnation to perfect the title.

2. But, supposing the *jus postliminii* still to continue, it is a right to be asserted by the subjects of the state from whom the property has been captured. But is it competent for one citizen of the belligerent state to divest another of the incipient inchoate title he had acquired by the first capture? The re-capture by the enemy might, indeed, enable the original owner to reclaim his property; if a sentence of condemnation be necessary, it might affect the title of a neutral purchaser; but the *jus postliminii* can have no operation as between the first and second captor.

Harper, contrà, was stopped by the court.

March 4th, 1816. MARSHALL, Ch. J.—An interest acquired by possession, is divested by the loss of possession, from the very nature of a title acquired in war. The law of *our own country, as to salvage, settles the question, and the case of *The Adventure*, 8 Cr. 221,(*a*) is directly [*128 in point and conclusive.

Sentence of the circuit court affirmed.

(*a*) This was the case of a British ship, captured by two French frigates, and, after a part of the cargo was taken out, presented to the libellants in the cause, citizens of the United States (then neutral), whose vessel the frigates had before taken and burnt;

by whom she was navigated into a port of this country, and pending the suit instituted by them, war was declared between the United States and Great Britain. A question arose, whether this was a case of salvage? Mr. Justice JOHNSON, by whom the opinion of the court was delivered, stated, that "the fact of the gift was established by a writing under the hand of the commander of the squadron of frigates, in these words, *Je donne au capitaine*, &c., in the language of an unqualified donation, *inter vivos*. In this case, the most natural mode of acquiring a definite idea of the rights of the parties in the subject-matter, will be, to follow it through the successive changes of circumstances, by which the nature and extent of those rights were affected—the capture, the donation, the arrival in the neutral country, and the subsequent state of war. As between belligerents, capture, undoubtedly, produces a complete divesture of property. Nothing remains to the original proprietor but a mere *scintilla juris*, the *spes recuperandi*. The modern and enlightened practice of nations has subjected all such captures to the scrutiny of judicial tribunals, as the only practical means of furnishing documentary evidence to accompany vessels that have been captured, for the purpose of proving that the seizure was the act of sovereign authority, and not of mere individual outrage. In the case of a purchase made by a neutral, Great Britain demands the production of such documentary evidence, issuing from a court of competent authority, or will dispossess the purchaser of a ship originally British. *The Flad Oyen*, 1 Rob. 135. Upon the donation, therefore, whatever right might, in the abstract, have existed in the captor, the donee could acquire no more than what was consistent with his neutral character to take. He could be in no better situation than a prize-master, navigating the prize, in pursuance of orders from his commander. *The vessel remained
*129] liable to British re-capture, on the whole voyage: and on her arrival in a neutral territory, the donee sunk into a mere bailee for the British claimant, with those rights over the thing in possession which the municipal law (civil and common) gives for care and labor bestowed upon it. The question then recurs, is this a case of salvage? On the negative of the proposition, it was contended, that it is a case of forfeiture, under the municipal law, and therefore, not a case of salvage, as against the United States; that it was an unneutral act to assist the French belligerent in bringing the vessel *infra præsidia*, or into any situation where the rights of capture would cease; and therefore, not a case of salvage, as against the British claimant. But the court entertains an opinion unfavorable to both those objections. This could not have been a case within the view of the legislature, when passing the non-importation act of March 1809. The ship was the plank on which the shipwrecked mariners reached the shore; but to have cast into the sea the cargo, the property of a belligerent, would have been to do him an injury, by taking away the chance of recovery, subject to which they took it into their possession. Besides, bringing it into the United States, does not necessarily presuppose a violation of the non-importation laws. If it came within the description of property cast casually on our shores, as the court is of opinion it did, legal provision existed for disposing of it, in such a manner as would comport with the policy of those laws. At last, they could but deliver it up to the hands of the government, to be re-shipped by the British claimants, or otherwise appropriated under the sanction of judicial process. And such was the course that they pursued. Far from attempting any violation of the laws of the country, upon their arrival, they delivered it up to the custody of the laws, and left it to be disposed of under judicial authority. The case has no feature of illegal importation, and cannot possibly have imputed to it the violation of municipal law. As to the question arising on the interest of the British claimants, it will, at this time (war having supervened), be a sufficient answer, that they who have no rights in this court cannot urge a violation of their rights against the libellants. But there is still a much more satisfactory answer. To have attempted to carry the vessel *infra præsidia* of the enemy, would, unless it could have been excused, on the ground of necessity, have been an unneutral act. But where every exertion is made to bring it into a place of safety, in which the original right of the captured would be revived, and might be asserted, instead of aiding his enemy, it is doing
*130] an act exclusively resulting to the benefit of the British claimant." A salvage *of

Matson *v.* Hord.

Land-law of Kentucky.

The law of Kentucky requires, in the location of warrants for land, some general description, designating the place where the particular object is to be found, and a description of the particular object itself.

The general description must be such as will enable a person intending to locate the adjacent *residuum*, and using reasonable care and diligence, to find the object mentioned in that particular place, and avoid the land already located; if the description will fit another place better, or equally well, it is defective.

"The Hunter's trace, leading from Bryant's station over to the waters of Hinkston, on the dividing ridge between the waters of Hinkston and the waters of Elkhorn," is a defective description, and will not sustain the entry.

Appeal from a decree in chancery in the Circuit Court of Kentucky. This cause was argued by *Hughes* and *Talbot*, for the appellants, and *Hardin*, for the respondents. It was, principally, a question of fact, arising under the local laws of real property in Kentucky, for an outline of which the general reader is referred to the Appendix, note 1, where *will be found an exposition of the elementary principles applicable to this class of causes. [*131

March 5th, 1816. Marshall, Ch. J., delivered the opinion of the court, as follows:—This is an appeal from a decree of the circuit court of Kentucky, by which the plaintiff's bill was dismissed. The object of the suit is to enjoin the proceedings of the defendant at law, and to obtain from him a conveyance for so much of the land contained in his patent, as interferes with the entry and survey made by the plaintiff.

The plaintiff claims by virtue of an entry, made on the 17th of January 1784, the material part of which is set forth in the bill in these words: "Richard Masterson enters 22,277 and a half acres of land, on treasury warrant No. 19,455, to be laid off in a parallelogram, twice as long as wide, to include a mulberry tree marked thus, 'F,' and two hickories, with four chops in each, to include the said three marked trees, near the centre thereof; the said trees standing near the Hunter's trace, leading from Bryant's station over to the waters of Hinkston, on the dividing ridge between the waters of Hinkston and the waters of Elkhorn." This entry has been surveyed, he states, according to location, and that part of it which covers the land in controversy has been assigned to him. The validity of this entry constitutes the most essential point in the present controversy. If it cannot be sustained, there is an end to the plaintiff's title; *if it can, other points arise in the case, which must be decided. [*132

This question depends on the construction of that clause in the land-law which requires that warrants shall be located so specially and precisely, as that others may be enabled, with certainty, to locate other warrants on the adjacent *residuum*. In the construction of an act so interesting to the peo-

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one-half was allowed by the court, and as to the residue, it was determined, that it must stand on the same footing with other property found within the territory at the declaration of war, and might be claimed, upon the termination of war, unless previously confiscated by the sovereign power. The court, therefore, made such order respecting it, as would preserve it, subject to the will of the court, to be disposed of as future circumstances might render proper.

ple of Kentucky, it is of vital importance, that principles be adhered to, with care, and that as much uniformity as is practicable be observed in judicial decisions. This court has ever sought, with solicitude, for the true spirit of the law, as settled in the state tribunals, and has conformed its judgments to the rules of those tribunals, whenever it has been able to find them established.

In the cases which have been, on different occasions, examined, that absolute certainty which would remove every doubt from the mind of a subsequent locator, appears never to have been required. The courts of Kentucky have viewed locations with that indulgence which the state of the country, and the general character of those who first explored and settled it, would seem to justify; and have required only that reasonable certainty which was attainable in such a country, and might be expected from such men as were necessarily employed. The effort has been to sustain, rather than to avoid entries; and although the motives which led to this course of adjudication are inapplicable to late entries, made on land supposed to be
*133] previously appropriated, yet it is not understood, that different rules of construction *have ever been applied to entries of different dates.

By these rules, a certainty to a common intent, a description which will not mislead a subsequent locator, which will conduct him, if he uses reasonable care and diligence, to the place where the objects are to be found, will satisfy the law, and sustain the entry; but such a certainty must exist, or the entry cannot be sustained. A location usually consists of some general description, which designates the place in which the particular object is to be found, and of a description of the particular object itself. The general description must be such as would enable a man intending to locate the adjacent *residuum*, by making those inquiries which would be in his power, and which he would naturally make, to know the place in which he was to search for the particular or locative call, so nearly, that, by a reasonable search, he might find the object mentioned in that particular or locative call, and avoid the land located. If the description will fit a different place better, or equally well, it is too defective, because, if it does not mislead the subsequent locator, it leaves him in doubt where to search.

The general description in this case is, "the Hunter's trace, leading from Bryant's station over to the waters of Hinkston, on the dividing ridge between the waters of Hinkston and the waters of Elkhorn." Will this description designate the place in which the trees called for in the location
*134] are to be found? *Bryant's station is a fixed place of public notoriety. It is on the great road leading from Lexington to Limestone, on the Ohio, which road crosses the dividing ridge between the waters of Elkhorn and Licking, which is the ridge mentioned in Masterson's entry. This road had been travelled by hunters, but seems to have been known by the name of the Blue Lick, or Buffalo trace, and not by the name of the Hunter's trace. A trace which was, at that time, called the Hunter's trace, leaves this great road, at Bryant's station, and proceeds in a direction west of north, until it crosses North Elkhorn, where it divides: the left-hand, or more western trace, after entering a road leading from Lexington to Riddle's station, on Licking, or that branch of Licking called Hinkston, crosses the dividing ridge, about the head-waters of a creek now called Townsend, which empties into the stream, running by Riddle's station, a little above

that station. This creek was, in the year 1784, known by the name of Hinkston creek, or, perhaps, Hinkston's mill creek. The right, or more eastern fork, again divides, nearly two miles before it reaches the dividing ridge. Each of these traces crosses the dividing ridge to the head-waters of Cooper's run, which empties into Stoner's fork. The more eastern of them crosses Stoner's fork, and passing Mastin's station, terminates very near that place. Cooper's run empties into Stoner's fork, which either empties into Hinkston, and then passing by Riddle's station, empties into Licking; or, uniting with Hinkston, forms the *south fork of Licking, and passes Riddle's station, with that name. The river, from the [*135 junction between Stoner and Hinkston, seems to have been known both by the name of the South Fork and of Hinkston's Fork.

All these traces were, in fact, hunters' traces; but each of them, except that leading to Mastin's station, was distinguished by some name peculiar to itself, generally, by the station or place to which it led, as Riddle's trace, the Blue Lick trace, &c.; and no one of them, except that leading to Mastin's, was notoriously and pre-eminently called "the Hunter's trace." There is some testimony that this was also known by the name of Mastin's trace; but the great mass of testimony in the cause proves, incontrovertibly, that this trace was known and distinguished, generally, by the peculiar appellation of "the Hunter's trace." It is on this trace that the location was made. The Hunter's trace, then, used in such a manner as to satisfy those interested in the inquiry, that it was intended to be employed as the name of some particular trace, would have been considered as designating the trace leading from Bryant's to Mastin's station, and would have been sufficient to show that the lands located by Masterson were on that trace. Had no further description of it been attempted, but the trees called for had been said to stand on "the Hunter's trace," where it crosses the dividing ridge between the waters of Hinkston and Elkhorn, it would have been clear, that the trace was referred to by its name of greatest notoriety, by a name *which no other trace received; and, both the trace and the part of [*136 the trace where the objects specially called for must be found, would have been designated with sufficient certainty. There is no evidence in this cause, nor is the court apprised that any other trace, distinguished as "the Hunter's trace," led from any other place than Bryant's station, over the dividing ridge between the waters of Elkhorn and Hinkston, and consequently, a reference to this trace, by its name, was all that was necessary for its designation, and would have designated it most unequivocally.

But a further description has been attempted, and this has produced the difficulty felt in deciding this cause. It will not be pretended, that the locator was confined to this reference to the name, or might not add to the description, and make it more minute; but if, in doing so, he has destroyed its certainty, if he has created doubts with respect to the trace intended, which may mislead subsequent locators, the validity of his location becomes questionable. The words added to "the Hunter's trace" are, "leading from Bryant's station over to the waters of Hinkston." These words are not unmeaning, nor does the court feel itself authorized to reject them as surplusage; nor do they form any part of the name of the trace. Why, then, are they introduced? Subsequent locators might consider them as explanatory of the words "the Hunter's trace." If they are so explanatory, there

is, certainly, much plausibility afforded to the conclusion, that the locator
*137] did not *mean to refer to the trace by its name ; for if such was his intention (there being no other trace of the same name), a further description would be unnecessary, and a more particular description would be impossible. Perplexity and confusion may be introduced, but an object cannot be rendered more certain than by bestowing on it its particular and appropriate name, if that name be one of general notoriety. The court felt the force of the argument, that "the Hunter's trace," leading from Bryant's station over to the waters of Hinkston, might be understood in the same sense with the words "the Hunter's trace," or "that Hunter's trace which leads from Bryant's station over to the waters of Hinkston." Understood in that sense, the additional and explanatory part of the description might be considered as its essential part, and might control the words "the Hunter's trace," which, connected as they are in this description, are not incapable of application to other hunter's traces, though not usually designated by that particular name. If this were to be received as the true construction, there are so many other traces leading across this dividing ridge, from Bryant's station to the waters of Hinkston, that all pretension to certainty, in this location, must be surrendered.

On this part of the case, the court has felt considerable difficulty ; and it is not without hesitation, that it has finally adopted the opinion, that "the Hunter's trace" is to be considered as referred to by its name ; and that the additional words, "leading from Bryant's station over to the waters of
*138] Hinkston," *are merely an affirmation that "the Hunter's trace" does lead from that station to those waters. It leads to Stoner's fork, which empties into, or unites with, Hinkston's fork, which afterwards empties into the main Licking. These branches are, all of them, called forks of Licking, and therefore, it would seem to the court reasonable (as is indeed indicated by much of the testimony), that this ridge was rather considered as dividing the waters of Elkhorn from those of Licking, than from those of Hinkston. But Stoner's fork, to which this trace leads, may, without impropriety, be denominated, as it sometimes has been denominated, "the waters of Hinkston."

It cannot escape notice, that if this trace had been designated as that leading to Mastin's station, it would have been freed from all ambiguity. But it has been decided in Kentucky, and necessarily so decided, that a locator ought not to be held to the most certain description of which the place is susceptible. A description which distinguishes it from any other, although a better or still more certain description might be given, is all that is required.

Having, with much difficulty, ascertained the trace, the next inquiry is, on what part of this trace the land entered by Masterson ought to lie. The location says, generally, "on the dividing ridge between the waters of Hinkston and the waters of Elkhorn." It has been objected, that neither the side of the ridge nor the side of the trace, is specified ; and that, to search both sides of the ridge and of the trace, is imposing an unreasonable
*139] labor on subsequent locators. The court does not think so. *The ridge is not of such breadth as to render the search on both sides the trace, from the foot of the ridge on one side to the foot of the ridge on the other, a very unreasonable one. But the trees must be found on the ridge,

and a subsequent locator is not bound to search for them elsewhere. The trees having in themselves no notoriety, it is the more necessary that the place on which they stand should be correctly described, and so described, that persons interested in discovering them, might know how to find them. Let us then examine the testimony to this point.

Richard Masterson, who made the location, proves the place where the trees stood. They are now cut down, but a mulberry stump remains, which is the stump of the tree he marked, as No. 33, west three poles from a white oak, now standing. He gives no description of the place.

Henry Lee was with Masterson, when he marked the trees, and saw him mark them. They had been hunting on the trace on Cooper's run; and on their return, he says, "on the aforesaid trace or path, after crossing the dividing ridge, near a small branch waters of Elkhorn, Richard Masterson marked," &c. This testimony would rather indicate that, in the opinion of the witness, the trees did not stand on the ridge.

Simon Kenton describes the crooked oak mentioned by Masterson and Jay: "it does not stand on the dividing ridge." On being further interrogated he says, "he well believes that the crooked oak stands on ground which is a spur of the dividing *ridge which leads down to the junction of the branches," which unite a small distance below the mulberry stump. In the course of his examination, this witness says, that if he could not have found these trees on the ridge, and had found them where they stood, he should have taken them for the trees called for in Masterson's entry; but in no part of his testimony does he indicate that he would have searched for them on the spur where they stood. [*140

Zachariah Easton, the surveyor, gives a very accurate description of the place. The mulberry stump stands between two branches, three poles from the eastern, thirty poles from the western, and forty-one poles from their junction. Along the trace, which crosses the branch several times, the stump is one hundred and ninety poles from the top of the ridge. The stump stands, not on the dividing ridge itself, but on a spur of the ridge, which does not continue along the trace, but takes a direction west thereof, and unites with the main ridge, as would seem from the plat, sixty or seventy poles west of the point at which the trace crosses it. Not a single witness deposes that the stump is on the ridge.

No testimony has been offered to the court, to induce the opinion that, in Kentucky, a spur of a ridge is considered as the ridge itself, and the contrary seems reasonable. Spurs sometimes extend for considerable distances, and are certainly distinguishable from the ridge from which they project. If, in this case, the trace had led up this spur, a subsequent *locator might have considered it as a continuation of the ridge. But the trace does not lead up the spur. It crosses a branch, after passing the spur, and then comes to the ridge. The court is of opinion, that subsequent locators could not be expected to continue their search, after reaching the foot of the ridge, and that the description fails in stating the marked trees to be on the dividing ridge, instead of stating them to be on a spur of the dividing ridge. The decree, therefore, dismissing the plaintiff's bill, is affirmed, with costs. [*141

Decree affirmed.

Taylor *v.* Walton and Hundly.

Land-law of Kentucky.

A question of fact respecting the validity of the location of a warrant for land, under the laws of Kentucky.

Appeal from a decree in chancery in the Circuit Court of Kentucky. The cause was argued by *Key*, for the appellants, and *Talbot* and *Hardin*, for the respondents.

March 6th, 1816. Marshall, Ch. J., delivered the opinion of the court: —

*142] *This is an appeal from a decree rendered in the circuit court of Kentucky, directing the appellant to convey to the appellees, lands lying within his patent, which the appellees claimed by virtue of a junior patent.

In all such cases, the validity of the entry which is the foundation of the title of the junior patentee, is first to be examined. This entry was made on the 4th of December 1783, and calls to begin "in the fork of Chaplin's fork, and the Beech fork, and to run thence up Beech fork, to the mouth of the first large creek, which is called, &c., thence to run up the creek, and up Chaplin's fork, till a line run straight across will include the quantity, to exclude prior legal claims."

The places called for being proved to have been places of notoriety which could not be mistaken, no want of certainty can be ascribed to this location, unless it be produced by the words "to exclude prior legal claims." These words are obviously attached to the quantity, not to the beginning, nor to the lines bounded by the creeks. They can then affect only the back line, which is to extend from one creek to the other. The locator seems to have supposed, that this line might approach towards, or recede from, the point of junction between the two creeks, as the amount of prior legal claims might require; that a location could adapt itself to circumstances, could assimilate itself to an elastic substance, and contract or expand as might secure the quantity of land it sought to appropriate. In this he was mis-

*143] taken. The boundaries of an entry must be fixed *precisely by its own terms, and cannot depend on previous appropriation. So much of this entry, therefore, as would so extend the back line as to comprehend, in one event, more land than the quantity mentioned in the location, is utterly void. The back line must run as it would run, if all the land was vacant. But it would be unreasonable, that this futile attempt to extend the back line farther than it is by law extendible, should destroy an entry, in all other respects certain. Accordingly, the courts of Kentucky, so far as their decisions are understood, have rejected such words as surplusage.

The entry of the appellees being good, it obviously comprehends, and has been surveyed to comprehend, the land of the appellant, and this brings us to the consideration of his title. The appellant claims under an entry made by John Pinn, the 13th of May 1780, in these words, "John Pinn enters 2000 acres of land, by virtue of a treasury warrant, on the dividing ridge between Chaplin's fork and waters of the Beech fork, about one and a half miles north of a buffalo lick, on a creek, water of the Beech fork, about 25 miles from Harrodsburg, and to extend eastwardly and westwardly for quantity." The plaintiffs below allege, in their bill, that this entry is void on account of its uncertainty, that the survey is unlawful and contrary to

the location, and therefore, pray that the land so surveyed and patented may be conveyed to them. The circuit court determined that the entry was void, and decreed according to the prayer of the bill. From this decree *the defendant has appealed to this court, and the validity of Pinn's location forms the principal question in the cause. [*144

The report of the surveyor, which is found in the record, is defective and unsatisfactory. He has neither placed Harrodsburg, nor the dividing ridge, on the plat; the court is under the necessity of supplying these defects, so far as they can be supplied, from other testimony which appears in the record. From that testimony, it appears, that the ridge must extend from some point below Pinn's entry, up the creek near which it is made, now called Long Lick creek; and that the trace leading up that creek was a trace leading from Cox's station to Harrodsburg. The inference seems inevitable, that Harrodsburg lay eastward from this location, since the trace leading up the creek to Harrodsburg took that direction. The testimony must be understood as showing, that in going up the Long Lick creek, you approach Harrodsburg. This is a material fact in the inquiry we are making. Harrodsburg is admitted to have been a place of general notoriety, as are Chaplin's fork, and the creek called for in Pinn's location. The dividing ridge between Chaplin's fork and the waters of Beech fork is also, of necessity, a place of notoriety, since the waters it divides are so.

The first call of Pinn's entry is for this dividing ridge; a general call for the ridge would be certainly too vague; but the land must lie on some part of it, and we must look to other calls of the entry to ascertain on what part. It is to be about one and *a half miles north of a buffalo lick, on a creek, water of the Beech fork. The question, whether this buffalo lick was, on the 13th of May 1780, a place of such notoriety as to instruct a subsequent locator how to find Pinn's beginning, is one of some doubt. The degree of proof which can now be adduced, and ought now to be required, respecting such a fact, must be affected by many circumstances. The contiguity of stations, the number of persons who frequented that particular part of the country, and above all, the lapse of time, will have their influence. [*145

Richard Stephens deposes, that he had travelled Powell's trace, which leads up the Long Lick fork, three times; understood, there was a lick at the place, and thinks he was at it, but was not much acquainted with it.

Edward Willis became acquainted with this lick in 1781 or 1782; there were several other licks on the same creek, but this was the largest and most frequented. Its reputed distance from Harrodsburg was better than twenty miles.

Joseph Willis hunted a good deal in that part of the country, and knew this lick. Never knew but one buffalo lick, though there are a number of small licks. Its reputed distance from Harrodsburg was upwards of twenty miles, but does not recollect whether it was a place of notoriety in 1780.

John Gritton calls it a buffalo lick, and has been acquainted with it ever since the month of June, in the year 1780. Its reputed distance from Harrodsburg was from twenty to twenty-five miles. There *are several other small licks on the creek, and one, a tolerable large one, lying on the south fork, a different creek from Long Lick; but no other than this was called a buffalo lick. In a subsequent part of his deposition, he is [*146

asked, whether this lick was a place of notoriety in 1780, and answered, that he knew nothing about it at that time. This must be intended for the month of May 1780, one month sooner than the date of his knowledge, or is a positive contradiction to his first assertion.

James Raig says, that this lick was generally known by the hunters about Harrodsburg, prior to the month of May 1780 ; that he encamped at it, with three hunters, in the summer of 1776, and hunted about there ; that there are several other licks in the neighborhood, but no other buffalo lick ; that its reputed distance from Harrodsburg, in 1781 or 1782, was about 25 miles.

This is all the testimony respecting the notoriety of the buffalo lick called for in Pinn's entry. Did the validity of this entry depend solely on the notoriety of the lick, a court would find some difficulty in pronouncing it too obscure an object to be noticed by subsequent locators. But, admitting that the lick wants sufficient notoriety to fix of itself the place of Pinn's entry, still, it must be allowed to be an object easily found, and easily distinguished, by those who are brought into its neighborhood, by the other descriptive parts of the entry. Let us, then, inquire, whether this entry does contain such description as would conduct a subsequent locator into its neighborhood.

*147] *The lick is within a mile and a half of the dividing ridge, on the south side of that ridge, and on a creek, water of Beech fork. This description, which, though not expressly, is substantially given, precisely fits Long Lick creek, and fits no other creek. The location calling to begin a mile and a half north of the lick, which lies on the creek ; it is sufficiently apparent, that no creek is crossed between the lick and the place on the dividing ridge, called for by Pinn's entry : consequently, the lick must lie on the creek nearest this dividing ridge. This is what has been since called Long Lick creek, but which was then without a name, and could be designated only by description. A subsequent locator searching for this lick, would look for it, then, on Long Lick creek. He is informed by the entry, that it lies on a creek so described as to be completely ascertained, about twenty-five miles from Harrodsburg. The part of that creek, then, which lies about twenty-five miles from Harrodsburg, is the place where he must search for this lick. Walton and Hundly state in their entries, that Powell's trace, which leads from Cox's station to Harrodsburg, and which arrives at Long Lick creek, a short distance above this lick, goes up the creek, five or six miles. James Ray says, that the trace leads nearly to its head ; and the surveyor in his report states, that it leads quite to its head. Long Lick creek, then, heads between Harrodsburgh and this lick, and is the creek on which the buffalo lick must lie. The entry tells us, it lies twenty-five miles from Harrodsburg.

*148] *If an object be called for as lying on a creek, so described as to be distinguished and ascertained, twenty-five miles from a given place of general notoriety, which has disappeared or cannot be found, it is understood to be settled, in Kentucky, that such location is not void for uncertainty, but is to be surveyed at the distance of twenty-five miles along the creek, from the place of departure. If the object be found and be identified, especially, if it be such an object as would readily attract attention, and be easily distinguished, exactness in the distance is not required. On

such occasions, the distance was, in fact, seldom measured by the locator, and could not be measured in a straight line, without the aid of a surveyor. The locator, in estimating distances, where they are considerable, is governed by general computation ; and this is known to subsequent locators. Exactness of distance, then, is introduced, for the purpose of giving certainty to locations, which can by no other means be rendered certain. Where the object called for is easily found and identified, the want of precision in distance will not defeat the location, unless the difference between the actual and estimated distance be such, as to mislead subsequent locators.

James Ray says, that the estimated distance from Harrodsburg to the mouth of Hanger run was 27 or 30 miles, and that the lick was about three miles nearer than the mouth of Hanger run to Harrodsburg. James Ray says, that the estimated distance from Harrodsburg to the lick was about 25 miles, and that it lies three or four miles above the junction *of the Beech and Chaplin forks. Several witnesses depose, that the estimated distance from Harrodsburg to this lick was upwards of twenty miles. The distance has been measured, and is, in a straight line, twenty miles and one-quarter of a mile. [*149

If this difference of distance could, in such a case, when unaided, affect the entry, yet there are other circumstances which relieve it from this difficulty. From the lick to the mouth of the creek on which it must lie, cannot, in a straight line, amount to two miles. Measured along its meanders, the distance is about three miles. This fact is ascertained by the surveys made of the two entries. The farthest point, then, of this creek from Harrodsburg, cannot, in a straight line, exceed twenty-two miles. But the lick lies, not at the mouth of the creek, but on the creek. The locator must, then, search for it up the creek, and nearer to Harrodsburg. The extent of this search for such an object as a buffalo lick, an object, to which he must be led by traces of the buffalo, which are in themselves so visible, so distinguishable, so readily found, cannot, without totally disregarding the whole system of Kentucky decisions, be pronounced too great a labor to be imposed on a subsequent locator. He is brought to the mouth of a creek, on which the object for which he searches lies : the object must lie up that creek, and cannot lie far from its mouth. It is an object discernable and distinguishable at a distance, and calculated from its nature to engage attention. He is within two miles of it on a straight line, and within three miles pursuing the meanders of the creek : if he does not find *it, it is to his own indolence, not to the obscurity of the object or the difficulty of the search, that the blame attaches. [*150

The lick being found, there is no difficulty in ascertaining its identity. The witnesses certainly say, that there are many other licks on the same creek, and the surveyor has laid down two others ; but they also say, that no other lick was a buffalo lick. It has been stated and argued at the bar, that although licks are of very different dimensions, and the difference is immense between the extremes, yet the gradations approach each other so nearly, that the exact line between them can scarcely be drawn. Admitting this to be true, yet there are licks which are indubitably buffalo licks, there are others which are as indubitably deer licks. Now, the witnesses pronounce, positively, that this is a buffalo lick, and that the others are deer licks. In addition to this, it is nearest to the mouth of the creek, and far-

thest from Harrodsburg; consequently, it is nearer the distance required by the location. There is no doubt, then, respecting the identity of this lick.

The lick called for in Pinn's entry being found and identified, there can be no difficulty in finding his land. It lies one and a half miles due north of this lick, on the dividing ridge. The place at which the mensuration is to commence being ascertained, the rules established in Kentucky will give form to the land, and direct the manner of making the survey.

It is the opinion of this court, that the decree of the circuit court is erroneous, and ought to be reversed; *and that the cause be remand- *151] ed to that court, with directions to order the land claimed by the appellant to be surveyed conformable to his location. In doing this, a point will be taken one mile and a half due north of the buffalo lick mentioned in Pinn's entry, from which a line is to be extended east and west, to equal distances, until it shall form the base of a square to contain 2000 acres of land, which is to lie north of the said line.

Decree reversed.

J. & T. Barr *v.* Lapsley *et al.*

Contract.

If a proposal be made by letter, stating also that the writer *will* empower A. to act for him, and the other party apply to A. and make known his acceptance, but A. informs him that he has received no instructions, and will not act, there is no complete and binding contract.[1]

Appeal from the Circuit Court of the district of Columbia. This cause was argued by *Jones*, for the appellants and complainants, and *Harper*, for the respondents and defendants.

March 6th, 1816. Johnson, J., delivered the opinion of the court.—The object of this bill is to obtain a specific performance of an alleged agreement to receive a quantity *of cotton bagging, at a specified price, in satis- [*152 faction of certain judgments at law. The defendants deny that the circumstances proved ever rendered the agreement final and obligatory upon them; and this is the principal, perhaps, the only, question the case presents.

It appears, that the complainants were indebted to one West, who assigned this debt (then unliquidated), together with the residue of his estate, to Lapsley *et al.*; that Lapsley liquidated the debt with the Barrs, and took their notes, payable at different periods, making up, together, the amount due. These notes having become due, and judgment being recovered on some of them, in October 1811, the Barrs addressed a letter to Lapsley, in which they offered to pay him in cotton bagging, at thirty-three cents per yard, by instalments, at certain periods. On the 17th of December, in the same year, Lapsley answered their communication, and the following words contained in that letter, are all that the court deem material to the point on which they propose to found their decision. "We are willing to take cotton bagging, in liquidation of the three last notes, delivered at the period you propose, but not at the price you offer it." "We expect that you give us satisfactory accounts for the punctual performance of your

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[1] See Insurance Co. *v.* Lyman, 15 Wall. 664; Deshon *v.* Fosdick, 1 Woods 286. Also, note to Head *v.* Providence Ins. Co., 2 Cr. 170.

engagements, and to this effect we shall direct Mr. McCoun, to whom we propose to write by the next mail." On another passage of this letter, and a letter written by West, on the 18th of December, it has been contended, that certain conditions were imposed upon the Barrs, which it was *incumbent upon them to comply with, before they could claim the benefit of the offer contained in Lapsley's letter. But as the opinion [*153 of this court is made up on a ground wholly unaffected by this question, we deem it unnecessary to notice this point.

It appears, that Lapsley never, in fact, instructed McCoun on the subject of this letter of the 17th of December. But Warfield, the agent of the Barrs (who were absent from home on the receipt of that letter), supposing his principals to be referred to McCoun as the authorized agent of Lapsley, notified to him the acceptance of Lapsley's offer, and remained under the impression that the agreement had become final, notwithstanding McCoun's declining altogether to act, for want of instructions. Lapsley, on the other hand, alleges, that the notification of acceptance ought to have been made to himself, and assigns the want of an answer from the Barrs, as his reason for never having given instructions to McCoun.

This state of facts presents an alternative of extreme difficulty. On the one hand, Lapsley, by writing that he shall direct McCoun by the next mail, plainly pointed to a mode of expediting the conclusion of the agreement, through the agency of a representative on the spot, and when he intimated his intention to write by the next mail, showed that it was not his intention to await Barr's answer. This was well calculated to delude Barr into the idea that Lapsley would recognise no notification but that which should be made to McCoun. On the other hand, how far could McCoun, unempowered, uninstructed *as he was, legally act, to bind Lapsley by his accept- [*154 ance of the notification? Or, if he had received instructions from Lapsley, what obligation was he under to have undertaken the agency? Under the pressure of this dilemma, there is but one principle to which the court can resort for a satisfactory decision. Something remained for Barr to do. The notification of his acceptance was necessary to fasten the agreement upon Lapsley. For this purpose, he very rationally addressed himself, in the first place, to McCoun; and the reference to Lapsley's letter would have been a sufficient excuse for not returning an answer, until a reasonable time had elapsed for McCoun to receive the expected communication from Lapsley. But when he found McCoun uninstructed, and unwilling to act under the letter addressed to Barr, his course was plain and unequivocal. A letter to Lapsley, transmitted by the mail, would have put an end to all doubt and difficulty. This is the method he ought to have pursued, and for not having pursued this course, we are of opinion, that the bill was properly dismissed below.

Decision affirmed.(*a*)

(*a*) In England, the court of chancery will not, in general, entertain a bill for a specific performance of contracts for the sale of chattels, or which relate to merchandise, but leaves the parties to their remedy at law, where it is much more expeditious. One exception to the general rule is, where the agreement is not final, but is to be made complete by subsequent acts, without which it would be deemed imperfect at law. *Buxton* v. *Lister*, 3 Atk. 383; 1 P. Wms. 570; Bunb. 135; 10 Ves. jr. 161; The

*Danforth's Lessee *v.* Thomas.

Indian reservation.

The acts of assembly of North Carolina, passed between the year 1783 and 1789, avoid all entries, surveys, and grants of lands set apart for the Cherokee Indians, and no title can be thereby acquired to such lands.[1]

The boundaries of the reservation have been altered by successive treaties with the Indians, but it seems, that the mere extinguishment of their title did not subject the land to appropriation, unless expressly authorized by the legislature.

Error to the Circuit Court for the district of East Tennessee. This cause, depending mainly on the same principles with the preceding case of *Preston* v. *Browder* (*ante*, p. 115), was argued by *Key*, for the plaintiff, and by *Jones*, for the defendant in error. The facts are fully stated in the opinion of the court.

*156] March 8th, 1816. *Todd, J., delivered the opinion of the court, as follows :—This was an action of ejectment, brought by the plaintiff in error against the defendant in error. On the trial of the cause, in the circuit court, it appeared from evidence, that the land in controversy was situate in the tract of country lying south of Holston and French broad river, and between the rivers Tennessee and Big Pigeon, the Indian title to which was extinguished by the treaty of Holston. The plaintiff claimed by virtue of a grant, issued by the state of North Carolina, bearing date the 26th of December 1791. The defendant claimed under a grant from the state of Tennessee, bearing date the 2d of January 1809. The defendant, by his counsel, objected to the grant under which the plaintiff claimed title being admitted in evidence, on the ground, that it was for land which the laws of North Carolina had prohibited from being entered, surveyed or granted. The court sustained the objection, and prohibited the grant from going in evidence to the jury; whereupon, a verdict and judgment was rendered in favor of the defendant. A bill of exception was taken to the opinion of the court, and the cause was brought up to this court by writ of error.

The correctness of the opinion of the circuit court depends on the sound construction of the act of the general assembly of the state of North Carolina, passed in 1783, c. 2, § 5, 6, whereby the lands, within certain limits therein designated (including the lands in controversy) are reserved for the *157] Cherokee *Indians, and the citizens prohibited from entering and surveying lands within those limits. It is contended, on the part of the plaintiff, that this act cannot be construed, nor did the legislature mean

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ground upon which a specific performance is refused, in these cases, is, that an adequate remedy exists at law, where damages may be recovered, and that the value of merchandise varies so much, at different times, and under different circumstances, as to render it frequently unjust to compel a specific performance. But where the question was, upon what terms a party should be relieved against the penalty of a bond, which had been forfeited, for not transferring stock at a given day, according to his agreement, the English court of chancery decreed him to transfer the stock in specie, and to account for all dividends accrued since he ought to have transferred it. 2 Vern. 394; 1 Bro. P. C. 193.

[1] Danforth *v.* Wear, 9 Wheat. 673; Patterson *v.* Jenks, 2 Pet. 216; Lattimer *v.* Potheet, 14 Id. 4.

to give the Indians a right of property in the soil, but merely the use and enjoyment of it. That the succeeding legislatures, by the acts of 1784, 1786 and 1789, have changed this reservation for the use of the Indians, and given unlimited access, for the purposes of making entries and surveys, "to all lands not before specially located," and to "all vacant lands" within the limits of the state. Consequently, locations could be made, and grants issued, to perfect titles of lands lying within the limits of the Indian reservation.

Whether the legislature had the power, or intended to give the Indians a right of property in the soil, or merely the use and enjoyment of it, need not be inquired into, nor decided by this court; for it is perfectly clear, that the fifth section of the act of 1783, c. 2, prohibibits all persons from making entries or surveys for any lands, within the bounds set apart for the Cherokee Indians, and declares all such entries and grants thereupon, if any should be made, utterly void. They had the power, and have declared, unequivocally, an intention to prohibit entries from being made within those reservations. The several acts of 1784, 1786 and 1789, although they contain general expressions, which, if taken singly, might seem to sanction entries and surveys for "all lands not before specially located," or to "all vacant lands;" yet, when taken together, these general *expressions must be controlled by the restrictions and prohibitions as to the reservations for the Indian tribes. The reasoning used in the case of *Preston* v. *Browder*, applies with equal, if not greater, propriety, to this case. And, although at different periods, different sections of these reservations have been subjected to appropriation by entries and surveys, it has been in consequence of the several treaties with the Indians, by which the boundaries of the reservations have been altered, and the Indian claim extinguished; but it is believed, that the mere extinguishment of the Indian title did not subject the land to appropriation, until an act of the legislature authorized or permitted it. Whatever doubts this court might entertain on this subject, were they now construing these laws upon the first impression, that doubt would be removed on a view of the case of *Avery* v. *Strother*, in the Reports in Conference, p. 434, decided by the judges of the supreme court of North Caroliua. This is a decision directly in point, made by the supreme court of the state, construing the laws brought into the view of this court, and is decisive of this case. And as this court have been uniformly disposed to pay great respect to the decisions of the state courts, respecting titles to real estate, this decision has its full influence on the present question; and therefore, the judgment of the circuit court is unanimously affirmed, with costs.

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Judgment affirmed.

*The Antonia Johanna.

Prize.—Neutral freight.

A neutral ship was chartered for a voyage from London to St. Michaels, thence to Fayal, thence to St. Petersburg, or any port in the Baltic, and back so London, at the freight of 1000 guineas; on her passage to St. Michaels, she was captured and brought into the port of Wilmington, North Carolina, for adjudication; a part of the cargo was condemned, and part restored: the freight was held to be chargeable upon the whole cargo, as well upon that part restored as upon that condemned.[1]

Quære? Whether more than a *pro rata* freight was due to the master?

It seems, that the property of a house of trade, in the enemy's country, is confiscable as prize of war, notwithstanding the neutral domicil of one or more of its partners.

Appeal from the Circuit Court for the district of North Carolina. This was the case of a Russian ship, captured on the 2d of June 1814, by the privateer Herald, on a voyage from London to St. Michaels, and brought into the port of Wilmington, North Carolina, for adjudication. The ship was chartered by Messrs. Burnett & Co., a mercantile firm at London, for a voyage from London to St. Michaels, thence to Fayal, thence to St. Petersburg, or any port in the Baltic, and thence to return to London, at the stipulated freight of one thousand guineas.

The ship and cargo were libelled as prize of war, and upon the hearing in the district court, that part of the cargo which was not claimed was condemned. The residue of the cargo, excepting one moiety of certain
*160] *packages, claimed on behalf of Messrs. Ivens & Burnett, a mercantile firm at St. Michaels, was restored. The whole freight was decreed to be paid to the master, and charged exclusively upon the proceeds of the property condemned, and the moiety of the property restored to Messrs. Ivens & Burnett. From so much of this decree as respected the controversy between the captors and the claimants of the cargo, an appeal was interposed to the circuit court, where the decree was affirmed, and the cause was brought, by appeal from the latter decree, to this court.

Wheaton, for the appellants and captors.—The cause may he divided into three branches: 1st. As to the claim for the three invoices of goods shipped by Messrs. Burnett & Co., of London, to Messrs. Ivens & Burnett, of St. Michaels. 2d. As to the remainder of the cargo. 3d. As to the order respecting the freight.

1. There is a hostile trade which will affect the property engaged in it with confiscation, as completely and effectually as a hostile domicil, and that, without regard to the national character of the individual. Thus, the produce of an estate in the enemy's country, belonging to a person domiciled in a neutral country, is liable to capture and condemnation. *The Phœnix*, 5 Rob. 20. This principle was adopted and confirmed by this court, in the case of Mr. Bentzen, a Danish subject, resident in Denmark, whose claim to
*161] 30 hogsheads *of sugar, the produce of an estate belonging to him, in a West India island possessed by the enemy, was rejected, and the property condemned. *Thirty Hogsheads of Sugar*, 9 Cr. 191. So, a vessel

[1] See the Nathaniel Hooper, 3 Sumn. 543; The Hannah M. Johnson, Blatch. Pr. Cas. 160; Bales of Cotton, Id. 325.

purchased *bonâ fide* in the enemy's country, by a neutral, continuing in her former trade, is good prize. *The Vigilantia*, 1 Rob. 1; *The Jemmy*, 4 Ibid. 31; *The Jonge Amelia*, cited in the case of *The Portland*. And the property of a house of trade, established in the enemy's country, though some of the parties may be domiciled in a neutral country, is prize of war. The case of Mr. Coopman, cited in *The Vigilantia*, 1 Rob. 1; *The Susa*, 2 Ibid. 251; *The Portland*, 3 Ibid. 41; *The Jonge Klassina*, 5 Ibid. 302. Apply these authorities to the present case: the share of Mr. Ivens cannot escape the same fate with that of his partner domiciled in London; the partnership is domiciled there, and his interest is so mixed up with hostile interests, that it cannot be separated. These principles were recognised by a learned judge of this court, in the first circuit, in the case of *The San Jose Indiano*, (*a*) the decree in which was acquiesced in by the counsel. Their general spirit was adopted by that venerable tribunal, the continental court of appeals in prize causes, and applied even to a treaty stipulation, that free ships should make free goods, which was held not to extend to a trade carried on by a neutral, but hostile in its nature. *The Erstern*, 2 Dall. 34.

2. As to the other portions of the cargo, the evidence to restore or condemn must come, in the first instance, from the documentary evidence and *the examinations *in præparatorio*. In this case, that is neither sufficient for condemnation, nor does it afford satisfactory grounds for immediate restitution; further proof ought, therefore, to be ordered. *162]

3. The neutral master is undoubtedly entitled to his freight; but this is not to be charged, exclusively, upon the property condemned and ordered to be sold, whilst the property specifically restored escapes the burden which is imposed, solely upon the ground of an implied performance of the contract on the part of the master. The law says, that capture is equivalent to delivery; it does not say, that condemnation only, is equivalent to delivery, and that, therefore, the portion of the cargo restored, shall be charged with no part of the freight. On the contrary, in a case where the cargo had been unlivered, and the whole was restored, upon the original evidence, the freight was held to be a charge upon the cargo, though it was not carried to the port of destination. *The Race Horse*, 3 Rob. 101. (*b*) But here, a *pro rata* freight only ought to be allowed; but a small part of the whole voyage, for which the 1000 guineas was stipulated to be paid, was to be performed in the service of this cargo, which was to be delivered at St. Michaels. The master was not bound to wait longer than the first adjudication; indeed, the unlivery completely dissolved the contract between him and the owners of the goods, and entitled the master to whatever freight he might have earned in their service. *The Hoffnung*, 6 Rob. 231; *The Friends*, Edw. Adm. 246; *The Copenhagen*, 1 Rob. 289; *The Isabella Jacobina*, 4 Ibid. 77.

Gaston, contrà.—1. The captors cannot now object, that the freight, decreed in the court below to be paid to the master, was unreasonable in itself, or not chargeable to them. They have acquiesced in this part of the decree, and it has been definitively carried into execution. [*163

(*a*) Affirmed by this court, *infra*, p. 208.
(*b*) See also The Martha and The Hamilton, in a note to the same case.

2. The goods shipped to Messrs. Ivens & Burnett, of St. Michaels, were shipped by order, and on account and risk of that house of trade. The claim, the documentary proof, and the preparatory examinations, are perfectly consistent, and establish that a moiety of this shipment is the property of that house, the partners of which are domiciled in a neutral country; they must, therefore, be regarded as neutral by both belligerents, with reference to the trade which they carry on with the adverse belligerent, and with all the world. In the case of *The San Jose Indiano*, it was insisted, that the principle of condemnation applied in cases where a partner of a neutral house is domiciled in the enemy's country, and ships to such house, goods, the manufacture of that country; but the position was expressly overruled. Even if the hostile and the neutral house here consisted of the same partners, and the shipment was made from the hostile to the neutral partner, for their joint concern, it would, nevertheless, be contended, that the share of the hostile partner was alone subject to condemnation. However sincere and profound a respect is felt for the learned judges, who are said to have decided, that the belligerent character of one partner shall avail to condemn, and the neutral character of the other shall not avail to save, *164] where the house has a *domicil both in the neutral and belligerent country; these supposed decisions cannot be reconciled with the dictates of justice, or the principles of reason, and it is, therefore, believed, that they will not receive the sanction of the highest judicial tribunal of this country.

3. No specific ground has been taken by the captor's counsel, to support the appeal as to the remaining portions of the cargo. The claims are verified by the documentary evidence, showing the goods to have been shipped by order, and for the account and risk of persons, subjects of, or domiciled in, a neutral country.

Wheaton, in reply.—1. If the captors have improvidently closed the door, in the court below, upon the question, as to what amount of freight shall be paid to the master, it is still open, as to whether any portion of the cargo is to be exempt from contributing to the payment of the freight. That is, emphatically, a controversy between the captors and claimants: the master has nothing to do with it; he has been paid his freight, and gone away. The bringing in the vessel and cargo for adjudication, was not a wrong done by the captors to the claimants, who may ultimately prove to be neutral; it was an inconvenience to which the latter subjected themselves by lading their goods in the same vessel with enemy's property; and it is not for the captors to indemnify them, by paying the freight of the neutral claimants' goods, as well as those which have become the property of the captors *jure belli*.

2. According to the claimant's counsel, the shipments by Messrs. Burnett *165] & Co. were *made by the hostile house, as the agents, and *bonâ fide* exclusively on the account and risk of the neutral house. On no other ground whatever, can this case be extracted from the principle of *The San Jose Indiano*; and upon that ground, the whole of the property ought to be restored, according to the limitations of the principle stated by the learned judge in the case of *The San Jose Indiano*. It is the domicil of the house, and the nature of its trade, and not the belligerent character of one of

the partners, that avails to condemn: and it is a doctrine that may be vindicated upon every principle of reason and justice. Upon what principle is the property of a neutral subject, personally domiciliated in the enemy's country, liable to condemnation? Not upon the ground that his original national character is lost, but that his property is undistinguishably incorporated with that of the enemy, and employed exclusively in carrying on his trade, and strengthening his resources. Is not the property of a house of trade, established in the enemy's country, wheresoever the partners may reside, in the same predicament? It is believed, that the decisions cited to support these principles, will be sanctioned by this tribunal; that they are corollaries from the rules of prize law which have already been sanctioned by it; that they are supported by all the analogies of that law, and are essential to its perfection as a system of jurisprudence impartially administered between belligerents and neutrals.

The interest which a power at war has in maintaining the principles of these decisions, is obvious. What interest has a fair and just neutral *in contesting it? His subjects may carry on their usual trade, through its accustomed channels, untouched by the flames of war [*166 spreading on every side. Do they wish to export their commodities to the enemy's country? They may consign them to commission-merchants there, or to their own supercargoes on board. Do they wish to import the productions of the enemy's country into their own? They may purchase them by the same instrumentality. Do they wish to become the carriers of both to every region of the globe? They may do it with impunity. A neutral merchant cannot, therefore, wish to be a partner in a house of trade in the enemy's country, unless for the purpose of lending his national character as a shield against the just rights of the other belligerent. It is by a more remote application of the same principle now contended for, that the property of persons taken in breach of blockade, as contraband of war, or sailing under an enemy's license, is liable to be considered as enemy's property, *pro hâc vice*. It is taken adhering to the enemy, clothed with his character, and inseparably blended with his interests. This rule is precisely settled by the positive adjudications of the British prize courts, and there is reason to believe is practised in those of France and other countries. It is not one of those interpolations into the code of public law, of which that great civilian, by whom it is expounded, has been accused. This is not like the rule which prohibits to neutrals, in time of war, all trade not open in peace; nor like the rule which declares whole coasts and countries in a state of blockade, *without investing or besieging a single port; nor like that which extends the infection of contraband to a return-voyage; nor that [*167 which swells the list of contraband, with every article however remotely useful in war. Nor is it a rule of recent invention; at least, there is no evidence that the cases mentioned in *The Vigilantia* were decided contrary to the practice and opinions maintained by the British courts of prize, when this country was a portion of the British empire.

3. The remaining claims are said to be verified by the papers found on board. But how are these papers verified? It is well known, that papers are a mere dead letter, unless supported by the testimony of living witnesses. When it is considered, that the cargo was laden in the enemy's country, and the papers put on board by enemy shippers, only one of whom

the master knows anything about, so as to be able to swear, even as to his belief, it is not too much to say, that this part of the case requires further proof to justify restitution of the goods as claimed.

March 8th, 1816. Story, J., delivered the opinion of the court, and after stating the facts, proceeded as follows:—Upon the argument, no specific objection was taken to the restitution of any of the property claimed, excepting that included in the claim of Messrs. Ivens & Burnett. This shipment was made by Messrs. Burnett & Co., of London, to Messrs. Ivens & Burnett, of St. Michaels, and the invoices declare the goods to be by order, and for account and risk, of the latter gentlemen. It is contended, in behalf *168] of the *captors, that both houses are composed of the same persons, viz., William S. Burnett, who is domiciled at London, and William Ivens, who is domiciled at St. Michael's; and that the documentary evidence, and private correspondence, showed, that the shipment was made on account of the hostile house. If the fact of the identity of the two houses were material to a decision of the cause, it might furnish a proper ground for an order for further proof. But admitting the fact to be as the captors contend, we are satisfied, that it can be of no avail to them. It is clear, from the whole documentary evidence, that this shipment was not made on the account and risk of the hostile house, but *bonâ fide* on the account and risk of the neutral house. It does not, therefore, present a case for the application of the principle, that the property of a house of trade in the enemy's country is condemnable as prize, notwithstanding the neutral domicil of one of its partners. On the contrary, it presents a case for the application of the ordinary principle which subjects to confiscation, *jure belli*, the share of a partner in a neutral house, where his own domicil is in a hostile country. And on this view, the decision of the circuit court is entirely correct, and is consistent with the doctrines established in the cases cited at the argument.

The next inquiry is, as to the freight decreed to the master. As no appeal was interposed to the decree of the district court, allowing the whole freight, for the whole voyage, the question, whether more than a *pro rata* freight was due (a question which would otherwise have deserved *169] grave consideration), *does not properly arise. The only discussion which can now be entertained, is, whether the freight so decreed ought not to have been charged upon the whole cargo, instead of being charged upon a portion of it. And we are all of opinion, that it was properly a charge upon the whole cargo. Although capture be deemed, in the prize courts, in many cases, equivalent to delivery, yet the captors cannot be liable for more than the freight of the goods actually received by them. The capture of a neutral ship, having enemy's property on board, is a strictly justifiable exercise of the rights of war. It is no wrong done to the neutral, even though the voyage be thereby defeated. The captors are not, therefore, answerable *in pœnam* to the neutral, for the losses which he may sustain by a lawful exercise of belligerent rights. It is the misfortune of the neutral, and not the fault of the belligerent. By the capture, the captors are substituted in lieu of the original owners, and they take the property *cum onere*. They are, therefore, responsible for the freight which then attached upon the property, of which the sentence of condemnation ascertains them to be the rightful owners, succeeding to the former proprietors.

So far the rule seems perfectly equitable; but to press it further, and charge them with the freight of goods which they have never received, or with the burden of a charter-party into which they have never entered, would be unreasonable in itself, and inconsistent with the admitted principles of prize law. It might, in a case of justifiable capture, by the condemnation of a single bale of goods, *lead the captors to their ruin, by loading them with the stipulated freight of a whole cargo. [*170

On the whole, we are all of opinion, that the decree of the circuit court ought to be affirmed, except so far as it charges the freight upon the property condemned, and the moiety claimed by Messrs. Ivens & Burnett; and as to this, it ought to be reversed, and that the freight should be decreed to be a charge upon the whole cargo, to be paid by each parcel thereof, in proportion to its value.

Decree affirmed, except as to the freight.(*a*)

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*The Nereide: Pinto, Claimant. [*171

Duties on prize goods.

Under the prize act of June 26th, 1812, and the act of the 2d of August 1813, allowing a deduction of thirty-three and one-third *per centum* on "all goods captured from the enemy, and made good and lawful prize of war, &c., and brought into the United States," are not included goods captured and brought in for adjudication, sold by order of court, and ultimately restored to a neutral claimant as his property; but such goods are chargeable with the same rate of duties as goods imported in foreign bottoms.

The Concord, 9 Cr. 387, re-affirmed.

This cause was originally brought into the Circuit Court, by appeal from the district court for the southern district of New York, in which the property, claimed by Mr. Pinto had been condemned as prize of war. The decree of the district court was affirmed in the circuit court, September term 1814, *pro formâ*, for the purpose of taking the cause, by appeal, before the supreme court, for its final determination; which was accordingly done, and the decree of the circuit court reversed, February term 1815, except as to the undivided fourth part which Mr. Pinto claimed of certain goods, part of the cargo, his claim to which was relinquished by his counsel, on the argument of the cause before the supreme court. All the other property claimed by Mr. Pinto, for himself and others, was ordered to be restored to him. (9 Cranch 388.) The cause was then remanded to the circuit court, with directions to carry the decree *of the supreme court into effect; [*172

(*a*) It has been held, that the charter-party is not the measure by which the captor is, in all cases, bound, even where no fraud is imputed to the contract itself. When, by the events of war, navigation is rendered so hazardous as to raise the price of freight to an extraordinary height, captors are not, necessarily, bound to that inflamed rate of freight. When no such circumstances exist, when a ship is carrying on an ordinary trade, the charter-party is undoubtedly the rule of valuation, unless impeached; the captor puts himself in the place of the owner of the cargo, and takes with that specific lien upon it. But a very different rule is to be applied, when the trade is subjected to very extraordinary risk and hazard, from its connection with the events of war, and the redoubled activity and success of the belligerent cruisers. *The Twilling Riget*, 5 Rob. 82.

and the mandate for that purpose was filed in the circuit court, April term 1815, and an order made in pursuance of the mandate.

It was then stated, and made to appear to the satisfaction of the circuit court, that after the Nereide and her cargo had been libelled by the captors, as prize of war, in the district court, and after the condemnation thereof, except the parts of the cargo which were claimed by Mr. Pinto, and during the pendency of such claim, Peter H. Schenck, the prize-agent of the Governor Tompkins, entered the whole of the cargo of the Nereide at the custom-house of the city of New York, and secured the duties thereon; Mr. Pinto having consented that the goods which he claimed should be entered with the others, and be subject to the payment of such duties as they were by law liable to, without prejudice to his rights under his claim; that the prize-agent did enter the goods, so condemned (as also the said goods of which Mr. Pinto claimed the one-fourth), as prize goods, and bonded therefor for prize duties; but was required by the collector of the customs, and did enter all the residue of the goods, claimed by Mr. Pinto, as neutral property, subject to the full duties payable on goods regularly imported in foreign bottoms, and bonded for the same accordingly. The goods claimed by Mr. Pinto were, afterwards, and before condemnation, sold by the marshal of the district, together with the goods condemned, in pursuance of an order of the district court, to which Mr. Pinto also consented, subject to the
*173] same reservation of his rights; and the proceeds of the sales of the goods claimed by Mr. Pinto, after deducting the duties, were paid into court; the amount of the said duties having been paid by the marshal to the prize-agent, with the consent of Mr. Pinto, for the prize-agent's indemnity.

The difference between the duties thus secured to be paid by the prize-agent on the goods finally restored to Mr. Pinto, according to the decision of the supreme court, and those which would have been payable on them, as prize goods, under the act of the 2d of August 1813, entitled, "an act for reducing the duties payable on prize goods captured by the private armed vessels of the United States," amounted to $11,079.59. After the mandate and decree of the supreme court, respecting the restitution of the goods claimed by Mr. Pinto, was carried into effect by the circuit court, there remained in the district court the sum of $18,771.63, being the amount of the net proceeds of the fourth part of the goods, Mr. Pinto's claim to which had been relinquished.

A motion was made in the circuit ceurt, on behalf of Mr. Pinto, that the prize-agent should be ordered to pay to him, out of any of the proceeds of the sales of the condemned part of the Nereide and cargo, and which were in, or might come to, his hands, the said sum of $11,079.59, the difference between the two rates of duties on the goods finally restored to Mr. Pinto, as before mentioned.

It then appeared to this court, that three bonds had been given by the prize-agent, for the duties on those goods, which were thus ordered to be
*174] restored *to Mr. Pinto; that the two of those bonds which first became due, had been paid by the prize-agent; but that the last, which became payable on the 9th of February 1815, and which was for the sum of $8782.97, the collector had suffered, as he said, to remain unpaid, until it should be ascertained whether the property, on which said duties

were thus secured, was condemned to the captors, or restored to the claimant. That after the mandate of the supreme court was returned to the circuit court, the collector required the prize-agent to pay this bond, and he paid the same accordingly, on the 7th of April 1815.

The court were divided in opinion on the point respecting the rates of duties chargeable on the goods so restored to Mr. Pinto; whereupon, it was ordered, that the said sum of $11,079.59 should remain subject to the opinion of the supreme court, and that the residue of the $18,771.65 be paid to Mr. Schenck, as the prize-agent. And that the point on which the disagreement of the judges of the circuit court took place should be certified to the supreme court for their final decision thereon.

Hoffman, for the appellant and claimant.—The statutes on this subject are, 1st. The prize act of the 26th of June 1812, § 14, which repeals the non-importation act, so far as respects goods "captured from the enemy, and made good and lawful prize of war;" and declares, that such goods, "when imported and brought into the United States, shall pay the same duties as goods imported *in American vessels, in the ordinary course of trade," [*175
&c. 2d. The act of the 2d of August 1813, which provides "that all goods captured from the enemy, and made good and lawful prize of war, &c., and brought into the United States, shall be allowed a deduction of thirty-three and one-third *per centum*." 3d. The acts of non-importation, prohibiting the importation of British goods.

1. The goods in question, being of British manufacture, could only be imported under the prize act, and the act of the 2d of August 1813. They were captured from the enemy, for they were on board an enemy's vessel; they were taken as enemy's property; they were captured and brought in, as good and lawful prize of war.

2. The character of the goods is determined at the time they were brought in; it is not to be determined by subsequent events: duties are payable on goods, on their being first imported or brought in; and the prize act puts these goods on the same footing with other importations, and of course, makes the duties on them payable at the same time.

3. The words "good and lawful prize of war," refer to the time of capture, and not of condemnation. By the very act of capture, the goods became prize; and being captured by a lawfully-commissioned vessel, were good and lawful prize. The expression "such goods," refers to goods so captured. They are to pay, when brought in, and not subsequently, upon condemnation.

4. The condemnation does not make the goods prize of war; it merely puts an end to the *jus recuperandi* of the former owner, and gives a new title to the purchaser. The character of prize is, *then, either con- [*176
firmed by condemnation, or lost by restitution. If the property is restored, it is released from the character it had before borne, from the time of capture, and ceases to be prize of war, but being captured and brought in as such, is to pay the prize duties.

Pinkney, for the respondents and captors.—The question now raised seemed to be settled by the decision in the case of *The Concord*, at the last term. (9 Cranch 387.) But, independently of authority, the question is manifestly against the claimant.

1. The goods were not entered under the prize act, and the act of the 2d of August 1813 ; but, as neutral property imported in a foreign bottom, and having been sold, are evidently liable to the full duties on such goods, unless these acts authorize a diminution of them.

2. These acts do not authorize such diminution ; the goods were not captured from the enemy, and have never been made good and lawful prize. They were taken from Mr. Pinto, who was no enemy, either in fact or constructively, according to the judgment of the court. If anything, then, has made them lawful prize, how has it happened that they have been restored? The claimant's counsel, to avoid the appearance of too bold a paradox, mitigates his conclusion on this head, in such a way as proves nothing for the purpose of his argument. He ends with saying, that these goods were captured and brought into the United States, as good and lawful prize. He can scarcely, however, have intended to stop here ; for if his conclusion goes no further, it surrenders the *whole argument, unless it can be *177] shown, that to seize and bring in as prize, that which is not good and lawful prize, and never can become so, makes good and lawful prize of the thing so seized and brought in ; or, in other words, that a seizure and bringing in, *as* prize, of neutral property, makes it, *ipso jure*, good prize, although the owner is, nevertheless, entitled to have it again, as not being good prize, and has, in fact, got it again, accordingly.

3. The character of these goods, with reference to their liability to duty, was not determined at the time they were brought in. If they had been specifically restored, and withdrawn from the United States by the claimant, they would have been liable to no duty.

4. The words "made good and lawful prize," do not refer to the capture merely : the act speaks of the capture first, and then adds, "and made good and lawful prize." The capture, too, must be of enemy's goods, either in fact, or in contemplation of law. To say, that the goods are, by the act of capture, made good and lawful prize, because the capture is made by a lawfully-commissioned cruiser, is to drop more than a moiety of the definition of good and lawful prize, or, rather, to insist on that which is not an essential part of its definition. Prize may be made (as a *droit*) by a non-commissioned captor ; but good and lawful prize cannot be made by any captor, unless the goods be liable to condemnation. It is the *formula* of a sentence of condemnation, to condemn the thing taken as "good and lawful prize," to the captors ; and this, not because it was taken by a lawfully-commissioned cruiser, but because, being so taken, it *was, under all the cir- *178] cumstances, subject to confiscation.

5. Capture gives possession ; but it is the condemnation which ascertains that the things taken are good prize of war : until condemnation, it cannot be known, whether they are good prize or not. But, certainly, it is self-evident, that after restitution, it must be held, that they were not good prize. The condemnation does more than destroy the *jus recuperandi ;* it establishes, what nothing else can establish, that the goods were lawful prize. Restitution, on the other hand, establishes, conclusively, that they never were lawful prize, although they might be justifiably seized, upon probable cause, as such.

March 6th, 1816. MARSHALL, Ch. J., delivered the opinion of the court,

that the goods were chargeable with the same rate of duties as goods imported in foreign bottoms, according to the decision in the case of *The Concord*, at the last term. (9 Cr. 387.)

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*Hepburn & Dundas's Heirs and Executors *v.* Dunlop & Company. [*179

Dunlop & Company *v.* Hepburn & Dundas's Heirs and Executors.

Specific performance.—Rescission.—Interest.

A court of equity will decree a specific performance of a contract for the sale of land, if the vendor is able to make a good title, at any time before the decree is pronounced;[1] but the dismissal of a bill to enforce a specific performance, in such a case, is a bar to a new bill for the same object.

The inability of the vendor to make a good title, at the time the decree is pronounced, though it forms a sufficient ground for refusing a specific performance, will not authorize a court of equity to rescind the agreement, in a case where the parties have an adequate remedy at law for its breach.

The alienage of the vendee is an insufficient ground to entitle the vendor to a decree for rescinding a contract for the sale of lands, though it may afford a reason for refusing a specific performance, as against the vendee.

But if the parties have not an adequate remedy at law, the vendor may be considered as a trustee for whoever may become purchasers, under a sale by order of the court, for the benefit of the vendee.

Where the vendor is indebted to the vendee, and the sale is made in order to pay the debt, the vendor must pay interest from the time the debt is liquidated, until he makes a good title, and the vendee is accountable for the rents and profits, from the time the title is perfected, until the contract is specifically performed.[2]

Hepburn *v.* Dundas, 2 Cr. C. C. 86, reversed.

These causes were appeals from the chancery side of the Circuit Court of the district of Columbia, for the county of Alexandria. The facts are stated in the opinion of the court, and the controversy is the *same as in the suits between the same parties reported in 1 Cranch 321, [*180 and 5 Ibid. 262.

The causes were argued by *Taylor* and *Swann*, for Hepburn & Dundas, and by *Jones* and *Lee*, for Dunlop & Company.

March 9th, 1816. Washington, J., delivered the opinion of the court.—These causes come before the court uppon appeals from the circuit court of the district of Columbia, for the county of Alexandria. The material facts upon which the questions now to be decided arise, are as follows:

Hepburn & Dundas, being indebted to John Dunlop & Co., of Great Britain, on account of certain mercantile dealings which had taken place between those parties, the precise amount whereof was disputed, an agreement in writing was entered into, on the 27th of September 1799, between the said Hepburn & Dundas, and Colin Auld, the attorney in fact of John Dunlop & Co.; whereby it was stipulated, that the parties mutually agreed to submit all matters in dispute respecting the demand of Dunlop & Co., to certain arbitrators named in the agreement, whose award should be made on or before the 1st day of January following. That Auld, as the agent of

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[1] Seymour *v.* Delancy, 3 Cow. 445; Browne *v.* Haff, 5 Paige 235; Tompkins *v.* Hyatt, 28 N. Y. 347.

[2] See s. c. 3 Wheat. 231.

Dunlop & Co., would, on the next day, to wit, the 2d day of January 1800, accept from Hepburn & Dundas, the sum which should be awarded to Dunlop & Co., in bills of exchange, or in Virginia currency, at the par of exchange; and upon such payment being made in either way, that Auld
*181] would give to Hepburn & Dundas a full receipt and *discharge of all the claims and demands of Dunlop & Co. against them; that in case Hepburn & Dundas should not, on the said 2d day of January, pay the amount of the said award, either in bills of exchange or in money, they should, on that day, assign to Auld, as attorney of Dunlop & Co., in the fullest manner, a contract, entered into in the year 1796, by Hepburn & Dundas, with a certain William Graham, for the sale of 6000 acres of land, lying on the river Ohio, for the recovery of which, on account of the non-payment of the purchase-money by Graham, Hepburn & Dundas had brought an ejectment, which was then depending; that this assignment should be accompanied by a power of attorney, irrevocable, to enable the said Auld to pursue all legal means to recover the possession of the land, or to enforce the payment of $18,000, the amount of the purchase-money, whichever of these measures Auld might prefer. Hepburn & Dundas further stipulated, not to interfere with the measures which Auld might choose to pursue for the recovery of the land, or the purchase-money, and further, that whenever any suit brought, or to be brought, for the land, should be judicially determined, or otherwise settled by an amicable compromise, Hepburn & Dundas would convey the same to the person who, by such determination or compromise, should be acknowledged to be entitled to it, in the manner expressed in the contract with Graham. It was also stipulated, that if the purchase-money for the said land, with interest thereon to the 2d of January 1800, should be insuffi-
*182] cient to discharge the sum which might be *awarded to Dunlop & Co., Hepburn & Dundas should, on that day, pay to Auld as much money as should make up the deficiency; and if, on the other hand, the said purchase-money and interest should fall short of the sum awarded, that Auld would, on the same day, pay to Hepburn & Dundas the excess over and above the sum awarded. Lastly, it was stipulated, that if Auld should recover the land, and be enabled to sell the same for more than was allowed to Hepburn & Dundas, by the said agreement, together with the costs and expenses attending the recovery, Auld should pay to Hepburn & Dundas the expenses incurred in prosecuting the suit commenced by them for the recovery of this land. In pursuance of these articles, an award was made, by the day mentioned in the submission, which award stated, that the sum of 4379*l.* 9*s.* 0¾*d.*, sterling, including interest, would be due to Dunlop & Co. on the 1st day of January 1800. This sum fell short of the purchase-money and interest, due by Graham to the same period, the sum of 494*l.* 6*s.* 8*d.*, Virginia currency. Hepburn & Dundas having prepared a deed of assignment of Graham's contract, and a power of attorney, as stipulated in the above-mentioned agreement, offered to deliver the same to Auld, on the 2d of January 1800, which he refused to accept, because the deed recited, as a part of the consideration, that a release had been executed by Auld, of all the claims and demands whatsoever of Dunlop & Co. against Hepburn & Dundas,
*183] and because, as is asserted by Auld, Hepburn & Dundas required Auld to execute such a release, prior to the *delivery of the deed of assignment. The suit of Hepburn & Dundas against Graham, for the recov-

ery of the 6000 acres of land, was prosecuted against his heirs ; and in May 1801, by a compromise between Hepburn & Dundas, and the defendants in the ejectment, judgment was rendered in favor of Hepburn & Dundas.

Without noticing, particularly, the conduct of those parties, subsequent to the transactions of the 2d of January 1800, as well as on that day, it may be sufficient to say, that if the tender made by Hepburn & Dundas was, upon the condition asserted by Auld, to have been annexed to it, and if, in consequence thereof, any legal advantage accrued to him, it was waived by his subsequent conduct. As late as February 1807, Auld made a tender of the difference between the sum awarded to Dunlop & Co., and the purchase-money and interest due upon Graham's contract, and demanded a deed ; but this demand was made in a manner, and under circumstances, which this court, upon a former occasion, deemed unreasonable.

Things remained in this situation, until some time about April 1801, when Hepburn & Dundas instituted a suit at law against Auld, for the difference between the sum awarded to Dunlop & Co. and the amount of the purchase-money and interest due by Graham's contract, on the 2d of January 1800. About the same time, a suit at law was commenced by Auld, against Hepburn & Dundas, upon the agreement of the 27th of September 1799, to recover the whole sum awarded. In the first case, *this court, upon a writ of error, decided upon the pleadings (which were so drawn as to present the point), that Hepburn & Dundas had no right to demand of Auld a release of all claims and demands against Dunlop & Co., to be executed as a precedent act to the assignment of Graham's contract, and the delivery of the power of attorney ; and on that ground, judgment was rendered against Hepburn & Dundas. (1 Cranch 321.) [*184

In the other case, the pleadings presented the question, whether the recital of such a release in the deed of assignment offered to be delivered by Hepburn & Dundas, invalidated the tender? Upon a writ of error, it was decided by this court, that the recital of the release could not impair the rights of Dunlop & Co., under the agreement of September 1799, and that it formed no objection to the assignment ; consequently, that the tender and refusal amounted to a performance, in like manner as if Auld had accepted the assignment ; but that Hepburn & Dundas would still be obliged to execute a proper deed of assignment, and a conveyance of the land, whenever they should be required to do so. Judgment was, accordingly, rendered in this suit against Auld. (5 Cranch 262.)

Hepburn & Dundas having been thus defeated in their attempt at law, to enforce a performance of the agreement, filed a bill in equity, praying for a specific performance. The answer of Auld contained, amongst other objections to a specific performance, an allegation that the title of Hepburn & Dundas *to the land was defective. Hepburn & Dundas then set forth their title in a supplemental bill. This suit came on to be heard, upon an appeal to this court, at the same time that Auld's suit at law against Hepburn & Dundas, above mentioned, was decided. This court determined, 1st. That since Auld had, by his conduct subsequent to the 2d of January 1800, waived all objections to the tender of the assignment of Graham's contract on that day, and did not refuse to receive a conveyance which was offered to be made by Hepburn & Dundas, in June 1801, on account of any defect in the title, but for other reasons which would equally have operated [*185

with him, had there been no such defect, Hepburn & Dundas would still be entitled to a specific performance, if they could then make a good title. 2d. That the title appeared by the bills to be defective as to 208 acres, being Thomas West's part of Mrs. Bronaugh's 1000 acres, and also his part of Francina Turner's interest in the same tract, and also on account of the failure to record Thomas West's deed to Hepburn & Dundas for 1000 acres. For these defects in the title, the bill was dismissed. (5 Cranch 262.)

Presuming that this decree, which seemed to close for ever the doors of a court of equity against Hepburn & Dundas, opened them to Dunlop & Co., to get rid of the contract altogether, Auld filed the bill which is now under consideration, stating, amongst other things, the previous and present
*186] inability of Hepburn & Dundas, to make a good title to this *land; and praying that the agreement may be set aside, and the debt awarded to Dunlop & Co., with the interest thereon, be decreed; or that, if the court should consider Dunlop & Co. under an obligation to accept of the land, that only the reasonable value of the land, at the time when Hepburn & Dundas's title to it was perfected, should be allowed. The bill, also, contains the general prayer for such relief as is consistent with equity.

Hepburn & Dundas seem to have given a very different construction to the above decree, and supposing that if, within a reasonable time after it was pronounced, they could remove the objections to their title, which were pointed out in the decree, they might still call for a specific performance, they soon obtained a conveyance from the heirs of Thomas West, of all their right, title and interest in and to this land, and on the 27th of March 1809, less than a month after the decree of dismissal by this court, they offered to convey to Auld a good and sufficient title. This offer being refused, Hepburn & Dundas filed a bill against Colin Auld, as attorney of Dunlop & Co., setting forth their ability and readiness to convey an unexceptionable title to this land, and praying that Auld, or Dunlop & Co., might be compelled to accept of a conveyance, and to pay the difference between the agreed value of the land and the sum awarded.

These suits came on to be heard at the same time. In the suit brought by Dunlop & Co., against Hepburn & Dundas, it was decreed by the court below, that Hepburn and the heirs of Dundas should pay to Dunlop & Co., or their agent, the sum of $33,060.37, being the amount of the sum awarded,
*187] *with interest thereon, at five per cent., from the 1st January 1800, to the time of rendering the decree; but that the sum of $21,112, part thereof, might be discharged by a conveyance, within a certain time, of the above land to Auld, in trust for Dunlop & Co. From this decree, an appeal was prayed by both parties.

In the other suit, brought by Hepburn & Dundas against Auld, a decree was made, that upon the complainant's paying to Auld, as attorney of Dunlop & Co., the sum of $11,966.37, and conveying to the said Auld, in trust for Dunlop & Co., on or before a certain day, the above-mentioned land, the said Auld, as attorney of said Dunlop & Co., should execute and deliver to Hepburn & Dundas such a receipt and dicharge of all the claims and demands of Dunlop & Co. against them, as the court might approve. From this decree, both sides again appealed.

Against so much of these decrees as compel Auld to accept of a conveyance in trust for Dunlop & Co., in part discharge of the debt decreed to be

paid by Hepburn & Dundas, to Dunlop & Co., the following objections have been made, and are now to be considered. 1st. That Hepburn & Dundas were guilty of a fraudulent misrepresentation of the value of this land; and also of a wilful concealment of the defects in the title, whereby Auld was induced to enter into the agreement of September 1799. 2d. A want of authority in Colin Auld to enter into an agreement for taking a conveyance of land in discharge of the debt due to Dunlop & Co. *3d. The refusal of Hepburn & Dundas to assign Graham's contract, on the 2d of January 1800, except upon a condition which they had no right to exact, and their interference in the suit with Graham's heirs, and the compromise made with them, whereby (it is contended) they disabled themselves from executing the agreement of September 1799. 4th. That the title to the land is yet defective. 5th. That the former decree, dismissing Hepburn & Dundas's bill for a specific performance, is a perpetual bar to the relief sought by their present bill. 6th. That Dunlop & Co., being aliens, and incapable of holding lands in Virginia, a court of equity will not compel them to execute their agreement, even if Hepburn & Dundas had been always in a condition to perform it on their part. [*188

I. The first objection appears to be unsupported by the evidence. In respect to the value of the land, the representations made of it in the letters of Hepburn & Dundas, to Dunlop & Co., and to Colin Auld, affirm no fact which is proved to be untrue. Those letters contain expressions of the opinion of Hepburn & Dundas, that the land was an ample security for the debt due to Dunlop & Co.; and it must be admitted, that in their letter to Colin Auld, of the 6th of September 1799, they seem to have indulged themselves in very extravagant notions of its value. But it is to be remarked, that the grounds of this calculation are fairly stated in the letter, and an opportunity is afforded to Auld to inquire into them and to judge for himself: besides which, it should be recollected, that Auld having agreed, in his letter *of the 4th of September, two days before the date of this letter, to submit to the award of arbitrators, and to receive an assignment of Graham's contract, at the stipulated sum to be paid by Graham, Hepburn & Dundas could have had no motive, at that time, to make an untrue representation of the value of the land. At no antecedent period, does it appear, that they have made an uncandid statement, upon this subject, to Dunlop & Co., or to Auld. Their opinion of the real value of the property might be incorrect; but a mistaken opinion of the value of the property, if honestly entertained, and stated as opinion merely, unaccompanied by an assertion or statement, untrue in fact, can never be considered as a fraudulent misrepresentation. That Hepburn & Dundas intended no deception, is evident from the following considerations: 1. That the offer made by them, to Colin Auld, of this land, was that of a security only, for the debt due to Dunlop & Co., which was declined by Auld, upon the ground, that if payment of the debt to Dunlop & Co. was to be postponed until the suit with Graham sould be concluded, Dunlop & Co. ought to be entitled to all the benefit of the contract with Graham, and for this reason, a proposition was made by him to accept an assignment of that contract, and to pay the difference between the purchase-money and interest thereon, and the sum which might be awarded, in case the latter should fall short of the former. 2. That Hepburn & Dundas had, in the year 1796, sold this land to Graham for the [*189

sum at which Auld agreed to take it, and as evidence of their opinion, that
*190] the *land had, since that sale, risen in value, they had instituted a suit at law against Graham in order to avoid the sale, and to recover back the land. If any farther answer to this objection be necessary, it may be sufficient to add, that the fraud now charged against Hepburn & Dundas was not thought of, and certainly not imputed to them, when the former suit of Hepburn & Dundas, for a specific performance, was depending. As to the alleged concealment by Hepburn & Dundas, of defects in their title, there is every reason to believe, that they were unknown to them until some time in the year 1805, when they endeavored to remove them, and supposed they had done so. The only objection suggested by the special verdict in the ejectment, was the want of a partition deed between the original grantees of this land, which objection this court has declared to be insufficient to bar Hepburn & Dundas from asking for a specific performance of the agreement.

II. The next objection to the decree below is, that Auld had no authority, in virtue of the power of attorney from Dunlop & Co., to enter into an agreement to receive land in discharge of the debt due by Hepburn & Dundas. This, like the former, is a new objection, not thought of, or argued as a reason against a specific performance, in the former suit. It is unnecessary to examine, with critical nicety, the import of the expressions used in the power of attorney to Auld. He was empowered to sue for, and to compound and agree for, all debts due to Dunlop & Co., and, in
*191] *general, to do all other lawful acts needful for those purposes, as as fully as Dunlop & Co. could do. Under this authority, he entered into the agreement with Hepburn & Dundas, which, there is no reason to doubt, he communicated in due time to his constituents, and it is perfectly fair, to consider their acquiescence in that agreement as amounting to a ratification of it. It would be most inequitable, to permit Dunlop & Co., at the distance of many years after this agreement was made, to controvert the authority of their agent, and to say, they are not bound to perform it, although it must be admitted, that during all that time, it was in their power to enforce it against Hepburn & Dundas, had it been their wish or interest to do so.

III. The third objection to the decrees below, is the refusal of Hepburn & Dundas to assign Graham's contract, on the 2nd January 1800, except upon a condition which he had no right to exact, and their interference in the suit with Graham's heirs, and their compromise made with them. In answer to the different parts of this objection, it might be sufficient to remark, that they were urged by Colin Auld, in his answer to Hepburn & Dundas's former bill; that they were considered by this court, and decided to be insufficient to deprive Hepburn & Dundas of the relief prayed for. However true the allegation may be, that Hepburn & Dundas refused to assign Graham's contract, and to deliver the power of attorney to Auld on the 2d of January 1800, unless Auld would first execute a release of all claims and demands of Dunlop & Co. against Hepburn & Dundas, yet the
*192] subsequent *conduct of Auld amounted to a waiver of all objections on that account: his, and his counsel's, letters to Edward Graham, in which he was asserted to be the assignee of the contract with Graham; his instructions to Cook to atted to the ejectment, and to get it brought to a

speedy decision ; his engaging counsel in that suit ; and in short, his whole conduct, throughout the year 1800, all tend to prove, that the transaction of the 2d of January 1800, had not, in any manner, impaired the rights of the parties under the agreement now alleged to have been violated by Hepburn & Dundas.

As to the compromise said to have been made by Hepburn & Dundas with the claimants under Graham, their conduct, upon that occasion, appears to have been unexceptionable. That a judgment against those claimants, at an early day, was anxiously desired by Auld, and the assistance of Hepburn & Dundas, to effect that object, was expected and required by him, is apparent, from the above letters from him to Edward Graham, and from many other facts proved in the former suit. The endeavors of Auld to hasten the decision of the ejectment, and to obtain a judgment for the land, seem to have been unremitting, until some time in December 1800, when he declined interfering any further in the business ; but neither then, nor at any subsequent period, did he express to Hebpurn & Dundas a disinclination to obtain a judgment, nor did he forbid them from proceeding to effect it. It is objected, under this head, that Hepburn & Dundas, contrary to an express stipulation in the agreement with Auld, released *to the [*193
defendants in the ejectment the right which, as trustee for Auld, they had to demand mesne profits, during the time that Hepburn and Dundas had been out of possession of the land ; and further, that they consented to permit those defendants to retain possession of the premises for a year after the judgment was rendered. Neither of these allegations are supported by the evidence in the cause. The agreement made by Hepburn & Dundas with the heirs of Graham, in relation to the costs of the suit and the mesne profits, disavows, in the most explicit terms, all power in them, and all intention to release either of those claims, but stipulates to indemnify those defendants against these claims, in case they should be made and enforced by Auld, who is declared to be alone entitled to make them. This contract of indemnity, therefore, did not amount to a release, nor did it impair the rights of Dunlop & Co., under their agreement with Hepburn & Dundas. As to the remainder of this objection, it is founded altogether upon the deposition of Mr. Sheffey, the counsel for Graham's heirs, which, as it is explained by the same witness, in a subsequent deposition, proves no more, than that such a proposition had been made by Edward Graham to Mr. Hepburn. That it was not accepted by him, is manifest by the judgment itself, which is unconditional, as well as by an agreement made between Hepburn & Dundas and Edward Graham, the day after the judgment was entered.

IV. The next objection is, that the title of Hepburn *& Dundas [*194
to this land, or to some part thereof, is still defective. In the opinion given by this court, at February term 1809 (5 Cr. 262), in the suit brought by Hepburn & Dundas, for a specific performance, the title was declared to be unexceptionable, except, 1st. As to 208 acres, being the part of Sarah Bronaugh's 1000 acres, to which Thomas West was entitled as one of the heirs of Mrs. Bronaugh, and of Francina Turner ; and 2d. As to 1000 acres, the original share of Thomas West, which had been conveyed by him to Hepburn & Dundas, by a deed which had not been recorded. These defects have since been cured by a conveyance to Hepburn & Dundas, by

the heirs of Thomas West, bearing date the 20th of March 1809, of all their title to the aforesaid parcels of land.

It is, nevertheless, contended, that this conveyance is insufficient to pass a clear and undisputed title ; inasmuch as the land may be bound by the claims of creditors, or of purchasers subsequent to the deed from Thomas West to Hepburn & Dundas. The answer given at the bar to these suggestions is entirely satisfactory to the court. If the land be exposed to the claims of subsequent purchasers or mortgagees under West, to be effectual against Hepburn & Dundas, the deeds must have been recorded within eight months after the death of West, at the latest period, either in the general court, or in the district or county court where the land lies. Had any such deeds been so recorded, it was in the power of Auld to have proved the fact,
*195] by the records *of some one of those courts, and the want of such proof destroys all presumption that any such conveyances were made. As to judgments against West, they too must be of record ; and after a lapse of ten years since his death, the court cannot presume the existence of such judgments. As to specialties in which the heirs of West are bound, if there be such, which is not proved, they cannot affect this land in the hands of a *bonâ fide* purchaser under those heirs.

V. The next objection made to the decrees below is, that the dismissal of the former bill of Hepburn & Dundas, for a specific performance, is a bar to their present bill for the same object. This objection is well founded. If a bill, by the vendor of land, seeking a specific performance of the contract, be dismissed on account of a defect in the title, the doors of a court of equity are, and ought to be, for ever closed against him, notwithstanding he should, afterwards, have it in his power to make a good title ; unless, perhaps, in a case where an original bill, in the nature of a bill of review, might be entertained. But the present bill is not founded upon new matter, discovered since the hearing of the former cause, and which it was not in the power of Hepburn & Dundas to produce at that time. It is not pretended, that he was ignorant who were the heirs of Thomas West, or that he could not as well have procured a deed from them before, as after the former decree. His ignorance was not of a matter of fact, but of law : he erroneously supposed that his title was good, and on account of the defects
*196] existing *in it, at the time of the decree, his bill was dismissed. The rule of the court of equity to decree a specific performance, if the vendor is able to make a good title, before the decree is pronounced, is an indulgence which he is not entitled to by the terms of his contract. A majority of this court approves of the rule, as a general one, but is not disposed to extend it as such. If, in a case peculiarly circumstanced, an extension of the time for completing the title would be proposed, and should be intended to be granted, the court would either continue the cause, in order to give the vendor time to perfect his title, or would dismiss the bill without prejudice.

The questions, then, which remain to be decided, are, 1st. Whether Dunlop & Co. are entitled to the relief for which they specifically prayed ? and if not, then, 2d. Are they entitled to any other, and what relief, under the general prayer in their bill ?

1. The relief specifically prayed for consists of two parts : 1st. That the agreement of September 1799, may be rescinded, and the sum awarded,

with interest, decreed to be paid. If this should be denied, and Dunlop & Co. be compelled to receive a conveyance of the land—then, 2d. That the reasonable value only of the land, at the time when the title was perfected, should be allowed.

As to the first. Most of the objections which have been urged against the decree of the court below, for a specific performance, were relied upon by the counsel for Dunlop & Co., as sufficient to set aside the contract. These have already been considered, and the result has been shown to be, that, if the bill *of Hepburn & Dundas, for a specific performance, [*197
were unaffected by the dismissal of their former bill, none of these objections would be sufficient to preclude them from the relief sought by their present bill. If so, they are insufficient to enable Dunlop & Co. to obtain a decree to rescind the contract. There are many cases in which a court of equity, although it would not decree a specific performance, will yet refuse to order a contract to be cancelled. The inability of the vendor to make a good title, at the time the decree is to be pronounced, furnishes a very good reason for excluding him from relief in a court of equity; and yet it does not follow, that the court will, for this reason merely, set aside the contract. Generally speaking, a court of law is competent to afford an adequate remedy to either party, for a breach of the contract by the other, from whatever cause it may have proceeded; and whenever this is the case, a resort to a court of equity is improper.

But if the contract ought not, in conscience, to bind one of the parties, as, if he had acted under a mistake, or was imposed upon by the other party, or the like, a court of equity will interpose and afford a relief, which a court of common law cannot, by setting aside the contract; and having thus obtained jurisdiction of the principal question, that court will proceed to make such other decree as the justice and equity of the case may require. Whether inability in the vendor to make a title, is, of itself, unattended by some peculiar circumstances of hardship, sufficient to justify the court in setting aside *the contract, need not now be decided. This is certainly [*198
not a case where the exercise of this branch of equity jurisdiction can be fairly demanded by Dunlop & Co. Within a month after the recovery of the judgment against the heirs of Graham, Hepburn & Dundas tendered to Colin Auld a conveyance of the land, which was refused, not on account of any defect in the title, but for reasons which would equally have operated with him, had there been no such defect. Immediately after the defects in the title were pointed out by this court, they were removed, and the conveyance of an unexceptionable title was tendered and refused. Had Hepburn and Dundas been in a condition to make such a title, a month sooner, this court, instead of dismissing their bill, would have decreed a specific performance. Under such circumstances, it would be inequitable to set aside the contract.

The alienage of the complainants is urged as an additional reason for setting aside this contract. Although the incapacity of the purchaser to hold land might afford a reason for denying a specific performance upon the prayer of Hepburn & Dundas (a point, however, not intended to be decided), it is certainly insufficient to entitle the vendor, under the circumstances of this case, to a decree to rescind the contract. But the court does not mean to intimate an opinion, that the terms of this contract did expose this land

to the danger which is apprehended. It appears by the contract, and the previous correspondence between these parties, that they contemplated a *199] sale of this land, in the event of the contract *with Graham being rescinded, and that the proceeds thereof should be paid over to Auld, in discharge of so much of the debt due by Hepburn & Dundas, to Dunlop & Co., as the purchase-money due by Graham, with interest thereon to the 1st of January 1800, would amount to ; and this, whether the land should sell for more or less than that sum. In this view of the case, the land was considered as a security for a stipulated sum, and Hepburn & Dundas were constituted trustees for whoever might become the purchasers of it. A conveyance to Auld, or to Dunlop & Co., does not appear to have been contemplated. But if, in point of law, it should be true, that Auld, by neglecting to proceed against Graham's representatives for the recovery of the land, in the name of Hepburn & Dundas, separated the interests of his constituents, this can surely afford no sound reason for setting aside the contract. It is sufficient, if Hepburn & Dundas are able and ready to make a conveyance, when they shall be required to do so.

2. The other specific relief prayed for, is, that Hepburn & Dundas may be credited on account of the land for no more than its real value in March 1809, when a conveyance was tendered and refused. A decree of this sort would be an anomaly in the jurisprudence of a court of equity. It would be an affectation of decreeing a specific performance, contrary to the terms of the contract upon which the decree is to operate. It would be, in fact, to make a contract for the parties, altogether different from *200] what they had made for themselves, and then to decree *an execution of it. There is no precedent, and certainly, no principle of equity, to sanction such a decree. Either the contract of the parties must be executed, according to the terms of it, or it cannot be executed at all.

The only remaining question, then, is, whether, under the general prayer, the court can grant any, and what relief? There can be no question, but that that is competent to Dunlop & Co. to ask for a specific performance of the agreement, so far as it can now be performed, although the court cannot listen to a similar prayer from Hepburn & Dundas. But this is not the relief specifically stated in this bill ; and it is supposed to be unreasonable, to compel a specific performance under the general prayer for relief, in opposition to the specific prayer that the contract may be set aside. To this objection, it may well be answered, that if it be improper to rescind, or to modify, the contract, nothing remains to be done, under the general prayer, but to dismiss the bill, or to decree an execution of the contract. But as the former cannot be presumed to be the object of the general prayer, it would seem to follow, that an execution of the contract was intended to be asked for, in case the specific relief should be denied. For these reasons, the court will decree a specific performance, so far as it is practicable, and considering Hepburn & Dundas as trustees for the person or persons to whom this land may be sold, the conveyance will be decreed to be made *201] to such persons *as may become the purchasers of the land under the decree of this court.

The residue of the decree below, which allows to the complainants, Dunlop & Co., interest upon the sum awarded, from the 1st of January 1800, to the time of the decree, is objected to by Hepburn & Dundas, upon the

ground, that the purchaser of land, to whom neither a conveyance has been made, or possession delivered, is to be considered in equity as the owner, and of course, entitled to the rents and profits; and that the right of the vendor to the purchase-money draws after it a corresponding right to demand interest upon the same, until it is paid. This, it must be acknowledged, is the general principle which prevails in the courts of equity.

But it would seem to be inequitable, to apply it to a case like the present. Here, the purchase-money was in the hands of the vendor, at the time the contract was made. It consisted of a debt due by the vendor to the purchaser, which the former bound himself, by his agreement, to discharge by bills of exchange or cash, or by an assignment of a contract for land, and a conveyance of a good title to it, and with money to make up any deficiency which might arise, by the agreed price of the land falling short of the debt. Neither bills nor cash were paid, nor was the contract assigned, nor a conveyance made, for it turned out, that the vendor could not make a good title to the whole of the land, until March 1809. They have always retained possession, and the land is, in reality, unproductive of profits in any measure equal to the interest on the *debt. This debt, unquestionably, bore interest, from the moment it was ascertained and agreed [*202 to be paid; and not having been paid, nor a tender of a good title to the land made, until March 1809, it would be highly unjust, to stop interest on the debt, until that period.

The written arguments of the counsel, which have been sent to the court, present two questions in relation to interest, which remain to be noticed. It is contended by the counsel for Dunlop & Co., that interest ought to be calculated upon the sum composed of principal and interest, stated, by the arbitrators, to be due on the 1st of January 1800, at the rate of six per cent. per annum, from that day. On the other side, it is insisted, that no more than five per cent. per annum should be allowed, and this not on the sum found by the arbitrators to be due, but upon the principal sum only.

The court is of opinion, that, although the award does not direct the sum which is found to be due by Hepburn & Dundas to be paid to Dunlop & Co., yet it ascertains the sum which was due on the 1st of January 1800, and the agreement upon which the submission was made bound Hepburn & Dundas to pay that sum, when it should be so ascertained. The two instruments, taken together, amount to a contract to pay a specific sum, and are clearly within the words, as well as the fair interpretation of the law of Virginia, passed in the year 1796, which fixed the rate of interest at six per cent. per annum. This principle being settled, it follows, that the interest must be calculated upon the sum *ascertained by the award to be due on the [*203 1st of January 1810. To separate the principal from the interest, even if the award furnished materials for such an operation, would be, in effect, to set aside the award, and to vary the agreement with which it is intimately connected.

It is, therefore, the opinion of the court, that Hepburn & Dundas ought to pay interest upon the sum awarded by the arbitrators, after the rate of six per cent. per annum, from the 1st of January 1800, to the 27th of March 1809, when they were able to make, and did, in fact, tender, a good and and sufficient conveyance to the agent of Dunlop & Co. From the 27th of

March 1809, interest ought to stop; but Hepburn & Dundas ought to account with Dunlap and Co., for the rents and profits of the 6000 acres of land, from that period to the time of rendering this decree.(*a*)

(*a*) In the progress of society, the defects of the common law to answer the exigencies of a civilized and commercial age, became manifest. It was particularly in not furnishing an adequate remedy for the breach of contracts, where the spirit of the agreement required a specific performance, that these defects were disclosed. For, except in real actions and ejectment, where the proceedings are *in rem*, and the actions of detinue and replevin, where the thing sued for is specifically recovered, a court of common law uniformly gives a compensation in money, for civil injuries, whether arising *ex contractu* or *ex delicto*. This remedy is frequently insufficient to repair the injury sustained by the parties, and to place them in the same situation they were in before the breach of the contract. Hence, the origin of that jurisdiction, which, although it was long contested by the courts of common law, has at length been firmly established, and matured into a regular system. This system, is, however, remarkably subject to the exercise of discretion, according to the peculiar circumstances of each particular case. But few inflexible rules can, therefore, be laid down concerning it. Among those admitting of the fewest exceptions are the following: 1st. This equitable jurisdiction extends to all cases where either the *res* in dispute, or the party, is within the jurisdiction of the court; for it proceeds *in personam* as well as *in rem*, and wherever the land or other thing in controversy is not within its reach, it will compel the specific performance of an agreement, by means of its appropriate process acting on the parties. 1 Ves. 447, 454. 2d. A specific performance will not be decreed of an agreement, whereupon damages could not be recovered by law. But if an action at law cannot be maintained, on account of a mere formal defect of the instrument, the agreement will be enforced in equity. 1 Ves. 256; 1 P. Wms. 243. And there are also several other cases of exception to this general rule, where, although the agreement was void at law, a specific performance has been decreed, there being a clear ground for the interference of equity, according to the general rules of the court. 2 Eq. Cas. Abr. 32, pl. 43; 2 Vern. 480; 2 P. Wms. 243; 2 Vern. 24; 3 P. Wms. 187. 3d. A specific performance will not be decreed, where the parties have an adequate remedy at law. 8 Ves. jr. 163; 2 Sch. & Lef. 553. And the court will exercise its discretion, and leave the contract at law, rather than compel a purchaser to take a doubtful title. 1 Ves. jr. 565; 2 P. Wms. 198; 2 Ves. 679; 1 Bro. C. C. 74; 4 Ibid. 80; 4 Ves. jr. 97; 5 Ibid. 186. 4th. If the vendor can make a good title, at the time the conveyance is to be made under the decree of the court, a specific performance will be decreed. 2 P. Wms. 630; 1 Atk. 12; 10 Ves. jr. 315; 5 Cranch 262; 8 Ves. jr. 655; 7 Ibid. 202. 5th. In the construction of a contract, it is considered as executed, from the time of its being entered into, unless some other time be stipulated for its execution. And so powerful is this rule, that by an equitable fiction, it is held to alter the very nature of things, to make land money, and, on the contrary, to make money land. Upon this principle, land which is sold is considered in equity as the property of the vendee, from the making of the contract, and descendible and devisable as such. 2 Vern. 536; 1 P. Wms. 872; 3 Ibid. 215; 7 Ves. jr. 294. 6th. In decreeing the specific performance of an agreement, time may be dispensed with, if it be not of the essence of the contract. 1 Atk. 12; 2 P. Wms. 630; 5 Cranch 262; 7 Ves. jr. 273; 12 Ibid. 326; 4 Bro. C. C. 329; 1 Ves. 450. But where there has been gross *laches* on the part of the plaintiff, a bill for specific performance will be dismissed. 5 Ves. jr. 145, 736, 818; 4 Ibid. 667, 686; 1 Bro. P. C. 27; 2 Eq. Cas. Abr. 686, pl. 5. 7th. Fraud will vitiate a contract in equity, as well as at law, and consequently, a fraudulent agreement will not be specifically enforced. And the morality of a court of equity, if the expression may be allowed, is even more strict than that of a court of law, in this particular, for *suppressio veri*, as well as *suggestio falsi*, is a ground for refusing to carry an agreement into effect. 3 Atk. 383; 2 Ibid. 271; 1 Bro. C. C. 440; Ambl. 495; 10 Ves. jr. 492.

Hepburn v. Dunlop.

*Decree.—These causes came on to be heard this 8th day of February 1816, on the transcript of the *records, and were argued by counsel, whereupon, it is decreed and ordered, that the decree of [*205 the circuit court of the district of Columbia for the county of Alexandria, in the suit of William Hepburn and the heirs and executors of John Dundas against Colin Auld, agent and attorney in fact for John Dunlop & Co., be reversed and annulled, and this court proceeding to give such decree as the said circuit court ought to have given, it is further ordered and decreed, that the said bill be dismissed.

And it is further decreed and ordered, that the decree in the suit of John Dunlop & Co., against William Hepburn and the heirs and executors of John Dundas be reversed, each party paying his own costs in this court. And this court proceeding to give such a decree in the said suit as the said circuit court ought to have given, it is decreed and ordered, that the defendants, William Hepburn and the executors and executrix of John Dundas, do, on or before the first day of April next, pay to the complainants, John Dunlop & Co., or to their agent or attorney, duly authorized to receive the *same, the sum of $9143.72, being the difference between the sum of $19,464.24, the value in current money, at the par of exchange, of [*206 the sterling debt stated in the award of William Hartshorne, William Herbert and William Hodgson, to be due by Hepburn & Dundas to John Dunlop, with interest thereon after the rate of six per centum per annum, from the first day of January 1800, to the 27th of March 1809, and $21,112, the sum due upon William Graham's contract on the first day of January, in the year 1800.

It is further decreed and ordered, that the 6000 acres of land in the proceedings mentioned, be sold at public auction, to the highest bidder, at such times, in such proportions, and upon such terms as John Dunlop & Co., or their agent or attorney in fact, may direct, and that the proceeds of such sales be paid over to the said John Dunlop & Co., or their agent or attorney as aforesaid; and upon such sale or sales being made, it is decreed and ordered, that the said William Hepburn, or his legal representatives, and the legal representatives of John Dundas, deceased, do, by good and sufficient deed or deeds in law, to be prepared at the expense of John Dunlop & Co., convey the aforesaid land to to the purchaser or purchasers thereof, in fee-simple, with a general warranty, and free from all incumbrances. And it is further ordered and decreed, that the sales of the aforesaid land be made under the superintendence *of Colin Auld, the attorney in [*207 fact of John Dunlop & Co., or of such other person or persons as the said circuit court may appoint, in case the said Colin Auld should decline to serve, or the said circuit court should see good cause to make such other appointment.

And it is further ordered and decreed, that the defendants, William Hepburn and the executors and executrix of John Dundas, deceased, do make up, state and settle, before a commissioner or commissioners to be appointed by the said circuit court, an account of the rents and profits of the said 6000 acres of land, since the 27th day of March 1809, and that they pay over the same to the complainants, John Dunlop & Co., or to their lawful agent or attorney.

And this cause is remanded to the said circuit court for such proceedings

to be had therein, for carrying into execution the decree of this court in the premises.(*a*)

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*208] *The St. Joze Indiano: Lizaur, Claimant.

Prize.—Enemy's property.

Goods were shipped by D. B. & Co., of Liverpool, on board a neutral ship, bound to Rio de Janeiro, which was captured and brought into the United States for adjudication; the invoice was headed, "consigned to Messrs. D. B. & F., by order and for account of J. L.;" in a letter accompanying the invoice from the shippers to the consignees, they say, "for Mr. J. L., we open an account in our books here, and debit him, &c., we cannot yet ascertain the proceeds of his hides, &c., but find his order for goods will far exceed the amount of these shipments; therefore, we consign the whole to you, that you may come to a proper understanding with him:" It was *held*, that the goods were, during their transit, the property, and at the risk of the enemy shippers, and therefore, subject to condemnation.

The San Jose Indiano, 2 Gallis. 268, affirmed.

Appeal from the Circuit Court for the district of Massachusetts. The ship St. Joze Indiano, bound from Liverpool to Rio de Janeiro, was captured and sent into the United States, as prize of war, in the summer of 1814. The ship and most of the cargo were condemned as British property, in the circuit court, and there was no appeal by any of the claimants, except in behalf of Mr. J. Lizaur, of Rio de Janeiro.

The right of Mr. J. Lizaur, to have restitution of property belonging to him, at the time of capture, was not contested by the captors; but it was contended, that the property in question, when captured, was at the risk of the shippers, Messrs. Dyson, Brothers & Co., of Liverpool. The bill of
*209] *lading did not specify any order, or account and risk. The invoice was headed, "consigned to Messrs. Dyson, Brothers & Finnie, by order, and for account of J. Lizaur." In a letter accompanying the bill of lading and invoice, of the 4th of May 1814, from Dyson, Brothers & Co., to Dyson, Brothers & Finnie, they say, "For Mr. Lizaur, we open an account in our books here, and debit him, &c. We cannot yet ascertain the proceeds of his hides, &c., but find his order for goods will far exceed the amount of these shipments, therefore, we consign the whole to you, that you may come to a proper understanding with him." The house of Dyson, Brothers & Co., of Liverpool, and of Dyson, Brothers & Finnie, of Rio, consist of the same persons; goods claimed in behalf of the latter house were condemned, on the ground, that both firms represented the same parties in interest, and from this decision, there was no appeal.

Harper, for the appellant and claimant.—This case may be contrasted with those said to be similar. In the case of *Kimmel & Alvers* (*The Merrimack*, 8 Cr. 317), on the authority of which this portion of the cargo was condemned in the court below, the claimants had ordered the goods shipped, but there was no evidence that they had paid for any part of the goods, or that they were charged to them by the shippers. In that case, the breaking out of the war produced a change in the destination of the goods, and a com-
*210] plete control over them was retained by the vendor, which control *was exercised, by his directing his agent not to deliver them with-

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(*a*) Mr. Justice Livingston and Mr. Justice Story did not sit in this cause.

out payment in cash, in case war should have been declared before their arrival. The doctrine in the case of the *Messrs. Wilkins* (Ibid.) fully bears out the present claim. In that case, the mere right of stoppage *in transitu* was held to be vested by the shipper in his agent, to be exercised only in the event of insolvency. But in the case now before the court, the power of Dyson & Co. was limited to an arrangement for the payment of a certain part of the price only which remained unpaid. In the case of the *Messrs. Wilkins* no part was paid in advance, and the goods were not charged to the claimants, another circumstance which distinguishes it from the present. The case of *Magee & Jones* (*The Venus*, 8 Cr. 253), and that of *Dunham & Randolph* (*The Frances*, 9 Ibid. 183), was a mere offer to sell, not a sale agreed to by the vendee, like that in the present case.

Dexter, for the respondents and captors.—The case is clearly within the principles adjudged. Thus, it has been determined, incidentally, at the present term, in the case of *Van Wagenen* (*The Mary and Susan*, *ante*, p. 46), that property is not immediately vested in the correspondent, by a purchase by his agent, by order, whether it be with the money of the former or latter. The case of *Messrs. Wilkins* was not a unanimous decision of the court, but is clearly distinguishable from the present. *Here, [*211
there was no change of possession from the shippers: the goods were in their possession, during the voyage, by their agent, the master; had the goods arrived, they would still have been in their possession, by their agents, the consignees. If the goods remained the property of the shippers, at the time of shipment, and during the voyage, then they became the property of the captors, *jure belli*. They remained the property of the shippers, because they were consigned to their agents, to be delivered, contingently, to the claimant. Therefore, the goods are confiscable as prize of war. The cases of *Magee & Jones*, and of *Dunham & Randolph*, are in point.

March 9th, 1816. Story, J., delivered the opinion of the court, and after stating the facts, proceeded as follows:—The single question presented on these facts is, in whom the property was vested at the time of its transit; if in Mr. Lizaur, then it is to be restored; if in the shippers, then it is to be condemned. It is contended, in behalf of the claimant, that the goods having been purchased by the order, and partly with the funds, of Mr. Lizaur, the property vested in him immediately, by the purchase, and the contract being executed by the sale, no delivery was necessary to perfect the legal title: that nothing was reserved to the shippers but a mere right of stoppage *in transitu*, and that if they had been burnt before the shipment, or lost during the voyage, the loss must have fallen on Mr. Lizaur.

*The doctrine as to the right of stoppage *in transitu*, cannot apply [*212
to this case. That right exists in the single case of insolvency, and presupposes, not only that the property has passed to the consignee, but that the possession is in a third person, in the transit to the consignee. It cannot, therefore, touch a case where the actual or constructive possession still remains in the shipper, or his exclusive agents. In general, the rules of the prize court, as to the vesting of property, are the same with those of the common law, by which the thing sold, after the completion of the con-

tract, is properly at the risk of the purchaser.(*a*) But the question still recurs, when is the contract executed? It is certainly competent for an agent abroad, who purchases in pursuance of orders, to vest the property in his principal, immediately on the purchase. This is the case when he purchases exclusively on the credit of his principal, or makes an absolute appropriation and *designation of the property for his principal. But where a merchant abroad, in pursuance of orders, either sells his own goods, or purchases goods on his own credit (and thereby, in reality, becomes the owner), no property in the goods vests in his correspondent, until he has done some notorious act to divest himself of his title, or has parted with the possession, by an actual and unconditional delivery, for the use of such correspondent. Until that time, he has, in legal contemplation, the exclusive property, as well as possession; and it is not a wrongful act in him, to convert them to any use which he pleases. He is at liberty to contract upon any new engagements, or substitute any new conditions in relation to the shipment. These principles have been frequently recognised in prize causes, heretofore decided in this court.(*b*)

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In the present case, the delivery to the master was not for the use of Mr. Lizaur, but for the consignees, a house composed of the same persons *as the shippers, and acting as their agents. They, therefore, retained the constructive possession, as well as right of property, in the shippers; and it is apparent from the letter, that the shippers meant to reserve to themselves, and to their agents, in relation to the shipment, all those powers which ownership gives over property. It is material also, in this view, that all the papers respecting the shipment, were addressed to their own house, or to a house acting as their agents, and the claimants could

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(*a*) By the common law, the right of property in the thing sold is completely vested in the purchaser, by the execution of the contract, subject to the equitable right of stoppage *in transitû*, in case of insolvency, and where the bill of lading has not been, in the mean time, indorsed to a third person. But by the civil law, the right of property was not vested in the purchaser, unless the goods were paid for, or sold on a credit. Inst. lib. 2, tit. 1, § 41; Pothier, *Traité de Vente*, No. 322. But this rule is not copied by the Napoleon code, which, on the contrary, adopts a principle similar to that of the common law. *Elle (la vente) est parfarite entre les parties, et la propriété est acquise de droit a l'egard du vendeur, des qu'on est convenue de la chose et du prix, quoique la chose n'ait pas encore été livrée ni le prix payé.* Code Napoleon, liv. 3, tit. 6, c. 1, No. 1583. The French commercial code also subjects the goods sold to the right of stoppage *in transitû*, by the vendor, upon the same conditions with our own law. Code de Commerce, liv. 3, tit. 3, *De la Revendication.*

(*b*) In The Venus, at February term 1814 (8 Cr. 253), on the claim of Messrs. Magee & Jones, Mr. Justice WASHINGTON, in delivering the opinion of the court, observed: "To effect a change of property, as between seller and buyer, it is essential, that there should be a contract of sale, agreed to by both parties, and if the thing agreed to be purchased is to be sent by the vendor to the vendee, it is necessary to the perfection of the contract, that it should be delivered to the purchaser, or to his agent, which the master of a ship, to many purposes, is considered to be." And adverting to the facts of that claim, he further says: "The delivery of the goods to the master of the vessel was not for the use of Magee & Jones, any more than it was for the shipper solely, and consequently, it amounted to nothing, so as to divest the property out of the shipper, until Magee should elect to take them on joint account, or to act as the agent of Jones."

have no knowledge or control of the shipment, unless by the consent of the consignees, under future arrangements to be dictated by them. In this view, this case cannot be distinguished from that of *Messrs. Kimmell & Alvers;* and it steers wide of the distinction upon which *Messrs. Wilkins'* claim was sustained. (*The Merrimack*, 8 Cr. 317.)

The authorities also cited at the argument, by the captors, are exceedingly strong to the same effect. *The Aurora*, 4 Rob. 218, approaches very near to the present case. There, the shipment, by the express agreement of the parties, was, in reality, going for the use, and by the order, of the purchaser, but consigned to other persons, who were to deliver them, if they were satisfied for the payment. And Sir William Scott there quotes a case as having been lately decided, where goods, sent by a merchant in Holland, to A., a person in America, by order, and for account, of B., with directions not to deliver them, unless satisfaction should be given for the payment, were condemned as the property of the Dutch shippers.

*On the whole, the court are unanimously of opinion, that the goods included in this shipment were, during their transit, the property, and at the risk, of the shippers, and therefore, subject to condemnation. The claim of Mr. Lizaur must, therefore, be rejected. [*215

Sentence affirmed, with costs.

Renner & Bussard *v.* Marshall.

Abatement.—Lis pendens.—Assessment of damages.

The commencement of another suit, for the same cause of action, in the court of another state since the last continuance, cannot be pleaded in abatement of the original action.

If matter in abatement be pleaded *puis darrein continuance*, the judgment, if against the defendant, is peremptory.[1]

Where the action is brought for a sum certain, or which may be rendered certain by computation, judgment for the damages may be entered by the court, without a writ of inquiry.

Error to the Circuit Court for the district of Columbia, for Washington county. The defendant in error, at June term 1813, declared against the plaintiffs in error, in *assumpsit*, upon an inland bill of exchange, drawn by one Rootes, on Renner & Bussard, and accepted by them, to which declaration they pleaded *non assumpsit*, and issue was thereupon joined, and the cause was continued to December term 1813.

At that term, the plaintiffs in error appeared, and *pleaded, "that, after the last continuance of the plea aforesaid, to wit, the first Monday of June, in the year 1814, from which day the plea aforesaid was further continued here until this day, to wit, the fourth Monday of December, in the year last aforesaid, and before this day, to wit, on the 19th day of October, in the year last aforesaid, before the superior court of chancery of the commonwealth of Virginia, &c., the plaintiff exhibited his certain bill of complaint against the defendants, &c.; and also against one Anthony Buck and one Miles Dowson, complaining and alleging in his said bill, that on the 12th day of October, in the year 1812, Thomas R. Rootes drew his bill of exchange upon the defendants, &c. And the said defendants further [*216

[1] Harkness *v.* Harkness, 5 Hill 213.

say, that the plea aforesaid, for which the said defendants, by the said plaintiff, in the said bill of complaint mentioned, are impleaded in the said superior court of chancery as aforesaid, is for the same identical matter and cause of action, of and for which the said plaintiff hath now impleaded the said defendants, Renner & Bussard," &c.

To which the plaintiff replied the prior pendency of the suit in the circuit court; and the defendants rejoined, in substance, the same matters as contained in their plea; whereupon, the plaintiff demurred specially. Upon which, the court rendered judgment, "that the plea of the said Daniel Renner and Daniel Bussard, by them above pleaded to the writ and declaration of the said Horace Marshall, and the plea of the said Daniel Renner and
*217] Daniel Bussard, by way *of rejoinder to the said replication of the said Horace Marshall, and the matters therein contained, are not sufficient in law to preclude him, the said Horace Marshall, from maintaining his action aforesaid; therefore, it is considered by the court here, that the aforesaid Horace Marshall recover against the said Daniel Renner and Daniel Bussard, as well the sum of, &c., his damages," &c.

The cause was argued by *Jones* and *Key*, for the plaintiff in error, and by *Lee*, for the defendant in error.

March 11th, 1816. Story, J., delivered the opinion of the court.—The first question in this case is, whether the commencement of another suit, for the same cause of action, in the court of another state, since the last continuance, can be pleaded in abatement of the original suit? It is very clear, that it cannot. A subsequent suit may be abated, by an allegation of the pendency of a prior suit; but the converse of the proposition is, in personal actions, never true. The decision of the circuit court of the district of Columbia overruling the plea was, therefore, correct.(*a*)

*218] *The next question is, whether the judgment rendered on the overruling of the plea ought to have been peremptory, or an award of *respondeas ouster*. This point is completely settled by authority. If matter in abatement be pleaded *puis darrein continuance*, the judgment, if against the defendant, is peremptory, as well on demurrer, as on trial.(*b*)

The last question is, whether judgment could be entered up for the plaintiff for the amount of his damages, by the court, without a writ of inquiry? This also is completely settled by authority, in all cases whether the action is brought for a sum certain, or which may be made certain, by computation.(*c*)

Judgment affirmed, with costs.

(*a*) The exception *rei judicatæ* applies only to final or definitive sentences, in another state, or in a foreign court, upon the merits of the case; and the rule has even been applied to the pendency of a cause in an inferior court in the same state. Bowne *v.* Joy, 9 Johns. 221, and the authorities there cited. *Sed quære?* if it were alleged that the inferior court had jurisdiction? Fitzg. 314. But whether the suit be pending in a foreign or a domestic court, a prior suit cannot be abated by the allegation of the pendency of a suit subsequently brought.

(*b*) See Chitty on Plead. 636.

(*c*) See Holdipp *v.* Otway, 2 Wms. Saund. 107, note 2; Maunsell *v.* Lord Massareene, 5 T. R. 87; Buthen *v.* Street, 8 Ibid. 326; Nelson *v.* Sheridan, Ibid. 395; Byron

*Morean *v.* United States Insurance Company.

Marine insurance.—Memorandum articles.

The insurer on memorandum articles, is only liable for a total loss, which can never happen where the cargo, or a part of it, has been sent on by the assured, and reaches the original port of its destination.[1]

Where the ship, being cast on shore, near the port of destinatiou, the agent of the assured employed persons to unlade as much of the cargo (of corn) as could be saved, and nearly one-half was landed, dried and sent on to the port of destination, and sold by the consignees, at about one-quarter the price of sound corn; this was held not to be a total loss, and the insurer not to be liable.

Morean *v.* United States Ins. Co., 3 W. C. C. 256, affirmed.

Error to the Circuit Court for the district of Pennsylvania. This was an action commenced by the plaintiff in error, upon a policy of insurance, dated the 14th of December 1812, on goods on board the brig Betsey, at and from Cape Henry to Lisbon, at a premium of six per cent., on which $5000 were underwritten by the defendants, and valued at that sum, declared to be against all risks, except British capture, warranted American property. The jury found a verdict for the plaintiff, subject to the opinion of the court upon the following facts, agreed by the parties:

The cargo consisted of 4406 bushels of Indian corn, 100 barrels of navy bread, and 20 barrels of corn-meal. The brig sailed from Baltimore, on the 11th of November 1812 and from Cape Henry, on the 13th of the same month. She experienced, on the voyage, many and severe gales of *wind. On the 18th of December, she passed the rock of Lisbon, [*220 and came to anchor about four miles below Belem Castle. She leaked considerably, in consequence of the injury she had sustained from the severe gales to which she had been exposed. After passing the rock, the wind died away, and the current being adverse, she came to anchor. The master and supercargo landed, went through the customary forms, at Belem, to obtain a permit to pass the castle, and then proceeded to Lisbon. The health-boat visited the brig, and ordered her to get above the castle, as soon as possible. On the 19th, she was again exposed to a heavy and fatal gale, and drove ashore near to Belem Castle, the sea breaking over her, and the crew hanging by the rigging to preserve their lives. The supercargo considered both vessel and cargo as totally lost. By directions of the custom-house, as much of the cargo as could be got out, was unladen by a number of French prisoners, who were employed for that purpose. The cargo was all wet, and the part of it which was then taken out was carried to the fort, where it was spread and dried. From thence, it was carried to Lisbon in lighters, and was sold in the corn-market, by the consignee of the cargo. The quantity so saved and sold amounted to about 1988 bushels, which was sold at 50 cents a bushel, whereas, the price of sound corn was $2.25 a bushel. The supercargo petitioned for liberty to sell the corn at the place where it

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v. Johnson, Ibid. 410; Thellusson *v.* Fletcher, 1 Doug. 302; Rashleigh *v.* Salmon, 1 H. Bl. 352; Andrews *v.* Blake, Ibid. 529; Longman *v.* Fenn, Ibid. 541; Brown *v.* Van Braam, 3 Dall. 355; Graham *v.* Bickham, 1 Ibid. 185; Graham *v.* Bickham, 4 Ibid. 149.

[1] S. P. Humphreys *v.* Union Ins. Co., 3 Mason 429; Robinson *v.* Commonwealth Ins. Co., 3 Sumn. 220. And see Insurance Co. *v.* Fogarty, 19 Wall. 640.

was first deposited and dried, which could not be granted, and he was obliged to submit to the custom of the place, and allow it to be sold at the corn-
*221] market. *The brig was so completely wrecked, that she was sold, with her materials, where she lay, in lots. Had the supercargo been left to the free exercise of his own judgment, he would not have attempted to save any part of the cargo, in consequence of the total damage, and the great expense of saving it. The net proceeds of the cargo were not much more than the expenses of saving it, including those of the supercargo. The port of Lisbon commences above Belem Castle, and the custom of the place is, to discharge cargoes of corn between that castle and Cantara, which latter place is from one to two miles below Lisbon. The vessel never arrived at her port of discharge. On the 22d of December, she was entered at the custom-house, by an American vice-consul, which he said was necessary; but port-dues do not attach to vessels, until they pass the castle. Still, as part of the cargo was carried to Lisbon, the entry was made by the consul, and the dues were paid. On the 11th of March 1813, the plaintiff, having received notice of the shipwreck, offered to abandon, which was refused. Upon these facts, the circuit court gave judgment for the defendants, and the cause was brought by writ of error into this court.

Pinkney, for the plaintiff.—By the shipwreck, and breaking up of the voyage, the plaintiff was entitled to abandon; and there is no distinction in law in this respect between memorandum articles and general articles. The wreck disabled the ship from transporting the commodity, and the assured
*222] was not *obliged to find another vehicle to carry it on. Here, more than a moiety of the thing insured was annihilated, to say nothing of the deterioration of the rest. By the contract, it became the duty of the agent of the assured, to labor about the thing; and if the wreck and consequent damage justified the right of abandonment, what effect can the conduct of the supercargo have? The subsequent transportation can have no effect on the right of abandonment: the supercargo was compelled to carry it on, by the Portuguese government, for the supply of the capital. The law holds, that the assured shall not abandon, in the case of memorandum articles, upon deterioration merely. This is not a mere technical total loss: it is the same thing as if the waves of the sea had washed this portion of the cargo up to Lisbon. The usage of the government, in compelling a sale in such cases, must have been equally known to both parties, and ought to operate equally on both.

Harper, contrà.—1. A distinction is here attempted to be taken, on account of the nature of the peril by which the loss was occasioned. But the law prescribes, that the assured must carry on memorandum articles, if possible, in another vehicle. No degree of injury, short of total destruction, will justify the assured in abandoning, without making an effort to carry on the articles; and their actual arrival at the port of destination, no matter how, prevents abandonment. Marsh. on Ins. (Condy's ed.) 223, and the cases
*223] there cited. Our policies contain no stipulation similar *to those in the English, as to "stranding of the ship," in the case of memorandum articles. Wreck cannot help the assured, where the consequence is the destruction of the voyage only, without the actual destruction of the thing. The right of abandonment exists, while the peril of total loss exists; but

when the article is saved from that peril, the right no longer exists. *Maggrath* v. *Church*, 1 Caines 211; *Neilson* v. *Columbian Ins. Co.*, 3 Ibid. 108; *Schieffelin* v. *New York Ins. Co.*, 9 Johns. 21; *Wilson* v. *Royal Ins. Co.*, 3 Camp. 623; *Anderson* v. *Royal Ins. Co.*, 7 East 38.

2. The right of abandonment was not exercised in due time; not until after the peril had ceased. Memorandum articles may be abandoned, while they are submerged, or the hand of the enemy is upon them; but here, the loss of the voyage was repaired by other means found to carry on the goods, before the abandonment is made. (Ibid.) They were transported, not by violence, but according to the usage of the country; and the parties must be considered, in law, as having assented to this usage.

Pinkney, in reply.—If the assured was not obliged to carry on the commoditities, and he would have had a right to abandon, at the time, nothing subsequent has divested it. The sole object of the memorandum clause is, to exempt the insurer from liability for deterioration only, and the reason was, the inherent tendency of these articles to decay. The destruction of the vehicle, and the destruction of the greater part of the things transported, justified *the abandonment. None of the cases cited apply to this [*224 case; and the insurer knew of the usage, as well as the assured. If this case be determined not to be a case justifying abandonment, on account of the saving of so small a part, what case of abandonment of memorandum articles can exist? The abandonment was in time, because made in good faith, and as soon as the assured knew of the peril.

March 11th, 1816. Washington, J., delivered the opinion of the court, and after stating the facts, proceeded as follows:—All considerations connected with the loss of the cargo, in respect to quantity or value, may, at once, be dismissed from the case. As to memorandum articles, the insurer agrees to pay for a total loss only, the assured taking upon himself all partial losses, without exception. If the property arrive at the port of discharge, reduced in quantity or value, to any amount, the loss cannot be said to be total in reality, and the assured cannot treat it as a total, and demand an indemnity for a partial loss. There is no instance where the assured can demand as for a total loss, that he might not have declined an abandonment, and demand a partial loss. But if the property insured be included within the memorandum, he cannot, under any circumstances, call upon the insurer for a partial loss, and consequently, he cannot elect to turn it into a total loss. These principles are clearly established by the case of *Mason* v. *Skurray*, at N. P. 1780, Park 116; Marsh. (Condy's ed.) 223; *Neilson* v. **Columbian Insurance Company*, 3 Caines 108; *Cocking* v. *Fraser*, [*225 Park 114; Marsh. (Condy's ed.) 227; *McAndrews* v. *Vaughan*, at N. P. 1793, Park 114; *Dyson* v. *Rowcroft*, 3 Bos. & Pul. 474; and *Maggrath* v. *Church*, 1 Caines 211. The only question that can possibly arise, in relation to memorandum articles, is, whether the loss was total or not? and this can never happen, where the cargo, or a part of it, has been sent on by the assured, and reaches the original port of its destination. Being there, specifically, the insurer has complied with his engagements; everything like a promise of indemnity against loss or damage to the cargo being excluded from the policy. If the question turn upon the totality of the loss, unconnected with the subject of loss, by deterioration of the cargo in value, or

reduction in quantity, there is no difference between memorandum and other articles. If the loss be total, in reality, or is such as the assured is permitted to treat as such, he is entitled to abandon, and recover as for a total loss, in the case of memorandum articles, but always with this exception, that he is not permitted to turn a partial into a total loss.

Keeping this distinction in view, the loss of the voyage by capture, shipwreck or otherwise, may be treated as a total loss. This is the doctrine in the case of *Dyson* v. *Rowcroft*, in which the right to abandon was placed, not upon the ground of deterioration of the cargo, but upon the justifiable necessity which resulted from it, of throwing the cargo overboard: *226] *this was, in effect, the same thing as if it had, in a storm, been swept from the deck. Such, too, was the case of *Manning* v. *Newnham*, Park 169. In *Cocking* v. *Fraser*, no such necessity existed, and the breaking up of the voyage was attempted to be justified by the damaged state of the cargo, which, *per se*, did not justify the assured in putting an end to the voyage, and thus to turn a partial loss, for which the insurer was not liable, into a partial loss. *Maggrath* v. *Church* establishes the same doctrine. Now, what is the present case? The ship being thrown on shore, within a mile or two from her port of destination, the agent of the assured employs persons to unlade as much of the cargo as could be saved, and nearly one-half was, by his exertions, landed, dried, and sent to the market at Lisbon, and sold by the consignees, at about one-quarter the price of sound corn, leaving a very inconsiderable sum for the owner, after paying the expenses. Is not this precisely the case of *Neilson* v. *Columbian Insurance Conpany*, and *Anderson* v. *The Same*, 3 Caines 108, with this difference only, that in the first case, the assured declined sending on the corn, when he might have done so, and consequently, he was not permitted to turn a partial into a total loss, by his own neglect; and in the latter case, part of the cargo having been rescued from the wreck, before the offer to abandon waa made, the assured could not claim as for a total loss, either on *227] account of the injury *which the corn had sustained, or of his own act in not sending it forward to its port of destination. In the case now before the court, the cargo which was saved was sent forward, and sold at the port of its destination.

*228] In addition to the cases above referred to, the cases of *Biays* v. *Chesapeake Insurance Company* (7 Cranch 415),(*a*) *and *Marcardier*

(*a*) This was an insurance on hides, "warranted by the assured free from average, unless general." The declaration was for a total loss by perils of the seas; but it appeared in evidence, that 3288 hides (the whole number insured being 14,565) were put on board of a lighter, to be transported from the vessel to their place of destination; that the lighter, on the passage to the shore, was sunk, by which accident, 789 of the hides, of the value of $4000, were totally lost, and the residue, to the number of 2491, were fished up and saved at the expense of $6000, which was paid by the assured. The hides, thus saved, were delivered to his agent, and sold on his account. The whole sum insured on the cargo was $25,000. In delivering the opinion of the court, it was remarked by LIVINGSTON, J., that whatever might have been the motive to the introduction of this clause in policies of insurance, which was done as early as the year 1749, and most probably, with the intention of protecting insurers against losses arising solely from a deterioration of the article, by its own perishable quality, or whatever ambiguity might once have existed, from the term average being used in

v. *The Same*, in this court (8 Ibid. 39), (*a*) are strongly applicable to the present, and seem, in a *great measure, to settle it. But it is contended by the counsel for the plaintiff, that if the loss be such [*229

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different senses, that is, as signifying a contribution to a general loss, and also a particular or partial injury falling on the subject insured, it was well understood, at the present day, with respect to such articles, that underwriters are free from all partial losses, of every kind, which do not arise from a contribution towards a general average. It only remained, then, to examine (and so the question had been properly treated at the bar), whether the hides which were sunk, and not reclaimed, constituted a total or partial loss, within the meaning of this policy. It had been considered as total, by the counsel for the assured, but the court could not perceive any ground for treating it in that way, inasmuch as out of many thousand hides which were on board, not quite 800 were lost, making in point of value somewhat less than one-sixth part of the sum insured. If there were no memorandum in the way, and the plaintiff had gone on to recover, as in that case he might have done, it was perceived at once, that he must have had judgment only for a partial loss, which would have been equivalent to the injury actually sustained. But without having recourse to any reasoning on the subject, the proposition appeared too self-evident not to command universal assent, that when only part of a cargo, consisting all of the same kind of articles, is lost, in any way whatever, and the residue (which in this case amounted to much the greatest part) arrives in safety at its port of destination, the loss cannot but be partial, and that it must for ever be so, so long as a part continues to be less than the whole. This, then, being a particular loss only, and not resulting from a general average, the court was of opinion that the defendants were not liable for it.

(*a*) This was an action on a policy of insurance for $31,000, upon any kind of lawful goods, on board the brig Betsey, on a voyage from New York to Nantz. The cargo was of the invoice value of $29,889, of which $7439 were in memorandum articles. The brig sailed on the voyage, but was compelled, by stress of weather, and other accidents, to bear away for the West Indies, and arrived at Antigua, where the master applied to the court of vice-admiralty for a survey; upon which the cargo was landed, and ordered by the court to be sold for the benefit of the concerned. Under this sale, the net proceeds of the cargo amounted to $13,767, and of the memorandum articles to $6863. The vessel was repaired, within a reasonable time, and capable of performing the voyage, with the original cargo, but the master abandoned the voyage, at Antigua. Of the cargo, 99 bags of coffee were spoiled and thrown overboard, and the residue greatly damaged by the perils of the seas; and the whole cargo, including the memorandum articles, sustained a damage during the voyage, exceeding a moiety of its original value. Within a reasonable time after receiving information of the loss, the plaintiff abandoned the whole cargo to the underwriters. The plaintiff contended that he was entitled to recover as for a total loss of the cargo insured, including the memorandum articles. Story, J., who delivered the opinion of the court, stated, that a technical total loss might arise from the mere deterioration of the cargo, by any of the perils insured against, if the deterioration be ascertained at an intermediate port of necessity, short of the port of destination. In such case, although the ship be in a capacity to perform the voyage, yet, if the voyage be not worth pursuing, or the thing insured be so damaged and spoiled, as to be of little or no value, the assured has a right to abandon the projected adventure, and throw upon the underwriter the unprofitable and disastrous subject of insurance. It had, therefore, been held, that if a cargo be damaged, in the course of the voyage, and it appear, that what has been saved is less in value than the amount of the freight, it is a clear case of a total loss. It did not, however, appear, that the exact *quantum* of damage which shall authorize an abandonment as for a total loss, had ever become the direct subject of adjudication in the English courts. The celebrated Le Guidon, c. 7, art. 1, considers that a damage exceeding the moiety of the value of the thing insured, is sufficient to authorize an abandonment.

*as that the insured might at one time have treated it as total, it con-
*231] tinues to be so, unless at the time *when the offer to abandon is made, clear of the effects of the peril, and in a condition to prosecute the voyage, it is restored to his possession. Now, this is certainly not the condition of property, which, at the time of the offer to abandon, is in the possession of a re-captor, who has a right to retain it, until he is paid his salvage. But in the present case, the corn never was out of the possession of the agents of the assured, who exercised every act of ownership over it,

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This rule had received some countenance from more recent elementary writers; and from its public convenience and certainty, had been adopted as the governing principle, in some of the more respectable commercial states in the Union, and was now so generally established as not easily to be shaken. 1 Johns. Cas. 141; 1 Johns. 335, 406; Marshall on Insurance 562, note 92 (Condy's ed.); Park 194 (6th ed.). But this rule has been deemed not to extend to a cargo consisting wholly of memorandum articles. The legal effect of the memorandum is, to protect the underwriters from all partial losses; and if a loss by deterioration, exceeding a moiety in value, would authorize an abandonment, the great object of the stipulation would be completely evaded. It seems, therefore, to be the settled doctrine, that nothing short of a total extinction, either physical, or in value, of memorandum articles, at an intermediate port, would entitle the assured to turn the case into a total loss, where the voyage is capable of being performed. And perhaps, even as to an extinction in value, where the commodity specifically remains, it might yet be deemed not quite settled, whether, under the like circumstances, it would authorize an abandonment for a total loss.

The case before the court was of a mixed character. It embraced articles of both descriptions; some within, and some without, the purview of the memorandum. If, in such a case, a deterioration, exceeding a moiety in value, be a proper case of technical total loss, it will follow, that in many cases, the underwriter will indirectly be rendered responsible for partial losses on the memorandum articles. Suppose, in such a case, the damage to the memorandum articles were 40 per cent., and to the other articles 10 per cent., in the whole amounting to half the value of the cargo, the underwriter would be responsible for a technical total loss, and thereby made to bear the whole damage, from which the memorandum meant to exempt him. Indeed, cases might arise, in which the damage might exclusively fall on memorandum articles; and if it exceeded the moiety in value of the whole cargo, might load him with the burden of a partial loss, in manifest contravention of the intention of the parties. A construction leading to such a consequence could not be admitted, unless it be unavoidable; and the court were entirely satisfied, that such a construction ought not to prevail. The underwriter is, in all cases of deterioration, entitled to an exemption from partial losses on the memorandum articles; and in order to effectuate this right, it was necessary, where a technical total loss is sought to be maintained, upon the mere ground of deterioration of the cargo, at an intermediate port, to a moiety of its value, to exclude from that estimate all deterioration of the memorandum articles. Upon this principle, in a cargo of a mixed character, no abandonment for mere deterioration in value, during the voyage, could be valid, unless the damage on the memorandum articles exceeded a moiety of the whole cargo, including the memorandum articles. The case was considered, as to the underwriter, the same as though the memorandum articles should exist in their original sound state. In this way, full effect was given to the contract of the parties. The underwriter would never be made responsible for partial losses on memorandum articles, however great; and the technical total losses for which alone he could be liable, were such as stood unaffected by the perishable nature of the commodity which he insures. Admitting, therefore, the rule to be correct, that the party has a right to abandon, when the depreciation exceeds a moiety of the value, the plaintiff had not brought himself within that rule, as applied to a cargo of a mixed nature, and there was, consequently, no total loss proved, by the perils of the seas.

subject, nevertheless to the laws and customs of the country to which it was sent, with which the insurer and assured are supposed to have been acquainted at the time they entered into this contract, and to which they impliedly agreed to submit. The cargo which was landed, not only continued in the possession, and under the direction, of the agents of the assured, but it was relieved from the effects of the peril, as between the insurer and assured, and it was not only in a condition to prosecute the voyage, but it did in reality complete it. Upon the whole, it is the opinion of the court, that this is not such a loss as the defendants engaged to indemnify against, and that judgment should be given in their favor.

Judgment affirmed.(*a*)

(*a*) We are informed by Targa, c. 52, n. 18, p. 230, and Casaregis, Disc. 47, that in the practice of Italy, in order to avoid the difficulty of settling averages on perishable articles, the clause *excluso getto et avaria*, as it was called, was introduced. The *French law requires goods, which, by their nature, are subject to particular detriment or diminution, such as grain, salt or merchandise subject to leakage, to be specified in the policy, otherwise the insurer is not liable for the damages or losses which may happen to these articles, unless the assured was ignorant of the nature of the cargo, at the time the contract was made. Ordonnance de la Marine, l. 3, tit. 6, *des Assurances*, art. 31; Code de Commerce, liv. 2, tit. 10, art. 355. In the different ports of France, before the revolution, various clauses were inserted in the policy, excluding responsibility for losses not exceeding a certain per-centage on such articles. At Marseilles, the insurers exempted themselves from average losses, on certain voyages, by a clause which was construed to extend both to general and particular average, on vessel or cargo. Under this clause, *franc d'avarie*, the insurer was held answerable only for an entire loss of the subject insured. It was, however, determined not to extend to any case of technical total loss, which, by the French law, authorizes the assured to abandon—such as capture, stranding, shipwreck, &c. 1 Emerigon, *Traité des Assurances*, c. 12, § 45, 46; Pothier, *d'Assurance*, No. 166; Valin, sur l'Ordonnance, liv. 3, tit. 6, *Des Assurances*, art. 47. The origin of the English memorandum is referred by Serjeant Dunning, in the case of Wilson *v.* Smith, 3 Burr. 1551, to its "being better calculated to deliver the insurers from small averages, than adapting the premium to the nature of the commodity, as it might happen to be more or less liable to perish or suffer; which method would have made the policy too complicated, and which the Dutch had at first tried, but afterwards altered." The English formula is as follows: "N. B. Corn, &c., are warranted free from average, &c., unless general, or the ship be stranded." The last words, "or the ship be stranded," have been omitted, for several years, in the forms of policies adopted by the English insurance companies, viz., the London Royal Assurance, and the Royal Exchange Assurance. 2 Selwyn's N. P. 949. They are not inserted in the policies used in the United States. [*232

*Welch *v.* Mandeville.

Dominus litis.

A nominal plaintiff, suing for the benefit of his assignee, cannot, by a dismissal of the suit, under a collusive agreement with the defendant, create a valid bar against any subsequent suit for the same cause of action.[1]

Welch *v.* Mandeville, 2 Cr. C. C. 82, reversed.

Error to the Circuit Court for the district of Columbia, for Alexandria county. This was an action of covenant, brought in the name of Welch (for the use of Prior) against Mandeville & Jamieson. The suit abated as to Jamieson, by a return of "no inhabitant."

The defendant, Mandeville, filed two pleas. The second plea, upon which the question in this court arose, stated, that, on the 5th of July 1806, James Welch impleaded Mandeville & Jamieson, in the circuit court of the district of Columbia, for the county of Alexandria, in an action of covenant, in which suit such proceedings were had, that, afterwards, to wit, at a session of the circuit court, on the 31st day of December 1807, "the said James Welch came into court and acknowledged that he would not further prosecute his said suit, and from thence altogether withdraw himself." The plea then averred, that the said James Welch, in the plea mentioned, was the same person in whose name the present suit was brought, and that the said Mandeville and Jamieson, in the former suit, were the same persons who
*234] are defendants *in this suit, and that the cause of action was the same in both suits.

To this plea the plaintiff filed a special replication, protesting that the said James Welch did not come into court and acknowledge that he would not further prosecute the said suit and from thence altogether withdraw himself; and averred, that James Welch, being indebted to Prior, in more than $8707.09, and Mandeville & Jamieson being indebted, by virtue of the covenant in the declaration mentioned, in $8707.09, to Welch, he, Welch, on the 7th of September 1799, by an equitable assignment, assigned to Prior, for a full and valuable consideration, the said $8707.09, in discharge of the said debt, of which assignment, the replication averred Mandeville & Jamieson had notice. The replication further averred, that the suit in the plea mentioned was brought in the name of Welch, as the nominal plaintiff, for the use of Prior, and that the defendant, Mandeville, knew that the said suit was brought, and was depending, for the use and benefit of the said Prior; and that the said suit in the plea mentioned, without the authority, consent or knowledge of the said Prior, or of the attorney prosecuting the said suit, and without any previous application to the court, was "dismissed, agreed." The replication further averred, that the said James Welch was not authorized by the said Prior to agree or dismiss the said suit in the plea mentioned; and that the said Joseph Mandeville, with whom the suppoesd

[1] In such case, the court will not permit the legal plaintiff to arrest the suit; the *cestui qui use* has a right to impetrate the writ, and to carry on the suit for his own benefit. Insurance Co. *v.* Smith, 11 Penn. St. 124. But the court, in a proper case, will search out the actual plaintiff, and fix on him the responsibility of a party, by subjecting him to costs, a plea of set-off, or any other liability that may be necessary to protect the defendant. Armstrong *v.* Lancaster, 5 Watts 68.

agreement for the dismissal of the said suit was made, knew, at the time of making the said supposed agreement, *that the said James Welch [*235 had not authority from Prior to agree or dismiss said suit. The replication further averred, that the said agreement and dismissal of the said suit were made and procured by the said Joseph Mandeville, with the intent to injure and defraud the said Prior, and deprive him of the benefit of the said suit in the plea mentioned. The replication also averred, that the said Prior did not know that the said suit was dismissed, until after the adjournment of the court at which it was dismissed; and further, that the supposed entry upon the record of the court in said suit, that the plaintiff voluntarily came into court and acknowledged that he would not further prosecute his said suit, and from thence altogether withdraw himself, and the judgment thereupon was made and entered by covin, collusion and fraud; and that the said judgment was fraudulent. To this replication, the defendant filed a general demurrer, and the replication was overruled.

It appeared by the record of the suit referred to in the plea, that the entry was made in these words: "This suit is dismissed, agreed," and that this entry was made by the clerk, without the order of the court, and that there was no judgment of dismissal rendered by the court, but only a judgment refusing to reinstate the cause.[1]

The cause was argued by *Lee*, for the plaintiff, and *Swann*, for the defendant.

March 11th, 1816. STORY, J., delivered the opinion of the court.—The question upon these pleadings comes to this—whether a nominal plaintiff, suing for the benefit of *his assignee, can, by a dismissal of the suit, [*236 under a collusive agreement with the defendant, create a valid bar against any subsequent suit for the same cause of action?

Courts of law, following in this respect the rules of equity, now take notice of assignments of *choses in action*, and exert themselves to afford them every support and protection not inconsistent with the established principles and modes of proceeding which govern tribunals acting according to the course of the common law. They will not, therefore, give effect to a release procured by the defendant, under a covinous combination with the assignor, in fraud of his assignee, nor permit the assignor injuriously to interfere with the conduct of any suit commenced by his assignee to enforce the rights which passed under the assignment.

The dismissal of the former suit, stated in the pleadings in the present case, was certainly not a *retraxit;* and if it had been, it would not have availed the parties, since it was procured by fraud. Admitting a dismissal of a suit, by agreement, to be a good bar to a subsequent suit (on which we give no opinion), it can be so only when it is *bonâ fide*, and not for the purpose of defeating the rights of third persons. It would be strange, indeed, if parties could be allowed, under the protection of its forms, to defeat the whole objects and purposes of the law itself.

It is the unanimous opinion of the court, that the judgment of the cir-

[1] See Welch v. Mandeville, 7 Cr. 152.

cuit court, overruling the replication to the second plea of the defendant, is
*237] erroneous, *and the same is reversed, and the cause remanded for further proceedings.

Judgment reversed.(*a*)

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*238] *L'Invincible: The Consul of France and Hill & McCobb, Claimants.

Prize jurisdiction.

During the late war between the United States and Great Britain, a French privateer, duly commissioned, was captured by a British cruiser, afterwards re-captured by an American privateer; again captured by a squadron of British frigates, and re-captured by another American privateer, and brought into a port of the United States for adjudication: restitution, on payment of salvage, was claimed by the French consul. A claim was also interposed by citizens of the United States, who alleged, that their property had been unlawfully taken by the French vessel, before her first capture, on the high seas, and prayed an indemnification from the proceeds. Restitution to the original French owner was decreed; and it was held, that the courts of this country have no jurisdiction to redress any supposed torts committed on the high seas, upon the property of its citizens, by a cruiser regularly commissioned by a foreign and friendly power, except where such cruiser has been fitted out in violation of our neutrality.[1]

The Invincible, 2 Gallis. 29, affirmed.

Appeal from the Circuit Court for the district of Massachutetts. The French private armed ship L'Invincible, duly commissioned as a cruiser, was, in March 1813, captured by the British brig of war La Mutine. In the same month, she was re-captured by the American privateer Alexander; was again captured, on or about the 10th of May 1813, by a British squadron, consisting of the frigates Shannon and Tenedos; and afterwards, in the
*239] same month, again re-captured by the American privateer Young *Teaser, carried into Portland, and libelled in the district court of Maine for adjudication, as prize of war.

(*a*) By the common law, *choses in action* were not assignable, except to the crown. The civil law considers them as, strictly speaking, not assignable; but, by the invention of a fiction, the Roman jurisconsults contrived to attain this object. The creditor who wished to transfer his right of action to another person, constituted him his attorney, or *procurator in rem suam*, as it was called; and it was stipulated, that the action should be brought in the name of the assignor, but for the benefit and at the expense of the assignee. Pothier, *de Vente*, No. 550. After notice to the debtor, this assignment operated a complete cession of the debt, and invalidated a payment to any other person than the assignee, or a release from any other person than him. Ibid. 110, 554; Code Napoleon, liv. 3, tit. 6, *De la Vente*, c. 8, § 1690. The court of chancery, imitating, in its usual spirit, the civil law, in this particular, disregarded the rigid strictness of the common law, and protected the rights of the assignee of *choses in action*. This liberality was at last adopted by the courts of common law, who now consider an assignment of a *chose in action* as substantially valid, only preserving, in certain cases, the form of an action commenced in the name of the assignor, the beneficial interest and control of the suit being, however, considered as completely vested in the assignee as *procurator in rem suam*. See Master *v.* Miller, 4 T. R. 340; Andrews *v.* Beecker, 1 Johns. 411; Bates *v.* New York Insurance Company, 3 Johns. Ch. 242; Wardell *v.* Eden, 1 Johns. 532, *in notis;* Carver *v.* Tracy, 3 Ibid. 426; Raymond *v.* Squire, 11 Ibid. 47; Van Vechten *v.* Greves, 4 Ibid. 406; Westor *v.* Barker, 12 Ibid. 276.

[1] The Bee, 1 Ware 332; The William, 1 Pet. Adm. 12. And see Hernandez *v.* Avery, 1 Journ. Jur. 131; The Santissima Trinidad, 7 Wheat. 283; The South Carolina, Bee 422.

L'Invincible.

The proceedings, so far as material to be stated, were as follows: At a special term of the district court, held in June 1813, a claim was interposed by the French consul, on behalf of the French owners, alleging the special facts above mentioned, and claiming restitution of the ship and cargo, on payment of salvage. A special claim was also interposed by Mark L. Hill and Thomas McCobb, citizens of the United States, and owners of the ship Mount Hope, alleging, among other things, that the said ship, having on board a cargo on freight, belonging to citizens of the United States, and bound on a voyage from Charleston, South Carolina, to Cadiz, was, on the high seas, in the latter part of March 1813, in violation of the law of nations and of treaties, captured by L'Invincible, before her capture by La Mutine, and carried to places unknown to the claimants, whereby the said ship Mount Hope and cargo became wholly lost to the owners, and thereupon praying, among other things, that after payment of salvage, the residue of said ship L'Invincible, and cargo, might be condemned and sold for the payment of the damages sustained by the claimants. At the same term, by consent, an interlocutory decree of condemnation to the captors passed against said ship L'Invincible, and she was ordered to be sold, and one moiety of the proceeds, after deducting expenses, was ordered to be paid to the captors, as salvage, and the other moiety to be brought into court, to abide the final decision of the respective claims of *the French consul and Messrs. Hill & McCobb. [*240

The cause was then continued for a further hearing unto September term 1813, when Messrs. Maisonarra & Devouet, of Bayonne, owners of L'Invincible, appeared, under protest, and in answer to the libel and claim of Messrs. Hill & McCobb, alleged, among other things, that the ship Mount Hope was lawfully captured by L'Invincible, on account of having a British license on board, and of other suspicious circumstances, inducing a belief of British interests, and ordered to Bayonne for adjudication; that (as the protestants believed) on the voyage to Bayonne, the Mount Hope was re-captured, by a British cruiser, sent into some port of Great Britain, and there finally restored, by the court of admiralty, to the owners, after which, she pursued her voyage, and safely arrived, with her cargo, at Cadiz, and the protestants thereupon prayed, that the claim of Messrs. Hill & McCobb might be dismissed. The replication of Messrs. Hill & McCobb denied the legality of the capture, and the having a British license on board the Mount Hope, and alleged embezzlement and spoliation by the crew of L'Invincible, upon the capture; admitted the re-capture by a British cruiser, and the restitution by the admiralty, upon payment of expenses, and prayed that the protestants might be directed to appear absolutely and without protest.

Upon these allegations, the district court overruled the objections to the jurisdiction of the court, and compelled the owners of L'Invincible to appear absolutely, and without protest, and thereupon, the *owners appeared absolutely, and alleged the same matters in defence which [*241 were stated in their answer under protest, and prayed the court to assign Messrs. Hill & McCobb to answer interrogatories touching the premises, which was ordered by the court. Accordingly, Messrs. Hill & McCobb made answer to the interrogatories proposed, except an interrogatory which required a disclosure of the fact, whether there was a British license on board, which McCobb (who was master of the Mount Hope at the time of the

capture) declined answering, upon the ground, that he was not compelled to answer any question, the answer to which would subject him to a penalty, forfeiture or punishment; and this refusal, the district court, on application, allowed. Hill, in answer to the same interrogatory, denied any knowledge of the existence of a British license. The cause was, thereupon, heard on the allegations and evidence of the parties, and the district court decreed, that Messrs. Hill & McCobb should recover against the owners of L'Invincible, the sum of $9000 damages, and the costs of suit.

From this decree, the owners appealed to the circuit court, and in that court, their plea to the jurisdiction was sustained, and the claim of Messrs. Hill & McCobb dismissed, with costs. An appeal was, thereupon, entered by them to this court.

Dexter, for the appellants.—The sole question is, whether the district court of Maine had jurisdiction? It is a case, where a citizen, against whose *242] property *a tort has been committed on the high seas, appears in his own natural *forum*, and the *res*, which was the instrument of the wrong done, is within the territorial jurisdiction of his own country, and in possession of the court for other (lawful) purposes, when he applies for justice.

1. An injury of this nature is either to be redressed by a process *in rem* or *in personam*, and in either case, application must be made where the thing or person is found. The action is transitory in both cases; where the party proceeds *in rem*, the possession of the thing gives jurisdiction to the tribunal having that possession. It is said, that in prize proceedings, the *forum* of the captor is the only one having jurisdiction. But what is the extent of the principle, and what are the exceptions to the rule? The rule is not of a nature peculiar to prize proceedings, but it is rather a corollary from the general principles of admiralty jurisdiction. The locality of the question of prize or no prize must have been originally determined by the fact of the property being carried *infra præsidia* of the captor's country, and in possession of its courts. I agree, that the possession of the thing does not give jurisdiction to a neutral country, and the reason is, because the country is neutral. But this has only been recently settled; and in the reign of Charles II., the question was referred to the crown lawyers in England (then neutral), whether the property of English subjects, unjustly taken by foreign cruisers, should not be restored to them by the English *243] court. (2 Bro. Civ. & Adm. Law 256.) *It is, however, now determined, that unless there has been a breach of neutrality in the capture, the courts of a neutral state cannot restore, much less condemn. But this concession does not shake the position, that local jurisdiction is founded upon the possession of the *res*, which, in this case, having escaped from the former captor, the action becomes transitory, and follows the thing. There are several decisions of this court, all confirming, either directly or by analogy, the position now taken. *Glass* v. *The Betsey*, 3 Dall. 6; *Talbot* v. *Jansen*, Ibid. 133; *Del Col* v. *Arnold*, Ibid. 333; *The Mary Ford*, Ibid. 138.

In the famous report of Sir George Lee, &c., on the memorial of the king of Prussia's minister, relative to the non-payment of the Silesian loan, which was intended to maintain the strongest maritime pretensions of Great Britain, the only passage that even glances at the doctrine of the exclusive

L'Invincible.

jurisdiction of the courts of the captor's country is, that all captors are bound to submit their seizures to adjudication, and that the regular and proper court is that of their own country. But this principle is sustained rather by the authority of usage and treaties, than by elementary writers; and yet, all the other incidental questions are illustrated by multifarious citations of elementary books, equally respected in Prussia as in England. The reporters do not fairly meet the menace of the Prussian monarch, to set up courts of prize in his own dominions; but content themselves with asserting that it would be irregular, absurd and impracticable. *Had it been, at that time, settled by European jurists of authority, the question would not have been made; or, if made, would have been satisfactorily answered. The general principle has been rather assumed, than proved: and the practice of one nation, at least, contradicts it; for the ordinance of Louis XIV. restores the property of French subjects brought into the ports of France.(a) [*244

2. Suppose, the *question of prize or no prize to be exclusively within the jurisdiction of the courts of the capturing power, yet that [*245

(a) Ordonnance de la Marine, liv. 3, tit. 9, *Des Prises*, art. 15. The same provision is contained in the 16th article of the Spanish ordinance of 1718; and Valin considers the restitution of the effects as a just recompense for the benefit rendered to the captor, in granting him an asylum in the ports of the neutral country to whose subjects those effects belong. But Azuni contests this opinion, and maintains, that the obligation to restore in this case is founded on the universal law of nations. Part 2, c. 4, art. 3, § 18. And it must be confessed, that the reasons on which Valin rests his opinion are by no means satisfactory; so that the French and Spanish ordinances are evidently mere municipal regulations, which have not been incorporated into the code of public law, and cannot be justified upon sound principles. It is an observation, somewhere made by M. Portalis, that such regulations are not, properly speaking, to be considered laws, but are essentially variable in their nature, *pro temporibus et causis*, and are to be tempered and modified by judicial wisdom and equity. These ordinances are, indeed, supported by the practice of the Italian states, and the theory of certain Italian writers. Among the latter are Galliani and Azuni, both of whom maintain, each upon different grounds, the right of the neutral power, within whose territorial jurisdiction a prize brought, to adjudicate upon the question of prize or no prize, so far as the property of its own subjects is concerned. They are, however, opposed by their own countrymen, Lampredi, who, after assigning the reasons for his dissent, concludes thus: "*Egli* (the neutral) *dunque dovrà rispettare questo possesso* (that of the captor) *lasciando che i giudici costituiti dal Sovrano del predatore lo dichiarino o legittimo, o illegittimo, e così o liberino la preda, o la facciano passare in dominio del predatore, purche questo giudizio si faccia fuori del suo territorio, ove nessuno usurpar può i dirriti spettanti al sommo impero. E falso adunque in diritto quello, che asserisce il Galiani, ed il progretto, ch'egli propone sul giudizio delle prede non si portrebbe eseguire senza lesione dei diritti sovrani.* Lampredi, p. 228. Since the decision of the case to which this note is appended, the following may be considered as the only exceptions to the general rule, that the question of prize or no prize, with all its incidents, is only to be determined in the courts of the captor's nation, established in his country, or in that of an ally or co-belligerent. 1st. The case of a capture made by the cruisers of the belligerents, within the jurisdiction of a neutral power; and 2d. That of a capture made by armed vessels, fitted out in violation of its neutrality, and where the captured property, or the capturing vessel, is brought into its ports. The obvious foundation of these exceptions is to be discovered in the right and the duty of every neutral state to maintain its neutrality impartially, and neither to do nor suffer any act which might tend to involve it in the war.

question does not arise in the present case. This is a question of probable cause. If the commander of L'Invincible took *without* probable cause, he had no right; if he took *with* probable cause, then the claimants have sustained no injury, and ought not to recover damages; consequently, no injury can result from the court taking cognisance of the suit. As to the spoliation, after the capture, that is still less a question of prize.

3. But be the general principles as they may, the jurisdiction having attached for other purposes, on re-capture, the former owner of a vessel unlawfully taken and despoiled by the prize, comes in and claims damages under the law of nations.

*246] *Pinkney*, contrà.—If there be any rule of public *law better established than another, it is, that the question of prize is solely to be determined in the courts of the captor's country. The report on the memorial of the king of Prussia's minister, refers to it as the customary law of the whole civilized world. The English courts of prize have recorded it; the French courts have recorded it; this court has recorded it. It pervades all the adjudications on the law of prize, and it lies, as an elementary principle, at the very foundation of that law. The whole question, then, is, whether this case be an exception to the general rule?

The positive law of nations has ordained the rule; the natural law of nations has assigned the reasons on which it is founded; and Rutherforth, in his Institutes (2 Ruth. 594), explains those reasons, which arise from the amenability of governments to each other. A cruiser is amenable only to the government by whom he is commissioned; that government is amenable to the power whose subjects are injured by him; and after the ordinary prize judicature is exhausted, they are to apply to their own sovereign for redress. The principal object of that judicature is the examination into the conduct of the captors; the question of property is merely incidental. But whatever the question may be, it is to be judged exclusively by the courts of the capturing power. It is contended, on the other side, that this jurisdiction must be exerted *in rem;* but the jurisdiction to which Rutherforth refers is much more extensive, not confining it to the question whether the *247] property be translated. If the *thing be within the possession of the court, then it exerts a jurisdiction *in rem*, by restitution or condemnation, as the case may be. But if not, then it exerts it on the person, and inquires into the manner in which the captor has used his commission, and whether any wrong has been done to friends, under color of its authority. It is a gratuitous assumption, that prize jurisdiction is always *in rem*, as that of the ordinary court of admiralty usually is. The commissioned captor cantor cannot be responsible to any but his own sovereign; from him he receives the law which forms his rule of conduct. Sir William Scott expressly admits, that his king can give him the law, and the judges of other European countries practically admit the same thing: *à fortiori*, can the sovereign give it to his delegated cruisers; he being answerable over, in the first instance, diplomatically, and finally by war, to the injured nation. The captor is responsible only through the courts of his own country.

2. Is this case an exception to the general rule? The reasons of the allowed exceptions do not apply to this case. Thus, the cases are, of violation of neutral territory; or where a commission is issued to subjects of the

neutral country; or lastly, of a prize brought into its territorial limits with neutral property on board. In the case of *Talbot* v. *Jansen*, the commission was null, and captures under it were void; it was equivalent to no commission at all. Here is no pretence that the commission was null; that she had been fitted out here; or that the thing captured had been brought within the grasp of our municipal law; or that the capture was made within our limits. In **Del Col* v. *Arnold* the ground of the decision was, that the thing was brought voluntarily into our limits, and the wrong done within those limits. The judgment must be supported on that ground, or it cannot be supported at all. As to *The Betsey*, its authority is doubtful, and it cannot be referred to any intelligible principle, unless it be, that the belligerent captor submits to the neutral jurisdiction, by bringing the property within it. *The Cassius* (3 Dall. 121), is directly in point for the captors, in the case now before the court. Why was the libellant's application refused in that case? Because the thing captured was not brought in; thereby showing that, in the present case, the prize not having been brought in, damages cannot be awarded against the captor. As to the ordinance of Louis XIV., it goes no further than this court did in the case of *The Betsey*. The same authority has been practically assumed among the Italian states; but further, no nation, ancient or modern, has gone. The natural, customary and conventional law of nations are all equally adverse to it. The claimants have a remedy, correspondent to the extent of their injury, in the courts of France. The prize jurisdiction is as effectually exerted, when the property is not, as when it is, within its control. The cases are multiplied, where the thing is even lost, of an application compelling the captor to proceed to adjudication; if he fails to show that the capture is lawful, he is mulcted in costs and damages. *The Betsey*, 1 Rob. 92. The cruisers of *every nation are bound to obey the instructions of the sovereign power, whether lawful or not. The condemnations under the British orders in council of November 1793, were reversed by the Lords of Appeal, and mere dry restitution decreed, without damages, because the cruisers were justified by the instructions. But the commissioners under the 7th article of the British treaty of 1794, gave damages for what the Lords of Appeal were obliged judicially to refuse them, upon the authority of Rutherforth, and upon the ground, that the British government was answerable over to the injured power. In the present case, if justice should be refused in the courts of France, the French government would be answerable over to this country. The process, is here, in effect, *in personam*, and it is as if the captor were here. You go beyond retaining your own property merely, and lay your hand on his; which is his by the municipal code only: by the law of nations, it is the property of the state. It is certain, he was not originally responsible personally, and the capture and re-capture can have made no difference. The acts exerted over him by the enemy could not have changed his responsibity; nor can the captors having failed to proceed to adjudication in France, for the claimants may compel him; nor the bringing in of his vessel, for, as to him, it was involuntary.

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3. Probable cause is emphatically a question of prize or no prize; but it is not always the same by the law of different countries. The law of France must, therefore, be looked into, and applied to the case, which the French courts only are competent to expound. If their *exposition

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does injustice to the party, his remedy is by application to his own government. So also, is the question of spoliation, a question of prize; and the prize court, having jurisdiction of the principal matter, has jurisdiction of all its incidents.

Dexter, in reply.—1. There is only one authority produced, to show that the prize jurisdiction is exclusively in the courts of the capturing power. Rutherforth speaks only of cases where the proceeding is to condemn or restore the captured property. When he, or any other writer, gives the reasons for his opinion, the latter is worth just as much as the former, and no more. What is the reason? He says, it cannot be known, before trial, that forcible possession was lawful; and if unlawful, it could not give jurisdiction. It may be answered, in every case where jurisdiction is gained by possession, it is unknown, before trial, whether it was obtained lawfully, or by force or fraud. All right of jurisdiction from possession is thus equally denied. The other party cannot be injured, by submitting to the jurisdiction, while that uncertainty remains. If it shall appear, that the possession was unlawfully acquired, he will be restored to his right, by the exercise of jurisdiction. Rutherforth asserts, that the true ground of prize jurisdiction is, that the state of the captor is responsible to other states for his misconduct. It may be answered, that when the state has only granted a lawful commission, and has not assented to any unlawful act done by color of it, such state is not responsible, though the act be unlawful; *for *251] the naked unauthorized act, then, the state is not accountable. The unjust judgment of a neutral state, condemning the property, might make the latter state answerable, but not the former. The reasoning goes on the supposition, that the state of the captor might relieve itself from responsibility, by doing justice, in restoring the property. This can only be done, where the property can be reached by it. Holding jurisdiction would rather relieve the state of the captor from responsibility; for either the injury of the complaining party would be repaired, or the courts of his own country would determine that he had not suffered any. There is no distinction between the property being lawfully brought in, as in this case, or voluntarily, as in the case of *The Betsey*. The injured party has an election to proceed *in personam* against the owners, or *in rem* against the inanimate instrument of the wrong.

2. There may be a jurisdiction to restore, without invading the exclusive prize jurisdiction of the captor's country. Let the court take jurisdiction, and if it turns out to be a question of prize or no prize, then dismiss the suit. Suppose, the question to be, whether the captor had a commission, must we not proceed further, and see what is the extent of that commission? And if the act done exceed its limits, has not the neutral state a right to adjudge costs and damages to its citizens, injured without any authority from the captor's sovereign?

3. The vessel is in judicature, rightfully and lawfully. The party now protesting against the jurisdiction, had submitted to it for another purpose. He claims his property, upon the payment of salvage. *The obvious *252] answer to his demand is, when you have discharged all liens, you shall have it. The court of admiralty, having jurisdiction for another purpose, like a court of chancery in the case of a mortgage, has a right to do

complete equity. Why is restitution decreed in the case of violated territory? Because the courts of the neutral state, having jurisdiction for the principal purpose of avenging its violated sovereignty, also take jurisdiction of all the incidents.

March 11th, 1816. JOHNSON, J., delivered the opinion of the court.—It would be difficult to distinguish this case, in principle, from those of *The Cassius*, and *The Exchange*, 7 Cr. 116,(*a*) decided in this court. The only circumstance, in fact, in which they differ, is, that in those cases, the vessels were the property of the nation; in this, it belongs to private adventurers. But the commission under which they acted was the same; the same sovereign power which could claim immunities in those cases, equally demands them in this; and although the privateer may be considered a volunteer in the war, it is not less a part of the efficient national force, set in action for the purpose of subduing an enemy. There may be, indeed, one shade of difference between them, and it *is that which is suggested by Rutherforth in the passage quoted in the argument. The hull, or the owners [*253 of the privateer, may, perhaps, under some circumstances, be subject to damages in a neutral court, after the courts of the captor have decided that the capture was not sanctioned by his sovereign. But until such a decision, the seizure by a private armed vessel is as much the act of the sovereign, and entitled to the same exemption from scrutiny, as the seizure by a national vessel. In the case of *The Cassius*, which belonged to the French republic, the vessel was finally prosecuted and condemned on an information *qui tam*, under the act of congress, for an illegal outfit, and thus had applied to her, under the statute, the principle which dictated the decision in the case of *Talbot* v. *Jansen*, with relation to a private armed vessel. As to the restitution of prizes, made in violation of neutrality, there could be no reason suggested, for creating a distinction between the national and the private armed vessels of a belligerent. Whilst a neutral yields to other nations the unobstructed exercise of their sovereign or belligerent rights, her own dignity and security require of her the vindication of her own neutrality, and of her sovereign right to remain the peaceable and impartial spectator of the war. As to her, it is immaterial, in whom the property of the offending vessel is vested. The commission under which the captors act is the same, and that alone communicates the right of capture, even to a vessel which is national property.[1]

*But it is contended, that, admitting the general principle, that [*254 the exclusive cognisance of prize questions belongs to the capturing power, still, the peculiar circumstances of this case constitute an exception, inasmuch as the re-capture of the Mount Hope puts it out of the power of the French courts to exercise jurisdiction over the case. This leads us to inquire into the real ground upon which the exclusive cognisance of prize questions is yielded to the courts of the capturing power. For the

(*a*) In this case, it was determined, that a public vessel of war, belonging to the Emperor Napoleon, which was before the property of a citizen of the United States, and as alleged, wrongfully seized by the French, coming into our ports, and demeaning herself in a friendly manner, was exempt from the jurisdiction of this country, and could not be reclaimed by the former owner, in its tribunals.

[1] The Estrella, 4 Wheat. 298; Stoughton v. Taylor, 2 Paine 653.

appellants, it is contended, that it rests upon the possession of the subject-matter of that jurisdiction; and as the loss of possession carries with it the loss of capacity to sit in judgment on the question of prize or no prize, it follows, that the right of judging reverts to the state whose citizen has been divested of his property. On the other hand, I presume, by the reference to Rutherforth, we are to understand it to be contended, that it is a right conceded by the customary law of nations, because the captor is responsible to his sovereign, and the sovereign to other nations.

But we are of opinion, that it rests upon other grounds; and that the views of Vattel on the subject are the most reconcilable to reason and the nature of things, and furnish the easiest solution of all the questions which arise under this head. That it is a consequence of the equality and absolute independence of sovereign states, on the one hand, and of the duty to observe uniform impartial neutrality, on the other. Under the former, every sovereign becomes the acknowledged arbiter of his own justice, and *255] cannot, *consistently with his dignity, stoop to appear at the bar of other nations, to defend the acts of his commissioned agents, much less the justice and legality of those rules of conduct which he prescribes to them. Under the latter, neutrals are bound to withhold their interference between the captor and the captured; to consider the fact of possession as conclusive evidence of the right. Under this it is, also, that it becomes unlawful to divest a captor of possession, even of the ship of a citizen, when seized under a charge of having trespassed upon belligerent rights.

In this case, the capture is not made as of a vessel of the neutral power; but as of one who, quitting his neutrality, voluntarily arranges himself under the banners of the enemy. On this subject, there appears to be a tacit convention between the neutral and belligerent; that, on the one hand, the neutral state shall not be implicated in the misconduct of the individual; and on the other, that the offender shall be subjected to the exercise of belligerent right. In this view, the situation of a captured ship of a citizen is precisely the same as that of any other captured neutral; or rather, the obligation to abstain from interference between the captor and captured becomes greater, inasmuch as it is purchased by a concession from the belligerent of no little importance to the peace of the world, and particularly of the nation of the offending individual. The belligerent contents himself with cutting up the unneutral commerce, and makes no complaint to the *256] neutral power, not even *where the individual rescues his vessel, and escapes into his own port, after capture.

Testing this case by these principles, it will be found, that, to have sustained the claim of the appellants, the court below would have violated the hospitality which nations have a right to claim from each other, and the immunity which a sovereign commission confers on the vessel which acts under it; that it would have detracted from the dignity and equality of sovereign states, by reducing one to the condition of a suitor in the courts of another, and from the acknowledged right of every belligerent to judge for himself, when his own rights on the ocean have been violated or evaded; and finally, that it would have been a deviation from that strict line of neutrality which it is the universal duty of neutrals to observe—a duty of the most delicate nature with regard to her own citizens, inasmuch as through their misconduct she may draw upon herself the imputation of secretly sup-

porting one of the contending parties. Under this view of the law of nations on this subject, it is evident, that it becomes immaterial, whether the *corpus* continue *sub potestate* of the capturing power, or not. Yet, if the re-capture of the prize necessarily draws after it consequences so fatal to the rights of an unoffending individual, as have been supposed in the argument, it may well be asked, shall he be referred for redress to courts which, by the state of facts, are rendered incompetent to afford redress? The answer is, that this consequence does not follow from the re-capture. The courts of the captor *are still open for redress. The injured neutral, it is to be presumed, will there receive indemnity for a wanton or illicit capture; and if justice be refused him, his own nation is bound to vindicate or indemnify him. [*257

Some confusion of idea appears to hang over this doctrine, resulting chiefly from a doubt as to the mode in which the principle of exclusive cognisance is to be applied, in neutral courts, to cases as they arise; and this obscurity is increased by the apparent bearing of certain cases decided in this court in the years 1794 and 1795. The material questions necessary to be considered, in order to dissipate these doubts, are: 1st. Does this principle properly furnish a plea to the jurisdiction of the admiralty courts? 2d. If not, then, does not jurisdiction over the subject-matter draw after it every incidental or resulting question relative to the disposal of the proceeds of the *res subjecta?*

The first of these questions was the only one settled in the case of *Glass* v. *The Betsey*, and the case was sent back, with a view that the district court should exercise jurisdiction, subject, however, to the law of nations on this subject, as the rule to govern its decision. And this is certainly the correct course. Every violent dispossession of property on the ocean is, *primâ facie*, a maritime tort; as such, it belongs to the admiralty jurisdiction. But sitting and judging, as such courts do, by the law of nations, the moment it is ascertained to be a seizure by a commissioned cruiser, made in the legitimate exercise of the rights *of war, their progress is arrested; for this circumstance is, in those courts, a sufficient evidence of right. [*258

That the mere fact of seizure as prize does not, of itself, oust the neutral admiralty court of its jurisdiction, is evident, from this fact, that there are acknowledged cases in which the courts of a neutral may interfere to divest possession; to wit, those in which her own right to stand neutral is invaded: and there is no case in which the court of a neutral may not claim the right of determining whether the capturing vessel be, in fact, the commissioned cruiser of a belligerent power. Without the exercise of jurisdiction thus far, in all cases, the power of the admiralty would be inadequate to afford protection from piratical capture. The case of *Talbot* v. *Jansen*, as well in the reasoning of the judges, as in the final decision of the case, is fully up to the support of this doctrine.

But it is supposed, that the case of *The Mary Ford* supports the idea, that as the court had acknowledged jurisdiction over the question of salvage, its jurisdiction extended over the whole subject-matter, and authorized it to proceed finally to dispose of the residue between the parties litigant. That case certainly will not support the doctrine, to the extent contended for in this case. It is true, that the court there lay down a principle, which, in its

general application, is unquestionably correct, and which, considered in the abstract, might be supposed applicable to the present case. But this pre-
*259] sents only one of innumerable cases which occur in *our books, to prove how apt we are to misconceive and misapply the decisions of a court, by detaching those decisions from the case which the court propose to decide. The decision of the supreme court in that case is in strict conformity with that of the circuit court in the present case. For when the court come to apply their principle, they do not enter into the question of prize, between the belligerents, but decree the residue to the last possessor: thus making the fact of possession, as between the parties litigant, the criterion of right; and this is, unquestionably, consistent with the law of nations. Those points, which can be disposed of without any reference to the legal exercise of the rights of war, the court proceeds to decide; but those which necessarily involve the question of prize or no prize, they remit to another tribunal.

It would afford us much satisfaction, could we, with equal facility, vindicate the consistency of this court in the case of *Del Col* v. *Arnold*. To say the least of that case, it certainly requires an apology. We are, however, induced to believe, from several circumstances, that we have transmitted to us but an imperfect sketch of the decision in that case. The brevity with which the case is reported, which we are informed had been argued successively at two terms, by men of the first legal talents, necessarily suggests this opinion; and when we refer to the case of *The Cassius*, decided but the term preceding, and observe the correctness with which the law
*260] applicable to this case, in principle, is laid down in *the recital to the prohibitions, we are confirmed in that opinion. But the case itself furnishes additional confirmation. There is one view of it, in which it is reconcilable to every legal principle. It appears, that, when pursued by the Terpsichore, the Grand Sachem was wholly abandoned by the prize-crew, and left in possession of one of the original American crew, and a passenger; that, in their possession, she was driven within our territorial limits, and was actually on shore, when the prize-crew resumed their possession, and plundered and scuttled her. Supposing this to have been a case of total derelict (an opinion which, if incorrect, was only so on a point of fact, and one in support of which much might be said, as the prize-crew had no proprietary interest, but only a right founded on the fact of possession), it would follow, that the subsequent resumption of possession was tortious, and subjected the parties to damages. On the propriety of the seizure of the Industry, to satisfy those damages, the court give no opinion, but place the application of the proceeds of the sale of this vessel, on the ground of consent; a principle, on the correctness of the application of which to that case, the report affords no ground to decide.

But, admitting that the case of *The Grand Sachem* was decided under the idea that the courts of the neutral can take cognisance of the legality of belligerent seizure, it is glaringly inconsistent with the acknowleged doctrine in the case of *The Cassius*, and of *Talbot* v. *Jansen*, decided the term
*261] next *preceding; and in *The Mary Ford*, decided at the same term with that of *The Grand Sachem*. The subject has frequently, since that term, been submitted to the consideration of this court, and the decis-

ion has uniformly been, that it is a question exclusively proper for the courts of the capturing power.

Sentence affirmed.

The Edward: Scott, Claimant.

Admiralty practice.—Embargo.

In revenue or instance causes, the circuit court may, upon appeal, allow the introduction of a new allegation into the information, by way of amendment.

Under the 3d section of the act of congress of the 28th of June 1809, every vessel bound to a foreign permitted port, was obliged to give a bond, with condition not to proceed to any port with which commercial intercourse was not permitted, nor to trade with such port.

Where the evidence is sufficient to show a breach of the law, but the information is not sufficiently certain to authorize a decree, the supreme court will remand the cause to the circuit court, with directions to allow the information to be amended.[1]

Appeal from the Circuit Court for the district of Massachusetts. The offence charged in the information filed in this case, in the district court of Massachusetts, was, that the ship Edward, on the 12th day of February 1810, departed from the port of Savannah, *with a cargo, bound to a foreign port with which commercial intercourse was not permitted, [*262 without a clearance, and without giving a bond in conformity with the provisions of the act of congress of the 28th of June 1809. A claim was interposed by George Scott, of Savannah, in which he alleged, that the ship did not depart from Savannah, bound to a foreign port, in manner and form as stated in the information.

The district court condemned the ship; from which sentence, an appeal was taken to the circuit court, where the district-attorney was permitted by the court to amend the information, by filing a new allegation, that Liverpool, in Great Britain, was the foreign port to which the ship was bound, when she departed from Savannah, and that she did so depart, without having a clearance, agreeable to law. The circuit court affirmed the sentence, and the cause was brought before this court upon an appeal.

Harper, for the appellants and claimants.—1. The object of the 3d section of the act of the 2d of June 1809, was, to prevent the going to prohibited ports. When this supposed offence was committed, there were no prohibited ports, and the legislature could never mean to attach the penalty to ports permitted temporarily. If Liverpool was not, at the time, a prohibited port, and there were no other prohibited ports, the vessel was not obliged to give bond. Before the voyage was undertaken, it had become impossible to commit the offence with which the vessel is charged.

2. The information charges the vessel *with going to a forbidden [*263 port, without a clearance. But Liverpool was not a forbidden port, and therefore, the information cannot stand.

3. The allegation was, that the vessel proceeded from Savannah; but the proof was, that the voyage was undertaken from Charleston. The prosecutor could not lawfully prove a proceeding from any other port than that alleged in the information.

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[1] The Divina Pastora, 4 Wheat. 52; The Palmyra, 12 Id. 1; The Sarah Ann, 2 Sumn. 206.

The *Attorney-General* and *Law*, for the respondents, argued: 1. That the laws under which the supposed offence was committed, were in force at the time. [But as the argument is fully stated in the opinions of the judges, it is omitted here.]

2. Common-law strictness is not required in these proceedings, and it is unreasonable, to insist on the particular foreign port being named. The prosecutor had a right to prove a voyage from Charleston. It has been decided in this court, that it is sufficient, if the offence be laid in the words of the act. Even the rules of the common law, applicable to indictments, do not require time and place to be proved as stated; and the only case where a variance is fatal is, where it affects the jurisdiction of the court, as where criminal proceedings are required to be local. (2 Hawk. ch. 25, § 83; ch. 23, § 88, 91; 2 Hale P. C. 179, 180.) In no case, in civil proceedings, does the common law consider the venue as matter of substance, except where both the proceedings are *in rem*, and the effect of the judgment could not be obtained, if the offence were laid in a wrong place. Cowp. 176.
*264] The circuit court had a *right to amend the proceedings, but the practice of this court is, to remand the cause to the circuit court, with directions to amend.

March 15th, 1816. Washington, J., delivered the opinion of the court, and after stating the facts, proceeded as follows:—Three questions have been made and discussed by the counsel, 1st. Whether the circuit court could, upon the appeal, allow the introduction of a new allegation into the information, by way of amendment? 2d. Whether the omission to give the bond required by the 3d section of the act of the 28th of June 1809, subjected the vessel to forfeiture? and if it did, then, 3d. Whether the information, which alleges the voyage to Liverpool to have commenced at Savannah, is supported by the evidence in the cause, and whether the sentence below ought not to be reversed for this reason, although the court should be satisfied that the ship departed from Charleston for Liverpool, without giving the bond required?

Upon the first question, it is contended for the claimant, that the circuit court has only appellate jurisdiction, in cases of this nature, and that to allow the introduction of a new allegation, would be, in fact, to originate the cause in the circuit court. This question appears to be fully decided by the cases of the *Caroline* and *Emily*, determined in this court. These were informations *in rem*, under the slave-trade act, and the opinion of this court was, that the evidence was sufficient to show a breach of the law; but that
*265] the informations were not sufficiently certain *to authorize a decree. The sentence of the circuit court was, therefore, reversed, and the cause remanded to that court, with directions to allow the informations to be amended. But even if an amendment would be improper, if it stated a different case from that which was presented to the district court, the objection would not apply to this case, in which the offence, though more definitely laid in the second allegation than it was in the first, is yet substantially the same. In both of them, the charge is, departing from Savannah to a foreign interdicted port, without giving bond, and the amendment, in substance, merely states the particular foreign port to which the vessel was destined.

The next question is, whether the omission to give the bond required by

the third section of the act of the 28th of June 1809, subjected the vessel to forfeiture? It is contended by the claimant's counsel, that after the end of the session of congress in which this law passed, there were no foreign ports either permitted or interdicted by law, inasmuch as the embargo laws which prohibited exportations from the United States to foreign countries, would then stand repealed, by force of the 19th section of the act of the 1st of March 1809, to interdict the commercial intercourse with Great Britain and France, and the 2d section of the above act of the 28th of June. That all the ports of the world being thus permitted to the commerce of the United States, no subject would remain on which the 3d section would operate; and consequently, there could be no necessity for giving a bond not to go to an interdicted port.

*An attentive consideration, however, of the two acts above mentioned, will show, that the argument is not well founded. The 3d [*266 section of the act of the 28th of June 1809, declares, that during the continuance of that act, no vessel, not within the exceptions therein stated, shall be permitted to depart for a foreign port, with which commercial intercourse has not been, or may not be, permitted by virtue of this act, or the act of the 1st of March 1809. And if bound to a foreign port with which commercial intercourse has been, or may be, permitted, still, she shall not be allowed to depart, without bond being given, with condition not to proceed to any port with which commercial intercourse is not thus permitted, nor be directly or indirectly engaged, during the voyage, in any trade with such port. This law was in full force, at the time the offence charged in this information is alleged to have been committed.

If, then, there was any country with which commercial intercourse was interdicted, and would continue to be so, after the end of the session, during which this law was passed, it seems to be admitted in the argument, that a vessel destined to a foreign permitted port would be liable to forfeiture, unless the above bond had been given. To ascertain whether there was any such country, it will be necessary to inquire, what is the true meaning of the term, commercial intercourse? No higher or more satisfactory authority upon this subject need be resorted to than the legislature itself, by which this act was passed.

The act of the first of March 1809, which is entitled, "an act to interdict the commercial intercourse *between the United States and Great [*267 Britain," &c., contains nineteen sections. The first ten (exclusive of the first, which denies to the vessels of those countries the privilege of entering the ports and harbors of the United States) forbid the importation into the United States of the products and manufactures of Great Britain and France, or of any other part of the world, if brought from the ports of either of those countries. The 12th section repeals, after the 15th of March 1809, all the embargo laws, except as they relate to Great Britain and France; and the 19th section repeals them, after the end of the succeeding session of congress, as to all the world. The 13th, 14th, 15th, 16th and 18th sections are intended to provide securities for enforcing the non-importation system established by this law; and the 17th section repeals the former non-importation law of April 1806.

Hence, it appears, that the commercial intercourse which this law was intended to interdict, consisted of importations from Great Britain and

France, and of the products and manufactures of those countries, and of exportations to them. In the 11th section, it is called the trade of the United States, suspended by that act and the embargo laws, which trade the president is authorized to renew, by his proclamation, upon a certain contingency, and in pursuance of this power, he did, accordingly, renew it with Great Britain, in April 1809.

Thus stood the commercial intercourse of the United States with foreign nations, at the commencement of the extraordinary session of congress, *268] which *commenced in May 1809; permitted by the above law, both as to exportations and importations with all the world, except Great Britain and France, and their dependencies; and as to them, interdicted in both respects as to France, and permitted with Great Britain, by virtue of the president's proclamation. But as the law of the 1st of March would expire, by its own limitation, after the end of the May session, whereby, not only exportations, but the importations forbidden by that act, in relation to France, would become lawful; the 1st section of the act of the 28th of June 1809, revives the whole non-importation system, except so far as it had been permitted to Great Britain by the proclamation; and the 2d section declares, in effect, that the embargo laws, which were repealed by the 12th and 19th sections of the act of the 1st of March, shall be and remain repealed, notwithstanding the expiration of that law by its own limitation.

From this view of the subject, it appears, that the non-importation system of the 1st of March was to continue in force, until the end of the session of congress, which would succeed that of May 1809, except as to Great Britain; and that, after the end of that session, the embargo laws would cease to operate against any nation.

If, then, importation be a branch of commercial intercourse, in the avowed meaning of congress, and if, on the 28th of June, and from thence until the end of the next session of congress, it was to continue in force, as to France (unless the president should declare, by proclamation, the revoca- *269] tion of *her offensive edicts), but were inoperative as to Great Britain, it follows, inevitably, that in February or March 1810, when the offence is charged to have been committed by this vessel, there were foreign ports permitted, and others interdicted, to the commerce of the United States; and consequently, that the destination of this vessel being to Liverpool, a bond ought to have been given, such as the 3d section of the act of the 28th of June required, not to go to an interdicted port. This construction of the law has frequently been given to it by this court: but the serious opposition made to it, by the counsel for the claimant, will account for the deliberate examination of the question which is contained in this opinion.

As to the last question, a majority of the court being of opinion, upon a view of the whole evidence, that the voyage to Liverpool had its inception at Savannah, the objection as to the form of the information, in this respect, has nothing to stand upon. Were the evidence, on this point, more doubtful than it is, the court would remand the cause, with directions to the circuit court to allow an amendment, by inserting Charleston instead of Savannah, from which the claimant could derive no benefit, since it is not denied, that the ship departed from Charleston directly for Liverpool, without giving bond.

The Edward.

LIVINGSTON, J., (*dissenting.*)—This ship was proceeded against under the 3d section of the act of the 28th of June 1809, for sailing from the United States to a foreign port with which commercial intercourse had not *been, nor was then, permitted, by virtue of that act, or of the act [*270
to interdict commercial intercourse between the United States and Great Britain and France, without a clearance, and without a bond having been given, in conformity to the provisions of the said act, not to proceed to any port with which commercial intercourse was not then, by law, permitted, nor be directly or indirectly engaged, during the voyage, in any trade or traffic with such place. The only question, on this part of the case, is, whether, at the time of the departure of the Edward from Savannah, which was in February 1810, there existed any law subjecting her to forfeiture, if the owner omitted giving the bond prescribed by the 3d section of the act above mentioned?

By the claimant, it is contended, that after the end of the session of congress, in which this act passed, which occurred on the 28th of June 1809, there ceased to exist in the United States any distinction between prohibited and permitted ports, within the meaning of the restrictive system; that the embargo laws, which alone restricted exportations to foreign countries, had, at that time, become repealed by the operation of the last section of the act of the 1st of March 1809, as well as by that of the 2d section of the act of the 28th of June, of the same year; that by this repeal, the whole world, so far as could depend on our own laws, was open to the vessels of the United States, and consequently, that it could not be illegal, to neglect giving a bond not to go to an interdicted port, if, at the time of sailing, [*271
there was *no port in the world to which that interdiction could apply.

In examining this question, my attention will be confined to a consideration of the two acts which have just been mentioned; because, if the interdiction which is supposed to have existed, when the Edward left Savanah, is not to be found in either of these laws, no other has been referred to as creating it. Let us, then, see what has been done, and if there be no ambiguity in the provisions of these two acts on the subject before us, it will be safer, in a case so highly penal, to adhere to the letter of them, than to incur the danger of falling into error, by indulging in a mode of interpretation which was adopted at the bar, and which was too conjectural to be in any degree satisfactory.

By the 12th section of the act of the 1st of March 1809, the embargo law was repealed as to all nations, except Great Britian and France, and their dependencies. This repeal, necessarily and immediately, created a distinction between ports with which commercial intercourse was permitted, and those to which it was interdicted; and we accordingly find congress, in the very next section of this act, providing for this new state of things, by requiring bonds to be given, when vessels were going to ports which had now become permitted ports, not to proceed to any port or place in Great Britain or France, &c. No such regulation had been prescribed, in consequence merely of the non-importation law, and for the plainest reason; for, while they prohibited an introduction into the United *States, [*272
from any part of the world, of the produce and manufactures of France and England, our vessels were allowed to go to those countries, and thus continue a commercial intercourse with either or both of them, limited,

it is true, as to the articles which might be brought from thence, but uncontrolled as to the commodities which might be carried thither, or as to the port to which they might go. This partial trade between the two countries, whether originating in the acts of the one government or the other, may frequently take place; but cannot, when it does, with any propriety, be termed an interdiction or suspension of commercial intercourse, which, *ex vi termini*, means an entire cessation, for the time being, of all trade whatever. It was under the embargo laws alone, that intercourse was interdicted between this country and Great Britain and France, as it was also with the rest of the world; which interdiction, as it arose out of those laws, so it is expressly continued, as it regards those two kingdoms, by excepting them out of the operation of the 12th section of the act of the 1st of March 1809, which repealed the embargo laws as to all other parts of the world. It would seem, then, that after this, no other inquiry would remain, than to ascertain whether the commercial intercourse thus interdicted by the act laying an embargo, and continued, or rather not repealed, as it respected Great Britain and France, by the 12th section just mentioned, was still in force at the time this offence is alleged to have been committed.

Without leaving the act now under consideration, we find, that it was *273] *to continue in force only until the end of the next session of congress, and that the act itself, which lays the embargo, was to expire at the same time. This event took place on the 28th of June 1809. Now, unless some law were passed, before that time, to continue the embargo longer, or, after that period, to revive it, how can it be said, that, after that day, a distinction could still continue between prohibited and permitted ports? This brings us to see whether anything was done by congress at the extraordinary session which commenced in May 1809. By an act which they passed on the 28th of June of that year, they continued in force, until the end of the next session, which happened on the 1st of May 1810, the 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 17th and 18th sections of the act of March 1809, and they declare, that all the acts repealed by the said act, shall remain repealed, notwithstanding any part of that act might expire by its own limitation. Now, if we return to the sections which are revived, we find them containing nothing more than an interdiction of the harbors and waters of the United States to vessels sailing under the flag of Great Britian or France, or owned by subjects of either, accompanied with a prohibition to import from any foreign port whatever, into the United States, any goods, &c., being of the growth, produce or manufacture of those countries, or their dependencies. In not one of them is found a prohibition to our citizens against trading with either of those countries. Their revival, then, does not operate so as to create a single interdicted port *274] in the whole commercial world. *Such interdiction, as has already been said, was a creature of, and owed its existence solely and exclusively to, the embargo laws.

If it be said, that such prohibition necessarily flowed from the revival of these sections, notwithstanding their entire silence on the subject, then would our vessels have been under a disability of going to any port of the world, because they were no more at liberty to bring British and French goods from other countries than from Great Britain and France; and yet the 12th section of this act, by only taking the embargo out of their way,

permitted them to go to any port of the world, except to Great Britain and France. But in availing themselves of this permission, they were still under a restraint not to bring to this country any British or French goods. The 11th section of the act of March 1809, which is continued by that of June, of the same year, authorizes the president, in certain cases, to issue his proclamation ; after which, the trade of the United States, suspended by that act, and by the embargo law, may be renewed with Great Britain or with France, as the case may be. In this section we are presented with a distinction, taken by the legislature themselves, and which, indeed, pervades the whole system between the suspension of trade created by that act, and by the embargo laws. The two systems were entirely different, and enforced by different and distinct penalties. By the one, our vessels were at liberty to go where they pleased ; by the other, they were prevented from going to any foreign port whatever. The revival, then, of these sections, did not preclude *our vessels from going to any part of the world, but only [*275
forbid their bringing to this country the articles whose importation was prohibited. If the 12th section had also been revived, then, no vessel of the United States could have gone to Great Britain or France, and the distinction of permitted and forbidden ports would have continued until the 1st of May 1810. But as the whole embargo system expired in June 1809, not only by the 19th section of the act of March 1809, but also by the express provision of the act of June, of the same year, the conclusion is inevitable, that when the Edward sailed, there was no law in force by which any distinction of prohibited and permitted ports existed ; and that, therefore, the not giving the bond in question was no violation of law.

No notice has been taken of either of the proclamations of the president, because, if the view here presented be correct, neither of them has any bearing on the question. Admitting the validity of both of them, the latter would not make the ports of England prohibited ports, if the laws which created the distinction had done it away, by opening to the citizens of the United States the ports of every nation on the globe. The president's power could only exist, while such a state of things continued, as suggested the necessity of, and would render, an interference on his part proper and useful, and no longer.

It may be, and has been said, that the opinion here expressed is at variance with the public opinion on this subject, as well as with the understanding *of the collectors and some other officers of government ; and [*276
that even this court has, at its present term, condemned property for the same offence with which the Edward is charged. The answer to all this is, that the condemation alluded to passed *sub silentio*, without bringing the point distinctly to our view, and is, therefore, no precedent ; and that, as to public opinion, or that of the officers of government, however respectable they may be, it can furnish no good grouds for enforcing so heavy a penalty, unless, on investigation, it shall appear to have been correctly formed. It was also urged, that congress must have supposed the law to be as it is now contended for by the attorney-general, or they would not have passed the 3d section of the act of the 28th June 1809, when there was no state of things to which its provisions could apply. To this, the answer which was given at the bar is satisfactory. At the time of the bringing in of that bill, the embargo laws were still in force, and would continue so, until

the end of that session. Now, as it could not then be foreseen, that the bill would not become a law, until the last day of the session, a prohibition not to go to prohibited ports was necessary, but became nugatory, by the law not passing until the time prescribed for the extinction of the whole system.

Upon the whole, it appears to me clear, that there was no law in force, when the Edward left Savannah, interdicting her from going to any foreign port whatever, or requiring from her owners any bond not to go to such
*277] port; and under this persuasion, *I have thought it a duty to express my dissent from the judgment which has been just rendered.

But were the case doubtful, I should still arrive at the same conclusion, rather than execute a law so excessively penal, about whose existence and meaning, such various opinions have been entertained. To satisfy ourselves that great difficulties must exist, in relation to this law, we have only to look at the progress of the case now before us. The offence with which the Edward is charged in the information, is going, without giving bond, to a prohibited foreign port. The condemnation in the circuit court, however, proceeded on the ground of all the ports of Great Britain (to one of which it was alleged she was going) being permitted ports. In the very able argument which was made here, in support of the prosecution, it was attempted to be shown, that Liverpool was not a permitted, but an interdicted, port. This state of uncertainty, which, it would seem, could hardly exist, if the legislature had expressed themselves with that precision and perspicuity which are always expected in criminal cases, would, with me, independent of my own convictions that there was no such prohibiting law, have been a sufficient reason for restoring this property to the claimants.

Sentence of the circuit court affirmed.(*a*)

(*a*) In order to enable the reader the better to understand this case, the following account of the dates and substance of the British orders in council, the French decrees, and the consequent acts of the United States government, has been subjoined.

*278] *On the 16th of May 1806, the British government issued an order in council, declaring the coast, included between the Elbe and Brest, in a state of blockade. On the 21st of November 1806, the French emperor issued his Berlin decree, declaring Great Britain and her dependencies in a state of blockade. On the 7th of January 1807, the British government issued an order in council, prohibiting neutral ships from carrying on trade from one enemy's port to another, including France and her allies.

On the 11th of November 1807, the British orders in council were issued, which declared the continental ports, from which British ships were excluded, in a state of blockade (except in case of ships cleared out from Great Britain whose cargoes had paid a transit duty), and rendered liable to condemnation, all neutral ships, with their cargoes, trading to or from the ports of France, or her allies, and their dependencies, or having on board certificates of origin. On the 7th of December 1807, the French emperor issued his Milan decree, declaring that any neutral ships which should have touched at a British port, or paid a transit duty to the British government, or submitted to be searched by British cruisers, should be liable to condemnation.

On the 22d of December 1807, the American embargo took place. On the 1st of March 1809, the embargo was removed, and a non-intercourse substituted with both France and England. On the 19th of April 1809, a negotiation was concluded by Mr. Erskine, in consequence of which the trade with Great Britain was renewed, on the 10th of June.

On the 26th of April 1809, a British order in council was issued, modifying the former blockade, which was henceforth to be confined to ports under the governments

*Mutual Assurance Society *v.* Watts's Executor.

Mutual insurance company.

Under the 6th and 8th sections of the act of assembly of Virginia, of the 22d of December 1794, property pledged to the Mutual Assurance Society, &c., continues liable for assessments, on account of the losses insured against, in the hands of a *bonâ fide* purchaser, without notice.

A mere change of sovereignty produces no change in the state of rights existing in the soil; and the cession of the district of Columbia to the national government, did not affect the lien created by the above act, on real property situate in the town of Alexandria, though the personal character or liability of a member of the society could not be thereby forced on a purchaser of such property.

Appeal from the Circuit Court in the district of Columbia for Alexandria county. The cause was argued by *Swann*, for the appellants, and by *Taylor* and *Lee*, for the respondents.

March 16th, 1816. Johnson, J., delivered the opinion of the court, as follows:—*This is a bill in chancery, filed by the complainants, to charge certain premises, in the possession of the defendant, situate in [*280 the town of Alexandria, with the payment of a sum of money, assessed in pursuance of the laws establishing the Mutual Assurance Society, for *quotas* becoming due, after his testator acquired possession. The executor has, in fact, sold the premises, under a power given him by the testator, but the money remains in his hands; and it is conceded, that the sole object now contended for is, to charge the money arising from the sale of the land in question, with the assessment to which, it is contended, that the land was liable. The insurance was made in 1799, and the property sold to the defendant's testator in 1807, long after the town of Alexandria ceased to be subject to the laws of Virginia. It is admitted, that the sale was made without notice of this incumbrance (if it was one), and the *quota* demanded was assessed on the premises, for a loss which happened subsequent to the transfer.

The points made in the case arise out of the construction of the 6th and 8th sections of the act of Virginia, passed the 22d of December 1794. The 6th section is in these words: "If the funds should not be sufficient, a repartition among the whole of the persons insured shall be made, and each shall pay, on demand of the cashier, his, her or their share, according to the

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of Holland (as far north as the river Ems) and France, together with the colonies of both, and all ports of Italy, included between Orbitello and Pesaro.

On the 10th of August 1809, the non-intercourse with Great Britain again took place, in consequence of Mr. Erskine's arrangement not being ratified.

On the 1st of May 1810, the trade with both Great Britain and France was opened, under a law of congress, that whenever either power should rescind its orders or decrees, the president should issue a proclamation to that effect; and in case the other party should not, within three months, equally withdraw its orders or decrees, that the non-importation act should go into effect, with respect to that power. On the 2d of November 1810, the president issued his proclamation, declaring the Berlin and Milan decrees to be so far withdrawn, as no longer to affect the neutral rights of America; and the orders in council not being rescinded.

On the 2d of February 1811, the importation of British goods, and the admission of British ships into America, were prohibited. On the 4th of April 1812, an embargo was laid in the United States, and on the 18th of June following, war was declared against Great Britain.

sum insured, and rate of hazard at which the building stands, agreeably to the rate of premium, for which purpose it is hereby declared, that the subscribers, as soon as they shall insure their property in the Assurance Society aforesaid, do mutually, for themselves, *their heirs, executors, administrators and assigns, engage their property insured, as security, and subject the same to be sold, if necessary, for the payment of such *quotas*." And the 8th section is in these words: "To the end that purchasers or mortgagees of any property insured by virtue of this act, may not become losers thereby, the subscriber selling, mortgaging or otherwise transferring such property, shall, at the time, apprise the purchaser or mortgagee of such assurance; and indorse to him or them the policy thereof. And in every case of such change, the purchaser or mortgagee shall be considered as a subscriber, in the room of the original, and the property so sold, mortgaged or otherwise transferred, shall still remain liable for the payment of the *quotas*, in the same manner as if the right thereof had remained in the original owner."

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In the argument, two points were made, 1st, That property pledged to the society remained liable for the *quotas* to a purchaser without notice. 2d. That the purchaser, by the purchase of such property, although without notice, became, by virtue of the 8th section, a member of the society, and liable, in all respects, as such.

The second of these questions is now withdrawn from the consideration of this court, by an agreement entered on record. And it must be admitted, that whatever may be the strict construction of the 8th section, and its operation in the state of Virginia, so far as it intended to force on the purchaser a personal character or liability, it could have no operation in the town of Alexandria, at the date of this transfer. *The laws of Virginia had then ceased to be the laws of Alexandria, and it could only be under an actually existing law, operating at the time of the transfer, that the character of membership in the Virginia company would be forced upon the purchaser. This is not one of those cases in which tenure attaches to an individual a particular characteristic or obligation; such cases arise exclusively between the occupant of the soil, and the sovereignty which presides immediately over the territory. The transfer, therefore, of the district of Alexandria to the national government, put an end to the operation of the 8th section, so far as it operated, by mere force of law, independent of his own consent, to fasten on the purchaser the characteristics of a member. But it is otherwise with regard to the soil. The idea is now exploded, that a mere change of sovereignty produced any change in the state of rights existing in the soil. In this respect, everything remains in the actual state, whether the interest was acquired by law, under a grant, or by individual contract. (See *Korn* v. *Mutual Assurance Society*, 6 Cr. 199.)

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We consider the question, then, as reduced to this: Does property pledged to the society, continue liable for assessments, in the hands of a *bonâ fide* purchaser, without notice, notwithstanding that he does not become a member by the transfer?

Here, we give no opinion on the extent or meaning of the words "property insured," how far they will operate to charge the lands on which buildings stand. The question was not made in the argument, and is *probably of no consequence in this or any other case. We only notice it, in order that such a construction may not be supposed

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admitted, as is too often concluded, because a court passes over a question *sub silentio.*

Whatever be the property thus pledged, it is very clear, that the words of the 6th section are abundantly sufficient, to create in it a common-law lien, not only in the hands of the original subscriber, but by express words, in those of his assignee. If the case rested here, there would be no doubt or difficulty; but every law, and every contract, must be construed with a reference to the subject of that law or contract, and which it is designed to answer. In this view, we readily concede, that the duration of the lien could not extend beyond the duration of the liability of the subscriber to pay the premium; nor could the liability of the subscriber extend beyond the liability of the company to indemnify him. On the other hand, it would seem, that as long as the company could exact of the subscriber the premium, they ought to be held liable to indemnify him. It will, then, be conceded, that the liability of the subscriber, and of the company, are mutual, correlative and co-extensive, and it remains to be examined, how this concession affects the case.

It is very clear, that there are but three ways by which a subscriber can cease to be a member: 1st. By the consumption of the buildings insured, which results from the nature of the contract. 2d. By complying with the stipulations of the 9th article of the rules and regulations of the society. *3d. By substituting a vendee in his place, in conformity with the 8th section of the act of the 22d December 1794. If, then, a subscriber [*284 has not become discharged in one of these three ways, what is to prevent the society from pursuing their summary remedy against him? They are not bound to search for his vendee, or to raise the money by a sale of the property pledged; much less are they bound to prosecute their remedy against a purchaser whose name is unknown to them, or who may be absent from the state, or from the United States, or insolvent, or protected, at the time, by some legal privilege. Their contract is with the original subscriber; their rules point out the mode in which he is to extricate himself from this liability, and if he has not pursued it, what defence is left him against a suit instituted by the society? The court cannot imagine one, that could avail him. He cannot urge, that he has parted with the property. The rules point out to him the conduct that he is to pursue in that event. He may give notice to the vendee of the insurance, and tender an assignment. If the vendee refuse to receive it, he is bound to remain but six weeks longer under the obligation to pay his *quotas* and indemnify the vendee, at the end of which time, he will be entitled to a discharge, upon giving due notice, and complying with the other requisitions of the 9th section. Nor can he urge, that he has no longer any interest in the thing insured; this, if any plea at all, is none in his lips. It belongs to the insurer, to avail himself of it, if it belongs to any one. But it is a plea not true in fact; for he continues *to [*285 indemnify his vendee against the *quotas* that may be assessed, which, by possibility may reach to the value of the whole property sold or insured; and, if correct in principle or fact, still, this plea could not avail him, since it is in consequence of his own folly or *laches*, that he continues liable to pay the premium of insurance for another's property. And should it be urged, that this would be converting an actual insurance into a wager policy, two answers may be given to it, either of which is sufficient; that there is noth-

ing illegal in a wager policy, in itself, and if there were, it is no objection in this case, when it results from the constitution and laws of the society.

But it may be contended, that the insurer is discharged, and therefore, the liability for the *quotas* ceases. It is unquestionably true, as a general principle, that where an insurer runs no risk, equity does not consider him entitled to a premium; and although there exist some reasons in policy and constitution of this society to apply it, in its fullest extent, to this case, yet, to give the argument its utmost weight, we are disposed to concede it. But what has occurred in this case, to discharge the underwriters from their contract? The subscriber was clearly not discharged from his liability to them, and this single consideration furnishes a strong reason for holding them still bound under their contract. What has the subscriber done, inconsistent with that contract? The only act he can be charged with, is alienating, without indorsing the policy. But alienation *alone is perfectly consistent with *286] the contract, for the policy issues to him and his assigns; and so far from interposing any obstruction to alienation, provision is made for that very case, and unlimited discretion vested in the subscriber, to indorse his policy to whom he pleases. Nor is alienation, without indorsing the policy, considered in any more offensive light; inasmuch as the 8th section, which enforces the assignment, declares expressly, that it is for the benefit of purchasers and mortgagees, "to the intent that they may not become losers thereby." It is not pretended, that it is for the society's own security; nor do they ever require notice to be given them, in case of such transfer of the policy. As to them, therefore, it is an innocent act, and we see no ground on which the society can be discharged, either to the vendor or vendee—they certainly remain liable, and although it may be a question to which of them equity would decree the money, yet, to one or the other, it certainly would be adjudged; but it is not material to this argument which, as it is a question between the vendor and vendee.

If, then, the case presents no legal ground for discharging either insurer or assured from the contract, and the lien created by the 6th section be commensurate with the liability of the assured, it will follow, that the plaintiffs, in this case, ought to have a decree in their favor.

But we will examine, at a closer view, the liability of the property in the hands of the vendee. That he is not liable to the summary remedy, is evi- *287] dent, from a variety of considerations. He must, then, be *brought into chancery, to have his property subjected to the consequences of the lien, whenever a loss happens and a *quota* is assessed. In that case, his defence will always be just what it is in this—that he purchased without notice. But this was never held to be a defence to a bill to foreclose a mortgage, which is precisely a similar case to this. Nor is it any better defence, to urge that he could derive no benefit under the policy, in case of a loss; for this is precisely the same defence, a little varied, as will be seen, by supposing that the vendee of a mortgagor should plead, to a bill of foreclosure, that the money borrowed did not come to his use. But his case is not as good as that of the vendee of the mortgagor in the case supposed; for the 8th section makes provision for his relief. That section says, "to the end that purchasers or mortgagees of any property insured, may not become losers thereby," the vendor shall give them notice, and indorse the policy over. In what manner shall the purchasers or mortgagees become

losers, unless the lien is to continue on the property in their hands? If the vendor be guilty of the folly of paying the *quotas*, and the vendee never receives notice of the lien, through a demand from the society, there is no damage sustained. If he should be assailed with such a demand, he has a right to require of the vendee an assignment of the policy; and as there existed an original duty to make such an assignment, it may well be held to operate, *nunc pro tunc*, and carry with it all the benefits of an original assignment.

*But it is contended, that the 8th section explains and limits the 6th section, in such a manner as to restrict the duration of the lien, in the hands of the vendee, to those cases only in which the transfer of the policy also takes place. This consequence cannot be logically maintained. The argument is, that the words "such change," mean only a change of the property, attended with an assignment of the policy, and that if the legislature had supposed that the property sold would, in the hands of the vendee, remain subject to the lien, they would not expressly have subjected it in such a case. But this section will, with philological correctness, admit of a different construction, and a construction more consistent with legal principles, inasmuch as it will not admit of an implication inconsistent with the preceding section, and even with other parts of the same section. Nor, if the construction on which this argument is founded were unavoidable, would the conclusion follow which the argument asserts. The question is, what is the meaning of the words "in every change," in the section under consideration? The solution is only to be found, by referring to the preceding and only other clause of the same section; and there we find, that a general provision is inevitably to be made for every possible change of sale or purchase. The operation of the clause will, then, be only to confirm and support the general words of the sixth section, and if it left any doubt with regard to the duration of the lien, in the hands of the vendee, to remove those doubts by express provision. This construction is also the most consistent with the recital *in the first clause of the same section, which, as has been before observed, with another view, is founded altogether on the idea, that property sold remained pledged to the society, in the hands of the vendee, whether with or without notice; as, in that case alone, could vendees or mortgagees need the protection held out to them in that clause. [*288 [*289

But if a different construction could legally be given to that section, so as to restrict the words "every such case," to mean those cases only which were attended with an assignment of the policy, it would not follow, that the lien ceased its operation in all others. To apply to this case the maxim, *expressio unius est exclusio alterius*, would be a glaring sophism. For, the only principle on which such a conclusion could be founded would be, that the repetition of a legal provision, included, with many others, in another law, produced a repeal of all others, by necessary implication. Such an implication may be resorted to, in order to determine the intention of the legislature, in a case of doubtful import, but cannot operate to destroy the effect of clear and unequivocal expressions. An obvious and unanswerable objection to giving this effect to this clause, is, that it puts it in the power of the subscriber to exonerate the property from the lien, by the single act of sale, not even sustaining it for the term of six weeks after the notice given of his intention to withdraw; an effect, glaringly inconsistent, no less

with the express words, than with the general view of the law on the subject. For there is nothing in the act which obliges the vendee to accept an assignment. *A tender to him, therefore, cannot subject him to any onerous consequences. He does no more than what he may lawfully do. If, then, the lien ceases, unless he accepts the assignment, and it is legally at his option to accept or refuse, the subscriber, in having the right to sell to whom he pleases, has also the duration of the lien submitted to his will.

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Some difficulty has also existed in the minds of some of the court, on the contingent nature of this lien, whether the lien was complete to all purposes, at any period before the assessment of a *quota*. But on this subject, the majority are of opinion, that, as to legal incumbrancy, or duration of a lien, it makes no difference, whether its object is to secure an existing debt, or a contingent indemnity. In the case of *Shirras* v. *Caig*, 7 Cr. 34, this court sustained a mortgage, given to secure an indorser against notes which he might indorse, where he had entered into no stipulation to indorse for the mortgagor. And in the case of bonds given for the discharge of duties, offices or annuities, it never was maintained as an objection, that the object of the lien was future, contingent or uncertain. In this case, the mutual stipulation to indemnify each other against losses, operates as a purchase of the lien, and places the parties on strong equitable grounds as to each other.

Some cases were cited in the argument, from the reports of decisions which have been made in the courts of Virginia. This court uniformly acts under the influence of a desire to conform its decisions to those of the state courts on their local laws; and *would not hesitate to pay great respect to those decisions, if they had appeared to reach the question now under consideration. But they are pursuaded, that those cases do not come up to the present. In the case of *Greenhow* v. *Barton* (1 Munf. 598), it is true, that the decision of the district court, which was finally confirmed, was in favor of the purchaser, without notice. But it was solely on the question, whether he was liable to the summary remedy, or, in other words, liable generally, as a member. And the *Case of Anna Byrd*, reported in the cases of the general court (1 Virg. Cas. 170), was likewise the case of a motion for a summary judgment. In the latter case, the court went much further in charging the vendee, than this court is called upon to proceed in the present case. But in neither of those cases, was a bill filed to charge the vendee, as in the present; nor was the question brought up in either, detached from that of his general liability as a member.

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The decree below will be reversed, and a decree ordered to be entered for the complainants.

Livingston, J., and Story, J., dissented.

Decree reversed.

*Walden *v.* Heirs of Gratz.

Maintenance.—Limitation.

Under the act of assembly of Kentucky, of 1798, entitled, "an act concerning champerty and maintenance," a deed will pass the title to lands, notwithstanding an adverse possession.

The statute of limitations of Kentucky does not differ essentially from the English statute of 21 James I., c. 1, and is to be construed as that statute, and all other acts of limitation founded upon it, have been construed. The whole possession must be taken together; when the statute has once begun to run, it continues; and an adverse possession under a survey, previous to its being carried into grant, may be connected with a subsequent possession.[1]

Error to the Circuit Court for the district of Kentucky. This was an action of ejectment, in which the defendants in error were the lessors of the plaintiff in the court below. The declaration in ejectment was returned to the November term of that court, 1813. At the May term 1814, the suit was abated as to one defendant; judgment by default was entered against Joseph Day, another defendant; and the defendants were admitted to defend, instead of the casual ejector.

The lessors of the plaintiff claimed under a patent issued to John Craig, in November 1784. On the 20th of April 1791, John Craig conveyed the lands mentioned in the declaration, in trust, to Robert Johnson, Elijah Craig and the survivor of them. On the 11th of February 1813, Robert Johnson, styling himself surviving *trustee, conveyed to the lessors of the plaintiff. The defendants below, now plaintiffs in error, claimed [*293 under a patent issued to John Coburn, in September 1795, founded on a survey made for Benjamin Netherland, in May 1782. John Coburn, claiming under the said survey, entered thereon, about the year 1790, and dwelt in a house, within the limits of said survey, but without the lines of Craig's patent. On the trial, the counsel for the defendants below moved the court to instruct the jury:

1st. That if the defendants, and those under whom they claim, were in the actual adverse possession of the lands in question, at the making of the deed by Craig's trustee, to the lessors of the plaintiff, that deed did not pass such title as would enable them to recover in this suit.

2d. That if the defendants, and those under whom they claim, were in the actual adverse possession of the lands in question, at the making of the deed by Craig's trustee to the lessors of the plaintiff, and had held such adverse possession for twenty years next before said time, that said deed did not pass such title as would enable the plaintiffs to recover in this suit.

3d. That if the defendants, and those under whom they claim, have had possession of the land in question, or any part thereof, for twenty years next before the commencement of this suit, that the plaintiff cannot recover the lands so possessed for twenty years.

On the first two points, the court instructed the jury, that, according to the principles of the common law, the deed from Craig's trustee to the lessors of *the plaintiff, would not pass the title to the lessors of the plaintiff; but that, under the operation of the act of assembly of the [*294 state of Kentucky, of 1798, the said deed was valid, and did pass the title to the lessors of the plaintiffs, notwithstanding the adverse possession of the defendants. The court refused to give the last instruction applied for, but

[1] Harris *v.* McGovern, 99 U. S. 161.

did instruct the jury, that if Coburn entered upon the land in controversy, under the survey on which his patent was founded, and he, and those holding under him, held the said lands for twenty years and upwards, prior to the commencement of this suit, yet, as the patent to Coburn did not issue until 1795, such possession could not avail the defendants, claiming under the said Coburn, but that the plaintiffs could recover, notwithstanding such possession. To these opinions and instructions, given by the court, the counsel for the defendants below excepted, and the cause was brought by writ of error into this court.

Hardin, for the plaintiff in error, and defendant in ejectment.—1. No person out of possession can grant: First, because, at common law, there must be livery of seisin. Secondly, because the grantee could not purchase a mere right of action. Coburn was in possession adversely; therefore, the deed from Craig's trustee to the lessors of the plaintiffs was void.

2. The limitation of twenty years' possession by the defendant, before notice of the ejectment, was a complete bar.

3. The deed of trust was joint, and it was incumbent upon the plaintiff to prove that one of the trustees was deed. The recital in the deed of conveyance *that E. Craig was dead, was no sufficient evidence of that fact, except as between the grantor and grantee. *295]

4. There is error in the judgment by default against Day.

Hughes and *Talbot*, contrà.—1. Before the act of 1798, "concerning champerty and maintenance," no title could pass, without an actual possession of the grantor; but this statute has abrogated the common law in that particular. But, in fact, Coburn was not in possession adversely, and a grant from the commonwealth of vacant lands, gives the patentee a right to convey.

2. A person leaving it equivocal what his possession was, cannot have an instruction in his favor. It does not appear, what part the defendant possessed, nor was the instruction asked under an adverse possession. Twenty years' possession was no bar: the local courts adhere to the English principle, that when the statute has once begun to run, it continues; but the act of assembly differs materially from the English act of 21 James I., c. 1; and after the statute has begun to run, it stops, if the title passes to a person under any legal disability, and recommences after the disability is removed.

March 18th, 1816. Marshall, Ch. J., delivered the opinion of the court, and after stating the facts, proceeded as follows:—The act of assembly, on which the opinion of the court below, on the first question, was given, is entitled, "an act concerning champerty and maintenance." It enacts, "that no person purchasing, or *procuring an interest in any legal or equitable claim to land held, &c., shall be precluded from *296]
prosecuting or defending said claim, under such purchase or contract; neither shall any suit or suits, brought to establish such purchase, or make good the title to such claim, be considered as coming within the provisions, either at common law, or by statute against champerty or maintenance," &c. This court is of opinion, that this statute enabled the lessors of the plaintiff to maintain a suit in their own name, for the lands conveyed to them, and that there is no error in this instruction of the circuit court.

On the third question, the circuit court instructed the jury, that an adverse possession under a survey, previous to its being carried into grant, could not be connected with a subsequent possession, but that the computation must commence from the date of the patent. In giving this opinion, the court unquestionably erred. No principle can be better settled, than that the whole possession must be taken together.

The counsel for the defendants in error have endeavored to sustain this opinion, by a construction of the statute of limitations of Kentucky. They contend, that after the statute has begun to run, it stops, if the title passes to a person under any legal disability, and recommences after such disability shall be removed. This construction, in the opinion of this court, is not justified by the words of the statute. Its language does not vary essentially from the language of the statute of James, the construction of which has been well settled; and it is to be construed, as that statute, and all other acts of limitation *founded on it, have been construed. This court [*297
is, therefore, of opinion, that there is error in the instruction given by the circuit court to the jury on the third prayer of the plaintiff in error. (*Duroure* v. *Jones*, 4 T. R. 300.)

It has been contended by the counsel for the plaintiff, that there is also error in the judgment rendered against Joseph Day by default; but of his case the court can take no notice, as he is not one of the plaintiffs in error, and the judgment rendered against him is not before us. The judgment must be reversed for error in the directions of the court to the jury, on the third point, on which instructions were given.

JUDGMENT.—This cause came on to be heard on the transcript of the record, from the circuit court for the district of Kentucky, and was argued by counsel; on consideration whereof, this court is of opinion, that there is error in the proceedings and judgment of the circuit court in this, that the judge thereof directed the jury, that the tenants in possession could not connect their adverse possession, previous to the date of the patent under which they claimed, with their adverse possession subsequent thereto, but in the length of time which would bar the action could compute that only which had passed subsequent to the emanation of their grant. Wherefore, it is considered by the court, that the judgment of the circuit *court be [*298
reversed and annulled, and that the cause be remanded to the circuit court, with directions to award a new trial therein.

Judgment reversed.[1]

[1] See Barr v. Gratz, 4 Wheat. 213.

The Harrison: Herbert, Claimant.

Prize.—Practice.

If the national character of property, captured and brought in for adjudication, appears ambiguous or neutral, and no claim is interposed, the cause is postponed for a year and a day, after the prize proceedings are commenced; and if no claimant appears within that time, the property is condemned to the captors.[1]

In prize causes, this court has an appellate jurisdiction only, and a claim cannot, for the first time, be interposed here; but where the court below had proceeded to adjudication, before the above period had elapsed, the cause was remanded to that court, with directions to allow a claim to be filed therein, and the libel to be amended, &c.

Appeal from the Circuit Court for the district of Maryland. The libel filed by the captors, in this case, in the district court, alleged, that the goods for which condemnation was sought, were captured and taken out of a Spanish vessel. No claim was filed for the goods in either of the courts below. But, upon the hearing, the district court dismissed the libel, upon the ground, that the property, to whomsoever belonging, was protected by
*299] the 15th article *of the treaty of 1795 with Spain, by which, free ships make free goods; and this decree was affirmed, upon the same principle, in the circuit court. The captors brought the cause, by appeal, to this court; and a motion was made by *Winder*, in behalf of Elry Herbert, an asserted claimant, to be admitted to file a claim in this court.

March 18th, 1816. Story, J., delivered the opinion of the court.—We have considered this question, with a view to the general rules of practice. Whenever a prize is brought to adjudication in the admiralty, if, upon the hearing of the cause, upon the ship's papers, and the evidence taken in preparatory, the property appears to belong to enemies, it is immediately condemned. If its national character appear doubtful, or even neutral, and no claim is interposed, the court do not proceed to a final decree, but the cause is postponed, with a view to enable any person, having title, to assert it, within a reasonable time, before the court. This reasonable time has been, by the general usage of nations, fixed at a year and a day after the institution of the prize proceedings; and if no claim be interposed within that period, the property is deemed to be abandoned, and is condemned to the captors, for contumacy and default of the supposed owner.

In the present case, the prescribed period had not elapsed, at the time when the district court proceeded to decree a dismissal of the libel. A claim cannot, by the practice of this court, be for the first time interposed here. In prize causes, this court can exercise only an appellate jurisdiction,
*300] and between *parties who have litigated in the court below. We are all, therefore, of opinion, that this cause ought to be remanded to the circuit court, with directions to allow the claim to be filed in that court; and also to allow the libel to be amended, so as to conform to the general allegation of prize, and enable the captors to obtain condemnation of the property, if the asserted claim shall not be sustained, and the property shall not appear entitled to the protection of the Spanish treaty.

Case remanded.(*a*)

(*a*) See Appendix, note 2.

[1] The Avery, 2 Gallis. 386.

Harden *v.* Fisher *et al.*

Burden of proof.

Under the 9th article of the treaty of 1794, between the United States and Great Britain, by which it is provided that British subjects, holding lands in the United States, and their heirs, so far as respects those lands, and the remedies incident thereto, should not be considered as aliens; the parties must show that the title to the land for which the suit was commenced was in them, or their ancestors, at the time the treaty was made.[1]

Fisher *v.* Harnden, 1 Paine 55, reversed.

Error to the Circuit Court for the district of New York. This case was argued, with great learning and ability, by *Hoffman*, for the plaintiff in error, and defendant in ejectment, and by *Stockton*, for the *defendants in error, and plaintiffs in ejectment. But, as the court [*301 gave no judgment upon the points discussed, the argument has been omitted.

March 18th, 1816. Marshall, Ch. J., delivered the opinion of the court.—This is an action of ejectment, brought by the defendants in error, in the circuit court for the district of New York, to recover certain lands, which they claim as the heirs of Donald Fisher, deceased. A special verdict was found in the case, which shows, that Donald Fisher was a British subject, residing in the city of New York, and departed this life, in the year 1798, leaving the lessors of the plaintiffs in ejectment his heirs-at-law, who are also British subjects. The plaintiffs, being thus found to be British subjects, are incapable of maintaining an action for real estate in the state of New York, unless they are enabled to do so by the 9th article of the treaty between the United States and Great Britain, made in the year 1794, which provides, that British subjects, holding lands in the United States, and their heirs, so far as respects those lands, and the legal remedies incident thereto, should not be considered as aliens. To avail themselves of this treaty, the lessors of the plaintiff below must show that their ancestors held the lands for which this suit was instituted, at the time when it was made. The court does not mean to say, that they must show a seisin in fact, or an actual possession of the land, but that the title was in him at the time. This must be *shown, in order to bring the case [*302 within the protection afforded by the treaty.

The jurors find that Donald Fisher was, on the first day of January, in the year 1777, seised in his demesne, as of fee, of the lands and tenements in the declaration mentioned, and was in the actual possession thereof, and continued so seised and possessed, until the rendering the judgment hereinafter mentioned.

On the 17th day of April, in the year 1780, the grand jury for the county of Charlotte, in the state of New York, found an indictment, stating that Donald Fisher (who is the ancestor under whom the lessors of the plaintiffs claim) did, on the 14th day of July, in the year 1777, voluntarily, with force and arms, adhere to the enemies of the state. The record proceeds to state, that "the said Donald Fisher having, according to the form of the act of the legislature, entitled 'an act for the forfeiture and sale of the estates of persons who have adhered to the enemies of the state,' &c., been

[1] Blight *v.* Rochester, 7 Wheat. 535.

notified to appear and traverse the said indictment, and not having appeared and traversed, within the time, and in the manner in and by the said act limited and required, it is, therefore, considered, that the said Donald Fisher do forfeit all and singular the estate, both real and personal, whether in possession, reversion or remainder, had or claimed by him, in this state." This judgment was signed on the 29th day of December 1783, and is the judgment referred to in the special verdict, as hereinbefore mentioned. Under
*303] these proceedings, the lands in the declaration mentioned *were sold, and the defendants, in the court below, hold under that sale.

There are other points raised in the special verdict, and urged by counsel; but it will be unnecessary to notice them, and the court does not mean to give any opinion on them. The court gave judgment for the plaintiffs below, and that judgment is now before this court on a writ of error.

It is contended by the defendants in error, that this judgment, having been rendered subsequent to the treaty of peace of 1783, and in direct repugnance thereto, is not merely voidable, but absolutely void. By the plaintiffs, it is alleged to be voidable only. This court cannot now decide that question. The verdict does not find that Donald Fisher held his title, until the treaty of 1794 was made, and although nothing is found to show that he has parted with it, yet the court cannot presume that he did not part with it. The verdict ought to have shown, that the title was in Donald Fisher, when the treaty was made, and continued in him to the time of his death. For this essential defect, the verdict is too imperfect to enable the court to decide on the case. The judgment of the circuit court must, therefore, be reversed, and the cause remanded to that court, with directions to award a *venire facias de novo.*

JUDGMENT.—This cause came on to be heard on the transcript of the record of the circuit court for the district of New York, and was argued by
*304] counsel; *all which being considered, this court is of opinion, that there is error in the judgment of the circuit court for the district of New York, in this, that the said court ought not to have rendered judgment on the said verdict in favor of the plaintiffs in ejectment, because it does not appear certainly, in the said verdict, that the ancestor, under whom they claim, held, in law or in fact, the lands mentioned in the declaration, when the treaty of 1794, between the United States and Great Britain, was made; therefore, it is considered by this court, that the said judgment be reversed and annulled, and that the cause be remanded to the circuit court, for the district of New York, with directions to award a *venire faceas novo.*

Judgment reversed.(*a*)

(*a*) See Jackson v. Decker, 11 Johns. 418.

MARTIN, Heir-at-law and Devisee of FAIRFAX, *v.* HUNTER'S Lessee.

Constitutional law.—Error to state court.—Practice in error.

The appellate jurisdiction of the supreme court of the United States extends to a final judgment or decree, in any suit in the highest court of law or equity of a state, where is drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United [*305 *States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of such their validity; or the construction of a treaty, or statute of, or commission held under, the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed, by either party, under such clause of the constitution, treaty, statute or commission.[1]

Such judgment or decree may be re-examined by writ of error, in the same manner as if rendered in a circuit court.

If the cause has been once remanded before, and the state court decline or refuse to carry into effect the mandate of the supreme court thereon, this court will proceed to a final decision of the same, and award execution thereon.[2]

If the validity or construction of a treaty of the United States be drawn in question, and the decision is against its validity, or the title specially set up by either party, under the treaty, this court has jurisdiction to ascertain that title, and determine its legal validity, and is not confined to the abstract construction of the treaty itself.

The return of a copy of the record, under the seal of the court, certified by the clerk, and annexed to the writ of error, is a sufficient return in such a case.

It need not appear, that the judge who granted the writ of error did, upon issuing the citation, take a bond, as required by the 22d section of the judiciary act. That provision is merely directory to the judge, and the presumption of law is, until the contrary appears, that every judge who signs a citation has obeyed the injunctions of the act.

Hunter *v.* Martin, 4 Munf. 1, reversed.

THIS was a writ of error to the Court of Appeals of the state of Virginia, founded upon the refusal of that court to obey the mandate of this court, requiring the judgment rendered in this same cause, at February term 1813, to be carried into due execution.

The following is the judgment of the court of appeals, rendered on the mandate: "The court is unanimously of opinion, that the appellate power of the supreme court of the United States does not *extend to this [*306 court, under a sound construction of the constitution of the United States; that so much of the 25th section of the act of congress, to establish the judicial courts of the United States, as extends the appellate jurisdiction of the supreme court to this court, is not in pursuance of the constitution of the United States. That the writ of error in this cause was improvidently allowed, under the authority of that act; that the proceedings thereon in the supreme court were *coram non judice*, in relation to this court, and that obedience to its mandate be declined by the court."

The original suit was an action of ejectment, brought by the defendant

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[1] Cohens *v.* Virginia, 6 Wheat. 264; Ableman *v.* Booth, 21 How. 206; Williams *v.* Bruffy, 102 U. S. 248. In the latter case, Judge FIELD says, that the appellate jurisdiction over the judgments of the state courts, in such cases, passed beyond the region of discussion in that court, more than half a century ago; and that no doctrine rests upon more solid foundations, or is more fully valued and cherished, than that which sustains its appellate power over state courts, when the constitution, laws and treaties of the United States are drawn in question, and their authority is denied or evaded, or where any right is asserted under a state law or authority, in conflict with them.

[2] Tyler *v.* Magwire, 17 Wall. 253; Williams *v.* Bruffy, 102 U. S. 248.

in error, in one of the district courts of Virginia, holden at Winchester, for the recovery of a parcel of land, situate within that tract, called the Northern Neck of Virginia, and part and parcel thereof. A declaration in ejectment was served (April 1791) on the tenants in possession; whereupon, Denny Fairfax (late Denny Martin), a British subject, holding the land in question, under the devise of the late Thomas Lord Fairfax, was admitted to defend the suit, and plead the general issue, upon the usual terms of confessing lease, entry and ouster, &c., and agreeing to insist, at the trial, on the title only, &c. The facts being settled in the form of a case agreed to be taken and considered as a special verdict, the court, on consideration thereof, gave judgment (24th of April, 1794), in favor of the defendant in ejectment. From that judgment, the plaintiff in ejectment (now defendant in error) appealed to the court of appeals, *being the highest court of law of Virginia. At April term 1810, the court of appeals reversed the judgment of the district court, and gave judgment for the then appellant, now defendant in error, and thereupon, the case was removed into this court.

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State of the facts as settled by the case agreed. 1st. The title of the late Lord Fairfax to all that entire territory and tract of land, called the Northern Neck of Virginia, the nature of his estate in the same, as he inherited it, and the purport of the several charters and grants from the kings Charles II. and James II., under which his ancestor held, are agreed to be truly recited in an act of the assembly of Virginia, passed in the year 1736 (*Vide* Rev. Code, vol. 1, ch. 3, p. 5), "for the confirming and better securing the titles to lands in the Northern Neck, held under the Rt. Hon. Thomas Lord Fairfax," &c.

From the recitals of the act, it appears, that the first letters-patent (1 Car. II.) granting the land in question to Ralph Lord Hopton and others, being surrendered, in order to have the grant renewed, with alterations, the Earl of St. Albans and others (partly survivors of, and partly purchasers under, the first patentees) obtained new letters-patent (2 Car. II.) for the same land and appurtenances, and by the same description, but with additional privileges and reservations, &c. The estate granted is described to be, "All that entire tract, territory or parcel of land, situate, &c., and bounded by, and within the heads of, the rivers Tappahannock, &c., together with the rivers themselves, and all the islands, &c., and all woods, under-woods, timber, &c., *mines of gold and silver, lead, tin, &c., and quarries of stone and coal, &c., to have hold and enjoy the said tract of land, &c., to the said patentees, their heirs and assigns for ever, to their only use and behoof, and to no other use, intent or purpose whatsoever." There is reserved to the crown the annual rent of 6*l.* 13*s.* 4*d.*, "in lieu of all services and demands whatsoever;" also one-fifth part of all gold, and one-tenth part of all silver mines.

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To the absolute title and seisin in fee of the land and its appurtenances, and the beneficial use and enjoyment of the same, assured to the patentees, as tenants *in capite*, by the most direct and abundant terms of conveyancing, there are superadded certain collateral powers of baronial dominion; reserving, however, to the governor, council and assembly of Virginia, the exclusive authority in all the military concerns of the granted territory, and the power to impose taxes on the persons and property of its inhabitants for the

public and common defence of the colony, as well as a general jurisdiction over the patentees, their heirs and assigns, and all other inhabitants of the said territory.

In the enumeration of privileges specifically granted to the patentees, their heirs and assigns, is that "freely and without molestation of the king, to give, grant, or by any ways or means, sell or alien all and singular the granted premises, and every part and parcel thereof, to any person or persons being willing to contract for, or buy, the same. There is also a condition to avoid the grant, as to so much of the granted premises as should not be* possessed, inhabited or planted, by the means or procurement [*309 of the patentees, their heirs or assigns, in the space of twenty-one years.

The third and last of the letters-patent referred to (4 Jac. II.), after reciting a sale and conveyance of the granted premises by the former patentees, to Thomas Lord Culpepper, "who was thereby become sole owner and proprietor thereof, in fee-simple," proceeds to confirm the same to Lord Culpepper, in fee-simple, and to release him from the said condition, for having the lands inhabited or planted as aforesaid. The said act of assembly then recites, that Thomas Lord Fairfax, heir-at-law of Lord Culpepper, had become "sole proprietor of the said territory, with the appurtenances, and the above-recited letters-patent."

By another act of assembly, passed in the year 1748 (Rev. Code, vol. 1, ch. 4, p, 10), certain grants from the crown, made while the exact boundaries of the Northern Neck were doubtful, for lands which proved to be within those boundaries, as then recently settled and determined, were, with the express consent of Lord Fairfax, confirmed to the grantees; to be held, nevertheless, of him, and all the rents, services, profits and emoluments (reserved by such grants) to be paid and performed to him.

In another act of assembly, passed May 1779, for establishing a land-office, and ascertaining the terms and manner of granting waste and unappropriated lands, there is the following clause, viz. (*vide* Ch. Rev. of 1783, ch. 13, § 6, p. 98): "And that the *proprietors of land within this [*310 commonwealth may no longer be subject to any servile, feudal or precarious tenure, and to prevent the danger to a free state from perpetual revenue, be it enacted, that the royal mines, quit-rents, and all other reservations and conditions in the patents or grants of land from the crown of England, under the former government, shall be and are hereby declared null and void; and that all lands thereby respectively granted shall be held in absolute and unconditional property, to all intents and purposes whatsoever, in the same manner with the lands hereafter granted by the common wealth, by virtue of this act.

2d. As respects the actual exercise of his proprietary rights by Lord Fairfax. It is agreed, that he did, in the year 1748, open and conduct, at his own expense, an office within the Northern Neck, for granting and conveying what he described and called, the waste and ungranted lands therein, upon certain terms, and according to certain rules by him established and published; that he did, from time to time, grant parcels of such lands in fee (the deeds being registered at his said office, in books kept for that purpose, by his own clerks and agents); that according to the uniform tenor of such grants, he did, styling himself proprietor of the Northern Neck, &c., in

consideration of a certain composition to him paid, and of certain annual rents therein reserved, grant, &c., with a clause of re-entry for non-payment of the rent, &c.; that he also demised, for lives and terms of years, parcels
*311] of the same description of lands, also reserving annual *rents; that he kept his said office open for the purposes aforesaid, from the year 1748 until his death, in December 1781; during the whole of which period, and before, he exercised the right of granting in fee, and demising for lives and terms of years, as aforesaid, and received and enjoyed the rents, annually, as they accrued, as well under the grants in fee, as under the leases for lives and years. It is also agreed, that Lord Fairfax died seised of lands in the Northern Neck, equal to about 300,000 acres, which had been granted by him in fee, to one T. B. Martin, upon the same terms and conditions, and in the same form, as the other grants in fee before described; which lands were, soon after being so granted, reconveyed to Lord Fairfax in fee.

3d. Lord Fairfax, being a citizen and inhabitant of Virginia, died in the month of December 1781, and, by his last will and testament, duly made and published, devised the whole of his lands, &c., called, or known by the name of the Northern Neck of Virgiuia, in fee, to Denny Fairfax (the original defendant in ejectment), by the name and description of the Reverend Denny Martin, &c., upon condition of his taking the name and arms of Fairfax, &c.; and it is admitted, that he fully complied with the conditions of the demise.

4th. It is agreed, that Denny Fairfax, the devisee, was a native-born British subject, and never became a citizen of the United States, nor any one of them, but always resided in England, as well during the revolutionary war, as from his birth, about the year 1750, to his death, which happened
*312] some time between *the years 1796 and 1803, as appears from the record of the proceedings in the court of appeals. It is also admitted, that Lord Fairfax left, at his death, a nephew named Thomas Bryan Martin, who was always a citizen of Virginia, being the younger brother of the said devisee, and the second son of a sister of the said Lord Fairfax; which sister was still living, and had always been a British subject.

5th. The land demanded by this ejectment being agreed to be part and parcel of the said territory and tract of land, called the Northern Neck, and to be a part of that description of lands, within the Northern Neck, called and described by Lord Fairfax as "waste and ungranted," and being also agreed never to have been escheated and seised into the hands of the commonwealth of Virginia, pursuant to certain acts of asembly concerning escheators, and never to have been the subject of any inquest of office, was contained and included in a certain patent, bearing date the 30th of April 1789, under the hand of the then governor, and the seal of the commonwealth of Virginia, purporting that the land in question is granted by the said commonwealth unto David Hunter (the lessor of the plaintiff in ejectment) and his heirs for ever, by virtue and in consideration of a land-office treasury-warrant, issued the 23d of January 1788. The said lessor of the plaintiff in ejectment is, and always has been, a citizen of Virginia; and in pursuance of his said patent, entered into the land in question, and was thereof possessed, prior to the institution of the said action of ejectment.

*313] *6th. The definitive treaty of peace, concluded in the year 1783, between the United States of America and Great Britain, and also

the several acts of the assembly of Virginia, concerning the premises, are referred to, as making a part of the case agreed.

Upon this state of facts, the judgment of the court of appeals of Virginia was reversed by this court, at February term 1813 (7 Cr. 603), and thereupon, the mandate above mentioned was issued to the court of appeals, which being disobeyed, the cause was again brought before this court.

Jones, for the plaintiffs in error.—There are two questions in the cause, 1st. Whether this court has jurisdiction? 2d. Whether it has been rightly exercised in the present case?

1. Contemporaneous construction, and the uniform practice since the constitution was adopted, confirms the jurisdiction of the court. The authority of all the popular writers who were friendly to it, is to the same effect; and the letters of Publius show that it was agreed, both by its friends and foes, that the judiciary power extends to this class of cases. In the conventions by which the constitution was adopted, it was never denied by its friends, that its powers extended so far as its enemies alleged. It was admitted, and justified, as expedient and necessary. Ascending from these popular and parliamentary authorities, to the more judicial evidence of what is the supreme law of the land, we find a concurrence of opinion. This government *is not a mere confederacy, like the Grecian leagues, or the Germanic constitution, or the old continental confederation. In its legislative, executive and judicial authorities, it is a national government, to every purpose, within the scope of the objects enumerated in the constitution. Its judicial authority is analogous to its legislative: it alone has the power of making treaties; those treaties are declared to be the law of the land; and the judiciary of the United States is exclusively vested with the power of construing them. The 2d section, article 3d, of the constitution provides, that the judicial power "shall extend to all cases in law or equity, arising under this constitution, the laws of the United States, and the treaties made, or which shall be made, under their authority," &c. The word *shall*, is a sign of the future tense, and implies an imperative mandate, obligatory upon those to whom it is addressed. The verb *extend*, is said to mean nothing more than *may* extend; but the neuter verb, and not the verb active, is used, and imports that the power *shall* extend—it shall reach to, or over. "All cases," is an emphatic expression, and shows that it cannot extend to a limited number of cases. The state legislatures cannot make treaties. Why should the state judicatures be offended at being excluded from the authority of expounding them? [*314

2. Has congress exercised the power vested in it, according to the constitution? If the jurisdiction be exclusive and paramount, it must be exercised according to the discretion of congress, the constitution having prescribed no specific mode; it must operate upon the people of the United States *in their personal and aggregate capacities, upon them and all their magistrates and tribunals. Congress *must* establish a supreme court. They *may* establish inferior courts. The supreme court must have the appellate jurisdiction vested in them by the constitution, and congress cannot denude them of it, by failing to establish inferior tribunals. Those tribunals may not exist; and therefore, the appellate jurisdiction must extend beyond appeals from the courts of the United States only. The state [*315

courts are to adjudicate under the supreme law of the land, as a rule binding upon them. They do not act upon it, as judges determining by a foreign law, in a case of *lex loci*, for example; they act upon it as a municipal law of the state where they sit, but derived from the government of the United States.

3. As to the remedy of the plaintiffs in error. This court is not limited to a mandate, as the only remedy. The judiciary act provides (§ 24), that when a cause has been once remanded, this court may award a writ of execution upon its own judgment. The cause is now before the court, so as to enable it to do this; the record is well certified, according to the law and practice of Virginia, and of every other state, under the seal of the court and signature of the clerk. Even supposing it necessary to take a retrospective view, and look at the former record, it originated, and still remains, in this *forum*, and it is unnecessary to send to the court of appeals for it.

Tucker, contrà.—1. At common law, the writ of error must be returned by the court itself. It is imperfect *in this case, and therefore, we *316] have a right to a *certiorari*, or writ of diminution. But there is no error; the court of appeals have done nothing; and therefore, there is no error in their proceedings. It is a mere omission to do what they ought to have done, and no judgment can be rendered here, to reverse what they have not done. This court cannot award execution upon the judgment in the original cause. That judgment is final; it is *functus officio*, and nothing more can be done with it. The original cause is not brought here again completely, and therefore, the provision in the 24th section of the judiciary act does not apply.

2. Is the judiciary act constitutional? This court, undoubtedly, has all the incidental powers necessary to carry into effect the powers expressly given by the constitution.

But this cannot extend to the exercise of any power inconsistent with the whole genius, spirit and tenor of the constitution. Neither the practice and acquiescence under it, nor contemporaneous expositions can apply, because they are contradictory. State courts have refused to execute the penal laws of the United States, and the court of appeals ground themselves on the resolutions of the Virginia legislature in 1798; but this court will disregard these controversial political party works. The chief defect of the former confederation was, that it acted on political, and not on natural, persons. The whole scheme of the constitution aims at acting on the citizens of the United States at large, and not on the state authorities. The philological criticism upon the third article is unsound. *Shall* is merely a sign of the *future tense, and not imperative; the laws of the United *317] States having, in some instances, given conjoint jurisdiction to the state courts, and upon that argument, must be unconstitutional. "Extend," or "shall extend," merely imports that it *may* extend. Congress are bound to establish tribunals inferior to the supreme court. How else are crimes against the United States to be punished, since the supreme court have not original jurisdiction of these cases? The state courts are bound by treaties, as a part of the supreme law of the land, and they must construe them in order to obey them. The only constitutional method of giving any greater

effect to the supremacy of treaties, would have been, by enabling the parties claiming under them to sue in the national courts.

3. There are three classes of cases enumerated as of appellate jurisdiction: that of treaties only applies to this case; but in this case, the British treaty was not principally, only incidentally, in question. It does not appear upon the face of the record, that the judgment was upon the treaty. It was not upon the treaty; the court of appeals, in their judgment, havs expressly declared that it was not upon the treaty, by affirming that part of the judgment of the district court at Winchester which determined in favor of the treaty.

Dexter, on the same side.—Every advocate is a citizen, and, on great constitutional questions, his duty to his client does not require him to conceal any opinion he may have formed. This cause may be safely carried through, without falsifying the true exposition *of the constitution. [*318
Believing that it is essential to the national welfare, that congress should have the right of arming the courts of the United States with every authority necessary to give complete effect to the judicial powers granted by the constitution, I dissent from the court of appeals of Virginia, when they deny that the appellate jurisdiction of the national tribunals extends to cases involving the construction and validity of treaties. But the question is, has congress provided an adequate method of exercising it?

1. Before a writ of error goes from this court to a state court, it must appear on the face of the record, 1st. That the construction or validity of a treaty is drawn in question. 2d. That the title or claim supposed to be infringed was specially set up or demanded by the party. 3d. That the state court did decide respecting the title or claim under the treaty. In the present instance, suppose, that there had been no case made, and that all the facts stated had been given in evidence, and a general verdict rendered thereon: the case is precisely in that predicament. The determination of the court was not limited, in any degree, to the construction of a treaty, which was only one of the numerous facts stated on which the title of the parties depended. How can this court ascertain on which of these facts the state court determined, or that it determined upon the treaty? The alienage of Lord Fairfax's devisee, and the question whether the lands did not escheat, without office found, might have been the point of decision, avoiding to consider *the construction or validity of the treaty, [*319
which applies only to things confiscable. Congress have not said, that this court shall determine conjecturally, but that the party shall specially set up his claim on the record, in order to see whether a treaty has been infringed. He may plead the matter specially, or except to the opinion of the court; but if he chose to make an agreed case, in the most general way, is this court to amend the defects of his proceeding?

2. As to the constitutionality of the judiciary act. It is agreed, that the judicial powers granted by the constitution are exclusive, or exclusive, in the election of congress; but that any appellate jurisdiction is given by the constitution, is what I deny. It is neither expressed nor implied; nor is there any necessity for it: for these suits might be removed from the state courts, as are suits commenced by foreigners and citizens of different states, in the first instance, or in the moment any ques-

tion touching a treaty arose, instead of being brought up by the offensive mode of a writ of error, directed to a court which is as supreme in its appropriate sphere as this court. Whether the court where the suit is commenced will, or will not, consent, the national court may take jurisdiction. If the state court pertinaciously proceeds, notwithstanding; its proceedings would be *coram non judice*. The original and the appellate jurisdiction are opposed to each other by the constitution. The first cannot regard the state courts; nor the latter: for it is only the *residuum* of the mass of power before given, which does not expressly include appeals from the state courts.
*320] Why is it to be supposed that the state *courts will exercise any part of that mass of power? There is no necessity for it, since the laws might provide a constitutional mode of excluding them. If they have not provided such a mode, it is not for this court to supply the defect. By attempting it, they will begin a conflict between the national and state authorities, that may ultimately involve both in one common ruin. The taper of judicial discord may become the torch of civil war, and though the breath of a judge can extinguish the first, the wisdom of the statesman may not quench the latter. I lament, that the courts of so patriotic a state as Virginia have denied the complete and exclusive dominion of the national government over the whole surface of the judicial power granted by the people to that government. "*Join or die*," was the word, when we were represented as a disjointed serpent, of which Virginia was the head. From that head sprung our "immortal chief," armed with the *ægis* of wisdom. But that great man, and those who advised him, improvidently assented to a law (the judiciary act) which is neither constitutionally nor politically adapted to enforce the powers of the national courts in an amicable and pacific manner. I have never feared that this government was too strong: I have always feared, it was not strong enough. I have long inclined to the belief, that the centrifugal force was greater than the centripetal. The danger is, not that we shall fall into the sun, but that we may fly off in eccentric orbits, and never return to our perihelion. But though I will struggle to preserve all the
*321] constitutional powers of the national government, *I will not strain and break the constitution itself, in order to assert them; there is danger too on that side. The poet describes the temple of Fame as situated on a mountain covered with ice. The palaces of power are on the same frail foundation; the foot of adventurous ambition often slips in the ascent, and sometimes the volcano bursts, and inundates with its lava the surrounding country. But I fear not that this court will be wanting in the firmness which becomes its station; and if it believes that it may, constitutionally, and legally, exert its powers upon the state courts, in this form (which is what I deny), it will not regard consequences in the exercise of its duty: it will say, with another august tribunal, "*Fiat justitia, ruat cœlum!*"

Jones, in reply.—The states are deprived, by the constitution, of the character of perfect states, as defined by jurists; they are still sovereign, *sub modo;* but the national government pervades all their territory, and acts upon all their citizens. The state judicatures are essentially incompetent to pronounce what is the law; not in the limited sphere of their territorial jurisdiction, but throughout the Union and the world. The constitution, art. 3, § 2, has distinguished between the causes properly national,

and "controversies" which it was thought expedient to vest in the courts of the United States. The judiciary act covers the first completely, the last only partially. It is said, the doctrine contended for involves the old anomaly of the national government acting, not on individuals, but on state authorities; *but this government must act in this manner by appeal from the state courts, or it cannot act at all. If you have an appellate jurisdiction, their judgment is your judgment. You may execute this your judgment; you need not remand the cause to the state court. These are mere arbitrary forms, which the court may discard or adopt, at pleasure. Neither is it necessary to send a writ of error to the state court; you may cite the parties themselves to appear in your *forum*, as soon as a question touching a treaty arises. There is no necessary connection between an appellate tribunal and the court appealed from; it is sufficient, that the parties have originally litigated before the court of first instance. The house of lords, an English common-law court, holds appeals from the court of sessions in Scotland, a civil-law tribunal. The union between that country and England is similar to our federative constitution. In whatever mode the appellate jurisdiction may be exercised, it is still liable to the difficulties suggested. The process by which a cause is to be removed from the state court, before judgment, must be addressed to that court; and if it still proceeds, the remedy must be as offensive as at present. But it would, also, be ineffectual and dilatory. Suppose, in a case of original jurisdiction, an ambassador prosecuted for a supposed crime in a state court, he might be imprisoned, or put to death, before the national authority could be interposed, unless it act directly on the state judicature. In this case, the court may act directly on the cause and the parties, in order to carry into complete effect the appellate powers with which it is invested by the constitution and laws. [*322

*There is nothing in the record, importing that the court of appeals determined on the ground of the party's title merely. Nor is it necessary that the treaty, under which that title is set up, should be specified in a bill of exceptions, or propounded in argument. It is sufficient, that the claim is stated upon the record, and that the title depends upon the treaty. This court is not to pronounce a mere abstract opinion upon the validity, or construction, of the treaty; it may, therefore, decide on other incidental matters; and if the party has a good title under the treaty, it is to enforce and protect that title. As to the sufficiency of the return, the law merely requires a transcript of the record to be removed, and by the rules of this court, a return by the clerk is sufficient. [*323

March 20th, 1816. Story, J., delivered the opinion of the court.—This is a writ of error from the court of appeals of Virginia, founded upon the refusal of that court to obey the mandate of this court, requiring the judgment rendered in this very cause, at February term 1813, to be carried into due execution. The following is the judgment of the court of appeals rendered on the mandate: "The court is unanimously of opinion, that the appellate power of the supreme court of the United States does not extend to this court, under a sound construction of the constitution of the United States; that so much of the 25th section of the act of congress to establish the judicial courts of the United States, as extends the appellate

jurisdiction of the supreme court to this court, is not in pursuance of the
*324] constitution of the *United States; that the writ of error, in this cause, was improvidently allowed, under the authority of that act; that the proceedings thereon in the supreme court were *coram non judice*, in relation to this court, and that obedience to its mandate be declined by the court."

The questions involved in this judgment are of great importance and delicacy. Perhaps, it is not too much to affirm, that, upon their right decision, rest some of the most solid principles which have hitherto been supposed to sustain and protect the constitution itself. The great respectability, too, of the court whose decisions we are called upon to review, and the entire deference which we entertain for the learning and ability of that court, add much to the difficulty of the task which has so unwelcomely fallen upon us. It is, however, a source of consolation, that we have had the assistance of most able and learned arguments to aid our inquiries; and that the opinion which is now to be pronounced has been weighed with every solicitude to come to a correct result, and matured after solemn deliberation.

Before proceeding to the principal questions, it may not be unfit to dispose of some preliminary considerations which have grown out of the arguments at the bar.

The constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by "the People of the United States."[1] There can be no doubt, that it was competent to the people to invest the
*325] general government *with all the powers which they might deem proper and necessary; to extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority. As little doubt can there be, that the people had a right to prohibit to the states the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact; to make the powers of the state governments, in given cases, subordinate to those of the nation, or to reserve to themselves those sovereign authorities which they might not choose to delegate to either. The constitution was not, therefore, necessarily carved out of existing state sovereignties, nor a surrender of powers already existing in state institutions, for the powers of the states depend upon their own constitutions; and the people of every state had the right to modify and restrain them, according to their own views of policy or principle. On the other hand, it is perfectly clear, that the sovereign powers vested in the state governments, by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States. These deductions do not rest upon general reasoning, plain and obvious as they seem to be. They have been positively recognised by one of the articles in amendment of the constitution, which declares, that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

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[1] The preamble to the constitution is constantly referred to, by statesmen and jurists, to aid them in the exposition of its provisions. On the proper construction of the words quoted in the opinion of the court, the two great political parties into which the country is divided, have based their respective principles of government.

The government, then, of the United States can claim no powers which are not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication. On the other hand, this instrument, like every other grant, is to have a reasonable construction, according to the import of its terms; and where a power is expressly given, in general terms, it is not to be restrained to particular cases, unless that construction grow out of the context, expressly, or by necessary implication. The words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged.

The constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen, that this would be perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen, what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence, its powers are expressed in general terms, leaving to the legislature, from time to *time, to adopt its own means to effectuate legitimate objects, and to mould [*327 and model the exercise of its powers, as its own wisdom, and the public interests, should require.

With these principles in view, principles in respect to which no difference of opinion ought to be indulged, let us now proceed to the interpretation of the constitution, so far as regards the great points in controversy.

The third article of the constitution is that which must principally attract our attention. The 1st section declares, "the judicial power of the United States shall be vested in one supreme court, and in such other inferior courts as the congress may, from time to time, ordain and establish." The 2d section declares, that "the judicial power shall extend to all cases in law or equity, arising under this constitution, the laws of the United States, and the treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state, claiming lands under the grants of different states; and between a state, or the citizens thereof, and foreign states, citizens or subjects." It then proceeds to declare, that "in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. *In all the other cases before mentioned, the supreme court shall have [*328 appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the congress shall make."

Such is the language of the article creating and defining the judicial power of the United States. It is the voice of the whole American people,

solemnly declared, in establishing one great department of that government which was, in many respects, national, and in all, supreme. It is a part of the very same instrument which was to act, not merely upon individuals, but upon states; and to deprive them altogether of the exercise of some powers of sovereignty, and to restrain and regulate them in the exercise of others.

Let this article be carefully weighed and considered. The language of the article throughout is manifestly designed to be mandatory upon the legislature. Its obligatory force is so imperative, that congress could not, without a violation of its duty, have refused to carry it into operation. The judicial power of the United States *shall* be vested (not *may* be vested) in one supreme court, and in such inferior courts as congress may, from time to time, ordain and establish. Could congress have lawfully refused to create a supreme court, or to vest in it the constitutional jurisdiction? "The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive, for their services, a compensation which shall not be diminished during their continuance in office." Could congress create or limit any other tenure of
*329] *the judicial office? Could they refuse to pay, at stated times, the stipulated salary, or diminish it during the continuance in office? But one answer can be given to these questions: it must be in the negative. The object of the constitution was to establish three great departments of government; the legislative, the executive and the judicial departments. The first was to pass laws, the second, to approve and execute them, and the third, to expound and enforce them. Without the latter, it would be impossible to carry into effect some of the express provisions of the constitution. How, otherwise, could crimes against the United States be tried and punished? How could causes between two states be heard and determined? The judicial power must, therefore, be vested in some court, by congress; and to suppose, that it was not an obligation binding on them, but might, at their pleasure, be omitted or declined, is to suppose, that, under the sanction of the constitution, they might defeat the constitution itself; a construction which would lead to such a result cannot be sound.

The same expression, "shall be vested," occurs in other parts of the constitution, in defining the powers of the other co-ordinate branches of the government. The first article declares that "all legislative powers herein granted shall be vested in a congress of the United States." Will it be contended that the legislative power is not absolutely vested? that the words merely refer to some future act, and mean only that the legislative power may hereafter be vested? The second article declares that
*330] "the *executive power shall be vested in a president of the United States of America." Could congress vest it in any other person; or, is it to await their good pleasure, whether it is to vest at all? It is apparent, that such a construction, in either case, would be utterly inadmissible. Why, then, is it entitled to a better support, in reference to the judicial department?

If, then, it is a duty of congress to vest the judicial power of the United States, it is a duty to vest the whole judicial power. The language, if imperative as to one part, is imperative as to all. If it were otherwise, this anomaly would exist, that congress might successively refuse to vest the

jurisdiction in any one class of cases enumerated in the constitution, and thereby defeat the jurisdiction as to all; for the constitution has not singled out any class on which congress are bound to act in preference to others.

The next consideration is, as to the courts in which the judicial power shall be vested. It is manifest, that a supreme court must be established; but whether it be equally obligatory to establish inferior courts, is a question of some difficulty. If congress may lawfully omit to establish inferior courts, it might follow, that in some of the enumerated cases, the judicial power could nowhere exist. The supreme court can have original jurisdiction in two classes of cases, only, viz., in cases affecting ambassadors, other public ministers and consuls, and in cases in which a state is a party. Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by *itself; and if in any [*331
of the cases enumerated in the constitution, the state courts did not then possess jurisdiction, the appellate jurisdiction of the supreme court (admitting that it could act on state courts) could not reach those cases, and consequently, the injunction of the constitution, that the judicial power "shall be vested," would be disobeyed. It would seem, therefore, to follow, that congress are bound to create some inferior courts, in which to vest all that jurisdiction which, under the constitution, is exclusively vested in the United States, and of which the supreme court cannot take original cognisance. They might establish one or more inferior courts; they might parcel out the jurisdiction among such courts, from time to time, at their own pleasure. But the whole judicial power of the United States should be, at all times, vested, either in an original or appellate form, in some courts created under its authority.

This construction will be fortified by an attentive examination of the second section of the third article. The words are "the judicial power shall extend," &c. Much minute and elaborate criticism has been employed upon these words. It has been argued, that they are equivalent to the words "may extend," and that "extend" means to widen to new cases not before within the scope of the power. For the reasons which have been already stated, we are of opinion, that the words are used in an imperative sense; they import an absolute grant of judicial power. They cannot have a relative signification applicable to powers already granted; for the American people *had not made any previous grant. The constitution was [*332
for a new government, organized with new substantive powers, and not a mere supplementary charter to a government already existing. The confederation was a compact between states; and its structure and powers were wholly unlike those of the national government. The constitution was an act of the people of the United States to supersede the confederation, and not to be engrafted on it, as a stock through which it was to receive life and nourishment.

If, indeed, the relative signification could be fixed upon the term "extend," it could not (as we shall hereafter see) subserve the purposes of the argument in support of which it has been adduced. This imperative sense of the words "shall extend," is strengthened by the context. It is

[1] It is a notorious fact, acknowledged by every federal judge, that congress have not vested the whole of the judicial powers granted by the constitution, in the United States courts.

declared, that "in all cases affecting ambassadors, &c., that the supreme court shall have original jurisdiction." Could congress withhold original jurisdiction in these cases from the supreme court? The clause proceeds—"in all the other cases before mentioned the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the congress shall make." The very exception here shows that the framers of the constitution used the words in an imperative sense. What necessity could there exist for this exception, if the preceding words were not used in that sense? Without such exception, congress would, by the preceding words, have possessed a complete power to regu-
*333] late the appellate jurisdiction, if the language were *only equivalent to the words "may have" appellate jurisdiction. It is apparent, then, that the exception was intended as a limitation upon the preceding words, to enable congress to regulate and restrain the appellate power, as the public interests might, from time to time, require.

Other clauses in the constitution might be brought in aid of this construction; but a minute examination of them cannot be necessary, and would occupy too much time. It will be found, that whenever a particular object is to be effected, the language of the constitution is always imperative, and cannot be disregarded, without violating the first principles of public duty. On the other hand, the legislative powers are given in language which implies discretion, as from the nature of legislative power such a discretion must ever be exercised.

It being, then, established, that the language of this clause is imperative, the question is, as to the cases to which it shall apply. The answer is found in the constitution itself the judicial power shall extend to all the cases enumerated in the constitution. As the mode is not limited, it may extend to all such cases, in any form, in which judicial power may be exercised. It may, therefore, extend to them in the shape of original or appellate jurisdiction, or both; for there is nothing in the nature of the cases which binds to the exercise of the one in preference to the other.

In what cases (if any) is this judicial power exclusive, or exclusive, at the election of congress? It will be observed, that there are two classes of
*334] cases enumerated *in the constitution, between which a distinction seems to be drawn. The first class includes cases arising under the constitution, laws and treaties of the United States; cases affecting ambassadors, other public ministers and consuls, and cases of admiralty and maritime jurisdiction. In this class, the expression is, and that the judicial power shall extend to all cases; but in the subsequent part of the clause, which embraces all the other cases of national cognisance, and forms the second class, the word "all" is dropped, seemingly *ex industriâ*. Here, the judicial authority is to extend to controversies (not to all controversies) to which the United States shall be a party, &c. From this difference of phraseology, perhaps, a difference of constitutional intention may, with propriety, be inferred. It is hardly to be presumed, that the variation in the language could have been accidental. It must have been the result of some determinate reason; and it is not very difficult to find a reason sufficient to support the apparent change of intention. In respect to the first class, it may well have been the intention of the framers of the constitution imperatively to extend the judicial power, either in an original or appellate form, to *all* cases; and

in the latter class, to leave it to congress to qualify the jurisdiction, original or appellate, in such manner as public policy might dictate.

The vital importance of all the cases enumerated in the first class to the national sovereignty, might warrant such a distinction. In the first place, as to cases arising under the constitution, laws and treaties of the United States. Here, the state courts *could not ordinarily possess a direct [*335 jurisdiction. The jurisdiction over such cases could not exist in the state courts, previous to the adoption of the constitution, and it could not afterwards be directly conferred on them; for the constitution expressly requires the judicial power to be vested in courts ordained and established by the United States. This class of cases would embrace civil as well as criminal jurisdiction, and affect, not only our internal policy, but our foreign relations. It would, therefore, be perilous to restrain it in any manner whatsoever, inasmuch as it might hazard the national safety. The same remarks may be urged as to cases affecting ambassadors, other public ministers and consuls, who are emphatically placed under the guardianship of the law of nations; and as to cases of admiralty and maritime jurisdiction, the admiralty jurisdiction embraces all questions of prize and salvage, in the correct adjudication of which foreign nations are deeply interested; it embraces also maritime torts, contracts and offences, in which the principles of the law and comity of nations often form an essential inquiry. All these cases, then, enter into the national policy, affect the national rights, and may compromit the national sovereignty. The original or appellate jurisdiction ought not, therefore, to be restrained, but should be commensurate with the mischiefs intended to be remedied, and of course, should extend to all cases whatsoever.

A different policy might well be adopted in reference to the second class of cases; for although it might be fit, that the judicial power should extend *to all controversies to which the United States should be a party, [*336 yet this power might not have been imperatively given, lest it should imply a right to take cognisance of original suits brought against the United States as defendants in their own courts. It might not have been deemed proper to submit the sovereignty of the United States, against their own will, to judicial cognisance, either to enforce rights or to prevent wrongs; and as to the other cases of the second class, they might well be left to be exercised under the exceptions and regulations which congress might, in their wisdom, choose to apply. It is also worthy of remark, that congress seem, in a good degree, in the establishment of the present judicial system, to have adopted this distinction. In the first class of cases, the jurisdiction is not limited, except by the subject-matter; in the second, it is made materially to depend upon the value in controversy.

We do not, however, profess to place any implicit reliance upon the distinction which has here been stated and endeavored to be illustrated. It has the rather been brought into view, in deference to the legislative opinion, which has so long acted upon, and enforced, this distinction. But there is, certainly, vast weight in the argument which has been urged, that the constitution is imperative upon congress to vest all the judicial power of the United States, in the shape of original jurisdiction, in the supreme and inferior courts created under its own authority. At all events, whether the one construction or the other prevail, it is manifest, that the judicial power

of the *United States is, unavoidably, in some cases, exclusive of all state authority, and in all others, may be made so, at the election of congress. No part of the criminal jurisdiction of the United States can, consistently with the constitution, be delegated to state tribunals. The admiralty and maritime jurisdiction is of the same exclusive cognisance; and it can only be in those cases where, previous to the constitution, state tribunals possessed jurisdiction, independent of national authority, that they can now constitutionally exercise a concurrent jurisdiction. Congress, throughout the judicial act, and particularly in the 9th, 11th and 13th sections, have legislated upon the supposition, that in all the cases to which the judicial powers of the United States extended, they might rightfully vest exclusive jurisdiction in their own courts.

But, even admitting that the language of the constitution is not mandatory, and that congress may constitutionally omit to vest the judicial power in courts of the United States, it cannot be denied, that when it is vested, it may be exercised to the utmost constitutional extent.

This leads us to the consideration of the great question, as to the nature and extent of the appellate jurisdiction of the United States. We have already seen, that appellate jurisdiction is given by the constitution to the supreme court, in all cases where it has not original jurisdiction; subject, however, to such exceptions and regulations as congress may prescribe. It is, therefore, capable of embracing every case enumerated in the constitution, *338] which is not exclusively to be decided by way of original *jurisdiction. But the exercise of appellate jurisdiction is far from being limited, by the terms of the constitution, to the supreme court. There can be no doubt, that congress may create a succession of inferior tribunals, in each of which it may vest appellate as well as original jurisdiction. The judicial power is delegated by the constitution, in the most general terms, and may, therefore, be exercised by congress, under every variety of form of appellate or original jurisdiction. And as there is nothing in the constitution which restrains or limits this power, it must, therefore, in all other cases, subsist in the utmost latitude of which, in its own nature, it is susceptible.

As, then, by the terms of the constitution, the appellate jurisdiction is not limited as to the supreme court, and as to this court, it may be exercised in all other cases than those of which it has original cognisance, what is there to restrain its exercise over state tribunals, in the enumerated cases? The appellate power is not limited by the terms of the third article to any particular courts. The words are, "the judicial power (which includes appellate power) shall extend to all cases," &c., and "in all other cases before mentioned the supreme court shall have appellate jurisdiction." It is the case, then, and not the court, that gives the jurisdiction. If the judicial power extends to the case, it will be in vain to search in the letter of the constitution for any qualification as to the tribunal where it depends. It is incumbent, then, upon those who assert such a qualification, to show its *339] existence, by necessary implication. If the *text be clear and distinct, no restriction upon its plain and obvious import ought to be admitted, unless the inference be irresistible.

If the constitution meant to limit the appellate jurisdiction to cases pending in the courts of the United States, it would necessarily follow, that the jurisdiction of these courts would, in all the cases enumerated in the con-

stitution, be exclusive of state tribunals. How, otherwise, could the jurisdiction extend to *all* cases arising under the constitution, laws and treaties of the United States, or to *all* cases of admiralty and maritime jurisdiction? If some of these cases might be entertained by state tribunals, and no appellate jurisdiction as to them should exist, then the appellate power would not extend to *all*, but to *some*, cases. If state tribunals might exercise concurrent jurisdiction over all or some of the other classes of cases in the constitution, without control, then the appellate jurisdiction of the United States might, as to such cases, have no real exisence, contrary to the manifest intent of the constitution. Under such circumstances, to give effect to the judicial power, it must be construed to be exclusive; and this not only when the *casus fœderis* should arise directly, but when it should arise, incidentally, in cases pending in state courts. This construction would abridge the jurisdiction of such courts far more than has been ever contemplated in any act of congress.

On the other hand, if, as has been contended, a discretion be vested in congress, to establish, or not to establish, inferior courts, at their own pleasure, and *congress should not establish such courts, the appellate jurisdiction of the supreme court would have nothing to act upon, [*340 unless it could act upon cases pending in the state courts. Under such circumstances, it must be held, that the appellate power would extend to state courts; for the constitution is peremptory, that it shall extend to certain enumerated cases, which cases could exist in no other courts. Any other construction, upon this supposition, would involve this strange contradiction, that a discretionary power, vested in congress, and which they might rightfully omit to exercise, would defeat the absolute injunctions of the constitution in relation to the whole appellate power.

But it is plain, that the framers of the constitution did contemplate that cases within the judicial cognisance of the United States, not only might, but would, arise in the state courts, in the exercise of their ordinary jurisdiction. With this view, the sixth article declares, that "this constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." It is obvious, that this obligation is imperative upon the state judges, in their official, and not merely in their private, capacities. From the very nature of their judicial duties, they would be called upon to pronounce the law applicable to the case in judgment. They were not to decide merely *according to the laws or constitution of the state, but according to the constitution, laws and [*341 treaties of the United States—"the supreme law of the land."

A moment's consideration will show us the necessity and propriety of this provision, in cases where the jurisdiction of the state courts is unquestionable. Suppose, a contract for the payment of money is made between citizens of the same state, and performance thereof is sought in the courts of that state; no person can doubt, that the jurisdiction completely and exclusively attaches, in the first instance, to such courts. Suppose, at the trial, the defendant sets up in his defence a tender under a state law, making paper-money a good tender, or a state law, impairing the obligation

of such contract, which law, if binding, would defeat the suit. The constitution of the United States has declared, that no state shall make any thing but gold or silver coin a tender in payment of debts, or pass a law impairing the obligation of contracts. If congress shall not have passed a law providing for the removal of such a suit to the courts of the United States, must not the state court proceeed to hear and determine it? Can a mere plea in defence be, of itself, a bar to further proceedings, so as to prohibit an inquiry into its truth or legal propriety, when no other tribunal exists to whom judicial cognisance of such cases is confided? Suppose, an indictment for a crime, in a state court, and the defendant should allege in his defence, that the crime was created by an *ex post facto* act of the state, must not the state court, in the exercise of a jurisdiction which has already
*342] rightfully attached, have a *right to pronounce on the validity and sufficiency of the defence? It would be extremely difficult, upon any legal principles, to give a negative answer to these inquiries. Innumerable instances of the same sort might be stated in illustration of the position; and unless the state courts could sustain jurisdiction in such cases, this clause of the sixth article would be without meaning or effect, and public mischiefs, of a most enormous magnitude, would inevitably ensue.

It must, therefore, be conceded, that the constitution not only contemplated, but meant to provide for cases within the scope of the judicial power of the United States, which might yet depend before state tribunals. It was foreseen, that in the exercise of their ordinary jurisdiction, state courts would incidentally take cognisance of cases arising under the constitution, the laws and treaties of the United States. Yet, to all these cases, the judicial power, by the very terms of the constitution, is to extend. It cannot extend, by original jurisdiction, if that was already rightfully and exclusively attached in the state courts, which (as has been already shown) may occur; it must, therefore, extend by appellate jurisdiction, or not at all. It would seem to follow, that the appellate power of the United States must, in such cases, extend to state tribunals; and if, in such cases, there is no reason why it should not equally attach upon all others, within the purview of the constitution.

It has been argued, that such an appellate jurisdiction over state courts
*343] is inconsistent with the genius *of our governments, and the spirit of the constitution. That the latter was never designed to act upon state sovereignties, but only upon the people, and that if the power exists, it will materially impair the sovereignty of the states, and the independence of their courts. We cannot yield to the force of this reasoniug; it assumes principles which we cannot admit, and draws conclusions to which we do not yield our assent.

It is a mistake, that the constitution was not designed to operate upon states, in their corporate capacities. It is crowded with provisions which restrain or annul the sovereignty of the states, in some of the highest branches of their prerogatives. The tenth section of the first article contains a long list of disabilities and prohibitions imposed upon the states. Surely, when such essential portions of state sovereignty are taken away, or prohibited to be exercised, it cannot be correctly asserted, that the constitution does not act upon the states. The language of the constitution is also imperative upon the states, as to the performance of many duties. It is

imperative upon the state legislatures, to make laws prescribing the time, places and manner of holding elections for senators and representatives, and for electors of president and vice-president. And in these, as well as some other cases, congress have a right to revise, amend or supersede the laws which may be passed by state legislatures. When, therefore, the states are stripped of some of the highest attributes of sovereignty, and the same are given to the United States; when the legislatures of the states are, in some *respects, under the control of congress, and in every case are, under the constitution, bound by the paramount authority of the United [*344 States; it is certainly difficult to support the argument, that the appellate power over the decisions of state courts is contrary to the genius of our institutions. The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the states, and if they are found to be contrary to the constitution, may declare them to be of no legal validity. Surely, the exercise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power.

Nor can such a right be deemed to impair the independence of state judges. It is assuming the very ground in controversy, to assert that they possess an absolute independence of the United States. In respect to the powers granted to the United States, they are not independent; they are expressly bound to obedience, by the letter of the constitution; and if they should unintentionally transcend their authority, or misconstrue the constitution, there is no more reason for giving their judgments an absolute and irresistible force, than for giving it to the acts of the other co-ordinate departments of state sovereignty.

The argument urged from the possibility of the abuse of the revising power, is equally unsatisfactory. It is always a doubtful course, to argue against the use or existence of a power, from the possibility of its abuse. It is still more difficult, by such an argument, to ingraft upon a general power, a restriction *which is not to be found in the terms in which [*345 it is given. From the very nature of things, the absolute right of decision, in the last resort, must rest somewhere—wherever it may be vested, it is susceptible of abuse. In all questions of jurisdiction, the inferior, or appellate court, must pronounce the final judgment; and common sense, as well as legal reasoning, has conferred it upon the latter.

It has been further argued against the existence of this appellate power, that it would form a novelty in our judicial institutions. This is certainly a mistake. In the articles of confederation, an instrument framed with infinitely more deference to state rights and state jealousies, a power was given to congress to establish "courts for revising and determining, finally, appeals in all cases of captures." It is remarkable, that no power was given to entertain original jurisdiction in such cases; and consequently, the appellate power (although not so expressed in terms) was altogether to be exercised in revising the decisions of state tribunals. This was, undoubtedly, so far a surrender of state sovereignty; but it never was supposed to be a power fraught with public danger, or destructive of the independence of state judges. On the contrary, it was supposed to be a power indispensable to the public safety, inasmuch as our national rights might otherwise be compromitted, and our national peace be endangered. Under the preseut constitution, the prize jurisdiction is confined to the courts of the United

states; and a power to revise the decisions of state courts, if they should
*346] assert jurisdiction over prize causes, cannot be less *important, or less useful, than it was under the confederation.

In this connection, we are led again to the construction of the words of the constitution, "the judicial power shall extend," &c. If, as has been contended at the bar, the term "extend" have a relative signification, and mean to widen an existing power, it will then follow, that, as the confederation gave an appellate power over state tribunals, the constitution enlarged or widened that appellate power to all the other cases in which jurisdiction is given to the courts of the United States. It is not presumed, that the learned counsel would choose to adopt such a conclusion.

It is further argued, that no great public mischief can result from a construction which shall limit the appellate power of the United States to cases in their own courts: first, because state judges are bound by an oath to support the constitution of the United States, and must be presumed to be men of learning and integrity; and secondly, because congress must have an unquestionable right remove all cases within the scope of the judicial power from the state courts to the courts of the United States, at any time before final judgment, though not after final judgment. As to the first reason—admitting that the judges of the state courts are, and always will be, of as much learning, integrity and wisdom, as those of the courts of the United States (which we very cheerfully admit), it does not aid the argument. It is manifest, that the constitution has proceeded upon a theory of its own, and
*347] given or withheld *powers according to the judgment of the American people, by whom it was adopted. We can only construe its powers, and cannot inquire into the policy or principles which induced the grant of them. The constitution has presumed (whether rightly or wrongly, we do not inquire), that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice. Hence, in controversies between states; between citizens of different states; between citizens claiming grants under different states; between a state and its citizens, or foreigners, and between citizens and foreigners, it enables the parties, under the authority of congress, to have the controversies heard, tried and determined before the national tribunals. No other reason than that which has been stated can be assigned, why some, at least, of those cases should not have been left to the cognisance of the state courts. In respect to the other enumerated cases—the cases arising under the constitution, laws and treaties of the United States, cases affecting ambassadors and other public ministers, and cases of admiralty and maritime jurisdiction—reasons of a higher and more extensive nature, touching the safety, peace and sovereignty of the nation, might well justify a grant of exclusive jurisdiction.

This is not all. A motive of another kind, perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even neces-
*348] sity of uniformity of decisions *throughout the whole United States, upon all subjects within the purview of the constitution. Judges of equal learning and integrity, in different states, might differently interpret the statute, or a treaty of the United States, or even the constitution itself:

if there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties and the constitution of the United States would be different, in different states, and might, perhaps, never have precisely the same construction, obligation or efficiency, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed, that they could have escaped the enlightened convention which formed the constitution. What, indeed, might then have been only prophecy, has now become fact; and the appellate jurisdiction must continue to be the only adequate remedy for such evils.

There is an additional consideration, which is entitled to great weight. The constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national *forum*, but also for the protection of defendants who might be entitled to try their rights, or assert their privileges, before the same *forum*. Yet, if the construction contended for be correct, it will follow, that as the plaintiff may always elect the state court, the defendant *may be deprived of all the security which the constitution intended [*349
in aid of his rights. Such a state of things can, in no respect, be considered as giving equal rights. To obviate this difficulty, we are referred to the power which, it is admitted, congress possesses to remove suits from state courts to the national courts; and this forms the second ground upon which the argument we are considering has been attempted to be sustained.

This power of removal is not to be found in express terms in any part of the constitution; if it be given, it is only given by implication, as a power necessary and proper to carry into effect some express power. The power of removal is certainly not, in strictness of language, an exercise of original jurisdiction; it presupposes an exercise of original jurisdiction to have attached elsewhere. The existence of this power of removal is familiar in courts acting according to the course of the common law, in criminal as well as civil cases, and it is exercised before as well as after judgment. But this is always deemed, in both cases, an exercise of appellate, and not of original jurisdiction. If, then, the right of removal be included in the appellate jurisdiction, it is only because it is one mode of exercising that power, and as congress is not limited by the constitution to any particular mode, or time, of exercising it, it may authorize a removal, either before or after judgment. The time, the process and the manner must be subject to its absolute legislative control. A writ of error is, indeed, but a process which removes the record of one court to the possession of another court, *and enables the latter [*350
to inspect the proceedings, and give such judgment as its own opinion of the law and justice of the case may warrant. There is nothing in the nature of the process, which forbids it from being applied by the legislature to interlocutory as well as final judgments. And if the right of removal from state courts exist, before judgment, because it is included in the appellate power, it must, for the same reason, exist, after judgment. And if the appellate power, by the constitution, does not include cases pending in state courts, the right of removal, which is but a mode of exercising that power,

cannot be applied to them. Precisely the same objections, therefore, exist as to the right of removal before judgment, as after, and both must stand or fall together. Nor, indeed, would the force of the arguments on either side materially vary, if the right of removal were an exercise of original jurisdiction. It would equally trench upon the jurisdiction and independence of state tribunals.

The remedy, too, of removal of suits, would be utterly inadequate to the purposes of the constitution, if it could act only on the parties, and not upon the state courts. In respect to criminal prosecutions, the difficulty seems admitted to be insurmountable ; and in respect to civil suits, there would, in many cases, be rights, without corresponding remedies. If state courts should deny the constitutionality of the authority to remove suits from their cognisance, in what manner could they be compelled to relinquish the jurisdiction? In respect to criminal cases, there would at once be an end of all control, and the *state decisions would be paramount to the constitution ; and though, in civil suits, the courts of the United States might act upon the parties, yet the state courts might act in the same way ; and this conflict of jurisdictions would not only jeopardize private rights, but bring into imminent peril the public interests.

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On the whole, the court are of opinion, that the appellate power of the United States does extend to cases pending in the state courts ; and that the 25th section of the judiciary act, which authorizes the exercise of this jurisdiction in the specified cases, by a writ of error, is supported by the letter and spirit of the constitution. We find no clause in that instrument which limits this power ; and we dare not interpose a limitation, where the people have not been disposed to create one.

Strong as this conclusion stands, upon the general language of the constitution, it may still derive support from other sources. It is an historical fact, that this exposition of the constitution, extending its appellate power to state courts, was, previous to its adoption, uniformly and publicly avowed by its friends, and admitted by its enemies, as the basis of their respective reasonings, both in and out of the state conventions. It is an historical fact, that at the time when the judiciary act was submitted to the deliberations of the first congress, composed, as it was, not only of men of great learning and ability, but of men who had acted a principal part in framing, supporting or opposing that constitution, the same exposition was explicitly declared and admitted by the friends and by the opponents of that system. It *is an historical fact, that the supreme court of the United States have, from time to time, sustained this appellate jurisdiction, in a great variety of cases, brought from the tribunals of many of the most important states in the Union, and that no state tribunal has ever breathed a judicial doubt on the subject, or declined to obey the mandate of the supreme court, until the present occasion. This weight of contemporaneous exposition by all parties, this acquiescence of enlightened state courts, and these judicial decisions of the supreme court, through so long a period, do, as we think, place the doctrine upon a foundation of authority which cannot be shaken, without delivering over the subject to perpetual and irremediable doubts.

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The next question which has been argued, is, whether the case at bar be within the purview of the 25th section of the judiciary act, so that this

court may rightfully sustain the present writ of error? This section, stripped of passages unimportant in this inquiry, enacts, in substance, that a final judgment or decree, in any suit in the highest court of law or equity of a state, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of such their validity; or of the constitution, or of a treaty or statute of, or commission held under, the United *States, and the decision is against the title, right, privilege or exemption [*353 specially set up or claimed by either party, under such clause of the said constitution, treaty, statute or commission, may be re-examined, and reversed or affirmed, in the supreme court of the United States, upon a writ of error, in the same manner, and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a circuit court, and the proceeding upon the reversal shall also be the same, except that the supreme court, instead of remanding the cause for a final decision, as before provided, may, at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution. But no other error shall be assigned or regarded as a ground of reversal, in any such case as aforesaid, than such as appears upon the face of the record, and immediately respects the beforementioned question of validity or construction of the said constitution, treaties, statutes, commissions or authorities in dispute.

That the present writ of error is founded upon a judgment of the court below, which drew in question and denied the validity of a statute of the United States, is incontrovertible, for it is apparent upon the face of the record. That this judgment is final upon the rights of the parties, is equally true; for if well founded, the former judgment of that court was of conclusive authority, and the former judgment of this court utterly void. The decision was, therefore, equivalent to a perpetual stay of proceedings upon *the mandate, and a perpetual denial of all the rights acquired under [*354 it. The case, then, falls directly within the terms of the act. It is a final judgment in a suit in a state court, denying the validity of a statue of the United States; and unless a distinction can be made between proceedings under a mandate, and proceedings in an original suit, a writ of error is the proper remedy to revise that judgment. In our opinion, no legal distinction exists between the cases.

In causes remanded to the circuit courts, if the mandate be not correctly executed, a writ of error or appeal has always been supposed to be a proper remedy, and has been recognised as such, in the former decisions of this court. The statute gives the same effect to writs of error from the judgments of state courts as of the circuit courts; and in its terms provides for proceedings where the same cause may be a second time brought up on writ of error before the supreme court. There is no limitation or description of the cases to which the second writ of error may be applied; and it ought, therefore, to be co-extensive with the cases which fall within the mischiefs of the statute. It will hardly be denied, that this cause stands in that pre-

dicament; and if so, then the appellate jurisdiction of this court has rightfully attached.

But it is contended, that the former judgment of this court was rendered upon a case, not within the purview of this section of the judicial act, and that, as it was pronounced by an incompetent jurisdiction, it was utterly void, and cannot be a sufficient foundation *to sustain any subsequent proceedings. To this argument, several answers may be given. In the first place, it is not admitted, that, upon this writ of error, the former record is before us. The error now assigned is not in the former proceedings, but in the judgment rendered upon the mandate issued after the former judgment. The question now litigated is not upon the construction of a treaty, but upon the constitutionality of a statute of the United States, which is clearly within our jurisdiction. In the next place, in ordinary cases, a second writ of error has never been supposed to draw in question the propriety of the first judgment, and it is difficult to perceive how such a proceeding could be sustained, upon principle. A final judgment of this court is supposed to be conclusive upon the rights which it decides, and no statute has provided any process by which this court can revise its own judgments. In several cases which have been formerly adjudged in this court, the same point was argued by counsel, and expressly overruled. It was solemnly held, that a final judgment of this court was conclusive upon the parties, and could not be re-examined.

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In this case, however, from motives of a public nature, we are entirely willing to waive all objections, and to go back and re-examine the question of jurisdiction, as it stood upon the record formerly in judgment. We have great confidence, that our jurisdiction will, on a careful examination, stand confirmed, as well upon principle as authority. It will be recollected, that the action was an ejectment for a parcel of land in the Northern Neck, formerly belonging to *Lord Fairfax. The original plaintiff claimed the land under a patent granted to him by the state of Virginia, in 1789, under a title supposed to be vested in that state by escheat or forfeiture. The original defendant claimed the land as devisee under the will of Lord Fairfax. The parties agreed to a special statement of facts, in the nature of a special verdict, upon which the district court of Winchester, in 1793, gave a general judgment for the defendant, which judgment was afterwards reversed in 1810, by the court of appeals, and a general judgment was rendered for the plaintiff; and from this last judgment, a writ of error was brought to the supreme court. The statement of facts contained a regular deduction of the title of Lord Fairfax, until his death, in 1781, and also the title of his devisee. It also contained a regular deduction of the title of the plaintiff, under the state of Virginia, and further referred to the treaty of peace of 1783, and to the acts of Virginia respecting the lands of Lord Fairfax, and the supposed escheat or forfeiture thereof, as component parts of the case. No facts disconnected with the titles thus set up by the parties were alleged on either side. It is apparent, from this summary explanation, that the title thus set up by the plaintiff might be open to other objections; but the title of the defendant was perfect and complete, if it was protected by the treaty of 1783. If, therefore, this court had authority to examine into the whole record, and to decide upon the legal validity of the title of the defendant, as well as its application to the

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treaty of peace, it would be a case within the express purview *of the 25th section of the act; for there was nothing in the record upon which the court below could have decided, but upon the title as connected with the treaty; and if the title was otherwise good, its sufficiency must have depended altogether upon its protection under the treaty. Under such circumstances, it was strictly a suit where was drawn in question the construction of a treaty, and the decision was against the title specially set up or claimed by the defendant. It would fall, then, within the very terms of the act.

The objection urged at the bar is, that this court cannot inquire into the title, but simply into the correctness of the construction put upon the treaty by the court of appeals; and that their judgment is not re-examinable here, unless it appear on the face of the record, that some construction was put upon the treaty. If, therefore, that court might have decided the case upon the invalidity of the title (and *non constat*, that they did not), independent of the treaty, there is an end of the appellate jurisdiction of this court. In support of this objection, much stress is laid upon the last clause of the section, which declares, that no other cause shall be regarded as a ground of reversal than such as appears on the face of the record and immediately respects the construction of the treaty, &c., in dispute.

If this be the true construction of the section, it will be wholly inadequate for the purposes which it professes to have in view, and may be evaded at pleasure. But we see no reason for adopting this narrow construction; and there are the strongest *reasons against it, founded upon the words as well as the intent of the legislature. What is the [*358 case for which the body of the section provides a remedy by writ of error? The answer must be, in the words of the section, a suit where is drawn in question the construction of a treaty, and the decision is against the title set up by the party. It is, therefore, the decision against the title set up, with reference to the treaty, and not the mere abstract construction of the treaty itself, upon which the statute intends to found the appellate jurisdiction. How, indeed, can it be possible to decide, whether a title be within the protection of a treaty, until it is ascertained what that title is, and whether it have a legal validity? From the very necessity of the case, there must be a preliminary inquiry into the existence and structure of the title, before the court can construe the treaty in reference to that title. If the court below should decide, that the title was bad, and therefore, not protected by the treaty, must not this court have a power to decide the title to be good, and therefore, protected by the treaty? Is not the treaty, in both instances, equally construed, and the title of the party, in reference to the treaty, equally ascertained and decided? Nor does the clause relied on in the objection, impugn this construction. It requires, that the error upon which the appellate court is to decide, shall appear on the face of the record, and immediately respect the questions before mentioned in the section. One of the questions is, as to the construction of a treaty, upon a title specially set up by a party, and every error that immediately respects *that question must, of course, be within the cognisance of the court. [*359 The title set up in this case is apparent upon the face of the record, and immediately respects the decision of that question; any error, therefore,

in respect to that title must be re-examinable, or the case could never be presented to the court.

The restraining clause was manifestly intended for a very different purpose. It was foreseen, that the parties might claim under various titles, and might assert various defences, altogether independent of each other. The court might admit or reject evidence applicable to one particular title, and not to all, and in such cases, it was the intention of congress, to limit what would otherwise have unquestionably attached to the court, the right of revising all the points involved in the cause. It, therefore, restrains this right to such errors as respect the questions specified in the section ; and in this view, it has an appropriate sense, consistent with the preceding clauses. We are, therefore, satisfied, that, upon principle, the case was rightfully before us, and if the point were perfectly new, we should not hesitate to assert the jurisdiction.

But the point has been already decided by this court upon solemn argument. In *Smith* v. *State of Maryland* (6 Cranch 286), precisely the same objection was taken by counsel, and overruled by the unanimous opinion of the court. That case was, in some respects, stronger than the present ; for the court below decided, expressly, that the party had no title, and there-
*360] fore, the treaty could not operate *upon it. This court entered into an examination of that question, and being of the same opinion, affirmed the judgment. There cannot, then, be an authority which could more completely govern the present question.

It has been asserted at the bar, that, in point of fact, the court of appeals did not decide either upon the treaty, or the title apparent upon the record, but upon a compromise made under an act of the legislature of Virginia. If it be true (as we are informed), that this was a private act, to take effect only upon a certain condition, viz., the execution of a deed of release of certain lands, which was matter *in pais*, it is somewhat difficult to understand, how the court could take judicial cognisance of the act, or of the performance of the condition, unless spread upon the record. At all events, we are bound to consider, that the court did decide upon the facts actually before them. The treaty of peace was not necessary to have been stated, for it was the supreme law of the land, of which all courts must take notice. And at the time of the decision in the court of appeals, and in this court, another treaty had intervened, which attached itself to the title in controversy, and of course, must have been the supreme law to govern the decision, if it should be found applicable to the case. It was in this view that this court did not deem it necessary to rest its former decision upon the treaty of peace, believing that the title of the defendant was, at all events, perfect, under the treaty of 1794.

*361] *The remaining questions respect more the practice than the principles of this court. The forms of process, and the modes of proceeding in the exercise of jurisdiction, are, with few exceptions, left by the legislature, to be regulated and changed, as this court may, in its discretion, deem expedient. By a rule of this court, the return of a copy of a record of the proper court, under the seal of that court, annexed to the writ of error, is declared to be "a sufficient compliance with the mandate of the writ." The record, in this case, is duly certified by the clerk of the court of

appeals, and annexed to the writ of error. The objection, therefore, which has been urged to the sufficiency of the return, cannot prevail.

Another objection is, that it does not appear that the judge who granted the writ of error did, upon issuing the citation, take the bond required by the 22d section of the judiciary act. We consider that provision as merely directory to the judge; and that an omission does not avoid the writ of error. If any party be prejudiced by the omission, this court can grant him summary relief, by imposing such terms on the other party as, under all the circumstances, may be legal and proper. But there is nothing in the record, by which we can judicially know whether a bond has been taken or not; for the statute does not require the bond to be returned to this court, and it might, with equal propriety, be lodged in the court below, who would ordinarily execute the judgment to be rendered on the writ. And the presumption of the law is, until the contrary *appears, that every judge who signs a citation has obeyed the injunctions of the act. [*362

We have thus gone over all the principal questions in the cause, and we deliver our judgment with entire confidence, that it is consistent with the constitution and laws of the land. We have not thought it incumbent on us to give any opinion upon the question, whether this court have authority to issue a writ of *mandamus* to the court of appeals, to enforce the former judgments, as we did not think it necessarily involved in the decision of this cause.

It is the opinion of the whole court, that the judgment of the court of appeals of Virginia, rendered on the mandate in this cause, be reversed, and the judgment of the district court, held at Winchester, be, and the same is hereby affirmed.

Johnson, J.—It will be observed, in this case, that the court disavows all intention to decide on the right to issue compulsory process to the state courts; thus leaving us, in my opinion, where the constitution and laws place us—supreme over persons and cases, so far as our judicial powers extend, but not asserting any compulsory control over the state tribunals. In this view, I acquiesce in their opinion, but not altogether in the reasoning or opinion of my brother who delivered it. Few minds are accustomed to the same habit of thinking, and our conclusions are most satisfactory to ourselves, when arrived at in our own way.

*I have another reason for expressing my opinion on this occasion. I view this question as one of the most momentous importance; as [*363 one which may affect, in its consequences, the permanence of the American Union. It presents an instance of collision between the judicial powers of the Union and one of the greatest states in the Union, on a point the most delicate and difficult to be adjusted. On the one hand, the general government must cease to exist, whenever it loses the power of protecting itself in the exercise of its constitutional powers. Force, which acts upon the physical powers of man, or judicial process, which addresses itself to his moral principles or his fears, are the only means to which governments can resort in the exercise of their authority. The former is happily unknown to the genius of our constitution, except as far as it shall be sanctioned by the latter; but let the latter be obstructed in its progress, by an opposition

which it cannot overcome or put by, and the resort must be to the former, or government is no more.

On the other hand, so firmly am I persuaded that the American people can no longer enjoy the blessings of a free government, whenever the state sovereignties shall be prostrated at the feet of the general government, nor the proud consciousness of equality and security, any longer than the independence of judicial power shall be maintained, consecrated and intangible, that I could borrow the language of a celebrated orator, and exclaim, "I rejoice that Virginia has resisted."

*364] Yet, here, I must claim the privilege of expressing *my regret, that the opposition of the high and truly respected tribunal of that state had not been marked with a little more moderation. The only point necessary to be decided in the case then before them was, "Whether they were bound to obey the mandate emanating from this court?" But in the judgment entered on their minutes, they have affirmed that the case was, in this court, *coram non judice*, or, in other words, that this court had not jurisdiction over it. This is assuming a truly alarming latitude of judicial power. Where is it to end? It is an acknowledged principle of, I believe, every court in the world, that not only the decisions, but everything done under the judicial process of courts, not having jurisdiction are, *ipso facto*, void. Are, then, the judgments of this court to be reviewed in every court of the Union? And is every recovery of money, every change of property, that has taken place under our process, to be considered as null, void and tortious?

We pretend not to more infallibility than other courts composed of the same frail materials which compose this. It would be the height of affectation, to close our minds upon the recollection that we have been extracted from the same seminaries in which originated the learned men who preside over the state tribunals. But there is one claim which we can with confidence assert in our own name, upon those tribunals—the profound, uniform and unaffected respect which this court has always exhibited for state decisions, give us strong pretensions to judicial comity. And another claim I may assert, in the name of the American people; in this court,

*365] every state in *the Union is represented; we are constituted by the voice of the Union, and when decisions take place, which nothing but a spirit to give ground and harmonize can reconcile, ours is the superior claim upon the comity of the state tribunals. It is the nature of the human mind, to press a favorite hypothesis too far, but magnanimity will always be ready to sacrifice the pride of opinion to public welfare.

In the case before us, the collision has been, on our part, wholly unsolicited. The exercise of this appellate jurisdiction over the state decisions has long been acquiesced in, and when the writ of error, in this case, was was allowed by the president of the court of appeals of Virginia, we were sanctioned in supposing, that we were to meet with the same acquiescence there. Had that court refused to grant the writ, in the first instance, or had the question of jurisdiction, or on the mode of exercising jurisdiction, been made here, originally, we should have been put on our guard, and might have so modelled the process of the court, as to strip it of the offensive form of a mandate. In this case, it might have been brought down to what probably the 25th section of the judiciary act meant it should be, to wit, an

alternative judgment, either that the state court may finally proceed, at its option, to carry into effect the judgment of this court, or, if it declined doing so, that then this court would proceed itself to execute it. The language, sense and operation of the 25th section on this subject, merit particular attention. In the preceding section, which has relation to causes brought up by writ of error from the circuit courts *of the United States, this court is instructed not to issue executions, but to send a special mandate to the circuit court to award execution thereupon. In case of the circuit court's refusal to obey such mandate, there could be no doubt as to the ulterior measures; compulsory process might, unquestionably, be resorted to. Nor, indeed, was there any reason to suppose, that they ever would refuse; and therefore, there is no provision made for authorizing this court to execute its own judgment in cases of that description. But not so, in cases brought up from the state courts; the framers of that law plainly foresaw that the state courts might refuse; and not being willing to leave ground for the implication, that compulsory process must be resorted to, because no specific provision was made, they have provided the means, by authorizing this court, in case of reversal of the state decision, to execute its own judgment. In case of reversal only, was this necessary; for, in case of affirmance, this collision could not arise. It is true, that the words of this section are, that this court may, in their discretion, proceed to execute its own judgment. But these words were very properly put in, that it might not be made imperative upon this court to proceed indiscriminately in this way; as it could only be necessary, in case of the refusal of the state courts; and this idea is fully confirmed by the words of the 13th section, which restrict this court in issuing the writ of *mandamus*, so as to confine it expressly to those courts which are constituted by the United States. [*366

*In this point of view the legislature is completely vindicated from all intention to violate the independence of the state judiciaries. Nor can this court, with any more correctness, have imputed to it similar intentions. The form of the mandate issued in this case is that known to appellate tribunals, and used in the ordinary cases of writs of error from the courts of the United States. It will, perhaps, not be too much, in such cases to expect of those who are conversant in the forms, fictions and technicality of the law, not to give the process of courts too literal a construction. They should be considered with a view to the ends they are intended to answer, and the law and practice in which they originate. In this view, the mandate was no more than a mode of submitting to that court the option which the 25th section holds out to them. [*367

Had the decision of the court of Virginia been confined to the point of their legal obligation to carry the judgment of this court into effect, I should have thought it unnecessary to make any further observations in this cause. But we are called upon to vindicate our general revising power, and its due exercise in this particular case.

Here, that I may not be charged with arguing upon a hypothetical case, it is necessary to ascertain what the real question is which this court is now called to decide on. In doing this, it is necessary to do what, although, in the abstract, of very questionable propriety, appears to be generally acquiesced in, to wit, to review the case, as it originally came up to this court *on the former writ of error. The cause, then, came up upon a [*368

case stated between the parties, and under the practice of that state, having the effect of a special verdict. The case stated brings into view the treaty of peace with Great Britain, and then proceeds to present the various laws of Virginia, and the facts upon which the parties found their respective titles. It then presents no particular question, but refers generally to the law arising out of the case. The original decision was obtained prior to the treaty of 1794, but before the case was adjudicated in this court, the treaty of 1794 had been concluded.

The difficulties of the case arise under the construction of the 25th section above alluded to, which, as far as it relates to this case, is in these words: "A final judgment or decree in any suit, in the highest court of law or equity of a state in which a decision in the suit could be had," "where is drawn in question the construction of any clause of the constitution or of a treaty," "and the decision is against the title set up or claimed by either party under such clause, may be re-examined, and reversed or affirmed." "But no other error shall be assigned or regarded as a ground of reversal, in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before-mentioned questions of validity or construction of the said treaties," &c.

The first point decided under this state of the case was, that the judgment being a part of the record, if that judgment was not such as, upon
*369] that case, it ought to have been, it was an error apparent on the *face of the record. But it was contended, that the case there stated presented a number of points upon which the decision below may have been founded, and that it did not, therefore, necessarily appear to have been an error immediately respecting a question on the construction of a treaty. But the court held, that as the reference was general to the law arising out of the case, if one question arose, which called for the construction of a treaty, and the decision negatived the right set up under it, this court will reverse that decision, and that it is the duty of the party who would avoid the inconvenience of this principle, so to mould the case as to obviate the ambiguity. And under this point, arises the question, whether this court can inquire into the title of the party, or whether they are so restricted in their judicial powers, as to be confined to decide on the operation of a treaty upon a title previously ascertained to exist.

If there is any one point in the case on which an opinion may be given with confidence, it is this: whether we consider the letter of statute, or the spirit, intent or meaning of the constitution and of the legislature, as expressed in the 27th section, it is equally clear, that the title is the primary object to which the attention of the court is called in every such case. The words are, "and the decision be against the title," so set up, not against the construction of the treaty contended for by the party setting up the title. And how could it be otherwise? The title may exist, notwithstanding the
*370] decision of the state courts to the contrary; and in that case, the *party is entitled to the benefits intended to be secured by the treaty. The decision to his prejudice may have been the result of those very errors, partialities or defects in state jurisprudence against which the constitution intended to protect the individual. And if the contrary doctrine be assumed, what is the consequence? This court may then be called upon to decide on a mere hypothetical case—to give a construction to a treaty,

without first deciding whether there was any interest on which that treaty, whatever be its proper construction, would operate. This difficulty was felt and weighed in the case of *Smith* v. *State of Maryland*, and that decision was founded upon the idea, that this court was not thus restricted.

But another difficulty presented itself: the treaty of 1794 had become the supreme law of the land, since the jndgment rendered in the court below. The defendant, who was, at that time, an alien, had now become confirmed in his rights under that treaty. This would have been no objection to the correctness of the original judgment. Were we, then, at liberty to notice that treaty, in rendering the judgment of this court?

Having dissented from the opinion of this court in the original case, on the question of title, this difficulty did not present itself in my way, in the view I then took of the case. But the majority of this court determined, that, as a public law, the treaty was a part of the law of every case depending in this court; that as such, it was not necessary that it should be spread upon the record, and that it was obligatory *upon this court, in rendering judgment upon this writ of error, notwithstanding the original [*371 judgment may have been otherwise unimpeachable. And to this opinion, I yielded my hearty consent; for it cannot be maintained, that this court is bound to give a judgment, unlawful at the time of rendering it, in consideration that the same judgment would have been lawful, at any prior time. What judgment can now be lawfully rendered between the parties, is the question to which the attention of the court is called. And if the law which sanctioned the original judgment expire, pending an appeal, this court has repeatedly reversed the judgment below, although rendered whilst the law existed. So too, if the plaintiff in error die, pending suit, and his land descend on an alien, it cannot be contended, that this court will maintain the suit, in right of the judgment, in favor of his ancestor, notwithstanding his present disability.

It must here be recollected, that this is an action of ejectment. If the term formally declared upon, expires, pending the action, the court will permit the plaintiff to amend, by extending the term—why? Because, although the right may have been in him at the commencement of the suit, it has ceased, before judgment, and without this amendment, he could not have judgment. But suppose, the suit were really instituted to obtain possession of a leasehold and the lease expire, before judgment, would the court permit the party to amend, in opposition to the right of the case? On the contrary, if the term formally declared on were more extensive than the *lease in which the legal title was founded, could they give judg- [*372 ment for more than costs? It must be recollected, that under this judgment, a writ of restitution is the fruit of the law. This, in its very nature, has relation to, and must be founded upon, a present existing right, at the time of judgment. And whatever be the cause which takes this right away, the remedy must, in the reason and nature of things, fall with it.

When all these incidental points are disposed of, we find the question finally reduced to this—does the judicial power of the United States extend to the revision of decisions of state courts, in cases arising under treaties? But in order to generalize the question, and present it in the true form in which it presents itself in this case, we will inquire, whether the constitution sanctions the exercise of a revising power over the decisions of state tribu-

nals in those cases to which the judicial power of the United States extends?

And here it appears to me, that the great difficulty is on the other side. That the real doubt is, whether the state tribunals can constitutionally exercise jurisdiction, in any of the cases to which the judicial power of the United States extends? Some cession of judicial power is contemplated by the third article of the constitution; that which is ceded, can no longer be retained. In one of the circuit courts of the United States, it has been decided (with what correctness I will not say), that the cession of a power to pass an uniform act of bankruptcy, although not acted on by the *373] United States, deprives *the states of the power of passing laws to that effect.[1] With regard to the admiralty and maritime jurisdiction, it would be difficult to prove that the states could resume it, if the United States should abolish the courts vested with that jurisdiction; yet, it is blended with the other cases of jurisdiction, in the second section of the third article, and ceded in the same words. But it is contended, that the second section of the third article contains no express cession of jurisdiction; that it only vests a power in congress to assume jurisdiction to the extent therein expressed. And under this head, arose the discussion on the construction proper to be given to that article.

On this part of the case, I shall not pause long. The rules of construction, where the nature of the instrument is ascertained, are familiar to every one. To me, the constitution appears, in every line of it, to be a contract, which, in legal language, may be denominated tripartite. The parties are the people, the states, and the United States. It is returning in a circle, to contend, that it professes to be the exclusive act of the people, for what have the people done, but to form this compact? That the states are recognised as parties to it, is evident, from various passages, and particularly, that in which the United States guaranty to each state a republican form of government.

The security and happiness of the whole was the object, and, to prevent dissension and collision, each surrendered those powers which might make them dangerous to each other. Well aware of the sensitive *irrita- *374] bility of sovereign states, where their wills or interests clash, they placed themselves, with regard to each other, on the footing of sovereigns upon the ocean; where power is mutually conceded to act upon the individual, but the national vessel must remain unviolated. And to remove all ground for jealousy and complaint, they relinquish the privilege of being any longer the exclusive arbiters of their own justice, where the rights of others come in question, or the great interests of the whole may be affected by those feelings, partialities or prejudices, which they meant to put down for ever.

Nor shall I enter into a minute discussion on the meaning of the language of this section. I have seldom found much good result from hypercritical severity, in examining the distinct force of words. Language is essentially defective in precision; more so, than those are aware of, who are not in the habit of subjecting it to philological analysis. In the case before us, for instance, a rigid construction might be made, which would annihilate

[1] Golden v. Prince, 3 W. C. C. 313.

the powers intended to be ceded. The words are, "shall extend to;" now that which extends *to*, does not necessarily include *in*, so that the circle may enlarge, until it reaches the objects that limit it, and yet not take them in. But the plain and obvious sense and meaning of the word *shall*, in this sentence, is in the future sense, and has nothing imperative in it. The language of the framers of the constitution is, "We are about forming a general government—when that government is formed, its powers shall extend," &c. I, therefore, see nothing imperative in this clause, and certainly *it would have been very unnecessary to use the word in that sense; for, as there was no controlling power constituted, it would [*375 only, if used in an imperative sense, have imposed a moral obligation to act. But the same result arises, from using it in a future sense, and the constitution everywhere assumes, as a postulate, that wherever power is given, it will be used, or at least used, so far as the interests of the American people require it, if not from the natural proneness of man to the exercise of power, at least, from a sense of duty, and the obligation of an oath.

Nor can I see any difference in the effect of the words used in this section, as to the scope of the jurisdiction of the United States courts over the cases of the first and second description, comprised in that section. "Shall extend to controversies," appears to me as comprehensive in effect, as "shall extend to all cases." For, if the judicial power extend "to controversies between citizen and alien," &c., to what controversies of that description, does it not extend? If no case can be pointed out, which is excepted, it then extends to all controversies.

But I will assume the construction as a sound one, that the cession of power to the general government, means no more than that they may assume the exercise of it, whenever they think it advisable. It is clear, that congress have hitherto acted under that impression, and my own opinion is in favor of its correctness. But does it not then follow, that the jurisdiction of the state court, within the range ceded to the general government, is permitted, and *may be withdrawn whenever congress think proper to do so? As it is a principle, that every one may renounce a right introduced [*376 for his benefit, we will admit, that as congress have not assumed such jurisdiction, the state courts may, constitutionally, exercise jurisdiction in such cases. Yet, surely, the general power to withdraw the exercise of it, includes in it the right to modify, limit and restrain that exercise. "This is my domain, put not your foot upon it, if you do, you are subject to my laws, I have a right to exclude you altogether; I have, then, a right to prescribe the terms of your admission to a participation. As long as you conform to my laws, participate in peace, but I reserve to myself the right of judging how far your acts are conformable to my laws." Analogy, then, to the ordinary exercise of sovereign authority, would sustain the exercise of this controlling or revising power.

But it is argued, that a power to assume jurisdiction to the constitutional extent, does not necessarily carry with it a right to exercise appellate power over the state tribunals. This is a momentous question, and one on which I shall reserve myself uncommitted for each particular case as it shall occur. It is enough, at present, to have shown, that congress have not asserted, and this court has not attempted, to exercise that kind of authority *in personam*, over the state courts, which would place them in the relation of an inferior

responsible body, without their own acquiescence. And I have too much confidence in the state tribunals, to believe that a case ever will occur, in
*377] which it will be necessary *for the general government to assume a controlling power over these tribunals. But is it difficult to suppose a case, which will call loudly for some remedy or restraint? Suppose, a foreign minister, or an officer, acting regularly under authority from the United States, seized to-day, tried to-morrow, and hurried the next day to execution. Such cases may occur, and have occurred, in other countries. The angry, vindictive passions of men have too often made their way into judicial tribunals, and we cannot hope for ever to escape their baleful influence. In the case supposed, there ought to be a power somewhere to restrain or punish, or the Union must be dissolved. At present, the uncontrollable exercise of criminal jurisdiction is most securely confided to the state tribunals. The courts of the United States are vested with no power to scrutinize into the proceedings of the state courts in criminal cases; on the contrary, the general government has, in more than one instance, exhibited their confidence, by a wish to vest them with the execution of their own penal law. And extreme, indeed, I flatter myself, must be the case, in which the general government could ever be induced to assert this right. If ever such a case should occur, it will be time enough to decide upon their constitutional power to do so.

But we know, that by the 3d article of the constitution, judicial power, to a certain extent, is vested in the general government, and that, by the same instrument, power is given to pass all laws necessary to carry into effect the provisions of the constitution. At present, it is only necessary to
*378] vindicate the *laws which they have passed affecting civil cases pending in state tribunals.

In legislating on this subject, congress, in the true spirit of the constitution, have proposed to secure to every one the full benefit of the constitution, without forcing any one, necessarily, into the courts of the United States. With this view, in one class of cases, they have not taken away absolutely from the state courts all the cases to which their judicial power extends, but left it to the plaintiff to bring his action there, originally, if he choose, or to the defendant, to force the plaintiff into the courts of the United States, where they have jurisdiction, and the former has instituted his suit in the state courts. In this case, they have not made it legal for the defendant to plead to the jurisdiction; the effect of which would be, to put an end to the plaintiff's suit, and oblige him, probably, at great risk or expense, to institute a new action; but the act has given him a right to obtain an order for a removal, on a petition to the state court, upon which the cause, with all its existing advantages, is transferred to the circuit court of the United States. This, I presume, can be subject to no objection; as the legislature has an unquestionable right to make the ground of removal, a ground of plea to the jurisdiction, and the court must then do no more than it is now called upon to do, to wit, give an order or a judgment, or call it what we will, in favor of that defendant. And so far from asserting the inferiority of the state tribunal, this act is rather that of a superior, inasmuch as the circuit court
*379] of the United States becomes bound, *by that order, to take jurisdiction of the case. This method, so much more unlikely to affect official delicacy than that which is resorted to in the other class of cases, might,

perhaps, have been more happily applied to all the cases which the legislature thought it advisable to remove from the state courts. But the other class of cases, in which the present is included, was proposed to be provided for in a different manner. And here, again, the legislature of the Union evince their confidence in the state tribunals; for they do not attempt to give original cognisance to their own circuit courts of such cases, or to remove them by petition and order; but still, believing that their decisions will be generally satisfactory, a writ of error is not given immediately, as a question within the jurisdiction of the United States shall occur, but only in case the decision shall finally, in the court of the last resort, be against the title set up under the constitution, treaty, &c.

In this act, I can see nothing which amounts to an assertion of the inferiority or dependence of the state tribunals. The presiding judge of the state court is himself authorized to issue the writ of error, if he will, and thus give jurisdiction to the supreme court: and if he thinks proper to decline it, no compulsory process is provided by law to oblige him. The party who imagines himself aggrieved is then at liberty to apply to a judge of the United States, who issues the writ of error, which (whatever the form) is, in substance, no more than a mode of compelling the opposite party to appear before this court, and maintain the legality of his judgment obtained before the *state tribunal. An exemplification of a record [*380
is the common property of every one who chooses to apply and pay for it, and thus the case and the parties are brought before us; and so far is the court itself from being brought under the revising power of this court, that nothing but the case, as presented by the record and pleadings of the parties, is considered, and the opinions of the court are never resorted to, unless for the purpose of assisting this court in forming their own opinions.

The absolute necessity that there was for congress to exercise something of a revising power over cases and parties in the state courts, will appear from this consideration. Suppose, the whole extent of the judicial power of the United States vested in their own courts, yet such a provision would not answer all the ends of the constitution, for two reasons:

1st. Although the plaintiff may, in such case, have the full benefit of the constitution extended to him, yet the defendant would not; as the plaintiff might force him into the court of the state, at his election.

2d. Supposing it possible so to legislate, as to give the courts of the United States original jurisdiction in all cases arising under the constitution, laws, &c., in the words of the 2d section of the 3d article (a point on which I have some doubt, and which in time might, perhaps, under some *quo minus* fiction, or a willing construction, greatly accumulate the jurisdiction of those courts), yet a very large class of cases would remain unprovided for. Incidental questions would often arise, and as a court of competent *juris- [*381
diction in the principal case must decide all such questions, whatever laws they arise under, endless might be the diversity of decisions throughout the Union upon the constitution, treaties and laws of the United States; a subject on which the tranquillity of the Union, internally and externally, may materially depend.

I should feel the more hesitation in adopting the opinions which I express in this case, were I not firmly convinced, that they are practical, and may be acted upon, without compromitting the harmony of the Union, or bring-

ing humility upon the state tribunals. God forbid! that the judicial power in these states should ever, for a moment, even in its humblest departments, feel a doubt of its own independence. Whilst adjudicating on a subject which the laws of the country assign finally to the revising power of another tribunal, it can feel no such doubt. An anxiety to do justice is ever relieved, by the knowledge that what we do is not final between the parties. And no sense of dependence can be felt, from the knowlege that the parties, not the court, may be summoned before another tribunal. With this view, by means of laws, avoiding judgments obtained in the state courts in cases over which congress has constitutionally assumed jurisdiction, and inflicting penalties on parties who shall contumaciously persist in infringing the constitutional rights of others—under a liberal extension of the writ of injunction and the *habeas corpus ad subjiciendum*, I flatter myself, that the full extent of the constitutional revising power may be secured to the United States, and the
*382] *benefits of it to the individual, without ever resorting to compulsory or restrictive process upon the state tribunals; a right which, I repeat again, congress has not asserted, nor has this court asserted, nor does there appear any necessity for asserting.

The remaining points in the case being mere questions of practice, I shall make no remarks upon them.

Judgment affirmed.

The Commercen: Lindgren, Claimant.

Contraband of war.—Freight.

Provisions, neutral property, but the growth of the enemy's country, and destined for the supply of the enemy's military or naval forces, are contraband.[1]

Provisions, neutral property, and the growth of a neutral country, destined for the general supply of human life in the enemy's country, are not contraband.[2]

Freight is never due to the neutral carrier of contraband.

Quære? In what cases, the vehicle of contraband is confiscable?

A neutral ship, laden with provisions, enemy's property, and the growth of the enemy's country, specially permitted to be exported for the supply of his forces, is not entitled to freight.

It makes no difference, in such a case, that the enemy is carrying on a distinct war, in conjunction with his allies, who are friends of the captor's country, and that the provisions are intended for the supply of his troops engaged in that war, and that the ship in which they are transported belongs to subjects of one of those allies.

The Commercen, 2 Gallis. 261, affirmed.

*383] Appeal from the Circuit Court for the district of Massachusetts. This was the case of a Swedish *vessel captured on the 16th of April 1814, by the private armed schooner Lawrence, on a voyage from Limerick, in Ireland, to Bilboa, in Spain. The cargo consisted of barley and oats, the property of British subjects, the exportation of which is generally prohibited by the British government; and as well by the official papers of the custom-house, as by the private letters of the shippers, it appeared to have been shipped under the special permission of the government, for the sole use of his Britannic Majesty's forces then in Spain. Bonds were accordingly given for the fulfilment of this object.

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[1] Maisonnaire *v.* Keating, 2 Gallis. 325.

[2] The Henry C. Homeyer, 2 Bond 217. See The Peterhoff, 5 Wall. 28.

The Commercen.

At the hearing in the district court of Maine, the cargo was condemned as enemy's property, and the vessel restored, with an allowance, among other things, of the freight for the voyage, according to the stipulation of the charter-party. The captors appealed from so much of the sentence as decreed freight to the neutral ship; and upon the appeal to the circuit court of Massachusetts, the decree, as to freight, was reversed; and from this last sentence, an appeal was prosecuted to this court.

Key, for the appellants and claimants.—1. The general principle of law allows freight to the neutral carrier of enemy's property. It is incumbent upon the captors, to show, that this case forms an exception to the rule, which they can only do, by alleging this to be an unlawful interposition in the war between the United States and Great Britain; but an interposition in the Peninsular war, was not necessarily an interposition in the American war. Were it *so, it would follow, that the Spaniards and Swedes might not trade with the United States, they being the allies of Great [*384
Britain; as the prize courts of England decide, that the subjects of an ally cannot lawfully trade with the common enemy. Bynkershoek puts the case of two powers allied, during a truce, but before enemies (Q. J. Pub. lib. 16, p. 125, Du Ponceau's Translation). What would be the situation of neutrals? If they came to the assistance of either, they might be liable to be treated as enemies by the other. In the present instance, if the British forces had been so situated, as that they might operate against the United States as well as France, it would alter the case. But remote and uncertain consequences cannot be held to affect the conduct of neutrals with illegality.

2. There is no proof or presumption, that the master knew the special destination of the cargo. His act cannot be unlawful, unless done knowingly and wilfully, as in the case of carrying enemy's dispatches, where Sir William Scott, at first, went entirely on the ground of the master's privity; afterwards, he adopted a rule more strict and severe; but still knowledge was held to be necessary, and presumed, wherever there was a want of extraordinary diligence on the part of the master. It is conceded, that the *onus* is on the claimant, to show his ignorance of the contents of the papers concerning the cargo, which, if the present testimony is not sufficient, may be done upon further proof.

*Story, J.—Ignorance of the master was not pretended, in the court below. [*385

Dexter, for the respondents and captors.—The rule that the neutral carrier of enemy's property is entitled to freight, is a mitigated rule, and Bynkershoek argues with much force against its reasonableness. (Q. J. Pub. ch. 14, p. 111, Du Ponceau's Translation.) But the master, in the present case, is not entitled to the benefit of it, having, by his conduct, made himself an enemy, *pro hâc vice*. The principle, as to the nature of the Spanish war, was settled, when the court determined, that to carry goods to Lisbon, under a British license, was cause of confiscation. Can a party in a similar predicament be entitled to freight? Can a neutral stand on any better ground than a citizen? Either the British troops in the Peninsula were enemies or friends. If enemies, this is an interposition which cannot be permitted to neutrals. Being at war, the British fleets and armies were

hostile, in every quarter of the globe. Where shall the line be drawn, to mark when they became our enemies? At what period, from the time of their landing in Portugal, until their crossing the Pyrennees, and embarking at Bordeaux for the United States? It is impossible to aid the operations of our enemy, in any part of the world, without strengthening his means of annoying us. The very men fed by this trade came here to fight us on our own soil, and to destroy our capital. It is said, that this involves the con-
*386] sequence, that we were at war *with Spain and Portugal; but it depends upon the councils of every country, to judge what acts of hostility shall render it expedient to make war; it depended on us, to be at war with the allies of our declared enemy. It is a general rule, that it is not unlawful to carry provisions to a neutral country; but if the enemy be there, and the articles are destined for his use, it is unlawful. The whole evidence shows, that the master knew he was carrying provisions for the supply of the British forces, and his ignorance of the law, is immaterial. But even if it were material, the inflamed rate of freight shows that he was conscious of the risk he ran.

Harper, in reply.—The principle contended for by the captors is *stricti juris*, and extreme in its application to this particular case, where there is nothing like moral guilt in the conduct of the master, who did not intend to interfere in our distinct war. There is no adjudged case that comes up to this; and freight is refused, from analogy to the general principle established by the British prize courts, as to neutral interposition in the war. But an interference in the coasting and colonial, or other privileged trade of the enemy, and relief to him, is a direct assistance, and the rule cannot justly be extended to a remote and consequential aid, not contemplated by the party. The license cases, determined by this court, went on the ground of an adoption of the enemy character, and an incorporation with enemy interests; the case of *The Liverpool Packet* (1 Gallis. 513), determined by
*387] the same learned judge who tried this cause, shows the distinction *between this and the license cases. The rule of the war of 1756, even supposing it to be well established, does not apply to the relative situation of Great Britain and the United States. The former had hung out no signals of depression and defeat in the Peninsular war, and required no neutral aid, as a relief from the pressure of her enemies.(*a*)

March 21st, 1816. Story, J., delivered the opinion of the court.—The single point now in controversy in this cause is, whether the ship is entitled to the freight for the voyage? The general rule, that the neutral carrier of enemy's property is entitled to his freight, is now too firmly established to admit of discussion. But to this rule there are many exceptions. If the neutral be guilty of fraudulent or unneutral conduct, or has interposed himself to assist the enemy in carrying on the war, he is justly deemed to have forfeited his title to freight. Hence, the carrying of contraband goods to the enemy; the engaging in the coasting or colonial trade of the enemy; the spoliation of papers, and the fraudulent suppression of enemy interests, have been held to affect the neutral with the forfeiture of freight, and in cases of a more flagrant character, such as carrying dispatches or hostile

(*a*) *Vide* Appendix, note III.

military passengers, an engagement in the transport service of the enemy, and a breach of blockade, the penalty of confiscation of the vessel has also been inflicted.(*a*) By the modern law of nations, provisions *are [*388 not, in general, deemed contraband; but they may become so, although the property of a neutral, on account of the particular situation of the war, or on account of their destination. *The Jonge Margaretha*, 1 Rob. 189. If destined for the ordinary use of life in the enemy's country, they are not, in general, contraband; but it is otherwise, if destined for military use. Hence, if destined for the army or navy of the enemy, or for his ports of naval or military equipment, they are deemed contraband. (Ibid.) Another exception from being treated as contraband is, where the provisions are the growth of the neutral exporting country. But if they be the growth of the enemy's country, and, more especially, if the property of his subjects, and destined for enemy's use, there does not seem any good reason for the exemption; for, as Sir WILLIAM SCOTT has observed, in such case, the party has not only gone out of his way for the supply of the enemy, but he has assisted him by taking off his surplus commodities. (Ibid.) But it is argued, that the doctrine of contraband cannot apply to the present case, because the destination was to a neutral country; and it is certainly true, that goods destined for the use of a neutral country can never be deemed contraband, whatever may be their character, or however well adapted to warlike purposes. But if such goods are destined for the direct *and [*389 avowed use of the enemy's army or navy, we should be glad to see an authority which countenances this exemption from forfeiture, even though the property of a neutral. Suppose, in time of war, a British fleet were lying in a neutral port, would it be lawful for a neutral to carry provisions or munitions of war thither, avowedly for the exclusive supply of such fleet? Would it not be a direct interposition in the war, and an essential aid to the enemy in his hostile preparations? In such a case, the goods, even if belonging to a neutral, would have had the taint of contraband, in its most offensive character, on account of their destination; and the mere interposition of a neutral port would not protect them from forfeiture.(*b*) Strictly speaking,

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(*a*) Bynk. Quæst. J. Pub. c. 14; The Sarah Christina, 1 Rob. 237; The Haase, Id. 288; The Emanuel, Id. 296; The Immanuel, 2 Id. 101; The Atlas, Id. 299; The Rising Sun, Id. 104; The Madonna delle Gracie, 4 Id. 161; The Neutralitat, 3 Id. 295; The Welvaart, 2 Id. 128; The Friendship, 6 Id. 420.

(*b*) Articles which are exclusively useful for warlike purposes, are always contraband, when destined for the enemy; those of promiscuous use, in war and in peace, only become so, under particular circumstances. Grotius, *De jure belli ac pacis*, lib. 3, c. 1, § 5; Vattel, lib. 3, c. 7, § 112. Among the latter class, are included naval stores and provisions; though Vattel considers naval stores as always contraband, whilst he holds that provisions only become so, under peculiar circumstances. "*Les choses qui sont d'un usage particulier pour la guerre, et dont on empêche le transport chez l'ennemi s'appellent marchandises de contrabande. Telles sont les armes, les munitions de guerre, les bois, et tout ce qui sert à la construction, et à l'armément des vaisseaux de guerre, les chevaux, et les vivres mêmes en certaines occasions, ou l'on espere de réduire l'ennemi par la faim.*" But Bynkershoek reasons against admitting into the list of contraband, articles of promiscuous use, and the materials out of which warlike articles are formed. Q. Jur. Pub. lib. 1, c. 10. He, however, states that materials for building ships may be prohibited under certain circumstances. "*Quandoque tamen accidit, ut et navium materia prohibeatur, si hostis ea quam maxime indigeat, et absque ea com-*

however, *this is not a question of contraband; for that can arise only when
*391] the property belongs to a neutral, *and here the property belonged to an enemy, and therefore, was liable, at all events, to condemnation.

But was the voyage lawful, and such as a neutral could, with good faith, and without a forfeiture, engage in? It has been solemnly adjudged, that being engaged in the transport service, or in the conveyance of military persons in his employ, are acts of hostility which subject the property to confiscation. *The Carolina*, 4 Rob. 256; *The Friendship*, 6 Ibid. 420; *The Orozenbo*, Ibid. 430. And the carrying of dispatches from the colony to the mother country of the enemy has subjected the party to the like penalty. *The Atalanta*, 6 Rob. 440; *The Constantia*, Ibid. 461, note. And in these cases, the fact that the voyage was to a neutral port, was not thought to

mode bellum gerere haud possit. Quum ordines generales in § 2, *edicti contra Lysitanos, Dec.* 31, 1657, *iis, quæ communi populorum usu contrabande censentur, Lysitanos juvari vetuissent, specialiter addunt in* § 3, *ejusdem edicti, quia nihil nisi mari a Lysitanos metuebant, ne quis etiam navium materiam iis advehere vellet, palam sic navium a contrabandis distincta, sed ob specialem rationem addita. Ob eandem causam navium materia conjungitur cum instrumentis belli in* § 2, *d. Edicti contrà Anglos, Dec.* 5, 1652, *et in Edicto ordinum generalium contrà Francos*, 9 *Mart.* 1689. *Sed sunt hæc exceptiones quæ regulam confirmant.*" So also, of provisions, they are not, in general, contraband; but if the produce of an enemy's country, and not destined for the ordinary sustenance of human life, but for military or naval use, they become contraband, according to the law of England. And articles, the growth of the neutral exporting country, are not contraband, though carried in the vessels of another country. The Apollo, 4 Rob. 161. And the benefit of the principle is extended to maritime countries, exporting the produce of neighboring interior districts, whose produce those countries are usually employed in exporting, in the ordinary course of their trade. The Evert, Id. 354. But the law of France and Spain does not consider provisions as contraband. Ordonnance de la Marine, lib. 3, tit. 9, *des Prises*, art. 11; D'Habreu, *sobre las Presas*, part 1, c. 10, p. 136. And Valin states, that, both by the law of France and the common law of nations, provisions are contraband only where destined to besieged or blockaded places. But he asserts, that naval stores were contraband, at the time he wrote (1758), and had been so since the beginning of that century, which they were not formerly. Sur l'Ord, Ibid. Pothier, commenting on the same article of the ordinance, observes, "*A l'égard des munitions de bouche que des sujets des puissances neutres envoient à nos ennemies, elles ne sont point censées de contrabande, ni par conséquent sujettes confiscation; sauf dans un seul cas, qui est lorsqu'elles sont envoyées à une place assiégée ou bloquée.*" De Propriété, No. 104. By the Swedish Ordinance of 1715, contraband articles are declared to be those "*qui peuvent être employées pour la guerre.*" The Danish Ordinance of 1659 (provided for the subsisting war with Sweden) contains a long list of contraband articles, among which are included naval stores and provisions. The modern conventional law of nations has generally excluded provisions and naval stores from the list of contraband, and in all the treaties made by the United States, since they were an independent power, except in the treaties with Great Britain, they are excluded; but the only treaty now subsisting which contains a definition of contraband, is that of 1795, with Spain, which embraces the munitions of war only. The treaty of 1794 with great Britain, declares naval stores, with the exception of unwrought iron and fir planks, to be contraband, and liable to confiscation, and declares, that when provisions and other articles, not generally contraband, shall become such, according to the existing law of nations, they shall be entitled to pre-emption, with freight to the carrier. By the treaty negotiated in 1807, but not ratified, provisions were omitted in the list of contraband, and tar and pitch (unless destined to a port of naval equipment) were added to the naval stores excepted in the treaty of 1794.

change the character of the transaction. The principle of these determinations was asserted to be, that the party must be deemed to place himself in the service of the hostile state, and *assist in warding off the pressure of the war, or in favoring its offensive projects. Now, we cannot [*392 distinguish these cases, in principle, from that before the court. Here is a cargo of provisions, exported from the enemy's country, with the avowed purpose of supplying the army of the enemy. Without this destination, they would not have been permitted to be exported at all. Can a more important or essential service be performed in favor of the enemy? In what does it differ from the case of a transport in his service? The property, nominally, belongs to individuals, and is freighted, apparently, on private account, but, in reality, for public use, and under a public contract, implied from the very permission of exportation. It is vain to contend, that the direct effect of the voyage was not to aid the British hostilities against the United States. It might enable the enemy, indirectly, to operate with more vigor and promptitude against us, aud increase his disposable force. But it is not the effect of the particular transaction that the law regards, it is the general tendency of such transactions to assist the military operations of the enemy, and the temptations which it presents to deviate from a strict neutrality. Nor do we perceive how the destination to a neutral port, can vary the application of this rule; it is only doing that, indirectly, which is prohibited in direct courses. Would it be contended, that a neutral might lawfully transport provisions for the British fleet and army, while it lay at Bordeaux, preparing for an expedition to the United States? Would it be contended, that he might lawfully supply a British *fleet [*393 stationed on our coast? We presume, that two opinions could not be entertained on such questions; and yet, though the cases put are strong, we do not know that the assistance is more material then might be supplied under cover of a neutral destination like the present.

An attempt has been made to distinguish this case from the ordinary cases of employment in the transport service of the enemy, upon the ground, that the war of Great Britain against France was a war distinct from that against the United States; and that Swedish subjects had a perfect right to assist the British arms, in respect to the former, though not to the latter. Whatever might be the right of the Swedish sovereign, acting under his own authority, we are of opinion, that if a Swedish vessel be engaged in the actual service of Great Britain, or in carrying stores for the exclusive use of the British armies, she must, to all intents and purposes, be deemed a British transport. It is perfectly immaterial, in what particular enterprise those armies might, at the time, be engaged; for the same important benefits are conferred upon an enemy, who thereby acquires a greater disposable force to bring into action against us. In *The Friendship*, 6 Rob. 420, 426, Sir W. Scott, speaking on this subject, declares, "It signifies nothing, whether the men, so conveyed, are to be put into action, on an immediate expedition, or not. The mere shifting of drafts in detachments, and the conveyance of stores from one place to another, is an ordinary employment of a transport vessel, and it is a distinction totally unimportant, [*394 *whether this or that case may be connected with the immedate active service of the enemy. In removing forces from distant settlements, there may be no intention of immediate action, but still, the general impor-

tance of having troops conveyed to places where it is convenient that they should be collected, either for present or future use, is what constitutes the object and employment of transport vessels." It is obvious, that the learned judge did not deem it material to what places the stores might be destined ; and it must be equally immaterial, what is the immediate occupation of the enemy's military force. That force is always hostile to us, be it where it may be. To-day it may act against France, to-morrow, against us ; and the better its commissary department is supplied, the more life and activity is communicated to all its motions. It is not, therefore, in our view, material, whether there be another distinct war in which our enemy is engaged, or not ; it is sufficient, that his armies are everywhere our enemies, and every assistance offered to them must, directly or indirectly, operate to our injury.

On the whole, the court are of opinion, that the voyage, in which this vessel was engaged, was illicit, and inconsistent with the duties of neutrality, and that it is a very lenient administration of justice, to confine the penalty to a mere denial of freight.(*a*)

*395] *Marshall, Ch. J. (*dissenting.*)—As a principle, which I think new, and which may certainly, in future, be very interesting to the United States, has been decided in this case, I trust, I may be excused for stating the reasons which have prevented my concurring in the opinion that has been delivered.

In argument, this sentence of the circuit court has been sustained on two
*396] grounds : 1st. That the exportation *of grain from Ireland is generally prohibited, and therefore, that a neutral cannot lawfully engage

(*a*) As to the penalty for the carrying of contraband, see 3 Rob. 182, note *a*. Freight and expenses are almost always refused by the British prize courts to a carrier of contraband. There is but one case in the books, of an exception to this rule, which was of sail-cloth carried to Amsterdam, the contraband being in a small quantity, amongst a variety of other articles. The Neptunus, 3 Rob. 91. The penalty is carried beyond the refusal of freight and expenses, and is extended to the confiscation of the ship, and innocent parts of the same cargo, 1st. Where the ship and the contraband articles belong to the same person. The Staadt Emden, 1 Rob. 31; The Young Tobias, Id. 330. 2d. Where the cargo is carried with a false destination, false papers, or other circumstances of fraud. The Franklin, 3 Rob. 217; The Edward, 4 Id. 69; The Richmond, 5 Id. 290; The Ranger, 6 Id. 125. 3d. Where the owner of the ship is bound, by the obligation of treaties between his own country and the capturing power, to refrain from carrying contraband to the enemy. The Neutralitet, 3 Rob. 295. By the ancient prize law of France, contraband goods were subject to pre-emption only. Ordonnance de 1584, art. 69. The ordinance of 1681 subjected the contraband articles only to confiscation; but by the regulation of 1778, the same penalty was extended to the ship, in case three-fourths of the cargo consisted of contraband articles. The law of Holland confiscates the contraband articles only, but refuses freight; the principle of of which is vindicated by Bynkershoek. "*Idque longe verissimum est, nam mercedes non debentur, nisi itinere perfecto, et, ne perficeretur, hostis jure prohibuit. Deinde publicantur contrabanda velex delicto, et ita nihil commiserunt navarchi, quam ipsi mercium vetitarum domini, vel, quod magis est, ex re, ex ipsa nimirum transvectione : quamois enim amico nostro non possimus commercio interdicere cum hoste nostro, possumus tamen prohibere, ne in bello illi prosit in necem nostram. Atque ita, quod publicatur, publicabitur citra ullum ullius hominis respectum, et habebitur, ac si divina periisset, extincto sic jure pignoris.*"

in it during war. 2d. That the carriage of supplies to the army of the enemy is to take part with him in the war, and consequently, to become the enemy of the United States so far as to forfeit the right to freight.

The first point has been maintained, on its supposed analogies to certain principles which have been, at different times, avowed by the great maritime and belligerent powers of Europe respecting the colonial and coasting trade, and which are generally known in England, and in this country, by the appellation of the rule of 1756. Without professing to give any opinion on the correctness of those principles, it is sufficient to observe, that they do not appear to me to apply to this case. The rule of 1756 prohibits a neutral from engaging, in time of war, in a trade in which he was prevented from participating in time of peace, because that trade was, by law, exclusively reserved for the vessels of the hostile state. This prohibition stands upon two grounds. 1st. That a trade, such as the coasting or colonial trade, which, by the permanent policy of a nation, is reserved for its own vessels, if opened to neutrals during war, must be opened under the pressure of the arms of the enemy, and in order to obtain relief from that pressure. The neutral who interposes to relieve the belligerent, under such circumstances, rescues him from the condition to which the arms of his enemy has reduced him, restores to him those resources which have been wrested from him by the *arms of his adversary, and deprives that adversary of the advantages which successful war has given him. This, the opposing belligerent pronounces a departure from neutrality, and an interference in the war, to his prejudice, which he will not tolerate. 2d. If the trade be not opened by law, that a neutral employed in a trade thus reserved by the enemy to his own vessels, identifies himself with that enemy, and by performing functions exclusively appertaining to the enemy character, assumes that character. Neither the one nor the other of these reasons applies to the case under consideration. The trade was not a trade confined to British vessels, during peace, and opened to neutrals, during war, under the pressure created by the arms of the enemy. It was prohibited, for political reasons, entirely unconnected with the interests of navigation, and thrown open from motives equally unconnected with maritime strength. Neither did the neutral employed in it engage in a trade, then, or at any time, reserved for British vessels, and therefore, did not identify himself with them. He was not performing functions exclusively appertaining to the enemy, and consequently, in performing them, did not assume that character. [*397

The second point presents a question of much more difficulty. That a neutral carrying supplies to the army of the enemy does, under the mildest interpretation of international law, expose himself to the loss of freight, is a proposition too well settled to be controverted. That it is a general rule, admitting of few, if any, exceptions, is not denied by the counsel *for the appellants. But they contend, that this case is withdrawn from that rule, by its peculiar circumstances. The late war between the United States and Great Britain was declared, at a time when all Europe, including our enemy, was engaged in a war with which ours had no connection, and in which we professed to take no interest. The allies of our enemy, engaged with him in a common war, the most tremendous and the most vitally interesting to the parties that has ever desolated the earth, were our friends. We kept up with them the mutual interchange of good offices, [*398

and declared our determination to stand aloof from that cause which was common to them and Great Britain. They, too, considered this war as entirely distinct from that in which they were engaged. Although, at a most critical period, we had attacked their ally, they did not view it as an act of hostility to them. They did not ascribe it to a wish to affect, in any manner, the war in Europe, but solely to the desire of asserting our violated rights. They seemed almost to consider the Britain who was our enemy, as a different nation from that Britain who was their ally.

How long this extraordinary state of things might have continued, it is impossible to say; but it certainly existed, when the Commercen was captured. What its effect on that capture ought to be, must depend more on principle than on precedent. It has been said, and truly said, by the counsel for the captors, that we were at war with Great Britain, in every part of the world. We were enemies everywhere. Her troops in Spain, or else-
*399] where, as *well as her troops in America, were our enemies. It was a conflict of nation against nation. This is conceded; and therefore, the cargo of the Commercen, being British property, was condemned as prize of war. But, although this must be conceded, the corollary which is drawn from it, that, those who furnish their armies in Spain with provisions, aid them to our prejudice, and therefore, take part in the war, and are guilty of unneutral conduct, must be examined, before it can be admitted. It is not true, that every species of aid given to an enemy, is an act of hostility which will justify our treating him who gives it, or his vessels, as hostile to us. The history of all Europe, and especially of Switzerland, furnishes many examples of the truth of this proposition. Those examples need not be quoted particularly, because they stand on principles not entirely applicable to this case. It is the peculiarity of this war, which requires the adoption of rules peculiar to a new state of things, in adopting which, we must examine the principle on which a nation is justified in treating a neutral as an enemy. That a neutral is friendly to our enemy, and continues to interchange good offices with him, can furnish no subject of complaint; for then, all commerce with one belligerent would be deemed hostile by the other. The effect of commerce is to augment his resources, and enable him the longer to prosecute the war; but this augmentation is produced by an act entirely innocent on the part of the neutral, and manifesting no hostility to the opposing belligerent. It cannot, therefore, be
*400] molested by him, while the same good offices *are allowed to him, although he may not be enabled to avail himself of them to an equal degree. It would seem, then, that a remote and consequential effect of an act, is not suffiicient to give it a hostile character; its tendency to aid the enemy in the war, must be direct and immediate. It is also necessary, that it should be injurious to us; for a mere benefit to another, which is not injurious to us, cannot convert a friend into an enemy.

If these principles be correct, and they are believed to be so, let us apply them to the present case. When hostilities commenced between the United States and Great Britain, that country was carrying on a war with France, in which the great powers of Europe were combined. We did not expect, and certainly had no right to expect, that our declaration of war against one of the allies, would, in any manner, affect the operations of their common war in Europe. The armies of Portugal and Spain were united to

those of Britain, and, unquestionably, aided and assisted our enemy, but they did not aid and assist him against us, and therefore, did not become our enemies. Had any other of the combined powers equipped a military expedition, for the purpose of reinforcing the armies of Britain in any part of Europe, or had a new ally engaged in the war, that would have been no act of hostility against the United States, although it would have aided our enemy. But if a military expedition to the United States had been undertaken, the case would have assumed a different aspect. Such expedition would be hostile to this country, and the power undertaking it would *become our enemy. It would have been an interference operating directly to our prejudice. The declaration of war against Great [*401 Britain had, without doubt, a remote and consequential effect on the war in Europe. The force employed against the United States must be subducted from that employed in support of the common cause in Europe, or greater exertions must be made, which might sooner exhaust those resources which enabled her to continue her gigantic efforts in their common war. Consequently, the declaration of war by the United States remotely affected the war in Europe, to the advantage of one party and the injury of the other. Yet no one of the allies considered this declaration as taking part in that war, and placing America in the condition of an enemy. But, had the United States employed their force on the Peninsula against the British troops, or had they interfered in the operations of the common war, it may well be doubted, whether they might not have been rightfully considered as taking part against the allies, and arranging themselves on the side of the common enemy.

In answer to arguments of this tendency, made at the bar, it was said, that nations are governed by political considerations, and may choose rather to overlook conduct at which they might justly take offence, than unnecessarily to increase the number of their enemies, or provoke increased hostility; but that courts of justice are bound by the law, and must inflexibly adhere to its mandate. While this is conceded, it is deemed equally true, that those acts which will justify the condemnation of a *neutral, as an enemy, would also justify the treating his nation as an enemy, if they [*402 were performed or defended by the nation. There is a tacit compact, that the hostile act of the individual shall not be ascribed to his government; and that, in turn, the government will not protect the individual from being treated as an enemy. But if the government adopts the act of the individual, and supports it by force, the government itself may be rightfully treated as hostile. Thus, contraband of war, though belonging to a neutral, is condemned as the property of an enemy, and his government takes no offence at it; but should his government adopt the act, and insist upon the right to carry articles deemed contraband, and support that right, it would furnish just ground of war. The belligerent might choose to overlook this hostile act, but the act would be, in its nature, hostile.

The inquiry, then, whether the act in which this individual Swede was employed, would, if performed by his government, have been considered an act of hostility to the United States, and might rightfully be so considered, is material to the decision of the question, whether the act of the individual is to be treated as hostile. Great Britain and Sweden were allies in the war against France. Consequently, the King of Sweden might have ordered

his troops to co-operate with those of Britain, in any place, against the common enemy. He might have ordered a reinforcement to the British army on the Peninsula, and this reinforcement might have been transported by sea. An attempt on the part of the United States to intercept it, because it
*403] was *aiding their enemy, would certainly have been an interference in the war of Europe, which would have provoked, and would have justified, the resentment of all the allied powers. It would have been an interference, not to be justified by our war with Britain, because those troops were not to be employed against us. If, instead of a reinforcement of men, a supply of provisions were to be furnished to that part of the allied army which was British, would that alter the case? Could an American squadron intercept a convoy of provisions, or of military stores, of any description, going to an army engaged in a war common to Great Britain and Sweden, and not against the United States? Could this be done, without interfering in that war, and taking part in it against all the allies? If it could not, then any supplies furnished by the government of Sweden, promoting the operations of their common war, whether intended for the British or any other division of the allied armies, had a right to pass unmolested by American cruisers. It is not believed, that any act which, if performed by the government, would not be deemed an act of hostility, is to be so deemed, if performed by an individual. Had the provisions then on board the Commercen been Swedish property, the result of this reasoning is, that it would not have been confiscated as prize of war. Being British property, it is confiscable; but the Swede is guilty of no other offence than carrying enemy's property, an offence not enhanced in this particular case by the character of that property, He is, therefore, as much entitled to freight,
*404] as if his cargo had been *of a different description. His trade was not more illicit, than the carriage of enemy's goods for common use, would have been.

If the cases in which neutrals have been condemned for having on board articles, the transportation of which clothe them with the enemy character, be attentively considered, it is believed, that they will not be found to contravene the reasoning which has been urged. To carry dispatches to the government, has been considered as an act of such complete hostility, as to communicate the hostile character of the vessel carrying them, But this decision was made in a case where the dispatches could only relate to the war between the government of the captors, and that to which the dispatches were addressed. They were communications between a colonial government, in danger of being attacked, and the mother country. In a subsequent case, it was determined, that a neutral vessel might bear dispatches to a hostile government, without assuming the belligerent character, if they were from an ambassador residing in the neutral state. Yet such dispatches might contain intelligence material to the war. But this is a case in which the belligerent right to intercept all communications addressed to the enemy, by the officers of that enemy, is modified and restrained by the neutral right to protect the diplomatic communications which are necessary to the political intercourse between belligerents and neutrals. It is a case, in which the right of the belligerent is narrowed and controlled by the
*405] positive rights of a neutral; still more reasonably may they *be narrowed and controlled by the positive rights of a belligerent engaged

in a war in which we have no concern, and in which we ought not to interfere. To transport troops, or military persons, belonging to the enemy, from one place to another, has also been determined to subject the vessel to condemnation ; but in those cases, the service in which it was supposed the persons, so conveyed, were to be employed, was against the government of the captors. The transportation of these persons was to aid the views of one belligerent against the other, and was therefore, to take part in the war against that other. It is an act, the operation of which is direct and immediate.

It may be said, that this reasoning would go to the protection of British troops passing to the Peninsula, and of British supplies transported in British vessels for their use ; that it, therefore, proves too much, and must, consequently, be unsound. It is admitted, that, pressed to its extreme point, the argument would go this extent, an extent which cannot be maintained ; but it does not follow, that it is unsound in every stage of its progress. In every case of conflicting rights, each must yield something to the other. The pretensions of neither party can be carried to the extreme. They meet—they check—they limit each other. The precise line which neither can pass, but to which each may advance, is not easily to be found and marked ; yet such a line must exist, whatever may be the difficulty of discerning it. To attack an enemy, or to take his property, if either can be done, without violating the sovereignty *of a friend, is of the very essence of [*406
war. None can be offended at the exercise of this right, who may not be offended at the declaration of war itself. The injury which the allies of our enemy, in a war common to them (but in which we are not engaged), sustain, by this occasional interruption, is incidental, while, on our part, it is the exercise of a direct and essential right. But when we attack a friend, who is carrying on military operations conjointly with our enemy, but not against us, we are not making direct war, but are using those incidental rights which war gives us, against those direct rights which are exercised by a belligerent, not our enemy, and which constitute war itself. In either case, it would seem to me, that the incidental must yield to the direct and essential right.

Upon this view of the subject, I have at length, not, it is confessed, without difficulty, come to the conclusion, that the Commercen, being a Swedish vessel, whose nation was engaged in a war, common to Great Britain and Sweden, against France, and to which the United States were not a party, might convey military stores for the use of the British armies engaged in that war, as innocently as she could carry British property of any other description, and is, therefore, as much entitled to freight as she would be, had the property belonged to the enemy, but been destined for ordinary use.

Livingston, J.—I concur in the opinion of the chief justice. Considering Sweden an ally of Great Britain, in the war which the latter was [*407
carrying on *in the Peninsula, either the king of Sweden himself might send transports with provisions for the use of the British army, while engaged in any common enterprise, or his subjects might lawfully aid in such transportation, without a violation of their neutral character, as it regarded the United States. If the American government had asserted the

right of capturing and condemning Swedish vessels, or depriving them of their freight, on the ground on which it has been denied to the Commercen, I am not certain, that Sweden would not have thought it a very serious aggression, and would not have had a right to consider it, if persisted in, as an act of hostility.

JOHNSON, J.—I also concur in the opinion of the chief justice; and I do it, without the least doubt or hesitation. Sweden was an ally in the war going on in the Peninsula, and her subjects had an indubitable right to transport provisions in aid of their nation, or its allies. The owner, therefore, had a right to his freight; for he did not act inconsistent with our belligerent rights, while in the direct and ordinary exercise of those rights which a state of war conferred on himself.

Sentence of the circuit court affirmed.

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*408] *The GEORGE, The BOTHNEA, and The JANSTAFF.

Evidence in prize causes.

In cases of joint or collusive capture, the usual simplicity of the prize proceedings is necessarily departed from; and where, in these cases, there is the least doubt, other evidence than that arising from the captured vessel, or invoked from other prize causes, may be resorted to.

APPEAL from the Circuit Court for the district of Massachusetts. These were British vessels captured and brought in by the private armed vessels, the Fly and the Washington, and libelled as prize of war. In each of them, the United States interposed a claim, charging that the capture was collusive and that the whole property ought, on that account, to be forfeited to the Uniied States. In each case, the captors applied for permission to make further proof. In that of the George, it was allowed in the district court, and partially received; but the application to make still further proof, and to introduce into the record testimony already taken, was rejected in the circuit court, and was again offered in this court. In the last two cases, further proof was refused, both in the district and circuit courts. In all the cases, the vessels and cargoes were condemned to the United States, and from each of these sentences of condemnation, the captors appealed to this court.

*409] *The first case was argued by *Dexter* and *G. Sullivan*, for the appellants and captors, and by the *Attorney-General*, for the United States. The last two by *Winder* and *Harper*, for the appellants and captors, and by *Dexter* and *Pinkney*, for the United States.

MARSHALL, Ch. J., delivered the opinion of the court as follows:—The first question to be discussed is, the propriety of allowing further proof. It is certainly a general rule in prize causes, that the decision should be prompt; and should be made, unless some some good reason for departing from it exist, on the papers and testimony afforded by the captured vessel, or which can be invoked from the papers of other vessels in possession of the court. This rule ought to be held sacred, in that whole description of causes to which the reasons on which it is founded are applicable. The usual controversy in prize causes is between the captors and captured. If the cap-

tured vessel be plainly an enemy, immediate condemnation is certain and proper. But the vessel and cargo may be neutral, and may be captured on suspicion. This is a grievous vexation to the neutral, which ought not to be increased, by prolonging his detention, in the hope that something may be discovered from some other source, which may justify condemnation. If his papers are all clear, and if the examinations *in præparatorio* all show his neutrality, he is, and ought to be, immediately discharged. In a fair transaction, this will often be the case. If anything suspicious appears in the papers, which involves the neutrality of the claimant *in doubt, [*410 he must blame himself for the circumstance, and cannot complain of the delay which is necessary for the removal of those doubts. The whole proceedings are calculated for the trial of the question of prize or no prize, and the standing interrogatories on which the preparatory examinations are taken, are framed for the purpose of eliciting the truth on that question. They are intended for the controversy between the captors and the captured ; intended to draw forth everything within the knowledge of the crew of the prize, but cannot be intended to procure testimony respecting facts not within their knowledge.

When the question of prize or no prize is decided in the affirmative, the strong motives for an immediate sentence lose somewhat of their force, and the point to which the testimony *in præparatorio* is taken, is no longer the question in controversy. If another question arises, for instance, as to the proportions in which the owners and crew of the capturing vessel are entitled, the testimony which will decide this question must be searched for, not among the papers of the prize-vessel, or the depositions of her crew, but elsewhere, and liberty must, therefore, be given to adduce this testimony. The case of a joint capture has been mentioned, and we think, correctly, as an analogous case. Where several cruisers claim a share of the prize, extrinsic testimony is admitted, to establish their rights. They are not, and ought not to be, confined to the testimony which may be extracted from the crew. And yet, the standing interrogatories are, in some degree, adapted to this case. Each individual of the crew is always asked *whether, [*411 at the time of capture, any other vessel was in sight. Notwithstanding this, the claimants to a joint interest in the prize, are always permitted to adduce testimony drawn from other sources, to establish their claim.

The case before the court is one of much greater strength. The captors are charged with direct and positive fraud, which is to strip them of rights claimed under their commissions. Even if exculpatory testimony could be expected from the prize-crew, the interrogatories are not calculated to draw it from them. Of course, it will rarely happen, that testimony taken for the sole purpose of deciding the question, whether the captured vessel ought to be condemned or restored, should furnish sufficient lights for determining whether the capture has been *bonâ fide* or collusive. If circumstances of doubtful appearance occur, justice requires that an opportunity to explain those circumstances should be given ; and that fraud should never be fixed on an individual, until he has been allowed to clear himself form the imputation, if in his power.

Under these impressions, the case must be a strong one, indeed ; the collusiveness of the capture must be almost confessed, before the court could think a refusal to allow other proof than is furnished by the captured vessel

justifiable. In the cases before the court, there are certainly many circumstances of great suspicion, but none which do not admit of explanation.

In the case of the George, captured by the privateer Fly, the circumstances relied on to prove the collusiveness of the capture are, *1st. The force of the Fly. 2d. The shipping articles. 3d. The cargo of George. 4th. The number of her crew. 5th. The place, and other circumstances of her capture. 6th. The sending the mariners on shore, instead of bringing them into the United States.

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1. The force of the Fly may probably neither require nor admit of explanation.

2. The shipping articles unquestionably furnish ground of suspicion. But some light may be thrown on this point, by testimony showing whether it was, or was not, common for small cruisers in the Bay of Fundy to give wages to the crew, instead of prize-money. It may be of still more importance, to determine whether each of the crew, like Gilley, who was examined, was to receive $20, in addition to his wages, for each prize.

3. Respecting the cargo, it is not probable, that further testimony can be adduced.

4. Respecting the number of mariners on board the captured vessel, the court would require some further information. On the one part, it is asserted, that they are insufficient, and on the other, that they are sufficient for the alleged voyage. There is no evidence which can incline the court the one way or the other.

5. On the place and other circumstances of capture, further information may certainly be given. The George appears to have sailed from St. Johns, New Brunswick, for the Havana, on the 8th, and to have been captured in Long Island harbor, at anchor, on the 13th of January 1814. The distance *between these places is said to be five hours' sail, with a favorable wind and tide. Where did she linger, during this interval? Was she in Etang harbor, during any part of the time? Why did she leave that harbor? Did she expect a convoy? Did a convoy sail about that time? Was it usual for vessels to wait for a convoy, at the island of Grand Menan? Could a vessel be descried, from the sea, lying at anchor in Long Island harbor? Satisfactory answers to these questions might certainly throw some light on this part of the case, and better enable the court to form an opinion on it.

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6. It may not, perhaps, be easy to account for not bringing in the crew. Yet it would contribute, in some degree, to the elucidation of the transaction, if the practice in that part of the country could be laid before the court. It might also be of some importance, to know whether the sum of $100 was usually paid by government for every merchant seaman brought into the country, whether he was a British subject, or the subject of a neutral power.

In the case of the Janstaff and the Bothnea, there are some points to be explained which are common to those cases with the George, and some which are peculiar to themselves. Of the latter class are the inquiries, 1st. Whether it frequently happened, that unarmed vessels, without a convoy, sailed from that port, either for New London, or for any other port of the United States, or for a foreign port? *2d. What is the character, and what the occupation, of the two passengers who were found, one

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on board the Bothnea, and the other on board the Janstaff? Are they acquainted with the coasts in or about Long Island sound? Are they capable of being supercargoes? How came they at Halifax?

In both cases, it will be desirable to know, whether any previous acquaintance existed between the captors and the owners of the captured vessels, and whether the captors had had any previous communication with the places from which the captured vessels sailed. In the cases of the Janstaff and Bothnea, all the circumstances attending the capture will be important. If, as is not expected, any further or better reason can be given for putting the whole crew on shore, it may throw some light on the cases. Each case depends, in some degree, on the points which have been suggested. They are stated, for the purpose of showing, that points, on which the judgment of the court may, in some degree, depend, are susceptible of explanation, and therefore, ought to be explained, so far as it may be in the power of the parties to explain them. It is not, however, intended to confine them to the particular points which have been stated. Full liberty is given to both parties to adduce further proof on every point in the case.

Further proof ordered.

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*United States *v.* Coolidge *et al.* [*415

Jurisdiction.

Quære? Whether the courts of the United States have jurisdiction of offences at common law against the United States.[1]

This was an indictment in the Circuit Court for the district of Massachusetts, against the defendants, for forcibly rescuing a prize, which had been captured and taken possession of by two American privateers.

The captured vessel was on her way, under the direction of a prize-master and crew, to the port of Salem, for adjudication. The indictment laid the offence as committed upon the high seas. The question made was, whether the circuit court has jurisdiction over common-law offences againt the United States? on which the judges of that court were divided in opinion.

The *Attorney-General* stated, that he had given to this case an anxious attention; as much so, he hoped, as his public duty, under whatever view of it, rendered necessary. That he had also examined the opinion of the court, delivered at February term 1813, in the case of the *United States* v. *Hudson and Goodwin* (7 Cr. 32). That considering the point as decided in that case, whether with or without argument on the part of those who had preceded him as the representative *of the government in this [*416 court, he desired respectfully to state, without saying more, that it was not his intention to argue it now.

Story, J.—I do not take the question to be settled by that case.

Johnson, J.—I consider it to be settled, by the authority of that case.

Washington, J.—Whenever counsel can be found ready to argue it, I shall divest myself of all prejudice arising from that case.

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[1] See note to United States *v.* Worrall, 2 Dall. 384.

LIVINGSTON, J.—I am disposed to hear argument on the point. This case was brought up for that purpose, but until the question is re-argued, the case of the *United States* v. *Hudson and Goodwin* must be taken as law.

March 21st, 1816. JOHNSON, J., delivered the opinion of the court.—Upon the question now before the court, a difference of opinion has existed, and still exists, among the members of the court. We should, therefore, have been willing to have heard the question discussed, upon solemn argument. But the attorney-general has declined to argue the cause; and no counsel appears for the defendant. Under these circumstances, the court would not choose to review their former decision in the case of the *United* *417] *States* v. *Hudson and Goodwin*, or draw it into doubt. They *will, therefore, certify an opinion to the circuit court, in conformity with that decision.

Certificate for the defendant.(*a*)

The ST. NICHOLAS: MEYER *et al.*, Claimants.

Prize.

A question of proprietary interest. Where enemy's property is fraudulently blended in the same claim with neutral property, the latter is liable to share the fate of the former.

APPEAL from the Circuit Court of Georgia. This vessel and the cargo were libelled as prize of war. The ship was claimed by John E. Smith, the supercargo, in behalf of John Meyer, alleged to be a Russian subject, residing at St. Petersburg. The cargo consisted of logwood and cotton, 200 bales of which were claimed by Smith, in behalf of Platzman & Gosler, also alleged to be Russian merchants, of St. Petersburg. The remainder of the cargo, consisting of 950 bales of cotton, and 58 tons of logwood, were *418] *claimed in behalf of John Inerarity, a Scotchman, domiciled at Pensacola, and an adopted Spanish subject.

The vessel was restored in the district court, and the cargo condemned, except the logwood, which was restored. Both parties appealed to the circuit court, and the cause was then heard and considered; but that court, under the influence of personal considerations, rendered only a *pro formâ* decree, affirming the sentence of the district court, at the same time, expressing a strong opinion, that both vessel and cargo were liable to condemnation. The cause had been continued, at the last term of this court, for further proof, but no further proof was produced at the present term.

The cause was argued by *Key* and *Harper*, for the appellants and claimants, and by *Pinkney* and *Charlton*, for the respondents and captors.

JOHNSON, J., delivered the opinion of the court, as follows:—This case presents itself in this court under a cloud of circumstances unusually threat-

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(*a*) See 1 Gallis. 488, for the learned and elaborate opinion of Mr. Justice STORY, in the circuit court, in this case, tending to show that all offences within the admiralty jurisdiction are cognisable by the circuit court, and in the absence of positive law, are punishable by fine and imprisonment.

ening. There is scarcely wanting in it one of those characteristics by which courts of admiralty are led to the detection of neutral fraud. Whether we consider the persons who conduct the voyage, the original character of the vessel, the time and circumstances of the transfer, the trade she has since been engaged in, the funds with which that trade has been transacted, or the manner in which it has been conducted, we find all the hopes and wishes of the adventure centring *in the hostile country. [*419

La French, the master, is a native Dane, a naturalized American citizen, a Russian subject, and finally, domiciled, and his family residing, in Great Britain, but (as he declares himself) having no particular residence. Smith, the supercargo, is a native Englishman, but a naturalized citizen of the United States; he has resided near thirty years in Baltimore, where the war finds him. He sails for Lisbon; from thence to Great Britain; and is almost immediately, without showing any pretensions to such credit, employed by an opulent house of trade, to take charge of this adventure, with a latitude of discretion which could be the result only of long acquaintance, or very strong recommendations. Such men are the proper instruments of belligerent or neutral fraud; they are the avowed panders of the mercantile world; their consciences are in the market. Having no national character or feeling, and but very few qualms of any other kind, their talents and fidelity to their employers, like those of the bravo, are sought out by the projectors of iniquitous adventure.

And who are Meyer, and Platzman & Gosler? They are introduced in the bills of the day, as very important personages; the one was the owner of the ship, the other of the cargo; but we find them acting a part conspicuous only for its insignificance. They cross the stage and disappear. It is a circumstance which scarcely admits of explanation, that Meyer never exercised a single act of ownership over this vessel. He resides at St. Petersburg, she is lying at Cronstadt. He purchases her, for aught we know, without having ever seen *her, of a person whom nobody knows, and whom nothing connects with the vessel; is introduced by [*420 a Mr. Nicholas, of Virginia, to the master, leaves him in command, and, from that time to the present, does not give him one order, nor writes a single letter to him. If we could suppose it possible, that there was no correspondence between them, from the 31st of July 1812, when the ship was purchased, to the 22d December, when she was chartered to Platzman & Gosler, at least, he would have written, at that time, and inclosed the master a copy of the charter-party, and a letter of instructions to regulate his conduct in the distant and perilous voyage on which he was about to enter. But we find La French without one scrap of instruction from the supposed owner, and, in all things, yielding implicit obedience to the supposed agent of Platzman & Gosler, whose interests might very well have been in many things inconsistent with those of the charterer. And what is not less remarkable, although he acknowledges that he must have been eighteen months or two years master of the same ship, prior to the sale to Meyer, we find nothing about him or the vessel by which we can discover who the former owner was, and when he is asked, who executed the bill of sale to Meyer, his reply is, he does not know; thus leading, fairly, to a conclusion, that reasons exist now, and existed formerly, for rendering such a correspondence either unnecessary or unsafe to accompany the ship.

As to Platzman & Gosler: the same observation is strikingly applicable to them. From the moment they launch their bark upon the ocean, she
*421] becomes, as to them, *a perfect derelict. Not one anxious inquiry, not one expression of feeling, is communicated by letter to their agent in London. Such, at least, we have a right to infer from the non-production of any such correspondence upon the order for further proof. And upon the supposition of the fairness of this transaction, the existence of letters to prove it fair, was unavoidable; for the letter of the 22d December, expressly calls for correspondence prior to that date, and having relation to this adventure. Beside that, as difficulties thickened upon the adventure, in Pensacola, bills on bills were drawn upon the British house, and letters on letters sent, under cover, to them, it would have followed, that communications would be made to the Russian house, and bills drawn for reimbursement. But over all this there rests an ominous silence.

Nor is there any intrinsic skill in the machinery of this transaction. It can neither claim the praise of genius in its invention, nor of skilful execution in the adaptation of its parts. This very inception of it is laid in a bungling artifice, that would not cheat a novice in the arts of commercial evasion. It bears, on the face of it, the record of its own conviction, and confesses itself to be, what it was intended to be, nothing but a neutral cloak. The correspondents, Simpson & Co., to whom the letter of the 22d of December is addressed, are expressly instructed to attach that letter to the invoice and bill of lading, in order to support the Russian national character. This, of itself, is conclusive to show that this evidence consti-
*422] tuted no part of the mercantile transaction *between the parties. For, when was it ever heard of, that a letter, which contains in it the whole evidence upon which a correspondent purchases, advances and negotiates to a great amount, is thus to be thrown to the winds, or returned to the hands of him who is interested in suppressing it?

And every step that we advance in the progress of this transaction, we find new light breaking in upon us, to make manifest its real characteristics. The letter itself, in which the whole adventure originates, bears, on the face of it, obvious symptoms of that over-anxiety which never fails to accompany a conscience ill at ease. In a letter to a man, to whom such facts must have been wholly indifferent, it brings together, into one view, a number of facts to which the English merchants (at least) know that courts of admiralty are in the habit of attaching importance, in deciding on questions of fraud or belligerent rights; as, for instance, to show that the ship had been previously engaged in neutral trade, they say, "after the discharge of a cargo of Russian produce at this port." And that it may appear that this adventure had not recently originated, they say, "our friends, Messrs. A. Glennie, Son & Co., with whom we have some time corresponded on this subject," &c. This letter, which is all-important to the decision of the cause, calls forth some more remarks. It contains a singular congeries of powers, instructions and facts. It is the only evidence we have that the vessel ever was chartered for this voyage. The only article of instructions to Meyer is to be
*423] found here; the only evidence of the right of A. Glennie & Co. *to act for Platzman & Gosler, is contained in it. Nor is there anything else that would have directed the house of Simpson & Co. in their transactions, had that house been in existence, when the vessel arrived at Pensacola.

It may well be asked, would A. Glennie & Co. have been satisfied to part with so important a voucher for their transactions as agents in this large adventure, had there been anything real in it? Or would so many persons have been satisfied to stake their fortunes on this initerant document, which was to give its light, and pass on, perhaps, never to return again? But if it did not bear upon the face of it, such palpable marks of its fictitious character, the conduct of the several persons who affected to be governed by it, would sufficiently show that it was a paper of no authority. It is to be remarked that on some points this letter of the 22d of December, in which alone Platzman & Gosler appear in a tangible form, in explicit and positive. On others, it yields unbounded discretion to A. Glennie & Co., to instruct Simpson & Co., to whom it is directed, in his conduct in that agency. With regard to two things, it yields no discretion. 1st, as to the article which is to be purchased, which is expressly limited to cotton. 2d, as to the homeward destination of the ship and cargo, which is exclusively to Gottenburg. Yet we find that on the 22d of February, and the 3d of March 1813, A. Glennie & Co. give Smith instructions authorizing a deviation from the orders of their principal, not only as to the articles of which the cargo might consist, but as to the voyage from New Orleans, *empowering him even to charter the vessel, and limiting him in the purchase of cotton [*424 to the price of eight cents, when Platzman & Gosler prescribe no limits, and, in fine, taking the power, both as to vessel and cargo, out of the hands of Simpson & Co., to whom the letter of Platzman & Gosler is directed, and placing the adventure altogether under the control of Smith, a man whom they appoint, for aught we know, without any authority from their principal, and whose presence was altogether unnecessary, under the supposition that Platzman & Gosler had really addressed themselves to Simpson & Co., to load the vessel on their account.

But this is not all; in every step of this transaction, the parties betray a consciousness of the necessity of artifice, and in every attempt to resort to it, betray more of a disposition, than a talent, for fraud. Well aware that it is necessary to keep up a correspondence with the supposed neutral, Smith resorts to a method in which he supposes he may covertly correspond with the English house, while he keeps up the appearance of corresponding with the neutral claimant. We find a most minute detail of all his transactions, and the events of the voyage contained in a series of letters directed to Platzman & Gosler, but uniformly transmitted open, and under cover to the persons really to be informed—the hostile house. This is a shallow artifice. The belligerent must be fatuous, who could be duped by it. And, unfortunately for the claimants, the letters, on the face of them, contain evidence to prove for whom they were really intended. Strike out the names of *Platzman & Gosler, and insert that of A. Glennie & Co., and they will be found to be written with a view to satisfy several passages in [*425 his general letter of instructions, of the 2d of February, from A. Glennie & Co.

This affected correspondence with Platzman & Gosler commences on the 24th of May 1813, and in the letter of that date, and that of the 5th of June following, there are very striking proofs of the nature and views of that correspondence. In the letter of the 25th of December 1813, which may be called the *magna charta* of this adventure, it will be recollected, Platzman

& Gosler are made to say, that as they live in so remote a place as St. Petersburg, Simpson must receive his instructions about the cargo of cotton altogether from A. Glennie & Co.; and in the letters of the 2d of February, and 5th of March, above referred to, Smith receives his instructions altogether from A. Glennie & Co., and yet when he writes to Platzman & Gosler, on the 24th of May, and announces his intended voyage to Liverpool (in express violation of their orders), he adds, "there I shall hope to receive your instructions about the disposal of the cargo." This, to the London house of A. Glennie & Co., was perfectly intelligible. It will also be recollected, that in the letters from A. Glennie & Co., of the 2d of February, Smith is expressly instructed to communicate all necessary information, so as to govern them in making insurance; and yet in these letters to Platzman & Gosler, he affectedly observes, that he sends them open to A. Glen-
*426] nie & Co., in order to direct their conduct, *in case Platzman & Gosler should have instructed them to make insurance.

When, to all these considerations, we add, that this adventure, in fact, originates in a hostile country, and never appears to look to any other termination, and that the funds on which it was projected were altogether English, we are satisfied, that the ship, and the 200 bales of cotton, laden professedly on account of Platzman & Gosler, are not owned as claimed. With regard to the ship, some additional reasons might be urged; but the foregoing, as applying to that whole claim, we deem sufficient.

With regard to the claim of Inerarity, the question there rests between positive swearing and irreconcilable circumstances. And it is a melancholy truth, that forces itself upon the observation of every one who is conversant with courts of admiralty, that positive oaths are too often the most unsatisfactory evidence that can be resorted to. A species of casuistry or moral sophistry seems to have acquired too great an ascendency over the witnesses who sometimes appear in those courts.

With regard to the logwood, nothing can be said against it, except that we find it in bad company. There is no evidence in the case which can induce a belief, that it belonged to any one but Inerarity. Not so with the cotton; except in his own oath, and in the invoice, he is nowhere recognised, among the acting parties, as owner of this cargo. The evidence of an invoice on such a subject, is literally reduced to nothing in the prize courts; and his own affidavit will be considered in due time. We will inquire into
*427] *the circumstances which involve him in suspicion, and see how these circumstances are explained.

It is in evidence, that on the arrival of Smith at Pensacola, and his ascertaining the impracticability of loading the ship on account of his owners, at the limited price, Inerarity himself advised him, as he says, in his letter of the 24th of May, to go to New Orleans, for the purpose of endeavoring to obtain freight. From this, it is evident, that at that time, he had no intention to embark in a shipment of cotton. The opportunity of securing this vessel, at such a time, would otherwise have been eagerly caught at. On going to New Orleans, Smith falls in with Milne, who finally ships the whole of this parcel of cotton, through Inerarity.

The bills of lading and invoice are made out to Inerarity, but Milne transmits the cotton to him, not generally, but expressly to be laden on board this ship. In all this transaction, Milne is the real *dux facti*. He

procures the cargo, for which Smith pays him a commission; he transmits the cotton; Inerarity never appears but as the agent of Milne. And when Smith speaks of the shipper, which he often does in his letters to La French, he speaks of him as Inerarity's friend.

But it is contended, that, by this expression, we are to understand Inerarity himself; that he was the neutral Spaniard spoken of as the shipper, in Smith's letters to Platzman & Gosler, and as no other shipper in the case but Inerarity's friend, and Inerarity himself, they must mean the same person. The idea is ingeniously taken up from an expression *in Smith's answer of the 12th October, to Inerarity's letter of the 6th, [*428 relative to the damage done to the cotton by water. In which letter, Smith says, "as a shipper on board the St. Nicholas, my wish is, to give you every satisfaction," &c. And in several of the letters to Platzman & Gosler, he speaks of the shipper, as a Spaniard and neutral. But as it was evidently a part of the original arrangement, that this cotton should be shipped in the name of Inerarity, who was a neutral Spaniard, the expressions, in both those letters, are satisfied by this consideration. And if we then take Milne, as Inerarity styles him, in the letter of October the 6th, "his friend" at New Orleans, everything becomes intelligible. Inerarity is the neutral Spaniard, in whose name the cotton is shipped, and Milne, his friend at New Orleans, with whom Smith makes his agreement about taking the cotton. It is to be remarked, that the letter of Inerarity, of the 6th of October, and Smith's answer, and the letters of Smith to Platzman & Gosler, were intended to see the light. The two former, as the inception of, or the ground of defence to, a legal inventigation; the latter, if necessary, to prove a legal character. It was necessary, therefore, for all the characters to assume their respective disguises. No one can believe, that when Smith was at New Orleans, urging the shipment of the cargo, every day making some new arrangement with the shipper, and writing to La French, in consequence of those agreements, to receive certain quantities of cotton from Inerarity, then at Penascola, that he could have confounded Inerarity and his friend so very often *as he does, at the same moment when [*429 he is distinguishing them, not only in words, but in acts.

Another circumstance, attaching no small suspicion to this claim, is the connection which the evidence makes out between the shipment by Milne and one Ralston, who appears on the stage, about the time when the vessel first sailed. We do not mean here to attach any importance to the evidence of Dayton. It was utterly disregarded in the court below, and meets with the same fate here. We do not consider it at all necessary to the case. But that Ralston was the person for whom Smith requests La French to provide as a passenger, and an only passenger, is proved by the fact of his being the only passenger on board, when the vessel sailed. This person, Smith says, was to have charge of the invoices; and this person must be presumed to have been an American, as we find him at large in the country, in a time of war. Whether American or Englishman, is immaterial to the decision of this court. Smith swears, indeed, that he had no connection with the cargo; but Smith himself furnishes the evidence in his letter, and testimony, to prove the contrary. Upon the whole, when the above considerations are taken in conjunction with this, that it is hardly possibly to assign a reason why Inerarity should not have appeared openly in purchasing and transmit-

ting this cargo at New Orleans, they cannot but so load his claim with suspicion, as to make it a case for condemnation, unless he can furnish some satisfactory explanation on the subject.

*430] *But what is the explanation? This leads us to the consideration of the affidavits. And here it is, with extreme regret, that we are called upon to declare, that we can attach no credence to them. Inerarity has forfeited his claim to the respect of this court, by taking an oath to a fact, which might, indeed, by possibility, have been true, but which he could not have known to be true. He has sworn, that this parcel of cotton, so clearly proved to have been purchased at New Orleans, was of Spanish origin. This is a part of the machinery, an authenticating document, and its foulness communicates a taint to the residue. But his test-affidavit bears, upon the face of it, another proof that he is an incautious swearer. For he testifies, with the same confidence that he does of his own claim, that the two hundred bales shipped for Platzman & Gosler were their absolute property. The testimony of some other witnesses is offered in evidence, all subject to the same objection, that they swear with similar confidence to a fact that they can know nothing of positively. These affidavits, together with several tending to discredit the testimony of Dayton, and one from Mr. Jenner, of the house of Eason, Jenner & Co., constitute all the evidence brought in upon the order for further proof. The affidavit of Jenner goes to negative the interest in the house of Eason, Jenner & Co. It also goes to prove that his house believed Inerarity to be the sole proprietor of this shipment. But what are we to think of the discretion of this witness also, who undertakes to swear, in terms the most positive, that A. Glennie & Co. had

*431] no interest *in this shipment? The case, indeed, furnishes no reason to believe they had; but on what ground can this witness undertake to deny positively a fact, which, with him, could only rest on belief? In none of these affidavits, is there anything to negative the probable American interest which the evidence makes out. And can there be a pretext for contending, that Inerarity could resort to no other evidence to satisfy this court of the fairness of his claim? Where is his correspondence with Milne? What was to have prevented him from showing how he bought and paid for this cotton? His accounts-current with his agents or factors might have thrown great light upon this transaction. He has had ample time to do this, and the practice of the court, not less than our strong conviction that he never can vindicate his claim, must now oblige us to shut the door upon him.

The logwood must share the fate of the cotton, blended in the same claim. This we consider as the positive law of the admiralty; and although highly penal, is not without its beneficial effects in deterring neutrals from attempting frauds upon belligerent rights.(*a*)

*432] *Sentence as to the ship reversed; affirmed as to the cargo, except the logwood, which was condemned.

(*a*) See the Eenroom, 2 Rob. 1; The Calypso, Id. 154; The Graaf Bernstorff, 3 Id. 111. So also, in the courts of municipal law, it is held, that property insured and warranted to be neutral, must not only have every document necessary, according to treaties and the law of nations, to prove its neutrality, but it must not be accompanied with any papers that compromit its neutral character. It is a maxim, that neutral

Russell *et al. v.* Trustees of the Transylvania University.

Land law of Kentucky.

A question under a bill in chancery, to obtain from the defendants a conveyance of a tract of land, in Kentucky, held by them, as the property of the original grantee, confiscated to the state, and claimed by the plaintiffs, under an equity arising from a sale made by the original grantee, of another tract of land, to which it was alleged, he erroneously supposed himself legally entitled, under the same warrant and survey: Bill dismissed.

The return of the surveyor into the office, is the only legal identification of the land, on which the right of the individual attaches.

Appeal from the Circuit Court for the district of Kentucky. This cause was argued at a former term, and continued to the present term for advisement.

*Johnson, J., delivered the opinion of the court as follows :—The [*433 object of this bill is to obtain a conveyance from the defendants, of a tract of land in the state of Kentucky, granted to one Alexander McKee, through whom both parties claim. The survey was made under a warrant from Lord Dunmore, then governor of Virginia, issued the 2d of April 1774. The complainants claim under a chain of title regularly deduced from McKee; the defendants, under an act of the legislature, vesting McKee's lands in them as confiscated property. But it appears, and is explicitly acknowledged in the bill, that the conveyance from McKee describes, by metes and bounds, a tract of land wholly different from that which the trustees hold. This court feels no difficulty in conceding, that whatever equity the complainants have a right to claim against McKee, this court is bound to decree against the trustees; for the act of the legislature could only have been intended to operate upon the interest of McKee, and not to defeat the rights of those who held, or might claim, the land, to the prejudice of McKee himself.

The equity set up by the complainants depends upon the following allegations: That the warrant was placed in the hands of one Douglas, a surveyor; that under that warrant, together with a number of others then in his hands, he surveyed what, in that country, is called a block of surveys (by which we understand a number of connected and dependent surveys, each containing the same quantity of land); that in this block of surveys were contained both *that which was conveyed to the claimants, and [*434 that which the defendants hold, each of 2000 acres. The bill then proceeds in the following words: "That the said McKee, who resided at a great distance from the land in question, was furnished with a boundary of a 2000 acre survey, agreeably to that which is contained in his aforesaid deed, as the boundary of his 2000 acre survey." "And afterwards, without his knowledge, the surveyor substituted the 2000 acres which is described

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commerce is to be conducted with good faith towards belligerents. Their rights are to be respected, as well as those of neutral nations. It is not sufficient, that a part only, but the whole property covered by the policy must be neutral. And if a cover is attempted for enemy's property, by an intermixture with neutral, it is held to subject the whole to confiscation. Blagge *v.* New York Ins. Co., 1 Caines 565. And if the general agent of a neutral cargo cover enemy's property in the same vessel, though without the consent or knowledge of his principal, the property of his principal is condemnable (notwithstanding it may be distinguished by the papers), and the warranty of neutrality is not fulfilled. Phœnix Ins. Company *v.* Pratt, 2 Binn. 308.

in the survey, for that which was originally intended for him." But they aver, "that it was the intention of the parties to the said deed, that by it should pass the 2000 acres survey, by whatever boundary described, to which the said McKee was entitled under the warrant granted to him as aforesaid."

By the land laws of Virginia, the return of the surveyor into the office is the only legal identification of the land on which the right of the individual attaches. So that the warrant of Lord Dunmore being a general, not a specific, warrant, there can be no doubt, that McKee never acquired any right, legal or equitable, in the land described in his conveyance. It is also admitted, that the land, of which the defendants are seised, was McKee's land, and derived to him through a warrant of Lord Dunmore, and a survey made by Douglas; so that if the other material allegations of the bill were supported by evidence, it is possible, that this court might be induced to think the complainants' case a good one.

As to the fact that the description by which McKee sold to the com-
*435] plainants was the first communicated *to him, this court can attach to it no importance; for, independently of its being unsupported by proof, it is not alleged by whom the communication was made. Nor, if it had been made by the surveyor, is it shown to us, that it would have bound him in making his return; or, if obligatory upon him, that it would have affected the rights of a third person, claiming under the return actually made into the office.

As, then, it is admitted, that the description in McKee's conveyance designates a tract wholly different from that held by the defendants, the whole equity of the complainants must depend upon the alleged intention of the parties, McKee and Ross, at the time when the former conveyed to the latter.

And here we find the case wholly unsupported by proof. It is only in the conveyance itself, in the answer of the defendants, or the extrinsic evidence in the cause, that we can look for proof of such intention. A conveyance of all McKee's lands, surveyed under a warrant, specifically described, might have placed the complainants on a different ground. But the deed does not specify the date of the warrant, the number of acres, nor the person to whom it issued. The words are (after describing the metes and bounds), "surveyed by virtue of a warrant from under the hand and seal of John, Earl of Dunmore, under the king's proclamation of 1763." Now, *non constat*, but that the warrant here referred to may have passed through a long course of conveyances down to McKee. Nor does the deed
*436] state that the land was surveyed for McKee, and so far may have *been perfectly consistent with the survey returned in favor of another person. The deed itself, then, furnishes no evidence of intention, and the answer does not admit it.

But it is contended, that the deed, taken in connection with one of the certified facts, "that but one of Lord Dunmore's warrants ever issued to McKee; that but one survey of 2000 acres was ever returned in his name under that warrant; and that this was the only survey of 2000 acres to be found in the office, in McKee's name, under any warrant," shows that he must have intended to convey that surveyed for him, and no other. But the majority of the court think otherwise. Had the deed described the land conveyed, as a tract of 2000 acres, surveyed for McKee himself, there might have been some ground for this argument. But the deed is not so

expressed ; and for aught we know, McKee may have been proprietor of many grants, surveyed under Dunmore's warrants, in the name of others, and conveyed to him. Such an intention ought not to be inferred from slight circumstances, nor precipitately acted upon. Where A. conveys to B., by metes and bounds, the circumstances ought to be very strong, to prove that he meant to convey any other lands than those specifically described, before this court would be induced to set aside one deed, and decree the execution of another. If the vendee may set up such a ground of equity, the vendor may do the same ; and the intrinsic difficulties which such investigations would present, would make it generally better to leave the parties to their remedy at law. *If a person, supposing himself possessed [*437
of a specific tract of land, in a certain neighborhood, should contract for the sale of that land to another, it does by no means follow, that he would have sold him any other tract, in the same vicinity, to which, without his knowledge, he was then entitled, much less, that he would have sold it for the same price.

It is a consideration of no little importance in this case, that the bill expressly alleges McKee's ignorance of the actual return of the surveyor. And on what ground are we to presume, that if he had known it, he would have sold the tract which it covered at all, or sold it at the price expressed in the deed to Ross? Its value might have been treble that of the other, and there is reason to think that this court would have been induced, under very strong circumstances only, to decree in favor of those complainants against McKee himself. The sale of a warrant, or of any survey that may be made under a warrant, would be in the nature of a wager or speculation, and might be sustained. But where an individual, supposing his warrant located on black acre, when it is, in fact, located on white acre, conveys the former, by metes and bounds, it must be a strong case, that will sanction a court in setting aside the conveyance of the one, and decreeing that of the other.

It is in vain to say, in this case, that the defendants are bound to show that McKee ever had, in fact, an interest in any survey of 2000 acres beside the one in litigation. The answer puts the complainants on their proof, and it is from them that the evidence is to proceed, upon which our decision is to be founded. *Besides, how are the defendants to be conusant of [*438
a fact like this? Their privity forces upon them no knowledge but what has relation to this single tract of land ; and even as to that, coming in, as they do, under an act of confiscation, there can be no reason for requiring of them evidence to such a fact. A necessary unavoidable implication or inference from the evidence adduced by the complainants is the only possible ground upon which such a necessity could be contended for, and even this, in our opinion, does not exist.

In this case, the court explicitly avows, that it has been not a little disposed to look unfavorable on a claim of such great antiquity. Nearly forty years have elapsed since McKee conveyed this land to Ross. Almost every party and every witness must now be no more ; and to undertake, at this late day, to inquire into the intentions of parties, in a transaction so very remote in time, might be attended with difficulties and evils which cannot now be foreseen.

Decree affirmed.

*The Elsineur: Jones, Claimant.

Documents in prize causes.

Where an inspection and comparison of original documents is material to the decision of a prize cause, this court will order the original papers to be sent up from the court below.

Appeal from the Circuit Court for the district of Georgia. In this case, which was principally a question of fact, *Pinkney* and *Charlton*, for the claimant, stated, that the condemnation in the court below was partly grounded on a comparison of certain documents in this case, with a paper invoked from *The Stackelburg*, another prize cause brought from the same court; that comparison of hands can never be evidence in a court that has not the two writings before it; and that the original papers might be brought up from the court below, in the same manner as the record is removed upon a writ of error, in England.

March 21st, 1816. The following order was made by the court:—In this case, it is ordered, that the claimant make further proof respecting the letter, dated at St. Barts, September 1st, 1813, and signed Jasper D. Blagge, which is now offered to the court; that he show where he received it, and why it has been so long suppressed. It is further ordered, that the clerk of the *440] circuit court for the district of Georgia, do, under *the direction of the judges of that court, transmit, by some safe conveyance, to this court, the original papers following, to wit, the Swedish registers of the Elsineur, of the Allemon, and the Stackelburg; the burgher's brief to Peter Hofstrom, and to Runnels, and the bill of sale to Blagge. The claimant is also required to state the persons to whom the vessel and cargo were consigned at Bath, in the voyages to that place, together with the detailed account of those voyages.

The Hiram: Cornthwait *et al.*, Claimants.

Enemy's license.

An agreement in a court of common law, chancery or prize, made under a clear mistake, will be set aside.[1]

Navigating under a license from the enemy, is cause of confiscation, and is closely connected in principle with the offence of trading with the enemy; in both cases, the knowledge of the agent will affect the principal, although he may, in reality, be ignorant of the fact.

Appeal from the Circuit Court for the district of Massachusetts. This was a vessel laden with flour, and bound from Baltimore to Lisbon, captured, and finally condemned by this court, at February term 1814, for sailing under a license from the enemy. (8 Cr. 444.) The present case was that of the claimants of a greater part of the cargo.

*441] The ship was owned, *and the license procured, by Samuel G. Griffith, a citizen of the United States. Separate bills of lading were at first signed by the master, one for each shipper, and separate letters of instruction were given to Patterson Hartshorne, the supercargo. But, in the expectation, as was alleged, that in case of detention, the delay and

[1] Daniel *v.* Mitchell, 1 Story 172. But the mistake must be established by testimony free from all suspicion. Willett *v.* Fister, 18 Wall. 91.

expense would be less considerable, if the cargo appeared to be the property of one individual, than if there should be several small claims, one general bill of lading was signed to the owner of the ship, and one general letter of instruction was given, in his name, to the supercargo, so as to make the whole cargo appear to be owned by Mr. Griffith, the owner of the ship, and of a small part of the cargo.

At the May term 1814, of the circuit court, the property of the claimants was condemned by that court, upon the ground, that their counsel had, at the preceding term, entered into an agreement with the captors, that the decision of the supreme court, as to Griffith's claim, should conclude the rest. Of this agreement, the circuit judge had made a memorandum in his minute-book, but it was not entered on the records of the court, until the May term, at which condemnation was pronounced, when it was admitted by the claimants' counsel to have been made, and was recorded. From this last sentence of condemnation, an appeal was taken to this court.

Pinkney, for the appellants and claimants.—1. The claimants of the cargo cannot be concluded by the verbal agreement in the court below, so as to exclude them from further proof. The agreement was, *that the decision of this court, as to the ship, should bind the fate of the cargo, and was entered into, upon a mistaken supposition that the question was the same in both cases. The court of chancery will grant a rehearing, though the parties have entered into an order by consent to abide the decree, and not to appeal. *Buck* v. *Turcott*, 2 P. Wms. 242; 1 Vern. 274; and see 2 Ves. 458. If a court of equity will do it, why will not a court of prize, which is still more liberal in its practice, do the same thing? [*442

2. Although further proof was ordered by the court below, it did not apply to the claimants' case, as distinguishable from that of the ship-owner, and they may, and ought to, be let in to further proof again. *The Harmony*, 2 Rob. 322; *The Franklin*, 6 Ibid. 132.

3. The principle on which a court of prize proceeds in confiscating the property of a citizen, for the offence of sailing with a license from the enemy, has its root in the municipal code. It is but enforcing the rule of municipal law, as to allegiance, in a court of the law of nations. Therefore, the party cannot be liable to a penalty *civiliter*, unless he would have been liable *criminaliter:* the presumption of law is, indeed, against the party, but it is a presumption which will bend to fact; and there must be an actual participation, by knowing the fact, or a virtual participation, in neglecting to make the proper inquiries. If the fact of trading with the enemy be a misdemeanor, the *scienter* must be laid in the indictment; and it must be a misdemeanor, or a court of prize cannot *furnish it. Resistance to the right of search by a neutral, ignorant of the existence of war, does not import confiscation. *The St. Juan Baptista*, 5 Rob. 33. Why? Because there was no intention to commit an offence. Ignorance of one part-owner of a ship, where the owners are not general partners, will exempt his share from the penalty of confiscation, for carrying contraband. *The Jonge Tobias*, 1 Rob. 330. Spoliation of papers, by the master, does not preclude the owners from further proof, though it does preclude him. 2 Rob. 108. The owner of the cargo is not held responsible for the master's breach of blockade, unless the blockade was known to exist, before the voyage commenced. [*443

The Adonis, 5 Rob. 262; *The Shepherdess*, Ibid. 267. There must be the intention as well as the act of trading with the enemy, to constitute guilt. The *continentiam delicta* is here wanting; the ship-owner was not the agent of the claimants for this purpose; and supposing the supercargo to have been their agent, where will be found the application of the maxim *respondeat superior?* In the prize court, when acting in the sphere of its proper jurisdiction of cases arising under the *jus gentium?* but this is the case of the property of a citizen taken in violation of his local allegiance. The court must, therefore, adopt the maxim of domestic jurisprudence, that guilt is never to be presumed, but always to be proved.

Dexter, for the respondents and captors, in reply.—The agreement in the court below, that the case of *the present claimants should abide that
*444] of the ship-owner in this court, was acknowledged by both parties, and recorded *nunc pro tunc*. It is impossible, under the circumstances of this case, that it should be a fact, that the owners of the cargo did not know the existence of the license; and therefore, it is impossible for them to prove their ignorance of it. The claimants are affected with knowledge, by the knowledge of their agents—the ship-owner and the supercargo; but it is superfluous to discuss the question of law, the facts are so clear.

Marshall, Ch. J., delivered the opinion of the court.—When the claimants in this case applied to the circuit court to be let in to further proof, for the purpose of showing their ignorance of the fact, that the Hiram sailed under the protection of a British license, the judge of that court considered the agreement of the parties, that these causes should depend on the fate of Griffith's claim, under which agreement, the sentence, that would otherwise have been pronounced against them, was suspended, until the decision of the supreme court on that claim should be made, as having the same validity as if that agreement had been entered, at the time, on the records of the court. In that opinion, there having been no doubt respecting the fact, this court concurs.

But this court is also of opinion, that if the agreement was made, under a clear mistake, the claimants ought to be relieved from it, where it could be done without injury to the opposite party. If a judgment be confessed
*445] *under a clear mistake, a court of law will set that judgment aside, if application be made, and the mistake shown, while the judgment is in its power. An agreement, made a rule of court, to confess a judgment, cannot be stronger than a confession itself; and, of course, a party will not be compelled to execute such an agreement, but will be allowed to show cause against the rule, in a case where it was plainly entered into under a mistake. If the judgment be no longer in the power of a court of law, relief may be obtained in chancery. Still more certainly will an agreement, entered into in a suit originally pending in a court of chancery, be relaxed, or set aside, if it be proved to the court, to have been entered into under a mistake. The case cited from Peere Williams is directly in point.

These principles are of universal justice, and of universal obligation. They cannot apply with less force to causes depending in prize courts, than to causes depending in other courts. The propriety, then, of rejecting further proof in this case, and of condemning the property claimed by the appellants, will depend on the clearness with which they show the mistake

under which the agreement was made, and on their ability to support their case, if that agreement be set aside. If a real and substantial difference exists between the case of the present claimants, and that formerly decided by this court, there will not be much difficulty in yielding to the suggestion, supported, as it is, by the proof now offered, that this agreement was made without knowledge of that difference, and consequently, by mistake. *But the question then occurs, whether restitution ought to be decreed to them, if the obligation of the agreement be removed. [*446

The claimants allege, that, in point of fact, they did not know that the Hiram sailed under a British license, and the proof they offer goes far in supporting this allegation. It is admitted, that ignorance of this fact will save from the forfeiture incurred by it, unless the claimants have such constructive notice as will preclude them from showing the want of actual notice. It has been argued, that the transaction rendered Griffith the agent of the other shippers, so as to infect their claims with his knowledge; that by consenting that their property should be shipped in his name, it becomes liable to all the risks to which it would have been exposed, had it been actually his. It has been also argued, that the supercargo is clearly the agent of the shippers, and that his knowledge of the license being on board is, constructively, their knowledge. The counsel for the claimants endeavors to rescue his clients from the effect of this constructive notice, by contending, that the principle of *respondeat superior* can never apply to a case of a criminal nature; that a license works a forfeiture, because it is a breach of allegiance—an offence which cannot be imputed to a person having no knowledge of the criminal act which constitutes the breach of allegiance: and that this principle has, in prize courts, been applied to cases punishable under the law of nations; not to offences against the government of the captor and captured.

*The court considers the sailing, under an enemy's license, as closely connected, in principle, with the offence of trading with the enemy; in which case, it is believed to be incontrovertible, that the knowledge of the agent would affect the principal, although he might, in reality, be ignorant of the fact.(a) Upon this ground, the sentence of the circuit court is affirmed, with costs. [*447

Sentence affirmed.

(a) Thus, where a shipment was made to the enemy, by the partners of a house of trade, resident in a neutral country, without the knowledge or consent of a copartner, resident in the belligerent state, his share was held liable to confiscation. The Franklin, 6 Rob. 129. And it appears, from that case, that even an inactive or sleeping partner (as it is termed) has been held, by the Lords of Appeal, incapable of receiving restitution in a transaction in which he could not lawfully be engaged, as a sole trader. Ibid. 131.

Ammidon *v.* Smith *et al.*

Insolvent discharge.

Under the laws of Rhode Island, a discharge, according to the act for the relief of poor prisoners for debt, although obtained by fraud and perjury, is a lawful discharge, and not an escape; and upon such a discharge, no action can be maintained upon a bond for the liberty of the prison-yard.

This was an action of debt, brought by the plaintiff against the defend-
*448] ant, in the Circuit Court of *Rhode Island, on a bond dated the 31st day of August 1810, with a condition, that if Simon Smith, a prisoner in jail, at the suit of the said Philip Ammidon, shall "continue and be a true prisoner in the custody, guard and safe-keeping of Roger Allenton, keeper of the said prison, &c., within the limits of the said prison, until he shall be lawfully discharged, without committing any manner of escape or escapes, during the term of his restraint, then this obligation to be void," &c.

The defendants pleaded, severally, two several pleas—1. That said Simon did remain a true prisoner, until lawfully discharged, and made no escape.

2. That, after notifying his creditors, he did take the oath provided by the law of the state of Rhode Island, for the relief of poor prisoners confined for debt, before proper authority, which oath is as follows: "that he had not any estate, real or personal, in possession, remainder or reversion, over ten dollars, and that he had not, since the commencement of the said suits against him, or at any other time, directly or indirectly, sold, leased, or otherwise conveyed or disposed of, to, or intrusted any person or persons whomsoever with, all, or any part, of the estate, real or personal, whereof he hath been the lawful owner or possessor, with any intent or design to secure the same, or to receive, or to expect any profit or advantage therefrom, for himself or any of his family, nor had he caused, or suffered to be done anything whatsoever whereby any of his creditors may be defrauded."

*To the first plea, the plaintiff replied, that he did not remain a
*449] true prisoner, until lawfully discharged, &c. To the second, he replied, that, after the commencement of the action, on which he was imprisoned, and after the contracting of the debt on which the action was brought, the said Simon was seised and possessed of real estate to the value of $40,000, and that, fraudulently contriving with his sons, Darius and Simon, jun., his sureties in said bond, to defraud him of his said debt, did lease, sell and convey to said Darius and Simon, jun., and his other children, all his said real estate, and did intrust them with it, for his and their benefit, with intent to defraud the plaintiff, and that he might be admitted to the benefit of the oath mentioned in said plea; that said Simon did intrust with said Darius and Simon, jun., and his other children, all his estate, both real and personal, of the value of $50,000, with the advice, counsel and assistance, and under the direction of said Darius and Simon, jun., and his other children, with an intent and design to secure the same to the said Darius and Simon, jun., and his family, to defraud the plaintiff of his said debt; and he avers, that the said Simon did falsely and fraudulently take said oath, with intent wilfully, falsely and fraudulently to hinder, delay and defraud the plaintiff of his just debt aforesaid, and avoid the payment thereof, and thereby hinder, delay and defraud the other creditors of the said Simon of

their just debts. And this he is ready to verify, wherefore, he prays judgment, &c. In his replication to *the pleas of the two sureties, the plaintiff added an averment, that the said Simon took the said oath, they, the defendants, well knowing that the same was false and fraudulent; and that the said Simon did wilfully, falsely and fraudulently take the said oath, with intent thereby to hinder, delay and defraud the plaintiff of his just debt aforesaid, and avoid the payment thereof, and thereby hinder and defraud the other creditors of the said Simon of their just debts. To this replication, the defendants demurred, and the plaintiff joined. [*450

On the argument of this demurrer, the judges of the circuit court were divided in opinion, whether the replication was sufficient to avoid the plea, which division of opinion was certified to this court.

Pitkin, for the plaintiff.—The question is, whether the fraudulent conduct of the defendants, as stated in the pleadings, can be taken advantage of in a suit on the bond? The laws of Rhode Island allow persons imprisoned for debt on mesne process, or execution, the limits of the prison, on giving a bond to the creditor, to remain true prisoners, until lawfully discharged. Debtors, having no estate, who take an oath that they have not any estate over $10, and that they have not disposed of any part of the estate of which they were possessed, for their own benefit, or that of their families, or with intent to defraud their creditors, may be discharged from jail; but if confined on execution, the debtor must leave with the keeper, to be delivered to his creditor, his *promissory note, payable to such creditor, for the amount of the debt, in two years, with interest. [*451 (Digest, p. 227; Supplement, p. 73.) In this case, the debtor was released from prison by the forms of law; but this discharge being obtained by fraud and perjury, is wholly inoperative, and a departure from the limits, under color of such a discharge, is, in law, an escape, and a breach of the condition of the bond. Fraud vitiates every act; and this axiom of jurisprudence is consecrated by the laws of Rhode Island, which provide, "That if any such prisoner aforesaid shall be convicted of having sold, leased or otherwise disposed of, or intrusted his or her estate, or any part thereof, directly or indirectly, contrary to his or her aforegoing oath or affirmation, he or she shall not only be liable to the pains and penalties of wilful perjury, but shall receive no benefit from said oath or affirmation." (Digest, p. 231.) The word "convicted," could not have been used here technically, but merely to declare, that if any person should swear falsely as to the disposition of his property, he should not only be liable for perjury, but should receive no benefit from such false swearing. Any other construction would defeat the object of the statute. The laws of the state contain a similar provision respecting debtors obtaining the benefit of the insolvent act; yet it has never been held, that the fraudulent debtor must be first criminally convicted, in order to give effect to this provision.

Hunter, contrà.—1. The discharge was obtained *by a court of competent jurisdiction, and is, therefore, of complete obligation. [*452 The decision in the present case was not only that of a court of competent jurisdiction, and therefore, conclusive, but it was, in terms and effect, a decision upon the very point now in controversy, and between the same parties. The statute is solicitous to prevent fraud, and for that purpose

allows to the party creditors a right to show the probability that a perjury is intended, and by that means a fraud may be perpetrated, and applying to the conscience of the debtor, imposes on him an oath of detailed, explicit and unequivocal purgation. The present plaintiff has no right to complain; though duly summoned, he did not appear, and his contumacy has forfeited his right of action. There is no principle of our jurisprudence more firmly settled, more reasonable and salutary, than that a party shall not be permitted to turn his own omissions into a charge upon another. Even a court of chancery will refuse relief against fraud, if it be obvious, that it might have been urged by the complainant, as matter of defence in a previous suit at law. *Le Guen* v. *Governeur*, 1 Johns. Cas. 392; 2 Burr. 1009; 7 T. R. 269; 2 H. Black. 414.

The discharge of the defendant is said to be invalidated by conveyances previously made by him. But of these conveyances the plaintiff had notice; the law requiring them to be recorded, and the plaintiff admitting that he had actual notice. If, then, these deeds constituted the fraud, the defendant
*453] had notice of the fraud, and ought to have appeared *to oppose the discharge. Knowing the defendant not to be entitled to it, he stands by, and permits him to obtain it, with an intention to convert a bond, meant as a substitution for the prison walls, into a pecuniary security for his debt, and thirty per cent. in addition. The plaintiff's conduct is thus analogous to a permissive escape at common law, where neither the creditor nor the sheriff can retake the prisoner, even in a fresh suit.

2. Considering this as a question upon the construction of the bond, no breach of its condition can be inferred. Such a breach imports an actual wrongful escape; such as, at common law, would give the sheriff a right of recaption—such as would subject him to an action, and the prisoner to an indictment. The phraseology of the bond is that of the common law, and the definition of the correlative phrases "escape" and "true prisoner," are exact, invariable and immemorial. That can never be an escape, where the prison-doors are opened by the hand of the law. He must have remained a true prisoner, whose remaining a single moment longer, by restraint, would have subjected his keeper to an action for false imprisonment. Escape, according to the definition as ancient as Rastel, in his *Termes de la Ley*, and adopted by Staundf. P. C. cap. 26, and all the subsequent writers, means a violent or privy evasion of some lawful restraint. It is a solecism in language, to say, that a discharge and enlargement by a court, is an escape; for, if the court has jurisdiction, the sheriff cannot judge of the validity of
*454] the process and other proceedings of such *court, but must obey. Moor 274; 1 Dyer 66. By the ancient common law, prison-breaking, either in a criminal or civil suit, was felony, and it is still an indictable offence. 2 Inst. 509; Cro. Car. 210. Can it be pretended, that the prisoner could be convicted of this offence? or that our jurisprudence is so inconsistent, as to present a different result on the same question, merely because the forms are conducted by a civil and not a criminal procedure?

3. The plaintiff has mistaken his remedy, and the mistake proceeds upon a violent attempt to convert a contract that a man shall not escape, into a guarantee for the payment of money. Undoubtedly, the general policy of the law is, to compel payment from the debtor, by the imprisonment of his body; but its rigor has been mitigated by statute, which permits him to

see the light of heaven, and breathe its genial air, upon giving security that he will not abuse this privilege, by a forcible or privy escape. This is all the sureties engage for; their contract is prospective only; and if the prisoner has previously made himself poor, by voluntary conveyances, it has no relation with their obligation. In this case, the creditor's remedy is not upon the bond, for the original debt remains; the contract is unimpaired. There is a renewal—a novation, as the civil law terms it, of the debt. The prisoner is obliged to give his promissory note for the amount of the execution, with interest; and his enlargement may, even then, be prevented by the creditor, by paying one dollar a week for his support in prison. In order *to extinguish the original debt, and create a remedy upon the bond, the prisoner must be convicted of the fraud, by a criminal process. [*455 Until that is done, his oath is taken for truth; it is the medium of proof, and its substitute, as in cases of usury, or in the action of book-account, or book debt, which prevails in the eastern states, where the oath of the party to his original entries is *primâ facie* evidence to enable him to recover. If the prisoner be convicted of perjury, the sentence would proceed to vacate all the proceedings consequent upon the fraud. *Hubert's Case*, Cro. Eliz. 531; 12 Co. 123.

All the cases under the stat. 27 Eliz. c. 4, § 7, and other like statutes, from *Twyne's Case*, soon after the enactment of the statute, down to the case of *Meux* v. *Howell*, 4 East 1, exhibit the same combination of civil and criminal procedure. The insolvent law of Rhode Island of 1756, and the statute under which this bond was taken, are alike. That law is mostly a transcript of an English statute passed the year before, which act was one of those temporary insolvent laws which have been passed, from time to time, since the original act of Charles II., made, principally, in consequence of the great fire of London. It is not probable, then, that the word "conviction," in this law, was used in any other than its technical and correct signification of a conviction in a court of criminal judicature. Such a conviction would be conclusive evidence of the fact, if it afterwards came in question in a court of civil jurisdiction. The plaintiff may pursue his remedy in a court of common *law, or in chancery; or he may resort to the legislature of [*456 Rhode Island, which, by the peculiar institutions and usages of that state, possesses the power of nullifying the proceedings of the ordinary courts of justice. There being no written constitution, its sovereignty is limited by nothing but its federal compact with the United States; and in the exercise of its residuary sovereignty, it is like the British parliament, in a legal sense, omnipotent.(*a*)

4. But this case is settled by that of *Simms & Wise* v. *Slacum*, 3 Cranch 307, which is undistinguishable in point of principle, and the minute differences between the law of Virginia and that of Rhode Island strengthen and illustrate the main principle of decision.

Pitkin, in reply.—The discharge cannot be conclusive, because the proceedings are summary, and founded entirely on the debtor's oath; from the determination of the magistrates, no appeal lies, nor can they grant a new

(*a*) As to the power of parliament, see Lords' Journals, vol. 1, p. 191; Commons' Journals, vol. 8, p. 344, Sir Edward Powell's case.

trial. The prison-doors were not opened by the hand of the law, but by a fraud upon the law. In the case of *Simms* v. *Slaeum*, the court held, that if the surety had combined with the magistrate, in order to procure the discharge, he could not set it up by way of defence, to an action on the bond. By the laws of the state, perjury is punishable by three years' imprison-
*457] ment; but this punishment could not be inflicted, if a civil sentence *is at the same time, to be pronounced, that the party shall return to the debtor's prison. Neither an action at law, nor a suit in chancery, can enforce the plaintiff's just rights upon the lands conveyed, in the hands of *bonâ fide* purchasers. Nor can the case of *Simms* v. *Slacum* be considered as decisive of the present, since the provisions of the two statutes are so different, and the point did not come up directly in that case; but when it was again brought before the court, upon a special verdict, the principles settled were favorable to the present plaintiff. (5 Cranch 363.)

March 21st, 1816. Marshall, Ch. J., delivered the opinion of the court, and after stating the facts, proceeded as follows:—The act of the legislature of Rhode Island, on which this case depends, enacts, "That it shall and may be lawful for the sheriffs of the several counties to grant to any person imprisoned for debt, a chamber in any of the houses or apartments belonging to such prison, and liberty of the yard within the limits thereof, on his giving bond to the creditor, with two sufficient sureties, in double the amount of the debt, with condition to remain a true prisoner, until lawfully discharged, and not to escape. And in case the creditor shall put the bond in suit, and recover judgment thereon, for breach of the condition, he is to recover his debt, with thirty *per centum* on the principal sum, for his damages;" and the
*458] principal and his sureties shall be committed to close *jail until the judgment be paid. The law then prescribes the manner in which a poor prisoner may obtain his discharge. On application to any judge of the court of common pleas, or justice of the peace in the county, notice is to be given to the creditor, to appear at such time and place as the judge or justice shall appoint, to show cause why the prisoner should not have the benefit of the act. Any one judge of the court of common pleas, and any one disinterested justice, are then authorized to administer the oath prescribed in the law; "if, after fully examining and hearing the parties, the said justices shall think proper so to do." A certificate being given to the jailer, the prisoner is to be discharged, on leaving with the jail-keeper, to be delivered to his creditor, his note, payable to the creditor, in two years, with interest, for the amount of the execution. It is then enacted, that if any such prisoner shall be convicted of having sold, leased or otherwise concealed or disposed of, or intrusted, his or her estate, or any part thereof, directly or indirectly, contrary to his or her oath or affirmation, he or she shall not only be liable to the pains and penalties of wilful perjury, but shall receive no benefit from said oath or affirmation.

The question to be decided by this court is, whether a prisoner obtaining a discharge according to the forms of law, by means of fraud and falsehood, has broken the condition of this bond? There is so much turpitude in the act confessed by the demurrer, such reluctance to allow any man
*459] to avail himself of so flagitious a defence, that it is *not without some difficulty, this question can be considered as a naked point of law.

It is, however, the duty of the court so to consider it; and this has been attempted.

The object for which this bond was given is of decisive importance, in the inquiry respecting the extent of the obligation it imposes. It is certainly, not given for the purpose of improving the security of the creditor, but simply for the purpose of allowing the debtor the benefit of the prison-yard, without impairing the right of the creditor to the custody of his person. The yard, and a comfortable chamber, are substituted for the walls of a jail; but as this substitution would facilitate an escape, it was deemed reasonable, to secure the creditor against the abuse of an indulgence which the humanity of the law afforded. This consideration would suggest the propriety of provisions against an actual escape, the means for making which were furnished by allowing the use of the prison-yard; but not againt the employment of fraud or artifice to obtain a discharge, in the manner prescribed by law, which may be employed in jail, as well as in the yard, and the means of employing which are not in any degree facilitated by substituting the yard for the walls of the jail. The condition of the bond is, to remain "a true prisoner, until lawfully discharged, without committing any escape or escapes, during the term of his restraint," and the certificate is a mode of discharge prescribed by law, which terminates "his restraint." If, as is conceived, this bond was intended to guard against the dangers created *by allowing the prisoner the liberty of the prison-yard, not against [*460
a fraud already committed, which is entirely unconnected with the bond, and the enlargement of his limits; then it is not broken by the practice of such fraud. The persons perpetrating it are, in a high degree, criminal, and ought not to be permitted to avail themselves of such conveyances. The jurisprudence of Rhode Island must be defective, indeed, if it does not furnish a remedy for such a mischief. The replication charges these conveyances to have been executed by the defendant, pending the suit, for the purpose of defrauding the plaintiff, of defrauding his creditors generally, and of enabling himself to take the oath of an insolvent debtor. It further charges, that after the execution of the bond, the false oath was taken, with the knowledge of the sureties. However criminal this act may be, it cannot be punished, by extending the obligation of the bond, on which this suit was instituted. The judgment rendered by the magistrates was obtained by perjury, but the discharge of the prisoner, which was the consequence of that judgment, was in the course of law, and is not deemed an escape.

This question appears to have been considered by the court in the case of *Simms et al.* v. *Slacum;* and although the question was not there decided, because in that case the sureties alone were sued, and did not appear to be concerned in the fraud of their principal, yet the reasoning of the court certainly applies to this case. The decision in the case of *Simms et al.* v. *Slacum* has been revised, and the court feels no *disposition to depart [*461
from it. The reasoning it contains need not be repeated, but is considered as applicable to this case.

There is some difference in the provisions of the two statutes, but not enough to induce a different construction as to the extent of the obligation of the bond for keeping the prison-rules. The law of Rhode Island enacts, that if any prisoner shall be convicted of having disposed of any part of his

estate, contrary to his oath or affirmation, "he shall not only be liable to the pains and penalties of wilful perjury, but shall receive no benefit from said oath or affirmation." Conviction is a technical term, applicable to a judgment on a criminal prosecution, not to a proceeding on this bond. The act contemplates a prosecution on which the party may be adjudged to suffer the penalties of perjury, in addition to which he is to be deprived of all benefit from the oath or affirmation. If this section has any influence, it would be to show that, in the contemplation of the legislature, such conviction is necessary, previous to the establishment of the absolute nullity of the oath or affirmation. The court, however, does not mean to indicate that the effect of the oath and of the discharge granted by the magistrates might not be controverted, in any proceeding against the parties, either in law or equity, other than in a suit on the bond for keeping the prison-rules.

CERTIFICATE.—This cause came on to be heard on the transcript of the record from the circuit court for the district of Rhode Island, containing the
*462] points *on which the judges of that court were divided in opinion, and was argued by counsel. On consideration whereof, this court is of opinion, that the replication of the plaintiff is insufficient to avoid the plea of the defendant. All which is ordered to be certified to the said circuit court.

Certificate for the defendant.

JONES *et al. v.* SHORE'S Executor *et al.*

UNITED STATES *v.* JONES *et al.*

Distribution of penalties.

A bond was given to T. S., the collector of the district of Petersburg, under the 2d section of the embargo act of the 22d of December 1807, and a suit was afterwards brought by him, on the same bond, in the district court, and pending the proceedings, to wit, on the 30th of October 1811, J. S., the collector, died; and judgment was recovered in favor of the United States, on the 30th of November 1811. On the 26th of the same November, J. J. was appointed collector of the same district, and entered on the duties of his office, on the 14th of December 1811; until which time T. S., who was deputy-collector under J. S., at his decease, continued, as such, to discharge the duties of the office. The judgment of the district court was subsequently affirmed by the circuit court. When the bond was taken, A. T. was surveyor of the district, and continued in that office, until his death, which was after the commencement of the suit on the bond, and before judgment thereon, and was succeeded by J. H. P., who was appointed on
*463] the 30th of March 1811, and entered on the duties of his office, on the 16th of the same *month. It was *held*, that the personal representatives of the deceased collector and surveyor, and not their successors in office, were entitled to that portion of the penalty which is, by law, to be distributed among the revenue-officers of the district where it was incurred. There being no naval officer in the district, the division was adjudged to be made in equal proportions between the collector and surveyor.

United States *v.* Jones, 1 Brock. 285, affirmed.

THE material facts of these cases are as follows:—On the 23d of November 1808, a bond was executed at the custom-house of Petersburg, in Virginia, to the United States, by Thomas Pearse, master of the ship Sally, of Philadelphia, and Robert McAdam, Daniel Filton and George Pegram, jun., in the penal sum of $46,300, upon condition, that if the cargo of said vessel, consisting of 830 hogsheads of tobacco, intended to be transported in said vessel from the port of Petersburg to the port of Boston, in Massachusetts,

should be re-landed in the United States, the danger of the seas excepted, then the obligation to be void, otherwise, to remain in full force. The bond was, in fact, given to John Shore, the collector of the district of Petersburg, in pursuance of the second section of the embargo act of the 22d December 1807, ch. 5.

A suit was afterwards brought by the said collector, on the same bond, in the district court for the district of Virginia, and pending the proceedings in said court, to wit, on or about the 30th of October 1811, John Shore, the collector, died; and judgment was finally recovered on the same bond, in favor of the United States, on the 30th of November 1811. On the 26th of the same November, John Jones was duly appointed and commissioned by the president as collector of the *same district, and he qualified as such, and took upon himself the discharge of the duties of the office, on [*464 the 14th of December 1811; until which time, Thomas Shore, who was deputy-collector under John Shore, at the time of his decease, continued, as such deputy-collector, to discharge the duties of the office. Mr. Pegram sued out a writ of error from the said judgment, to the circuit court for the district of Virginia, and Mr. Pegram having died, pending the proceedings, the suit was revived by his administrator, and the judgment of the district court was, at May term 1814, affirmed by the circuit court. At the time when the bond was taken by the collector, Andrew Torborn was the surveyor of said district for the port of City Point, and continued in that office until his death, which happened after the commencement of the suit on said bond, and before the rendition of judgment thereon, and was succeeded in his office by John H. Peterson, who was appointed and commissioned, on the 3d of March 1811, and qualified and entered upon the discharge of the duties of that office, on the 16th of the same month. At the May term of the circuit court 1814, the whole debt and costs recovered by the judgment, were paid into court by the administrator of Mr. Pegram. Cross-petitions were thereupon filed by the district-attorney, in behalf of the United States, praying the whole sum to be paid to him, or deposited in the bank of Virginia, to the credit of the treasurer of the United States, by the present collector and surveyor of the district of Petersburg, and by the representatives of the deceased collector and surveyor, *praying a payment over, and distribution of, the sum so recovered, according to the rights respectively [*465 claimed by them. A bill was also filed on the chancery side of the circuit court, by the representatives of the deceased collector and surveyor, against the present collector and surveyor, and the clerk of the court, praying a moiety to be paid over to them, or such other portion as they were entitled to by law, and also for general relief.

Upon the hearing of the cross-petitions, the circuit court overruled the prayer of the motion of the district-attorney; the court being of opinion, that the United States were entitled only to a moiety of the money, and that the same ought to be paid to the collector of the district, and ordered the clerk of the court, accordingly, to pay the same to John Jones, the present collector, after deducting therefrom one-half of one *per centum* for his commission. And the court being divided in opinion, whether the other moiety should be paid to the said collector, to be distributed by him according to law, as this court should direct, or without any direction on the subject, certified the same question to the supreme court. Upon the hearing of the

suit in chancery, on the bill, answer and proofs, in which none of the facts were controverted, a question occurred before the court, whether the representative of the late surveyor, in right of his intestate, was entitled to receive the moiety of that portion of the penalty which is, by law, to be distributed among the several revenue-officers of the district wherein the penalty was
*466] incurred; upon which *question the court was divided, and the same question was certified to this court.

Swann, for Jones *et al.*—The whole body of embargo laws shows, that the collector is, *ex officio*, to receive penalties and forfeitures; and that he who is to receive, is to have his distributive share, as his property, of right, and to make the division among the other persons entitled. The term collector means the officer of the law, invested with legal immortality. Official obligations do not attach to the person of the individual, but to the office. *Streshley* v. *United States*, 4 Cr. 171. The penalty may be released by the treasury, at any time before the collector receives it.

Wirt, for Shore's executor *et al.*—The question is, whether, of these two officers, he who supports all the labor and inconvenience shall be entitled to the reward. The death of Mr. Shore did not discontinue his office; his deputy exercised the duties, as by law he was authorized to do, until the rendition of the judgment. The reason of the law is its soul; the intention of the legislature must be regarded; it must have been their motive to stimulate the zeal and exertions of the officers of the customs by an adequate incentive. Policy rendered it more essential in the embargo laws, than in the ordinary revenue laws, and the reward was, therefore, attached to the incumbent who detected the offence, and prosecuted. The question is *stricti*
*467] *juris*, and must be determined *by the letter of the law. It does not require the collector to live on, till the reward is reaped, but the right descends to his representatives. If there be a private information, the common informer gets half the moiety of the officers. If there be no informer, they are entitled, upon the ground of like merit. The title of the informer vests upon the information, and the collector takes his place. The law provides that a person entitled to a share, who shall desire to become a witness, must release; he must renounce and lay down his title, in order to qualify himself as a witness. Where the forfeitures are recovered, in consequence of information by the officers of a revenue-cutter, a share is given to them, but nobody pretends, that their successors would take. It is conceded, that the title may be defeated, by a remission of the penalty; but that is a condition originally attached by law. The collector dies; but he lives in his deputy, for whose conduct his estate is responsible.

Pinkney, in reply.—The argument drawn from an equitable construction, according to relative merit, is unsatisfactory. The law holds out a contingent prospective reward; if the officer dies, it is gone, and the policy of the law is sufficiently satisfied. But the letter of the law is clear and peremptory; the penalty is given to the officer, where it was incurred, and not to the seizing officer. At what epoch will you stop, in fixing the character of the person entitled? At the seizure? the prosecution? or the rendition of the
*468] judgment? At neither: for the word *"recovered" is the emphatic expression, and it is recovered, when adjudged and received. Every

other construction is arbitrary and fictitious. The president's power of pardoning is a conclusive argument; if the right vested, it could not be thereby divested. The provision, as to officers wishing to become witnesses, signifies nothing. They have an interest; not a vested and absolute interest, but contingent upon the recovery, and if they think fit to sacrifice it, they may be witnesses. The collector did not live in his deputy; the law merely casts the responsibility upon his estate as to the acts of the deputy.

STORY, J., delivered the opinion of the court, and after stating the facts, proceeded as follows:—As the United States have not asserted any claim, the first question for the decision of the court is, whether the present collector and surveyor, the actual incumbents in office, or the representatives of the late collecter and surveyor, in right of their testator and intestate, are entitled to the moiety of the money received in satisfaction of the judgment above stated, and now in the custody of the circuit court.

By the express provisions of law, all penalties and forfeitures accruing under the embargo acts, with a few exceptions, not applicable to this case, are to be distributed and accounted for in the manner prescribed by the collection law of the 2d of March 1799, ch. 122. To this latter act, therefore, the arguments of counsel have been chiefly directed; and upon the true construction of the 89th section of the act, the decision of this cause must principally rest. *The 89th section enjoins the collector, within [*469
whose district a seizure shall be made, or forfeiture incurred, to cause suits for the same to be commenced, without delay, and prosecuted to effect; and authorizes him to receive from the court, within which a trial is had, or from the proper officer thereof, the sums so recovered, after deducting the proper charges, and on receipt thereof, requires him to pay and distribute the same, without delay, according to law, and to transmit, quarter-yearly, to the treasury, an account of all the moneys received by him for fines, penalties and forfeitures, during such quarter. The 91st section declares that all fines, penalties and forfeitures, recovered by virtue of the act, and not otherwise appropriated, shall, after deducting all proper costs and charges, be disposed as follows, viz: "one moiety shall be for the use of the United States, and be paid into the treasury thereof, by the collector receiving the same; the other moiety shall be divided between, and paid, in equal proportions, to the collector and naval officer of the district, and surveyor of the port, wherein the same shall have been incurred, or to such of the said officers as there may be within the same district; and in districts where only one of the aforesaid officers shall have been established, the said moiety shall be given to such officer." Then follow provisions referring to the distribution, in cases where the recovery has been had in pursuance of information given by any informer, or by any officer of a revenue-cutter.

It is argued on behalf of the present collector and surveyor, that upon the true construction of these *clauses, no title to a distributive share [*470
of penalties and forfeitures vests, until the money has been actually received by the collector from the officer of the court; and that upon such receipt, it vests in the proper officers of the customs who are then in office. And in support of this argument, it is further asserted, that until this epoch, the claim is a mere expectancy and not a right, the interest being in abeyance, uncertain and contingent. An attempt has been made, to press the

language of the act into the service of this argument. But it certainly will not support it: the language of the act, in its most obvious import, does not seem to have contemplated any change in the officers of the customs, between the time of the accruing and the receipt of the penalty or forfeiture. It seems principally to have been adapted to cases of the most ordinary occurrence, and it is only by an equitable construction, that it can, in aid of the legislative intention, be brought to reach the present case. The act must receive the same construction in relation to forfeitures *in rem*, as in relation to personal penalties. Both are distributable in the same manner, and subject to the same rules. The case, therefore, will be first considered, in reference to forfeitures *in rem*.

Whenever a forfeiture *in rem* accrues, it is, by the act, made the duty of the collector, to seize the thing, and to prosecute a suit therefor to final judgment. The law contemplates that he may seize, upon probable cause of seizure, not simply in cases of personal knowledge, but upon the information of others. He seizes, however, at his peril, and if the act be not
*471] justifiable, he is subject to a personal responsibility *for all damages. He is placed, therefore, in a situation in which he is bound to act, and yet is not protected against the legal consequences of his acts. It is, unquestionably, with a view to stimulate his vigilance, and reward his exertions, that the law has given him a share of the forfeitures recovered by his enterprise and activity. And yet it would follow, upon the argument which has been stated, that the collector who seizes might be liable to all the responsibility of the act, in case of a failure, without receiving any of the fruits of his toil, if crowned with success. This certainly would seem to be against the policy of the legislature, as well as against the plainest rules of equity. It is a maxim of natural justice, *qui sentit commodum sentire debet et onus;* and the words of a statute ought to be very clear, that should lead to a different determination.

But the case is not left to the result of general reasoning upon the intent and policy of the legislature. It is not true, that the right of a seizing officer to a distributive share, is a mere expectancy. By the common law, a party entitled to a share of a thing forfeited, acquires by the seizure an inchoate right, which is consummated by a decree of condemnation, and when so consnmmated, it relates back to the time of the seizure. This principle is familiarly applied to many cases of forfeitures to the crown; and even in respect to private persons entitled to forfeitures, the interest which is acquired by seizure has been deemed a sufficient title to sustain an action
*472] of detinue for the property. And it is very clear, that the legislature steadily kept in view this principle of the *common law; for the act has expressly provided, that any officer entitled to a part of the forfeiture may be a witness at the trial; and in such a case, he shall lose his share in the forfeiture. The law, therefore, deems him a party having a real substantial interest in the cause, and not a mere expectancy—"a fleeting hope that only keeps its promise to the ear, but breaks it to the sense." It is true, that the act, in making distribution of forfeitures, speaks of the parties entitled to them, by the description of their office; but it cannot with any color of reason, be argued that this designation of office meant to exclude a *designatio personæ*. On the contrary, it is most manifest, that the act meant to point out the person entitled, by a description of his office.

The question then recurs, who is the person meant under this description of office? Is it the person who happens to be in office when the forfeiture is received? Or the person who was in office when the seizure was made, and who thereby acquires an inchoate right, which the subsequent judgment ascertained and fixed? The words may be literally applied indifferently to either; but in point of law, they can be properly applied only to him who has, under the same description of office, already acquired a vested title inchoate or consummate, in the forfeiture. This construction is fortified by a recurrence to other provisions in the 91st section of the act. It is, in the first place, provided, that in all cases of forfeitures, recovered in pursuance of information given to such collector (pointing to the collector entitled to a distributive share), a moiety of the moiety shall be given to the *informer. The grammatical connection of the words, as well as the [*473 obvious exposition of the clause, supposes, that the collector who receives the information, and commences the suit, is the person entitled to the distributive share of the forfeiture. In the next place, it is provided, that when the forfeitures are recovered, in consequence of any information given by any officer of the revenue-cutter, one moiety thereof shall be distributed among the officers of such cutter. Can there be a doubt, that the persons who were officers, at the time of the information, and not those who were officers at the time of the receipt of the forfeitures, are the parties entitled to this moiety? Yet the same reasoning applies here, with equal force, as in the case of the collector. So, by the embargo act of the 9th January 1809, ch. 72, § 12, forfeitures recovered, in consequence of any seizure made by the commander of any public armed vessel of the United States, are to be distributed according to the rules of the navy prize act of the 22d April 1800, ch. 33; and it is clear, beyond all doubt, that the parties so entitled are the officers and crew, at the time of the seizure. The analogous rule, in cases of captures, *jure belli*, is here expressly alluded to, and adopted by the legislature, and that rule stands on the same general foundation with that of the common law. The right of captors to prizes is but an inchoate right, and until a condemnation, no absolute title attaches. But when condemnation has passed upon the property, it relates back to the capture, and [*474 although the parties have died in the *intermediate time, the title vests *in proprio vigore* in their representatives.

Much stress has been laid upon the clauses in the 89th and 91st sections of the collection law of the 2d March 1799, which authorize the collector to receive from the proper officer of the court the moneys recovered in suits for penalties and forfeitures, and which require him to pay and distribute the same, according to law, among the officers of the customs, and other parties entitled thereto. But these provisions are merely directory to the collector, and do not vest in him any personal right to the money received, which he did not before possess; much less do they authorize the supposition that, until the receipt, no title vested in any person. It might, with as much force and propriety, be urged, that, until the same epoch, no right to the other moiety vested in the United States; for the statute is equally mandatory and precise in this case as in the other. It would, however, be quite impossible to contend, upon any legal principles, that the title of the United States was not, to all intents and purposes, consummated by the judgment.

The same reasoning which has been used in respect to forfeitures *in rem*,

applies to personal penalties; and it is unnecessary to repeat it. The court are clearly of opinion, that the right of the collector to forfeitures *in rem* attaches on seizure, and to personal penalties on suits brought, and in each case it is ascertained and consummated by the judgment; and it is wholly immaterial, whether the collector die before or after the judgment. And
*475] they are further *of opinion, that the case of the surveyor is not, in this respect, distinguishable, in any manner, from that of the collector. They are, therefore, of opinion, that the representatives of the deceased collector and surveyor, and not the present incumbents in office, are entitled to the distributive shares of the moiety of the money now in the registry of the circuit court.

The next question is, as to the proportions in which this moiety is to be divided between the representatives of the collector and surveyor. Whatever may have been the practice in the district of Petersburg, the words of the act admit of no reasonable doubt. The moiety is to be divided in equal proportions between the collector, naval officer and surveyor, or between such of the said officers as there may be in the district. There was no naval officer in the district of Petersburg, and consequently, the division must be, in equal proportions, between the collector and surveyor.

It is the unanimous opinion of this court, that it be certified to the circuit court, that it is the opinion of this court:

1st. In the case of the United States against Joseph Jones and others, that the moiety of the money now remaining in the custody of the circuit court, in the proceedings in the case of the United States, appellants, against Joseph Jones and others, mentioned, should be paid to the said Joseph Jones, collector of the district of Petersburg, to be, by him, divided in equal proportions between Thomas Shore, as he is executor of the last will and
*476] testament of *John Shore, deceased, and Reuben M. Gillian, as he is administrator of the goods and effects of Andrew Tarbone, deceased.

2d. In the case of Thomas Shore and another against Joseph Jones and others, that the representative of the late surveyor, in right of his intestate, was entitled to receive one moiety of that portion of the penalty in the proceedings mentioned, which is by law to be distributed among the several revenue officers of the district wherein the penalty was incurred.

Patton's Lessee *v.* Easton.

Statute of limitations.

Under the act of the legislature of Tennessee, passed in 1797, to explain an act of the legislature of North Carolina, of 1715, a possession of seven years is a bar, only when held under a grant, or a deed founded on a grant.

The act of assembly vesting lands in the trustees of the town of Nashville, is a grant of those lands, and when the defendant showed no title under the trustees, nor under any other grant, his possession of seven years was held insufficient to protect his title, or bar that of the plaintiff, under a conveyance from the trustees.

Error to the Circuit Court for the district of West Tennessee. This was an ejectment for one moiety of a lot of land lying in Nashville.

The cause was argued at February term 1815, by *Humphries* and
*477] **Jones*, for the plaintiff in error, and by *P. B. Key*, and *Swann*, for the defendant, and was continued for advisement to the present term.

March 21st, 1816. MARSHALL, Ch. J., delivered the opinion of the court.—The legislature of North Carolina, while Tennessee was a part of that state, passed an act establishing the town of Nashville, and vesting 200 acres of land in trustees, to be laid off in lots, and sold and conveyed in the manner prescribed by the act. On the 1st of July 1784, subsequent to the passage of the act establishing the town, the trustees executed a deed, regularly conveying the lot, for a moiety of which this suit was brought, to Abednigo Lewellin. On the 1st of April 1810, Shadrack Lewellin, heir-at-law of Abednigo, who had then attained his full age of twenty-one years, for seven years and upwards, executed a deed conveying the land in controversy to Francis May; after which, and previous to the institution of this suit, Francis May conveyed the same land to the lessor of the plaintiff.

The defendant produced a deed, dated the 2d of February 1793, executed by a certain Josiah Love, and purporting to convey the land in controversy to William T. Lewis. It appeared in evidence, that Lewis had purchased the land fairly, and paid a valuable consideration for it, and that at the time, no person was in possession of it. Immediately after this conveyance, Lewis entered into, and took full possession of, the premises, made valuable improvements thereon, and continued so possessed, until the 14th of February *1810, when he sold and conveyed the same to William Easton, the defendant, who entered into and took possession, and continued [*478 peaceably possessed thereof, until the 12th of November 1810, when this suit was instituted.

Upon this testimony, the defendant's counsel moved the court to instruct the jury, that the defendant was protected in his possession of the premises, by the laws of the land, and that by virtue of the said laws, the plaintiff was barred from recovering the said parcel of ground and premises. On this question, the judges were divided in opinion, which question and division have been certified to this court, as prescribed by law.

The evidence is not so stated on the record, as to present any point for the consideration of this court, other than the question whether a possession of seven years is, in this case, a bar to the plaintiff's action. This question depends on the construction of an act of the legislature of Tennessee, passed in the year 1797, to explain an act of the legislature of North Carolina, passed in the year 1715.

The act of 1715, after affirming, in the first and second sections, certain irregular deeds, previously made, under which possession had been held for seven years, enacts, in the third section, "that no person or persons, or their heirs, which hereafter shall have any right or title to any lands, tenements or hereditaments, shall thereunto enter or make claim, but within seven years after his, her or their right or title shall descend or accrue; and in *default thereof, such person or persons so not entering or making [*479 default, shall be utterly excluded and disabled from any entry or claim thereafter to be made." The fourth section contains the usual savings in favor of infants, &c., who are authorized within three years after their disabilities shall cease, "to commence his or her suit, or make his or her entry." Persons beyond sea are allowed eight years after their return; "but that all possessions held without suing such claim as aforesaid, shall be a perpetual bar against all and all manner of persons whatever, that the expectation of heirs may not, in a short time, leave much land unpossessed,

and titles so perplexed that no man will know from whom to take or buy land."

The judges and lawyers of the state of North Carolina have been much divided on the construction of this act; some maintaining, that like other acts of limitation, it protects mere naked possession; others, that the first and second sections (which are retrospective) have such an influence on the third and fourth (which are prospective), as to limit their operation to a possession acquired and held by color of title. This court is relieved from an investigation of these doubts, by a case decided in the supreme court of North Carolina, in which it was finally determined that the act of 1715 afforded protection to those only who held by color of title. This contest was maintained as strenuously in Tennessee, after its separation from North Carolina, as in the parent state.

Anterior to the decision of the supreme court of North Carolina, which *480] has been mentioned, *the legislature passed an act to settle "the true construction of the existing laws respecting seven years' possession," in which it is enacted, "that in all cases, wherever any person or persons, shall have had seven years' peaceable possession of any land, by virtue of a grant, or deed of conveyance founded upon a grant, and no legal claim, by suit in law, by such, set up to said land, within the above term, that then, and in that case, the person or persons, so holding possession as aforesaid, shall be entitled to hold possession, in preference to all other claimants, such quantity of land as shall be specified in his, her or their said grant or deed of conveyance, founded on a grant as aforesaid." The act then proceeds to bar the claim of those who shall neglect, for the term of seven years, to avail themselves of any title they may have.

As not unfrequently happens, this explanatory law generated as many doubts as the law it was intended to explain. On the one part, it was contended, that being designed for the sole purpose of removing all uncertainty respecting the construction of the act of 1715, its provisions ought to be limited to its avowed object, and a doubt had never existed, whether it was necessary for a person in possession to show more than a color of title, a deed, acquired in good faith, in order to protect himself under that act; so, nothing further ought to be required, in order to enable him to avail himself of the act of 1797. That if it should be necessary to trace a title up to a grant, the act of 1797, instead of quieting possession, would, in process of *481] time, strip a very long possession of that protecting *quality which the policy of all other countries bestowed upon it; that the act of 1797 was obviously drawn with so much carelessness as, in some of its parts, to exclude the possibility of a literal construction; and for this reason, a more liberal construction would be admissible, in order to effect its intent. It was, therefore, insisted, not to be necessary for the defendant, holding possession under a *bonâ fide* conveyance of lands which had been actually granted, to deduce his title from the grant; but that it was sufficient, to show that the land had been granted, and that he held a peaceable possession of seven years under a deed. On the other part, it was contended, that, on this point, there is no ambiguity in the words of the act. The seven years' possession, to be available, must be "by virtue of a grant, or of a deed founded on a grant." It is as essential that the deed should be founded on a grant, as that a deed should exist. A possession of seven years does no

more, in the one case than in the other, bar a legal title. The words of the act being perfectly clear; they must be understood in their natural sense. When confined to different deeds, founded on the same patent, or to deeds founded on different patents, for the same land, although some cases of fair possession may be excluded from their operation, yet they will apply to the great mass of cases arising in the country.

This question, too, has, at length, been decided in the supreme court of the state. Subsequent to the division of opinion on this question, in the circuit court, two cases have been decided in the supreme *court for the state of Tennessee, which have settled the construction of the act of 1797. It has been decided, that a possession of seven years is a bar only when held "under a grant, or a deed founded on a grant." The deed must be connected with the grant. This court concurs in that opinion. A deed cannot be "founded on a grant" which gives a title not derived in law or equity from that grant; and the words founded on a grant, are too important to be discarded. The act of assembly vesting lands in the trustees of the town of Nashville, is a grant of those lands, and as the defendant shows no title under the trustees, nor under any other grant, his possession of seven years cannot protect his title, nor bar that of the plaintiff. And this is to be certified to the circuit court for the district of West Tennessee. [*482

Certificate for the plaintiff.

Ross and Morrison *v.* Reed.

Land-law of Tennessee.

Where the plaintiff in ejectment claimed title to lands in the state of Tennessee, under a grant from said state, dated the 26th of April 1809, founded on an entry taken in the entry-taker's office, of Washington county, dated the 2d of January 1779, in the name of J. McDowell, on which a warrant issued on the 17th of May 1779, to the plaintiff, as the assignee of J. McDowell, and the defendants claimed under a grant from the state of North Carolina, dated the *9th of August 1787, it was determined, that the prior entry might be attached to a junior grant, so as to overreach an elder grant, and that a survey having been made, and a grant issued upon McDowell's entry, in the name of the plaintiff, calling him assignee of McDowell, was *primâ facie* evidence that the entry was the plaintiff's property; and that a warrant is sufficiently certain to be sustained, if the objects called for are identified by the testimony, or unless the calls would equally well suit more than one place. [*483

Error to the Circuit Court for the district of East Tennessee. The defendant in error, who was plaintiff in the court below, claimed title under a grant from the state of Tennessee, bearing date the 26th day of April 1809, founded on an entry made in the entry-taker's office of Washington county, No. 975, dated on the 2d day of January 1779, in the name of John McDowell, for 500 acres of land, on which a warrant issued on the 17th day of May 1779. The defendants in the court below, now plaintiffs in error, claim under a grant from the state of North Carolina to John Henderson, dated the 9th of August 1787, and a deed of conveyance from John Henderson to the defendant, Ross, duly executed and registered. Morrison held as tenant under Ross.

At the trial of the cause, a bill of exceptions was taken by the defendants, in which was stated a transcript taken from the book procured from the office of the secretary of state of the United States, which contains

reports of the lands entered in Sullivan and Washington counties; also a copy of the warrant issued to John McDowell for 500 acres of land, both of which are certified by the clerk to the commissioner of East Tennessee. *484] Also the grants under *which each party claims, the deed of conveyance from Henderson to Ross, together with the *vivâ voce* testimony of the witnesses produced. It then proceeded to state, "that the defendants contended."

"1st, That having the eldest grant, the plaintiff could not recover, unless he had shown a prior entry, which the law would consider special for the place now claimed, and produced satisfactory evidence that the right was vested in him. That as no proof had been given, that Reed had ever purchased or paid any consideration for McDowell's entry, he could not, in virtue of that entry, entitle himself to a verdict. That the mere statement in the survey and grant, that Reed was assignee of McDowell, was no evidence whatever of that fact.

"2d. That if such proof had been given, still, he could not recover, because the proof shows that the objects called for in the entry existed at two places, some distance from each other; and therefore, the entry was ambiguous and doubtful.

"But the court charged and instructed the jury, that the circumstance of a survey having been made, and a grant issued upon McDowell's entry, in the name of Reed, calling him assignee of McDowell, was *primâ facie* evidence that the entry was the property of Reed. And that it was true, if the calls in an entry would equally well suit more than one place, it would not be considered special for either place; but it was for the jury to determine, from the evidence, whether the place spoken of, on the south side of Holston, would as well suit the calls of the entry as the one on the north side; and that, except for James King's testimony, he had hardly *485] *ever heard an entry better established than the one now under consideration."

There was a verdict and judgment in favor of the plaintiff, and the cause was brought up to this court by writ of error.

March 21st, 1816. Todd, J., delivered the opinion of the court.—It is now objected by the plaintiffs in error, that the transcript first mentioned contains nothing but a naked designation of number, date, person's name, and number of acres, but no description of the land whatever; not even specifying the county where situate.

To this objection, it may be answered, that it is a fact, which will appear from the reports of cases decided in the courts of Tennessee, that the books containing entries for land in the counties of Sullivan and Washington have been lost or destroyed. It is also a fact, that the original of the transcript under consideration was directed, by a statute of Tennessee, to be procured and deposited in the commissioner's office; and copies therefrom, certified by the clerk, are declared to be evidence in the courts of that state; but a conclusive answer is furnished by an examination of the bill of exceptions: it was not objected to in the court below.

The same answers may also be given to the objection taken to the copy of the warrant. Under the laws of North Carolina, for appropriating the vacant lands, an entry is made with the entry-taker, before a warrant

issues: the warrant describes *the land specified in the entry: the special or locative calls for appropriation of the land can be seen and examined as well from a view of the warrant as from the entry. In consequence of various frauds respecting warrants, they were by law to be submitted to a board of commissioners, and if decided to be valid, the original was deposited with the commissioner, and copies, certified by the clerk, were to be received in evidence. The copy of the warrant, in this case, corresponds with these regulations, and was properly received, nor was it objected to in the court below.

The practice in the courts of Tennessee, of attaching a prior entry to a junior grant, to everreach an elder grant in an action of ejectment, was brought into the view of, and recognised by, this court, in the case of *Polk* v. *Hill et al.* (9 Cr. 87); it is, therefore, not now to be departed from.

The location in this case, upon the face of the warrant, appears to be sufficiently certain to be sustained, if the objects called for are identified by the testimony, or unless the calls would equally well suit more than one place. These were questions properly submitted to the jury; there was, therefore, no error in the charge and instruction given on this point. Nor was there error in the residue of the instruction. It is a general principle, to presume that public officers act correctly, until the contrary be shown. It must, therefore, be presumed, that the officer, when he surveyed McDowell's entry, in Reed's name, had sufficient evidence produced to *satisfy him that Reed was the owner of it, and this presumption is increased by the act of another officer in issuing the grant; these [*487 circumstances furnished *primâ facie* evidence, at least, that he was the owner.

Judgment affirmed.

APPENDIX.

NOTE I.

Extract from the Preface to Bibb's Reports of Cases in the Court of Appeals of Kentucky.

"THE rules of landed property in Kentucky are, in an eminent degree, the creatures of the court—a species of judicial legislation. The disputes between claimants under the laws of Virginia have grown, principally, out of two requisitions in the statute of 1779. The one requiring of those claiming rights of settlement, or of pre-emption, to obtain certificates from the commissioners appointed for that purpose, mentioning the cause of the claim, the number of acres, and 'describing, as near as may be, the particular location;'(*a*) the other, requiring the holders of land-warrants to lodge them with the surveyor, and in a book to be kept for that purpose, to 'direct the location thereof so specially and precisely, as that others may be enabled, with certainty, to locate warrants on the adjacent *residuum*.'(*b*) The text was short and novel: the commentary was left to the direction of the judges. The ancient depositories of the law gave but little light to guide the exercise of this discretion. The rules for construction of deeds gave some aid; but this was far short of what was wanted. For a time, unfettered by precedent, undirected by rule, each decision was but fact—multiplication of facts gave precedents, and precedents have grown into doctrine. The statute requires first, a description *of the particular tract, specially and precisely; that is to say, that the description shall apply, certainly, to one identical tract, and not [*490 uncertainly, or equally to two, or divers. Next, that this description shall enable others to find and know the identical tract intended. The statute intends the entry in the surveyor's book, to be notice to all persons of the appropriation. The question arising out of the entry is, does it contain that description which was sufficient to operate as notice of an appropriation of a particular tract? This question is analyzed into the identity and notoriety of the objects referred to in the location. That is to say, the entry must contain proper allusion and reference to known and certain objects, which shall serve as *indices* to the particular tract of land intended to be appropriated.

"Identity is absolutely necessary in the investigation of every question of *meum et tuum*. The propriety of making identity one subject of inquiry in testing entries, needs no explanation. But in deciding upon what description is sufficient to give identity or individuality to the location, various rules have been established, whereby entries, apparently admitting of diversity of figures, have been helped, and rendered identical by construction. A location, "to include his cabin," in matter of facts, admits

(*a*) LL. V Chan. Rev. 93; 1 Litt. E. L. K. 402-3. (*b*) Chan. Rev. 95; 1 Litt. 410.

of divers surveys, each of which may inclose the cabin, and yet not have an acre in common. If the locator could take any one of these circumjacent tracts, as whim or fancy may direct, it is evident, that, until this choice was made known, by some act posterior to his entry, others could not know the adjacent *residuum*, nor appropriate it with certainty. But, as matter of law, the courts have established as a rule, in such cases, that the survey shall be in a square, with lines due north or south, east and west, the cabin at the intersection of the diagonals. Thus (the quantity being expressed), when the particular cabin is ascertained, the location is reduced to mathematical certainty, appropriate to one precise identical tract. This is one example, among many, of which you will read in these reports.

"The identity of the tract being ascertained, the inquiry is, whether the description was, at the date of the location, with the surveyor, sufficient to enable others to find and know it? *This branch of the subject has called forth many decisions, and
*491] embraces the doctrine of notoriety, so frequently recurring in questions upon conflicting claims.

"This rule is, that the location must contain such expressions and allusions to objects, natural or artificial, as would enable others, using reasonable diligence of inquiry, to ascertain the particular tract intended to be appropriated. A reference to obscure objects, known to the locator only, without proper directions for finding them, could not satisfy the requisitions of the statute, although the figure of the land could be precisely described, if the beginning could be ascertained. For such reference to obscure objects, although it might enable the locator himself to appropriate the adjacent *residuum*, would not enable others to do it. This required reference to known objects by their known appellations, or other distinguishing characteristics, is essential to every geographical description, and is founded in the very constitution of language, as the medium of communicating the ideas of one man to another. The geographer must draw his equator, and establish and make known his first meridian, before he can describe, intelligibly, the relative positions of the different parts of the earth, and of the countries he describes. The surveyor must have his first positions, from whence to take his bearings and distances, his latitude and departure. In language, the sign and the thing signified by articulate sounds, must be agreed upon, and mutually made known, before men can converse intelligibly one with another. The substances must be pointed out, and the names repeated, before the child, or the foreigner, understands what we mean by land, water and cabin. There is no natural connection between words and the ideas they are intended to stand for; otherwise, there would be but one language among all men. But sounds, as the representatives of ideas, are of mere arbitrary imposition; therefore, language is properly defined 'a system of articulate sounds, significant by compact.' This compact is established by common consent, use and custom, in every country. It is this established use, custom and common consent which makes names, words and terms, mark and signify particular ideas. All men, therefore, who speak intelligibly *to others, must use words which stand for
*492] ideas, and employ those words according to their common use and acceptation in the language of the country. A man who would use three to signify eight would deceive his hearers. He who would speak to others of substances and objects, by sounds never before used to signify those things, without any explanation to make known his meaning, would be guilty of an abuse of language, by uttering empty sounds and nothing else. From known ideas, the mind may be conducted to the knowledge of things new, and before unknown. But from things unknown, to attempt to describe things more unknown, so far from helping us to knowledge, serves only the more to perplex and bewilder the mind. A locator using words which stand for ideas in his own mind, but which do not convey the same ideas, or no certain ideas, to the mind of others, has not complied with the requisitions of the statute. Should he allude to a water-course only, by a name unheard of by others, and arbitrarily imposed by himself, he does not write intelligibly to others. So, 'to include a tree in a forest, whereon he has marked the initials of his name,' may identify the land in his own mind, but does not communicate to others a competent idea of the intended appropria-

tion. Locators must have reference to objects known to others by their usual names, or by terms in common use and acceptation, describe and make known the objects intended.

"Notoriety is either absolute or relative. Absolute, as where the object is known so generally that, according to the usual courtesies and intercourse among men, the presumption is irresistible, that any one using ordinary inquiry might have been conducted to the place, as Lexington, Bryant's Station, the Lower Blue Licks, &c. Relative, as where the particular object is not actually known, but is ascertainable by reasonable diligence—as one mile east of the Lower Blue Licks &c.

"As the record in the books of entries is to have the effect of general notice to all holders of warrants, the entry must contain apt reference to objects known to the generality of persons acquainted in the neighborhood of the intended appropriation. Neither will the proof, that the particular conflicting claimant had knowledge of the appropriation intended, suffice to *help out an entry in a controversy with him, as is adjudged in several cases, and, I think, very properly. 1st. That [*493 would be to make the entry valid as to some, and invalid as to others, as is more fully explained in Craig *v.* Pelham, *Sneed* 286–7. 2d. That would be to test the entry, not by the record, but by matters out of the scope of the record. 3d. It would put men's estates upon a tenure too slender and uncertain, without any sufficient safeguard against the perjury or mistakes of a solitary witness; whereas, evidence of notoriety, being an appeal to general understanding and knowledge of the people of the neighborhood, is capable of being rebutted and disproved, if untrue, by calling upon other men who had equal opportunities of information on the subject. 4th. To admit proof that a particular person understood the entry, would be to test the signification and propriety of the language of the entry, not by the standard of general use and common acceptation, but by the particular ideas of two individuals.

"Notoriety must have been co-existent with the entry. The location, when made, if valid, is to stand for notice of appropriation from that time. Words conveying to others no precise idea of appropriation, at the time used, because they were not conformable to objects then in existence; or, because the names and terms employed had not then been annexed, in common use and understanding of the neighborhood, to any individual object, being signs without anything signified, cannot, without abuse of language and of truth, be made to apply to after-made objects, or after-acquired names. 'A. enters for 400 acres, to include his cabin;' at the time, he had no cabin, and therefore, his entry was null, appropriating no land: one year afterwards, A. builds a cabin. Ought he to be permitted to hold land around it, by virtue of his entry before the fact? If so, A. has had one year to make his choice of the country. To suffer him to hold by relation to the time of his entry, would be a fraud upon intermediate purchasers. To suffer him to hold against after purchasers, would be, 1st. To make the same entry valid and invalid; good against some persons, and null as to others, of which enough has been said before. 2d. To refer his claim, not to the the truth of the recorded entry, but to mere occupancy. 3d. To make an act not valid in the *beginning, grow valid and legal in the lapse, which is contrary to a maxim in law. '*Quod* [*494 *ab initio non valet, in tractu temporis non convalescit.*'(*a*) Noy's Max. 9. In illustration of the maxim, Noy putteth the case of A. 'remainder limited to A., the son of A. B. Having no such son, and afterwards a son is born to him, whose name is A., during the particular estate,' the remainder is void, whether the entry alluded to objects not then existing, or employed names or terms, not then standing for signs of the existing objects, or signs of ideas among the generality of those acquainted in the neighborhood, the reason is the same for denying validity to the entry by means of after notoriety. To test the entry by any other standard than the significancy or insignificancy, of the words at its date, would produce an inconstancy and shifting of locations. Objects lose their old names and acquire new ones. Names of streams are transposed

(*a*) 4 Co. 61; 10 Ibid. 62; Plowd. 344.

in the progress of time, and of the settlement of the country. Upon the doctrine that after notoriety should apply to a previous entry, the identity and validity of entries would be referred, not to one uniform standard expressed in the face of each entry, but to perplexed and different standards, according to the dates of the entries happening to conflict. Thus, the date of a subsequent conflicting entry, would make a part of a prior entry, and affect its validity or invalidity."

NOTE II.

On the Practice in Prize Causes.

In some of the district courts of the United States (to which courts the exclusive jurisdiction in the first instance belongs) *great irregularities have crept into the practice in prize causes. These irregularities have been censured at the bar, and occasionally noticed, with expressions of regret, by the supreme court. It is hoped, therefore, that an attempt to sketch an outline of the regular practice of prize courts, in some of the more important particulars, may not be without use to the profession. This outline will be principally copied from the rules of the British courts, which, so far as cases have arisen to which they could apply, have been recognised and enforced by the supreme court of the United States; and for the most part, are conformable with the prize practice of France, and other European countries, as will appear by a reference to the laws and treaties quoted in the margin. The letter of Sir William Scott, and Sir John Nicholl, to Mr. Jay, written in September 1794, which is printed in the appendix to Chitty's Law of Nations (American edition), and Wheaton on Captures, affords, so far as it goes, a very satisfactory and luminous view of the subject. Something more in detail, however, may be desirable to those who are not familiar with the admiralty practce.

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As soon as a vessel or other thing captured as prize, arrives in our ports, notice should be given thereof by the captors to the district judge, or to the commissioners appointed by him, that the examinations of the captured crew, who are brought in, may be regularly taken in writing, upon oath, in answer to the standing interrogatories. These are usually prepared under the direction of the district judge, and should contain sifting inquiries upon all points which can affect the question of prize. The standing interrogatories used in the English high court of admiralty (1 Rob. 381), have been drawn up with great care, precision and accuracy, and are an excellent model for other courts. They were generally adopted during the late war, by the district judges in the principal states, with a few additions, and scarcely any variations. The examinations upon these interrogatories are rarely taken by the district judge in person, for in almost all the principal ports within his district, he appoints standing commissioners for prize proceedings, upon which this duty devolves.

It is also the duty of the prize-master, to deliver up to the district judge all the papers and documents found on board and, *at the same time, to make an affidavit that they are delivered up as taken without fraud, addition, seduction or embezzlement. (a)

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In general, the master and principal officers, and some of the crew of the captured

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(a) Aussi tôt que la prise aura été amenée en quelques rades ou ports de notre royaume, le capitaine qui l'aura faite, s'il y est en personne, sinon celui qu'il en aura chargé, sera tenu de faire son rapport aux officiers de l'amirauté; de leur représénter et mettre entre les mains les papiers et prisioniers; et de leur déclarer le jour et l'heure que le vaisseau aura été pris; en quel lieu ou à quelle hauteur; si le capitaine a fait refus d'amener les voiles, ou de faire voir sa commission ou son congé, s'il attaque ou s'il s'est défendu; quel pavillon il portait, et les autres circonstances de la prise et de son voyage. Ordonnance de la Marine 1681, tit. 9, art. 21; Declaration du 24 Juin 1778, art. 42. See also the Swedish Ordinance of 1715, Coll. Mar. 168.

vessel, should be brought in for examination. This is a settled rule of the prize courts,(a) and was, during the late war, enforced by the express instructions of the president. The examination must be confined to persons on board at the time of the capture, unless the special permission of the court is obtained for the examination of others. (The Eliza and Katy, 6 Rob. 185 ; The Henrick and Maria, 4 Ibid. 43, 57.) In order to guard as much as possible against frauds * and mis-statements from after contrivances, the examinations should take place as soon as possible after the [*497 arrival of the vessel, and the witnesses are not allowed to have communication with, or to be instructed by counsel. The captors should also introduce all their witnesses in succession; for if the commissioners have taken the despositions of some of the crew, and transmitted them to the judge, they will not be at liberty, without a special order, to examine others who are afterwards brought by the captors before them. (The Speculation, 2 Rob. 243.) On the other hand, an equal strictness is held over the conduct of the claimants. If they keep back any one of the captured crew, for two or three days after the vessel comes into port, and then offer him, together with papers in his possession, the commissioners will be justified in not examining him. (1 Rob. 331: and see The William and Mary, 4 Ibid. 381.) The ship's papers, and other documents found on board, which are *not delivered up to the district judge, or the commissioners, before, or at the time of, the examinations, will not be admitted as [*498 evidence. (Ibid.)

Although the examinations are to be on standing interrogatories, without the instructions of counsel, yet the witnesses are produced in the presence of the agents of the parties, before the comissioners, whose duty it is to superintend the regularity of the proceedings, and protect the witnesses from surprise or misrepresentation. When the deposition is taken, each sheet is afterwards read over to the witness, and separately signed by him. (The Apollo, 5 Rob. 286.) And the commissioner should be careful, that the various answers are taken fully and perfectly, so as to meet the stress of every question, and should not suffer the witness to evade a sifting inquiry, by vague and obscure statements. If the witness refuse to answer at all, or to

(a) Thus, in a treaty of amity and commerce between Charles VIII., king of France, and Henry VII., of England, concluded at Boulogne, the 24th of May 1497, and which may be considered as evidence of the prize practice of Europe at that period, is contained the following article: "Simili quoque juramento solemniter præstando promittent, quod de qualibet præda, captura, manubiis, sive spoliis, adducent duos aut tres viros in capto navi præcipuum locum obtinentes, ut magistrum, submagistrum, patronum, aut hujusmodi conditionis, quos admiraldo, vice-admiraldo, aut eorum officiariis exhibebunt, ut per eosdem, aut eorum alterum, debite examinetur ubi, super quibus, et qualiter, navis sive bona capta sint; nec facient aut fieri permittent aliquas prædarum, spoliorum, mercium, aut bonorum, per eos capiendorum divisiones, patitiones, traditiones, permutationes, alienationesve, priusquam se viros captos, bona et merces, integre dominis, admiraldo, vice-admiraldo, aut eorum vices gerentibus repræsentaverint; qui de illis disponi, si æquum putabunt, permittent, alias nihil hujusmodi permissuri. Coll. Mar. 95.

De toutes les prises qui se feront en mer, soit par nos subjects, ou autres tenans nostre party, et tant soubs ombre et couleur de la geurre q'autrement, les prisonniers ou pour les moins deux ou trois des plus apparentes d'iceux seront amenez à terre, devers nostre dit admiral, ou son vis-admiral, ou lieutenant, pour, au plustost que faire se pourra, estre par lui examinez et ouys, avant qu'aucune chose des dits prises soit descendue; a fin de savoir le pays delà où ils seront, à qui appartiennent les navires et biens d'iceux, pour si la prise se trouve avoir esté bien faite, telle la declarer, si non, et ou il se trouveroit mal faite, la restituer a qui elle appartiendra, &c. Ordonnance de 1584, art. 33; Ord. de 1400, art 4; de 1543, art. 20; Declaration du premier Févoier, 1650, art. 9; Les officiers de l'amirauté entendront sur le faite de la prise, le maître ou commandant du vaisseau pris, même quelques officiers et matelots du vaisseau preneur, s'il est besoin. Ordonnance de la Marine 1681, tit. 9, art. 24. Si le vaisseau est amené sans prisonniers, charte-parties ni connaisemens, les officiers, soldats et équipages de celui qui l'aura pris, seront separement examinés sur les circonstances de la prise, et pourquoi le navire a été amene sans prisonniers, et seront, le vaisseau et les marchandises visités par experts, pour connoître, s'il se peut, sur qui la prise aura été faite. Ibid. art. 25.

answer fully, the commissioners are to certify the fact to the court, and, in addition to the other penal consequences to the owners of the ship and cargo, from a suppression of evidence, he will be liable to close imprisonment for the contempt. The witnesses should be examined separately, and not in presence of each other, so as to prevent any fraudulent concert between them.

As soon as the examinations are completed, they are to be sealed up and directed to the proper district court, together with all the ship's papers, which have not been already lodged by the captors in the registry of the court.

It is upon the ship's papers, and depositions thus taken and transmitted, that the cause is, in the first instance, to be heard and tried. The Vigilantia, 1 Rob. 1.(*a*) *499] This is not a mere *matter of practice or form: it is of the very essence of the administration of prize law; and it is a great mistake, to admit the common-law notions, in respect to evidence, to prevail in proceedings which have no analogy to those at common law. In some few of the district courts, it was not unusual, during the late war, to allow the witnesses to be examined, orally, at the bar of the court, long after their preparatory examinations had been taken, and full opportunities had been given to enable the parties to shape any new defence, or explain away any asserted facts. This was, unquestionably, a great irregularity, and, in many instances, must have been attended with great public mischiefs. By the law of prize, the evidence to acquit or condemn, must, in the first instance, come from the papers and crew of the captured vessel. The captors are not, unless under peculiar circumstances, entitled to adduce any extrinsic testimony. It is, therefore, of the last importance, to preserve the most rigid exactness as to the admission of evidence, since temptations would otherwise be held out to the captured crew, to defeat the just rights of the captors, by subsequent contrivances, explanations and frauds. There can be no honest reason why the whole truth should not be told by the captured persons, at the first examination; and if they then prevaricate, or suppress important facts, it must be from motives which would materially impair the credibility of their subsequent statements. Where the justice of the case requires the admission of new evidence, that may always be obtained, except where, by the rules of law, or the misconduct of the parties, the right to further proof has been forfeited. But whether such further proof be necessary or admissible, can never be ascertained, until the cause has been fully heard upon the facts, and the law arising out of the facts, already in evidence. And in the supreme court, during the whole of the late war, no further proof was ever admitted, until the cause had been first heard upon the original evidence, although varions applications were made to procure a relaxation of the rule. We shall have occasion hereafter to state some of the cases in which further proof is allowed or denied.

*500] *If a person wishes to procure the restitution of any property captured as prize, it is necessary that he should, after the prize libel is filed, and at or before the return of the monition thereon, or time assigned for the trial, enter his claim for such property before the proper court. And if the captors omit, or unreasonably delay to institute prize proceedings, any person claiming an interest in the captured property may obtain a monition against them, citing them to proceed to adjudication; which if they omit to do, or show cause why the property should be condemned, it will be restored to the claimants, proving an interest therein. And the same process is often resorted to, where the property is lost or destroyed, through the fault or negligence of the captors, in order to obtain a compensation in damages for the unjust

(*a*) Il est ordonné, &c. que pleine et entière foi sera ajoutée aux dépositions des capitaines, matelots et officiers des vaisseaux pris, s'il n'y a contre eux aucun reproche valable proposé par les réclamateurs, ou quelque preuve de subornation et de seduction. Réglement du 26 Octobre 1692. Veut que dans aucun cas, les piéces qui pourraient être rapportées, après la prise des bâtimens, puissent faire aucune foi, ni être d'aucune utilité, tant aux propriétaires desdits bâtimens q'uá ceux des marchandises qui pourraient avoir été chargées: Voulant qu'en tout occasions l'on n'ait égard qu'aux seules piéces trouvées abord. Réglement du 26 Juillet 1778. See also the Swedish Ordinance of 1715, art. 7. Coll. Mar. 169.

seizure and detention. (The Betsey, 1 Rob. 93; The Mentor, Ibid 181; The Huldah, 3 Ibid. 239; The Der Mohr, Ibid. 129; The George, Ibid. 212; The William, 4 Ibid. 215; The Susanna, 6 Ibid. 48.) The claim should be made by the parties interested, if present, or, in their absence, by the master of the ship, or some agent of the owners. A mere stranger will not be permitted to interpose a claim merely to speculate on the chances of an acquittal.(*a*) The claim must be accompanied by an affidavit, stating briefly the facts respecting the claim and its verity. This affidavit should be sworn to by the parties themselves, if they are within the jurisdiction. But if they are absent from the country, or at a very great distance from the place where the court is held, the affidavit may be sworn to by an agent. Before a claim is made, and affidavit put in (which should always be special, if the case stands on peculiar grounds), it is not permitted to the parties to examine the ship's papers, and the preparatory examinations, in order to shape their claims; for this might lead to great abuses. *But if it be necessary to ascertain the particulars of a claim, the court will, upon a special application, suffer so many of the papers to be examined as directly relate to such claim; but a sufficient reason is always expected to be shown, on affidavit, to sustain such an application. (The Port Mary, 3 Rob. 233.) It is a general rule, that no claim is to be admitted, which stands in entire opposition to the ship's papers and to the preparatory examinations. (The Vrow Anna Catharina, 5 Rob. 15, 19; La Flora, 6 Ibid. 1.) But this only applies to cases arising during the war, and not to cases arising before the war. (The Anna Catharina, 5 Rob. 15.) And it is not so inflexible as to exclude the interest of a citizen or subject, where there is an absolute necessity to simulate papers, as in the case of a trade with the enemy licensed by the state. (La Flora, 6 Rob. 1.) It is also a general principle, that no citizen or subject can be admitted to claim in a prize court, where the transaction, in which he is engaged, is in violation of the municipal laws of his own country. (The Walsingham Packet, 2 Rob. 77; The Etrusco, 4 Ibid. 262, note; The Cornelis and Maria, 5 Ibid. 23; The Abby, Ibid. 251; The Recovery, 6 Ibid. 341.) Nor can a person be admitted to claim, where the trade in which he is taken is forbidden by the law of nations, and by the municipal law of his own country, and that where the court is sitting. (The Amedie, Edinb. Review, vol. 16, No. 21, p. 426.) Nor can an enemy interpose a claim, unless under the protection of a flag of truce, a cartel, license, pass, treaty, or some other act of the public authority suspending his hostile character. (The Hoop, 1 Rob. 196.) And, even in the case where the capture has been made in violation of the territorial jurisdiction of a neutral country, the claim for restitution must be made, not by the enemy proprietor, but the neutral government. (The Vrow Anna Catharina, 5 Rob. 15; 3 Ibid. 162, note.)

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Where no claim is interposed, it is not now usual to condemn the goods for want of a claim, until a year and a day has elapsed from the time of the return of the monition, except in cases where there is a strong presumption, and reasonable proof, that the property actually belongs to an enemy. (The Staadt Embden, 1 Rob. 26, 29. And see The Henrick and Maria, 4 Ibid. 43; Coll. Mar. 88, note.) But after a year *and a day has elapsed, condemnation goes, of course, if there be no claim interposed.(*b*)

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After a claim is once put in, it is not amendable, of course; but if an amendment

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(*a*) Il est fait très expresses inhibitions et défenses à toutes sortes de personnes de réclamer aucunes des prises faites par ses vaisseaux de guerre ou ceux des armateurs particuliers, ni faire aucune procédure, en l'amirauté, sans être au préalable, parteurs de procurations en bonne forme de ceux pour qui ils feront les reclamations, et les avoir présentées aux officiers de l'amirauté des ports ou les prises auront été conduites, à peine de six cents livres d'amende. Ordonnance du 30 Janvier 1692. Réglement du 19 Juillet 1778.

(*b*) Si par la déposition de l'equipage et la vente du vaisseau et des marchandises, on ne peut eécouvrir sur qui la prise aura été faite, le tout sera inventorié et apprécié, et mis sous bonne et sûre garde, pour être restitué à qu'il appartiendra, s'il est réclamé dans l'an et jour; sinon, partagé comme épave de la mer, également entre nous, l'amiral et les armateurs. Ordonnance de la Marine de 1681, tit. 9, art. 26.

is wanted, to correct the generality of the original claim, it will not be allowed, unless a proper case is made out, and sufficient reasons given for the admission in the first instance. (The Graaf Bernstoff, 3 Rob. 109; and see The Sally, Ibid. 179.)

It often happens, that persons whose property has been captured apply to the court for a delivery upon bail, and under a mistaken notion, that such a delivery, after an appraisement, was a matter of course, or was to be governed by the same rules as are prescribed in the case of municipal forfeitures under the act of the 2d of March 1799, c. 128. Some of the district courts have allowed such applications, before any hearing of the cause; and parties have thereby, sometimes, fraudulently obtained possession of goods at an under-valuation, where their title was totally defective, or grossly illegal. It is a settled rule of the prize court, not to deliver a cargo on bail, before the cause has been fully heard, unless by the consent of all parties; and if any inconvenience should result from this rule, as if the property be perishable, it may easily be avoided by an interlocutory sale. (The Copenhagen, 3 Rob. 178.) After the hearing, if the claimant obtain a decree in his favor, or an order for further proof, the court will listen to an application for a delivery on bail; but if his claim be rejected, or be affected with the imputation of fraudulent or unlawful conduct, *the application will not be allowed, notwithstanding an appeal is interposed. Where there is a decree of condemnation, the captors are, in general, entitled to a delivery of the property, or the proceeds thereof, upon bail.

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On an appeal to the circuit court, the property follows the appeal into that court, and is no longer subject to the interlocutory orders of the district court. It is otherwise with regard to the supreme court, whose decrees are always remanded to the circuit court for execution; and therefore, the property always remains in the custody of the latter. In cases of delivery on bail, a stipulation, according to the course of the admiralty, and not a bond, should be taken. (*a*)

*Where further proof is admissible, it may, in the discretion of the court, be by affidavits and other papers introduced without any formal allegations, or by way of plea and proof, where formal allegations are made by each party, in the nature of special pleadings; and it may be opened to the claimants only, or to the captors as well as claimants. Upon a simple order for further proof, the captors are not entitled to adduce any new evidence, unless by the special direction of the court; but upon plea and proof, both parties are at liberty to introduce new evidence to support their respective allegations, and the points put in issue. (The Adriana, 1 Rob. 313.)

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The court is, in no case, concluded by the original evidence, but may order further proof on a doubt arising from any cause or quarter (The Romeo, 6 Rob. 351); and it will sometimes direct it, where suspicion is produced by extrinsic evidence. (Ibid.) But

(*a*) Et si ab interlocutoriis dictorum judicum partes appellare contigerit, nihilominus super principale usque ad sententiam definitivam inclusive, appellationibus illis non obstantibus, procedere poterunt. Sed si sententia super bonorum restitutione seu principali feratur, illa executioni demandibitur, tractatum pacis insequendo, appellationibus etiam quibuscumque non obstantibus. Poterit tamen supplicari ad consilia principum, modo supradicta, scilicet cautione præstita ab ea parte, contra quam supplicabitur, de bonis captis restituendis, in eventum contrariæ sententiæ, et a parte supplicante, de expensis damnis et interesse, si in causa succumbunt. Traité de Paix et de Commerce, entre Charles VIII., Roi de France et de Navarre, et Henry VII., Roi d'Angleterre, 1497. Coll. Mar. 101.

Les marchandises qui no pourront être conservées, seront vendues sur la requisition des parties intéressées, et adjudgées au plus offrant, &c. Ordonnance de la Marine de 1681, tit. 9, art. 28. Le prix de la vente sera mis entre les mains d'un bourgeois solvable, pour être délivrée après le jugement de la prise, à qui il appartiendra. Ibid. art. 29. Lorsque la vente ne se fait qu'après que la prise a été declarée bonne, c'est toujours entre les mains de l'armateur que les deniers en provenans son remis, à la charge d'en compter; & afin qu'il en fût autrement, il faudroit que sa solvabilité fût bien suspecte. Valin, sur l'Ordonnance, Ibid. And according to the French practice, where restitution is decreed by the council of prizes on the original hearing, the claimants are entitled to a delivery of the property on bail, notwithstanding an appeal to the council of state, on the part of the captors. 2 Valin 335.

this is rarely done, unless there be something in the original evidence which lays a suggestion for prosecuting the inquiry further. (The Sarah, 3 Rob. 330.) And where the case is perfectly clear, and not liable to any just suspicion, the disposition of the court leans strongly against the introduction of extraneous matter, and against permitting the captors to enter upon further inquiry. (The Romeo, 6 Rob. 351.)

The most ordinary cases of further proof are, where the cause appears doubtful upon the original papers, and the answers to the standing interrogatories; and in such cases, if the parties have conducted themselves with good faith, and the error or deficiency may be referred to honest ignorance or mistake, the court will indulge them with time to supply the defects, by the introduction of new evidence. But further proof is, in no case, a matter of right, and rests to the sound discretion of the court. Further proof is, in all cases, necessary, where the master does not swear to, or give any account of he property. (The Eenroom, 2 Rob. 1; The Juno, Ibid. 1241; The Convenientia, 4 Ibid, 201.) Where the shipment, though stated to be on neutral account, is not stated to be on account of any particular person. (The Jonge Pieter, 4 Rob. 79.) Where the ship has been purchased in the enemy's country. (The Welvaart, 1 Ibid. 122.) Where there has been any loss or suppression of material papers. (The Polly, 2 Ibid. 361.) *And indeed, in all cases where the defects of the papers, the conduct of the parties, the nature of the voyage, or the original evidence, in general, induces any doubt of the proprietary interest, the legality of the trade, or the integrity of the transactions. [*505 But it is not in every case where further proof is necessary, that the parties will be permitted to introduce it; for the privilege may be forfeited by fraud or gross misconduct. And in cases where further proof is necessary, if it is not allowed, the penal consequences are as fatal, as if the property were originally hostile, since a condemnation certainly follows the denial. (The Welvaart, 1 Rob. 122; The Juffrow Anna, Ibid. 124; The Graaf Bernstorf, 3 Ibid. 109; The Eenroom, 2 Ibid. 1.) Further proof is never allowed to the claimants, where fraudulent papers have been used. (The Welvaart, 1 Rob. 122; The Juffrow Anna, Ibid. 124; The Juffrow Elbrecht, Ibid. 126.) Where there has been a spoliation of papers. (The Rising Sun, 2 Ibid. 104.) Where there has been a fraudulent covering or suppression of an enemy's interest. (The Graaf Bernstorf, 3 Ibid. 109.)(*a*) Where there is a false destination, and false papers. (The Nancy, 3 Ibid. 122; The Mars, 6 Ibid. 79.) Nor, in general, where the case appears incapable of fair explanation. (The Vrow Hermina, 1 Ibid. 163.) Or where *there has been gross prevarication, or an attempt to impose spurious claims upon the court, or such a want of good faith as shows [*506 that the parties cannot safely be trusted with an order for further proof.

If, upon further proof ordered, no proof is adduced, or the proof be defective, or the parties refuse to swear, or swear evasively, it is deemed conclusive evidence of hostile interests, or of such misconduct as authorizes condemnation. And it is a general rule of the prize court, that the *onus probandi* that the property is neutral rests upon the claimant; and if he fails to show it, condemnation ensues. (The Walsingham Packet, 2 Rob. 77; The Rosalie & Betty, Ibid. 343; The Countess of Lauderdale, 4 Ibid. 283.)

In cases where further proof is admitted on behalf of the captors, they may introduce papers taken on board of another ship, if they are properly verified by affidavit.

(*a*) Et pour ce qu'il pourroit advenir, qu'aucuns de nosdits alliez et confederez, voudroyent porter plus grande faveur à nosdits ennemis, et adversaires, que à nous, et a nosdits subjets, et à ceste cause, voudroyent dire et soustenir contre verité, que les navires pris en mer par nosdits subjets leur appartiendroyent, ensemble la marchandise, pour en fraude nosdits subjets; voulons et ordonnons, qu'incontinent âprês la prise et abordement de navire, nosdits subjets facent diligence de recouvrer la charte-partie, et autres lettres concernant la charge du navire; et incontinent a leur arrivement à terre, les mettre par devers le lieutenant de nostredit admiral, afin de cognoistre à qui le navire et marchandises appartiennent; et où ne seroit trouvée charte dedans lesdits navires, ou que le maistre et compagnons l'eussent jettée en la mer, pour en celer le verité, voulons que les dits navires ainsi pris, avec les dits bien et marchandises estans dedans soyent declarez de bonne prise. Ordonnance de 1584, art. 70, du 5 Septembre 1708, du 21 Octobre 1744, art. 6.

The Romeo, 6 Rob. 351; The Maria, 1 Ibid. 340.) And they may also invoke papers from another prize cause. (The Romeo, 6 Rob. 350; The Sarah, 3 Ibid. 330; The Vriendschap, 4 Ibid. 166.) It has even been permitted to the captors, to invoke the depositions of the claimant, given in another cause, to prove his domicil, at the first hearing, and without an order for further proof. (The Vriendschap, 4 Rob. 166.) And upon an order for further proof, the affidavits of the captors, as to facts within their own knowledge, are admissible evidence. (The Maria, 1 Rob. 340; The Resolution, 6 Ibid. 13.)

It is time to draw this note to a close, and in so doing, it is proper to inform the reader, that, although authorities are cited to support some of the positions, they will not always be found to support them in their full extent. Much of what is stated, as the general practice of prize courts, is to be gathered from lights scattered here and there in the books, and more frequently and accurately, by attendance on the arguments of prize causes, where the points are discussed by counsel, or ruled incidentally by the court.

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*507] *NOTE III.

On the Rule of the War of 1756.

The rule, commonly called the rule of 1756, has acquired this denomination, from its having been first judicially applied by the courts of prize, in the war of that period. The French (then at war with Great Britain), finding the trade with their colonies almost entirely shut off by the maritime superiority of the British, relaxed their monopoly of that trade, and allowed the Dutch (then neutral) to carry on the trade between the mother country and her colonies, under special licenses or passes, granted to Dutch ships for this special purpose, excluding at the same time, all other neutrals from the same trade. Many Dutch vessels so employed, were captured by the British cruisers, and, together with their cargoes, were condemned by the prize courts, upon the just and true principle that, by such employment, they were, in effect, incorporated into the French navigation, having adopted the character and trade of the enemy and identified themselves with his interests and purposes. They were, in the opinion of these courts, to be considered like transports in the enemy's service, and hence liable to capture and condemnation, upon the same principle as property condemned by way of penalty for resistance to search, for breach of blockade, for carrying military persons or dispatches, or as contraband of war. In all these cases, the property is considered, *pro hâc vice*, as enemy's property, as so completely identified with his interests, as to acquire a hostile character. So, where a neutral is engaged in a trade which is exclusively confined to the subjects of a country, in peace and in war, and is interdicted to all others, and cannot be avowedly carried on in the name of a foreigner, such a trade is considered so entirely national, that it must follow the hostile situation of the country.(*a*) There is all *the difference between this principle and the modern British doctrine, which interdicts to neutrals, during war, all trade not open to them in time of peace, that there is between the granting by the enemy of special licenses to the subjects of the belligerent state, protecting their property from capture in a particular trade, which the policy of the enemy induces him to tolerate, and a general exemption of such trade from capture. The former is clearly cause of confiscation, whilst the latter has no such effect.(*b*) The rule of the war of 1756 was

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(*a*) The Princessa, 2 Rob. 52; The Anna Catharina, 4 Ibid. 118; The Rendsborg, Ibid. 121; The Vrow Anna Catharina, 5 Ibid. 150. In this last case, Sir William Scott distinguishes from the ordinary colonial trade, "the strict exclusive colonial trade from the colony to the mother country, where the trade is limited to native subjects, by the fundamental regulations of the state; and the national character is required to be established by oath, as in the case of the Spanish register ships.

(*b*) See the opinion of Mr. J. Story, in the case of The Liverpool Packet, 1 Gallis. 513, 524.

founded upon the former principle, and likewise upon a construction of the treaties between Great Britain and Holland, in which, the former power contended, was conceded to the latter a freedom of commerce only as to her accustomed trade in time of peace. The rule lay dormant through the war of the American revolution; but was afterwards revived, during the war of the French revolution, and extended to the prohibition of all neutral traffic whatsoever with the colonies, and upon the coasts of an enemy.

That this is a correct representation of the nature, origin and subsequent application, of this celebrated rule of the British prize courts, will appear from its history. It cannot be pretended, that its origin can be traced, in judicial records, to an earlier source than that war from which it derives its name. It has, indeed, been attempted to seek, by the aid of historical lights, for earlier instances of the application of the rule. But it is evident, that the property of the pretended neutrals, who according to M. Arnould, were employed by the French administration to carry on the colonial trade, during the war which ended with the peace of Utrecht, and that of 1744,(*a*) must have been condemned as enemy's property; *because, with all the advantages possessed by the advocates for the British doctrine, of access to the records of the proceedings of the prize courts, during those wars, no trace can be found in them, of condemnations under the rule as applicable to the colonial trade, and because that trade was expressly adjudged to be lawful, by the Lords of Appeal, during the war of 1744.(*b*) It has also been asserted, that the treaty of 1668, renewed in 1674, between Great Britain and Holland, relaxed the primitive rigor of the law of nations in this particular, and that this relaxation was gradually extended by similar treaties to other nations.(*c*) But this treaty was contended by Great Britain to be a declaration of the original and pre-existing law of nations on this subject; and the explanatory article, signed on the 30th of December 1675, was itself declaratory of the meaning of the treaty, and was drawn up at the request of the British minister, Sir William Temple.(*d*) It is true, it contains a proviso, "that this declaration shall not be alleged by either party for matters which happened before the late peace, February 1673-4." But before that peace, the two parties were at war with one another, and could not claim the rights of neutrality against each other, and previous to that war, they were at peace with all the world; so that this reservation could not imply that vessels had been recently drawn into judgment on a different understanding of the principle. Nor does the letter of Sir Leoline Jenkins, of the 6th of February 1667, imply, that at that time, a vessel carrying enemy's goods, between ports of an enemy, was held liable to condemnation. It is admitted, that the preceding letter of the Swedish resident adverted only to the circumstance of the vessel's having carried enemy's goods, on her outward voyage, as the ground on which she was seized on her return-voyage; and it will be seen, by quoting the whole of Sir Leoline Jenkins's letter, that he does not lay any stress whatever on the circumstance of the former voyage being a coasting voyage: "The question which I am, in obedience to his majesty's most gracious *pleasure, to answer unto, being a matter of fact, I thought it my duty not to rely wholly on my own memory or observation, but further to inquire of Sir Robert Wiseman, his majesty's advocate-general; Sir William Turner, his royal highness, the lord high admiral's, advocate; Mr. Alexander Check, his majesty's proctor; Mr. Roger How, principal actuary and register in the high court of admiralty in England—whether they, or any of them, had observed, or could call to mind, that, in the late war against the Dutch, any one ship, otherwise free, as belonging to some of his majesty's allies, having carried goods belonging to his majesty's enemies, from one enemy's port to another, and being seized, after it had discharged the said goods, laden with the proceeds of that freight which it had carried, and received of the enemy upon the account of the ship's owners, had been adjudged prize to his majesty; they all unani-

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(*a*) 6 Rob. 474, Appendix, note I. (a)

(*b*) See the argument of Drs. Arnold and Laurence, in the case of The Providentia, 2 Rob. 146.

(*c*) 6 Rob. 74, n. (a.)

(*d*) 2 Sir W. Temple's Works, 313.

mously resolved, that they had not observed, nor could call to mind, that any such judgment or condemnation ever passed in the said court; and to this, their testimony, I must, as far as my experience reaches, concur; and if my opinion be, as it seems to be, required, I do not, with submission to better judgment, know anything, either in the statutes of this realm, or in his majesty's declarations upon occassion of the late war, nor yet in the laws and customs of the seas, that can (supposing the property of the said proceeds to be *bonâ fide* vested in the ship-owners of his majesty's allies) give sufficient ground for a condemnation in this case. And the said advocates, upon the debate I had with them, did declare themselves positively of the same opinion. Written with my hand, this 6th day of February 1667."(*a*) So that there does not appear to be any doubt respecting the legality of the former voyage, but only whether the vessel, with a return-cargo, being the proceeds of the freight received from the enemy on the former voyage, could be condemned on the return voyage; which question was answered in the negative, provided the property had *bonâ fide* vested in the neutral ship-owners. Before the treaty of 1674 was concluded, foreign vessels were freely admitted into the coasting trade of France; and when Louis XIV. was making efforts
*511] to *establish a nursery of seamen for his navy, and Colbert, under the influence of the commercial system of political economy, was endeavoring to appropriate to his own country some portion of the benefits of the carrying trade, which had been before almost entirely conducted, even from one French port to another, by the Dutch, they did not exclude foreign vessels from the coasting trade, but only imposed a tonnage of fifty sous upon the Dutch, and a crown upon Spanish and Flemish vessels.(*b*) A like discriminating duty was imposed upon foreign vessels entering French ports, in whatever commerce they might be engaged; so that there was as much reason to conclude, that the whole trade of France was exclusively appropriated to her own shipping, in time of peace, as that the coasting trade was thus appropriated. This renders it more improbable, that the trade from one enemy's port to another should have been considered unlawful by the British prize courts, until the principle of adoption, or naturalization, was applied, in the war of 1756, to the trade between the mother country and her colonies, from which neutrals, were in fact, excluded in time of peace. Neither that principle, nor the more modern doctrine, which confines the neutral to his accustomed peace trade, could be applied to a commerce which the neutral might carry on in peace or war, upon payment of alien tonnage duties. According to Lord Liverpool, this discriminating duty of fifty sous was suspended during the war of 1756, in order to ward off the effects of the British superiority at sea;(*c*) and this might afford a pretext for applying the rule, during that war, to the coasting trade of France, as it would raise a presumption of enemy's interests in the foreign shipping, thus adopted into his navigation, with all the privileges of French-built ships. But such a presumption could never arise from neutral vessels entering the coasting trade, under the disadvantage of the discriminating duty; nor could the doctrine which confines the neutral to his accustomed peace trade
*512] be applied, *since it is admitted by Sir William Scott, in the case of The Immanuel, that the neutral has a right to push his accustomed trade to the utmost extent of which it is capable, but not to enter a new trade from which he was before wholly excluded.(*d*)

(*a*) Sir Leoline Jenkins's Works, vol. 2, p. 741.

(*b*) Valin, sur l'Ordonnance, tom. 1, p. 14.

(*c*) Discourse on the Conduct of the Government of Great Britain, &c., p. 9.

(*d*) "I do not mean to say, that in the accidents of a war, the property of neutrals may not be variously entangled and endangered; in the nature of human connections, it is hardly possible, that inconveniences of this kind should be altogether avoided. Some neutrals will be unjustly engaged in covering the goods of the enemy, and others will be unjustly suspected of doing it; these inconveniences are more than balanced by the enlargement of their commerce; the trade of the belligerents is usually interrupted in a great degree, and falls, in the same degree, into the lap of neutrals. But without reference to accidents of the one kind or the other, the general rule is, that the neutral has

It is incredible, that the freight only should have been forfeited, in the wars of 1744, 1756 and 1778, as a mitigation of the primitive strictness of the rule, when we know that vessels engaged in the colonial trade, in the war of 1756, were confiscated, together with their cargoes; and the Veranderen, taken *on a voyage from Bordeaux to Dunkirk, 1778, and the Prosperité, from Nantz to Dunkirk, 1779, [*513 could not have been restored by Sir James Marriott, upon the ground of a relaxation, but restitution must have been decreed, upon the principle of a total abandonment of the rule, since the one was a vessel belonging to Prussia, and the other to Lubeck, with neither of which states Great Britain had, at that time, any treaty regarding this matter.

It is true, that, before the war of 1756, attempts were made to prohibit, by mere proclamation, all trade with an enemy. Thus, beside the earlier attempts of this nature,(*a*) by the convention concluded at London, on the 22d of August 1689, between England and Holland, wherein the contracting parties say, "that, having declared war against the Most Christian King, it behoves them to do as much damage as possible to the common enemy, in order to bring him to agree to such conditions as may restore the repose of Christendom; and that, for this end, it was necessary to interrupt all trade and commerce with the subjects of the said king," it was agreed between them, "that they would take any vessel, whatever king or state it may belong to, that shall be found sailing into, or out of, the ports of France, and condemn both vessel and merchandise as legal prize; and that this resolution should be notified to all neutral states." Lord Liverpool and Mr. Ward, among the strongest advocates for the maritime claims of Great Britian, condemn in the most unequivocal manner, this pretension, on her part.(*b*) The French regulation of the 23d July 1704 seems to have been intended to counteract these measures of the English and Dutch, during the war which followed the English revolution in 1688, and we may suppose, were revived during the subsequent war concerning the Spanish succession. Although Louis XIV., in the preamble to this ordinance, studiously negatives the idea of its being *intended as a [*514 measure of retaliation, yet this profession is powerfully contrasted with the provisions actually contained in the body of the edict, prohibiting all neutral trade in articles the growth or manufacture of the enemy's country, except in the direct voyage from the enemy's ports to a port of the neutral country to which the vessel belongs.(*b*)

During the long period of tranquillity which followed the peace of Utrecht, interrupted only by the very short war of 1719, no occasion could be afforded to administer the principles of prize law; and, as we have seen, no traces of the existence of the rule in question can be found, previous to that epoch, although the colonial system

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a right to carry on, in time of war, his accustomed trade, to the utmost extent of which that accustomed trade is capable. Very different is the case of a trade which the neutral has never possessed; which he holds by no title of use and habit, in times or peace, and which, in fact, can obtain, in war, by no other title, than by the success of the one belligerent against the other, and at the expense of that very belligerent under whose success he sets up his title; and such I take to be the colonial trade, generally speaking." (2 Rob. 198.) The truth is, France never had a navigation act, similar to the English, and absolutely excluding foreign shipping from her coasting and carrying trade, until the revolution, when the decree of the 21st of September 1793, entitled *Acte de Navigation*, was passed, which is alluded to by Sir W. Scott in the case of The Emanuel (1 Rob. 297), as if it had been a re-enactment of the ancient laws of France. This was, besides, limited to the coasting trade; as it only extended to the transportation of goods of French production or manufacture, and not to the trade from port to port, in commodities of foreign growth or fabric; which last has been confounded by the British prize courts in the same indiscriminate rule of condemnation with the coasting trade, properly so called.

(*a*) Coll. Mar. 158, note *h*.

(*b*) Discourse on the conduct of the Government of Great Britain, &c., p. 36; Ward on the Rights and Duties of Belligerents and Neutrals, &c., pp. 3, 4.

(*c*) Valin, sur l'Ordonnance, 2 tom. p. 248.

of Europe had, long before, been established, and its maritime nations all participated in the commerce of the East and West Indies.

The judicial history of the rule, during the subsequent wars, is so admirably traced in a memorial to congress from the merchants of Baltimore, &c., a paper drawn up, in 1806, by Mr. Pinkney, that the subject cannot be better illustrated than by the following extract:

"In the war of 1744, in which Great Britain had the power, if she had thought fit to exert it, to exclude the neutral states from the colony trade of France and Spain, her high court of appeals decided, that the trade was lawful, and released such vessels as had been found engaged in it.

"In the war which soon followed the peace of Aix-la-Chapelle, Great Britain is supposed to have first acted upon the pretension, that such a trade was unlawful, as being shut against neutrals in peace. And it is certain, that, during the whole of that war, her courts of prize did condemn all neutral vessels, taken in the prosecution of that trade, together with their cargoes, whether French or neutral. These condemnations, however, proceeded upon peculiar grounds. In the seven years' war, France did not throw open to neutrals the traffic of her colonies. She established no free ports in the east, or in the west, with which foreign vessels could be permitted to trade, either generally, or occasionally, as such. Her first practice was simply to grant special licenses to particular neutral vessels, principally Dutch, and commonly chartered by Frenchmen, to make, under the usual restrictions, particular trading voyages to the colonies. These licenses *furnished the British courts with a peculiar reason for condemning vessels sailing under them, viz., 'that they become in virtue of them, the adopted or naturalized vessels of France.'

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"As soon as it was known, that this effect was imputed to these licenses, they were discontinued, or pretended to be so; but the discontinuance, whether real or supposed, produced no change in the conduct of Great Britain; for neutral vessels, employed in this trade, were captured and condemned as before. The grounds upon which they continued to be so captured and condemned, may best be collected from reasons subjoined to the printed cases in the prize causes, decided by the high court of admiralty (in which Sir Thomas Salisbury, at that time, presided), and by the Lords Commissioners of Appeal between 1757 and 1760.

"In the case of The America (which was a Dutch ship, bound from St. Domingo to Holland, with the produce of that island, belonging to French subjects, by whom the vessel had been chartered), the reason stated in the printed case is, 'that the ship must be looked upon as a French ship (coming from St. Domingo), for by the laws of France, no foreign ship can trade in the French West Indies.'

"In the case of The Snip, the reason (assigned by Sir George Hays and Mr. Pratt, afterwards Lord Camden) is, 'for that the Snip (though once the property of Dutchmen), being employed in carrying provisions to, and goods from, a French colony, thereby became a French ship, and as such was justly condemned.'

"It is obvious, that the reason, in the case of The America, proceeds upon a presumption, that as that trade was, by the standing laws of France, even up to that moment, confined to French ships, any ship found employed in it must be a French ship. The reason in the other case does not rest upon this idle presumption, but takes another ground; for it states, that by the reason of the trade in which the vessel was employed, she became a French vessel.

"It is manifest, that this is no other than the first idea of adoption or naturalization, accommodated to the change attempted to be introduced into the state of things, by the actual or pretended discontinuance of the special licenses. What, then, is the amount of the doctrine of the seven years' war, in the utmost extent which it is possible to ascribe to it? It is, in substance, no more than this, that as France did not, at any period of that war, abandon, or in any degree suspend, the principle of colonial monopoly, or the system arising out of it, a neutral vessel, found in the prosecution of the trade, which, according to that principle and that system, still continuing in force, could only be a French trade, and open to French vessels, either became, or was legally

to be presumed to be, a French vessel. It *cannot be necessary to show, that this doctrine differs essentially from the principle of the present day; but even if it were otherwise, the practice of that war, whatever it might be, was undoubtedly contrary to that of the war of 1744, and as contrasted with it, will not be considered, by those who have at all attended to the history of these two periods, as entitled to any peculiar veneration. The effects of that practice were almost wholly confined to the Dutch, who had had rendered themselves extremely obnoxious to Great Britain, by the selfish and pusillanimous policy, as it was falsely called, which enabled them, during the seven years' war, to profit of the troubles of the rest of Europe.

"In the war of 1744, the neutrality of the Dutch, while it continued, had in it nothing of complaisance to France; they furnished, from the commencement of hostilities, on account of the pragmatic sanction, succors to the confederates; declared openly, after a time, in favor of the Queen of Hungary; and finally, determined upon, and prepared for, war by sea and land. Great Britain, of course, had no inducement, in that war, to hunt after any hostile principle, by the operation of which, the trade of the Dutch might be harassed, or the advantage of their neutral position, while it lasted, defeated. In the war of 1756, she had this inducement in its utmost strength. Independent of the commercial rivalry existing between the two nations, the Dutch had excited the undisguised resentment of Great Britain, by declining to furnish against France the succors stipulated by treaty; by constantly supplying France with naval and warlike stores, through the medium of a trade, systematically pursued by the people, and countenanced by the government; by granting to France, early in 1757, a free passage through Namur and Maestricht, for the provisions, ammunition and artillery belonging to the army, destined to act against the territories of Prussia, in the neighborhood of the Low Countries; and by the indifference with which they saw Nieuport and Ostend surrendered into the hands of France, by the court of Vienna, which Great Britain represented to be contrary to the Barrier treaty and the treaty of Utrecht. Without entering into the sufficiency of these grounds of dissatisfaction, which undoubtedly had a great influence on the conduct of Great Britain towards the Dutch, from 1757 until the peace of 1763, it is manifest, that this very dissatisfaction, little short of a disposition to open war, and frequently on the eve of producing it, takes away, in a considerable degree, from the authority of any practice to which it may be supposed to have led, as tending to establish a rule of the public law of Europe. It may not be improper to observe, too, that the station occupied by Great Britain in the seven years' war (as proud a one as any country ever did occupy), compared with that of the other European *powers, was not exactly calculated to make the measures which her resentments against Holland, or her views [*517 against France, might dictate, peculiarly respectful to the general rights of neutrals. In the north, Russia and Sweden were engaged in the confederacy against Prussia, and were, of course, entitled to no consideration in this respect. The government of Sweden was, besides, weak and impotent. Denmark, it is true, took no part in the war; but she did not suffer by the practice in question. Besides, all these powers combined, would have been as nothing against the naval strength of Great Britain, in 1758. As to Spain, she could have no concern in the question, and at length, became involved in the war, on the side of France. Upon the whole, in the war of 1756, Great Britain had the power to be unjust, and irresistible temptations to abuse it. In that of 1744, her power was, perhaps, equally great, but everything was favorable to equity and moderation. The example afforded on this subject, therefore, by the first war, has far better title to respect than that furnished by the last.

"In the American war, the practice and decisions on this point followed those of the war of 1744. The question first came before the Lords of Appeal, in January 1782, in the Danish cases of the Tiger, Copenhagen, and others, captured in October 1780, and condemned at St. Kitts, in December following. The grounds on which the captors relied for condemnation, in The Tiger, as set forth at the end of the respondent's printed case, were, 'for that the ship having been trading to Cape François, where none but French ships are alllowed to carry on any traffic, and having been laden, at the

time of the capture, with the produce of the French part of the island of St. Domingo, put on board at Cape François, and both ship and cargo taken, confessedly, coming from thence, must (pursuant to precedents in the like cases in the last war), to all intents and purposes, be deemed a ship and goods belonging to the French, or at least adopted and naturalized as such.'

"In The Copenhagen, the captor's reasons are thus given: '1st. Because it is allowed, that the ship was destined, with her cargo, to the island of Guadaloupe, and no other place. 2d. Because it is contrary to the established rule of general law, to admit any neutral ship to go to, and trade at, a port belonging to a colony of the enemy, to which such neutral ship could not have freely traded in time of peace. On the 22d of January 1782, these causes came on for hearing before the Lords of Appeal, who decreed restitution in all of them; thus, in the most solemn and explicit manner, disavowing and rejecting the pretended rules of the law of nations, upon which the captors *relied; the first of which is literally borrowed from the doctrine of the war of 1756, and the last of which is that very rule on which Great Britain now relies. *518]

"It is true, that, in these cases, the judgment of the Lords was pronounced upon one shape only of the colony trade of France, as carried on by neutrals; that is to say, a trade between the colony of France and that of the country of the neutral shipper. But as no distinction was supposed to exist, in point of principle, between the different modifications of the trade, and as the judgment went upon general grounds, applicable to the entire subject, we shall not be thought to overrate its effect and extent, when we represent it as a complete rejection, both of the doctrine of the seven years' war, and of that modern principle, by which it has been attempted to replace it. But at any rate, the subsequent decrees of the same high tribunal did go that length. Without enumerating the cases, of various descriptions, involving the legality of the trade in all its modes, which were favorably adjudged by the Lords of Appeal, after the American peace, it will be sufficient to mention the case of The Vervagting, decided by them in 1785 and 1786. This was the case of a Danish ship, laden with a cargo of dry goods and provisions, with which she was bound on a voyage from Marseilles to Martinique and Cape François, where she was to take in, for Europe, a return-cargo of West India produce. The ship was not proceeded against; but the cargo, which was claimed for merchants of Ostend, was condemned as enemy's property (as in truth it was), by the vice-admiralty of Antigua, subject to the payment of freight *pro rata itineris*, or, rather, for the whole of the outward voyage. On appeal, as to the cargo, the Lords of Appeal, on the 8th of March 1785, reversed the condemnation, and ordered further proof of the property to be produced, within three months. On the 28th March 1786, no further proof having been exhibited, and the proctor for the claimants declaring, that he should exhibit none, the Lords condemned the cargo, and on the same day, reversed the decree below, giving freight *pro rata itineris* (from which the neutral master had appealed), and decreed freight, generally, and the costs of the appeal.

"It is impossible, that a judicial opinion could go more conclusively to the whole question on the colony trade than this; for it not only disavows the pretended illegality of neutral interpositions in that trade, even directly between France and her colonies (the most exceptionable form, it is said, in which that interposition could present itself); it not only denies, that property engaged in such a trade, is, on that account, liable to confiscation (inasmuch as, after having *reversed the condemnation of the cargo pronounced below, it proceeds afterwards to condemn it, merely for want of further proof as to the property), but it holds, that the trade is so unquestionably lawful to neutrals, as not even to put in jeopardy the claim to freight for that part of the voyage which had not yet begun, and which the party had not yet put himself in a situation to begin. The force of this, and the other British decisions produced by the American war, will not be avoided, by suggesting, that there was anything peculiarly favorable in the time when, or the manner in which, France opened her colony trade to neutrals on that occasion. Something of that sort, however, has been said! We *519]

find the following language in a very learned opinion on this point: 'It is certainly true, that in the last war (the American war), many decisions took place, which then pronounced that such a trade between France and her colonies was not considered as an unneutral commerce; but under what circumstances? It was understood, that France, in opening her colonies, during the war, declared, that this was not done with a temporary view, relative to the war, but on a general permanent purpose of altering her colonial system, and of admitting foreign vessels, universally, and at all times, to a participation of that commerce; taking that to be the fact (however suspicious its commencement might be, during the actual existence of a war), there was no ground to say, that neutrals were not carrying on a commerce as ordinary as any other in which they could be engaged; and therefore, in the case of The Vervagting, and in many other succeeding cases, the Lords decreed payment of freight to the neutral ship-owner. It is fit to be remembered, on this occasion, that the conduct of France evinced how little dependence can be placed upon explanations of measures adopted during the pressure of war; for, hardly was the ratification of the peace signed, when she returned to her ancient system of colonial monopoly.'

"We answer to all this, that, to refer the decision of the Lords, in The Vervagting, and other succeeding cases, to the reason here assigned, is to accuse that high tribunal of acting upon a confidence which has no example, in a singularly incredible declaration (if, indeed, such a declaration was ever made), after the utter falsehood of it had been, as this learned opinion does itself inform us, unequivocally and notoriously ascertained.

"We have seen, that The Vervagting was decided by the Lords in 1785 and 1786, at least two years after France had, as we are told, 'returned to her ancient system of colonial monopoly,' and when, of course, the supposed assertion of an intended permanent abandonment *of that system, could not be permitted to produce any legal consequence. We answer, further, that if this alleged declaration was in [*520 fact made (and we must be allowed to say, that we have found no trace of it out of the opinion above recited), it never was put into such a formal and authentic shape, as to be the fair subject of judicial notice. It is not contained in the French *arrêts* of that day, where only it would be proper to look for it, and we are not referred to any other document proceeding from the government of France, in which it is said to appear. There does not, in a word, seem to have been anything which an enlightened tribunal could be supposed capable of considering as a pledge on the part of France, that she had resolved upon, or even meditated, the extravagant change in her colonial system, which she is said, in this opinion, to have been understood to announce to the world. But even if the declaration in question was actually made, and that, too, with all possible solemnity, still, it would be difficult to persuade any thinking man, that the sincerity of such a declaration was, in any degree, confided in; or that any person in any country, could regard it in any other light than as a mere artifice that could give no right which would not equally well exist without it. Upon the whole, it is manifestly impracticable to rest the decisions of the Lords of Appeal, in and after the American war, upon any dependence placed on this declaration, of which there is no evidence that it ever was made—which, it is certain, was not authentically or formally made—which, however made, was not, and could not be, believed, at any time, far less in 1785 and 1786, when its falsehood had been unquestionably proved by the public and undisguised conduct of its supposed authors, in direct opposition to it. That Sir James Marriot, who sat in the high court of admiralty of Great Britain, during the greater part of the late war, did not consider these decisions as standing upon this ground, is evident; for notwithstanding that, in the year 1756, he was the most zealous, and perhaps, able advocate for the condemnation of the Dutch ships engaged in the colony trade of France, yet, upon the breaking out of the late war, he relied upon the decisions in the American war as authoritatively settling the legality of that trade, and decreed accordingly.

"If, as a more plausible answer to these decisions (considered in the light of authorities), than that which we have just examined, it should be said, that they ought rather to be viewed as reluctant sacrifices to policy, or even to necessity, under circum-

stances of particular difficulty and peril, than as an expression of the deliberate opinion of the Lords of Appeal, or the government of Great Britain, on the *matter of right, it might, perhaps, be sufficient to reply, that if the armed neutrality, coupled with the situation of Great Britain as a party to the war, did in any degree compel these decisions, we might also expect to find, at the same era, some relaxation on the part of of that country, relative to the doctrine of contraband, upon which the convention of the armed neutrality contained the most direct stipulations which the northern powers were particularly interested to enforce. Yet such was not the fact. But in addition to this, and other considerations of a similar description, it is natural to inquire, why it happened, that if the Lords of Appeal were satisfied that Great Britain possessed the the right in question, they recorded, and gave to the world a series of decisions against it, founded, not upon British orders of council, gratuitously relaxing what was still asserted to be the strict right, as in the late war, but upon general principles of public law. However prudence might have required (although there is no reason to believe it did require) an abstinence, on the part of Great Britain, from the extreme exercise of the right she had been supposed to claim, still it could not be necessary to give, to the mere forbearance of a claim, the stamp and character of a formal admission, that the claim itself was illegal and unjust. In the late war, as often as the British government wished to concede and relax, from whatever motive, on the subject of the colony trade of her opponents, an order of council was resorted to, setting forth the nature of the concession or relaxation, upon which the courts of prize were afterwards to found their sentences; and, undoubtedly, sentences so passed cannot, in any fair reasoning, be considered as deciding more than that the order of council is obligatory on the courts whose sentences they are. But the decrees of the Lords of Appeal, in and after the American war, are not of this description; since there existed no order of council on the subject of them; and of course, they are, and ought to be, of the highest weight and authority against Great Britain, on the questions involved in, and adjudged by, them."

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In confirmation of the preceding authorities, adduced from the decisions of the British prize courts, during the wars of 1744, 1756 and 1778, the following cases may be added from the adjudications of the common-law tribunals.

The first is that of Berens *v.* Rucker, ruled by Lord MANSFIELD, at the sittings after Trinity term 1761. (1 W. Black. 313.) This was an action on a policy of insurance on a Dutch ship, called the Tyd, *and its cargo, at and from St. Eustatius to Amsterdam, warranted a Dutch ship, and the goods Dutch property, and not laden in any French port in the West Indies. The cargo was worth 12,000*l.*, and insured at a premium of 15 guineas per cent., which was inflamed to this high rate, on account of the number of captures made by the British, of neutral vessels, on suspicion of illicit trade, and the detention of those vessels by the proceedings in the courts of admiralty. In May 1758, the ship was at St. Eustatius, taking in her cargo, which consisted of sugar and indigo, and other French commodities, which were put on board her, partly out of barks from sea, and partly from the shore of the island. On the 18th of June 1758, she sailed on her voyage to Amsterdam; on the 27th, she was taken by a British privateer, and carried into Portsmouth, in England. On the 1st of August, the seamen were examined on the standing interrogatories, and the master entered his claim in the high court of admiralty. In October, the claimants were cited to specify what part of the goods were taken from the shore of St. Eustatius, and what from the barks. Citation was continued, from court to court, until February 1759, when an interlocutory decree was pronounced, for the contumacy of the claimants, in not specifying, and that, therefore, the goods should be presumed French property. There was an appeal to the Lords, but as many cases stood before it, as the market was very high, and as the cargo was, in part, perishable, the agent of the owners agreed with the captors to give them 800*l.* and costs, in order to obtain a reversal of the sentence. The reversal was had by consent, and in order to give costs to the captors, it was decreed, by consent, that there was probable cause for seizure, and thereupon, costs were

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decreed to the captors, and the cargo was restored to the claimants. The ship, when restored, proceeded to Amsterdam; and after her arrival there, the chamber of insurances, in that city, settled the average of the plaintiff towards the loss and expenses occasioned by the capture, detention and litigation, and for this sum the action was brought.

"Lord Mansfield.—The first question is, whether this was a just capture? Both sentences are out of the case, being done, and undone, by consent. The capture was certainly unjust. *The pretence was, that part of this cargo was put on board, off St. Eustatius, out of barks supposed to come from the French islands, and not loaded immediately from the shore. This is now a settled point by the Lords of Appeal, to be the same thing as if they had been landed on the Dutch shore, and then put on board afterwards; in which case, there is no color for seizure. The rule is, that if a neutral ship trade to a French colony, with all the privileges of a French ship, and is thus adopted and naturalized, it must be looked upon as a French ship, and is liable to be taken. Not so, if she have only French produce on board, without taking it in at a French port, for it may be purchased of neutrals. [*523

"The second question is, whether the owners have acted *bonâ fide* and uprightly, as men acting for themselves, and upon a reasonable footing, so as to make the expenses of this compromise a loss to be borne by the insurers. The order of the judge of the admiralty to specify, was illegal, contrary to the marine law and the act of parliament, which is only declaratory of the marine law; because, if they had specified, it could be of no consequence, according to the rule I before mentioned. The captors were, however, in possession of a sentence, though an unjust one; and a court of appeal cannot, or seldom does, upon a reversal, give costs or damages which have accrued subsequent to the original sentence; for these damages arise from the fault of the judge, not of the parties. Under all these circumstances, the owners did wisely to offer a compromise. The cargo was worth 12,000*l.*, the appeal was hazardous, the delay certain. The Dutch deputy in England negotiated the compromise; the chamber of commerce, at Amsterdam, ratified it, and thought it reasonable. Had the whole sentence been totally reversed, the costs must have sat heavy on the owners. I, therefore, think the insurers liable to answer this average loss, which was submitted to, in order to avoid a total one." (*a*)

Such was the definition of the rule, as given by a judge who, according to Blackstone, attended the commission of appeals, *and conducted its decisions during the war of 1756, and "whose masterly acquaintance with the law of nations was known and revered by every state in Europe." (*b*) [*524

The next case is that of Brymer *v.* Atkyns, determined in the court of common pleas, Hilary Term 1789, in which Lord Loughborough uses the following words: "But during the prosecution of the war which ensued in the year 1758, great complaints were made by neutral powers of the misconduct of English privateers in the channel, in seizing their merchantmen, and a question had also arisen between the subjects of Holland and the officers of the British navy, upon the extent of the treaties of commerce between this country and the Dutch republic; the Dutch claiming a right to carry to the French all such goods as were not specifically enumerated under the title of contraband; while, on the part of the British navy, it was contended, that free ships only made free goods as to such course of trade as was carried on in time of peace; that the Dutch being excluded from the French islands in the West Indies, in time of peace, and only admitted in time of war, to cover their trade, their ships ought to be considered as adopted French, and were, therefore, lawful prize." (*c*)

The next adjudication which may be advantageously cited, to illustrate the history of the rule, is the case of The Katharina, determined in the House of Lords, on the 2d of May 1783. (*d*) This was a Dutch ship, which sailed from the Texel, on the 31st of August 1779, bound to Curaçoa, where she arrived on the 18th of November following,

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(*a*) Park on Ins. 90, ed. 1809.
(*b*) 3 Bl. Com. 70.
(*c*) 1 H. Bl. 191.
(*d*) 5 Bro. Parl. Cas. 328, ed. 1803.

with a cargo of linen goods, and some articles of provisions, and thence sailed for Cape François, in the island of St. Domingo, where the cargo was sold, a return-cargo of colonial produce taken on board, and the ship sailed for Amsterdam, on the 17th of April 1780. On the 22d of May, she was captured by a British privateer, and carried into Scotland, where the ship and cargo were, on the 22d of September 1780, condemned, as lawful prize, by the judge-admiral. An appeal was entered to the court of session, where *the sentence was affirmed, and the claimants appealed to the House of Lords, who reversed the decrees of the courts below, and ordered the value of the ship and cargo to be paid to the claimants.

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It has been alleged, that this case was determined by the House of Lords, as it is said the parallel case of The Tiger must have been by the Lords of Appeal, upon the ground of the existence of a French edict, dated the 31st of July 1779, opening the colonial trade to neutrals.(*a*) But, as we have seen, this could not possibly have been the foundation for the decree of restitution in the case of The Tiger. 1st. Because no such edict can be found in any collection of French *arretés*, and it is acknowledged that the search for it had been fruitless.(*b*) 2d. Because the edict has been supposed to have been issued *flagrante bello;* and a trade opened in time of war to neutrals, could not be considered as an accustomed trade, in the view of the prize courts. 3d. Because it is admitted, that France returned to her ancient colonial system, after the peace of 1783, and yet the Lords of Appeal persisted in decreeing restitution of neutral property taken during the war. 4th. Because the supposed edict of the 31st July 1779, is not recited in the printed case of The Tiger; but on the contrary, a special ordinance, of a preceding date, is relied upon by the claimants in that case, as opening to foreigners the ports of St. Domingo. The objection also applies to this ordinance, that, beside its being issued immediately upon the commencement of hostilities, it was the mere local act of a colonial governor, and still less likely to be regarded by the Lords of Appeal as indicative of a permanent change in the colonial system of France, than the supposed more general edict of the 31st July 1779.

If, then, the opening of the French colonies to neutrals could not have formed the basis on which restitution was decreed by the Lords of Appeal, in the case of The Tiger, was it the real ground of the reversal, by the House of Lords, of the decree of condemnation in the case of The Katharina?

*When the grounds of a judicial decision are stated by a court, it is not only superfluous, but manifestly tends to lead the inquirer astray, who is seeking for the real grounds of such decision, to look for it in the arguments of the parties. It was, indeed, argued by the counsel for the claimants, in The Katharina, that the French edict of the 31st July 1779, excepted that case from the general rule which had been enforced in the preceding war; whilst, on the other hand, the captor's counsel denied that any reliance could be placed on the sincerity and permanence of the supposed change in the colonial system of France. It was also contended by the claimants' counsel, that the ship was exempted from capture, under the general immunity of the Dutch treaty of 1674; whilst, on the contrary, the counsel for the captors maintained, that she was liable to condemnation for carrying provisions on her outward voyage, contrary to the same treaty. But the only points even glanced at by the learned Lord who moved for the reversal in the House of Lords were, 1st. The want of jurisdiction in the court below. 2d. The discontinuance, during the war of the American revolution, of the principle of the war of 1756.

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As to the first point, there seems to be no doubt, that by the articles of union between England and Scotland, the court of admiralty, in Scotland, was preserved in its ancient jurisdiction, which, unquestionably, extended to prize causes, and no subsequent act of the British parliament has made any change in this respect. The appeal is to the court of session, and thence to the House of Lords.(*c*)

The second point, on which the decree of the House of Lords was founded is, "because the principle on which the courts below had proceeded, although adhered to

(*a*) 6 Rob. Appendix, Note I., 476. (*b*) Ibid. 476. (*c*) 2 Browne's Civ. & Adm. Law 30.

in the war which ended in 1763, had been departed from in that which terminated in 1782."

Hence, it is manifest, that the decree of the House of Lords, in this case, can only be referred to an actual abandonment of the rule of the war of 1756. And such is the effect of this adjudication, as understood by the reporter himself, who, in his marginal note to the case, says, in the very words of the claimants' *counsel, "It is now established, by repeated determinations, that neither ships nor cargoes, the property of subjects of neutral powers, either going to trade at, or coming from, the French West India islands, with cargoes purchased there, are liable to capture." There is, then, no occasion to advert to the printed reasons of the parties, in order to rest this decree upon a supposed exception to the rule which is not stated by the tribunal itself. [*527

Yet they may be quoted, as a confirmation of what has been before asserted respecting the origin and nature of the rule. Thus, it was stated by the claimant's counsel (of whom Sir William Scott, then at the bar, was one), "That it was now established, that neither ships nor cargoes, the property of subjects of neutral powers, either going to trade at, or coming from, the French West India islands, with cargoes purchased there, are liable to capture; for in many recent instances, particularly The Tiger, a Danish ship, with a cargo purchased at Cape François, proceeding to St. Thomas; The Copenhagen, a Danish ship, from St. Thomas to Guadaloupe; The Jonge Jan, a Dutch ship, with a cargo taken at Port-au-Prince, and bound to Curaçoa; and likewise, in the case of The Sloop Nancy, and six other Danish vessels, with cargoes taken in at Guadaloupe, in the year 1780, and bound therewith to the island of St. Thomas, under convoy of a Danish frigate; all which were captured by British cruisers, and condemned in the vice-admiralty courts, in the British West Indies, the Lords Commissioners of Appeal reversed the sentences of condemnation, and restored the ships and cargoes."(*a*)

To which it was answered by the captor's counsel, "That the subjects of all other nations being absolutely prohibited to trade to or from the French West India islands, by the fundamental laws of France, the ship in question, coming directly from St. Domingo, with a cargo taken in there (be the property whose it might), must be considered as French, and, as such, both ship and cargo were lawful prize, agreeable to many decisions in the courts of admiralty, and by the Lords of Appeal, **last war*, founded upon the clearest principles. But it is objected, that, by an edict of the French king, dated in July 1779, the trade to his colonies was laid open to all neutral states. To this it is answered, that during the last war, Dutch ships, engaged in this fraudulent trade, obtained special licenses from the French government; but these were constantly disregarded, when urged as obviating the allegation of their being engaged in a trade open only to French subjects, and even were taken as conclusive evidence of their being adopted French ships. During the present war, it is said, a general license has been given, which cannot vary the case, when the views and consequences are precisely the same. The opening a trade to the colonies of France, *flagrante bello*, is a transaction to the prejudice of Great Britain, and a mere device and cover for fraud. A Dutchman, who trades under a privilege of this kind, is not in the ordinary situation of a neutral subject, continuing his own commerce with the warring nations, as in time of peace; he is, to all intents and purposes, carrying on the trade of France, being admitted to a participation, *ad hunc effectum*, in the exclusive rights of a French subject; and as the government of France considers such persons as temporary subjects, to the effect of being allowed to trade with the French West Indies, the subjects of Great Britain, on the other hand, must, according to every principle of justice and sound reasoning, be entitled to consider them in the same light and to seize, as lawful prize, both ships and cargoes employed in this extraordinary commerce. No person can possibly believe, that the license will be continued by France, after the peace. It has been shown, in a variety of instances, that the Dutch do not [*528

(*a*) 5 Bro. Parl. Cas. 339.

understand that it will; and till such a license has been granted, or continued, in time of profound peace, no regard can be paid to it, when issued in time of war."(*a*)

Bui this doctrine of the captor's counsel was rejected by the House of Lords in the case of The Katharina, as it had before been in the cases of The Tiger and The Copenhagen, by the Lords of Appeal; and thus we have the conjoint authority of the two highest *tribunals in the British empire, to confirm the abandonment of this rule, during the war of the American revolution.

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We come now to the first war of the French revolution, and here we have the testimony of Sir WILLIAM SCOTT, to show that his predecessor, in the high court of admiralty (Sir JAMES MARRIOT) adhered, at the commencement of that war, to the practice which had been settled in the war of 1778, and accordingly, decreed freight to neutral vessels employed in the coasting trade of the enemy. In the case of The Emanuel (April 9th, 1799),(*b*) Sir WILLIAM SCOTT says, "with respect to authorities, it has been much argued, that in three cases, this war, the court of admiralty has decreed payment of freight to vessels so employed; and I believe that such cases did pass under an intimation of the opinion of the very learned person who preceded me, in which the parties acquiesced without resorting to the authority of a higher tribunal. But a case before the Lords seems to convey a different opinion upon this subject of the coasting trade of the enemy—the case of The Mercurius, in which freight was refused."

Here, it is to be remembered, that this case of The Mercurius was determined by the Lords of Appeal, on the 7th of March 1795, and therefore, can be no authority as to the practice at an earlier period of the war, or as to the law at the same period, which was understood by Sir JAMES MARRIOTT, and the learned counsel who acquiesced in his decisions, without an appeal, still to subsist as settled by the Lords during the preceding war, and adhered to by them, down to the year 1786. Even Sir WILLIAM SCOTT himself, long after the case of The Mercurius was decided by the Lords, seems to have regarded the rule, in respect to the coasting trade, as merely creating a presumption of enemy interests, and not as affording a substantive ground of condemnation. Thus, in the case of The Welvaart (January 8th, 1799),(*c*) he says, "Besides, this vessel appears to have been engaged in the coasting trade of France. The court has never gone so far as to say, that pursuing one voyage of that kind would be sufficient to fix a hostile character; but in *my opinion, a habit of such trading would. Such a voyage must, however, raise a strong degree of suspicion against a neutral claim, and the plunging at once, into a trade so highly dangerous, creates a presumption, that there is an enemy proprietor lurking behind the cover of a neutral name." So also, in the case of The Speculation (December 16th, 1799),(*d*) the king's advocate (Sir John Nicholl) stated, "That the ship appeared to have been carrying on the coasting trade of France; a trade not only generally forbidden, but expressly prohibited to neutral ships, by the ordinances of France, which have issued during this war, that she would, therefore, come under the character of an adopted French ship." Whilst on the other hand, the claimant's counsel (Dr. Laurence) answered, that "it has not been held in the present war, that the mere circumstances of being engaged in the coasting trade of the enemy, does amount to that adoption, which will subject the property to condemnation." Sir WILLIAM SCOTT, in his judgment says, "This is a case of a ship taken on a voyage from one French port to another, which is certainly a sufficient justification of the capture; because the very circumstance of being engaged in conducting the trade of the enemy, from one port to another, will justly subject the vessel to inquiry; and perhaps, in some future case, the court may have occasion to consider, how far the regulations that have been alluded to, and the acting upon them (which it may be proper to consider at the same time), may not make such a trade liable to be considered as a case of adoption."

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We may therefore, considered it as proved, that the rule was suffered to slumber, from the beginning of the war of the American revolution, until it was awakened, with

(*a*) 5 Bro. Parl. Cas. 341. (*b*) 1 Rob. 301. (*c*) 1 Rob. 124. (*d*) 2 Rob. 293.

increased activity, by the orders in council of the 6th November 1793, instructing the public and private ships of war of Great Britain, to "stop and detain all vessels laden with goods, the produce of any colony belonging to France, or carrying provisions, or other supplies, for the use of any such colony, and to bring the same, with their cargoes, to legal adjudication in our courts of admiralty."

*Although some confusion and contradiction exists in the language of the British prize courts, whether instructions of this nature are binding on the tribunals of the nation by whom they are issued, as a positive law, or merely as declaratory of the pre-existing law of nations, Sir WILLIAM SCOTT appearing, at one time, to regard the text of the king's instructions, as binding on his judicial conscience, and at another, holding it indecorous to anticipate the possibility of their conflicting with the law of nations, whilst Sir JAMES MACKINTOSH declared, that, if he saw in such instructions, any attempt to extend the law, to the prejudice of neutrals, he should not obey them, but regulate his decisions by the known and recognised law of nations;(a) yet, the instructions of 1793 might properly be considered as evidence of what the British government deemed to be law, if this inference were not somewhat weakened by the circumstances that they were secretly issued, precipitately repealed, and full indemnification was made, for the captures under them. On the 8th January 1794, the following instruction was substituted: "That they shall bring in for lawful adjudication, all vessels, with their cargoes, that are loaded with goods, the produce of the French West India islands, and coming directly from any port of the said islands, to any port in Europe. And on the 25th of Jannary 1798, this order was also revoked, and the following was issued: "That they should bring in, for lawful adjudication, all vessels, with their cargoes, that are laden with goods, the produce of any island or settlement, belonging to France, Spain, or the United Provinces, and coming directly from any port of the said islands or settlements, to any port in Europe not being a port of this kingdom, nor a port of that country to which such ships, being neutral ships, shall belong." [*531

We have seen, that, up to the time when this last order was issued, the prize courts had never, of their own authority, revived the rule which they had invented in the war of 1756, and laid aside in that of the American revolution. But when it was once more called into life, by the instructions of the executive government, they gradually enlarged the sphere of its activity *beyond the text of those instructions, either upon the principle of affecting the return-voyage, with the penalty of contraband, contrary to Sir WILLIAM SCOTT's own previous opinions,(b) or, upon the principle of a continuity of the voyage, which had been repudiated by the Lords of Appeal, in the war of 1756, even where the colonial produce was transshipped in a neutral port, from barks, in which it was brought from enemy's ports, and not from the shore. Upon one or the other of these assumptions, the rule was applied to cut off the exportation of the produce of the enemy's colonies from neutral countries, where it had been imported, unless it had become incorporated into the general stock of national commodities (c) according to the fluctuating rules prescribed to break the continuity of voyage. On the renewal of the war, after the peace of Amiens, the following order was issued, dated on the 24th of June 1803: "In consideration of the present state of commerce, we are pleased hereby to direct the commanders of our ships of war and privateers, not to seize any neutral vessel which shall be carrying on trade, directly between the colonies of the enemy, and the neutral country to which the vessel belongs, and laden with the property of the inhabitants of such neutral country; provided, that such neutral vessel shall not be supplying, nor shall, on the outward voyage, have supplied the enemy with any articles contraband of war, and shall not be trading with any blockaded port." This instruction is substantially the same with that of 1798, except that it adopts the innovation of the prize courts, affecting the return-voyage with the penalty of contraband [*532

(a) The Minerva, 1 Hall's L. Journ. 217.

(b) The Frederick Molke, 1 Rob. 87; The Margaretha Magdalena, 2 Ibid. 140.

(c) See The William, 5 Rob. 349; and The Maria, Ibid. 325, where all the cases on the subject of continuity of voyage, are cited.

carried outward. Under it, the same course of decisions took place, by which the noxious qualities of the rule were much enlarged, and its wide-spreading desolation threatened to interrupt the amicable relations between the United States and Great Britain: when the order in council, of the 16th of May 1806, was issued, blockading
*533] the coasts from the river Elbe to Brest, inclusive, except that neutral *vessels, coming directly from the ports of their own country, were allowed to enter and depart from the blockaded ports, with cargoes, not enemy's property, nor contraband, but were not permitted to trade from port to port. This order was supposed to have been drawn up with a view to the colonial trade; but it does not appear to have been considered by the prize courts, as containing any relaxation of the principles they had established respecting that trade, and the whole question was at length merged in the orders in council of the 7th of January, and the 11th of November 1807; by the first of which, all neutral trade, from one enemy's port, or from a port where the British flag was excluded, to another such port, and by the latter (among other provisions) the exportation of the produce of the enemy's colonies, from a neutral country, to any other country than Great Britain, was prohibited. These orders were issued in retaliation of the Berlin decree of the French emperor, and on the 26th of April 1809, they were relaxed, as to the European blockade, but extended to the total prohibition of all neutral trade with the colonies of France and Holland.

It would unreasonably swell this note, to enlarge upon this part of the subject. These edicts were condemned by the universal voice of the impartial world; they were condemned by the past example of the powers who issued them; they were condemned by the authority of the jurists whom Europe revered in better times, as the oracles of public law.(*a*) It is pretended, by a superficial writer on the law of nations, that Sir William Scott decided the case of The Nayade, 4 Rob. 251, upon the principle of retaliating the injustice of an enemy on a neutral power, who passively submits to that
*534] injustice.(*b*) *Sir William Scott did no such thing; all that he determined, in that case, was, that Portugal and Great Britain, being allied by ancient treaties, the *casus fœderis* between them had arisen, by the passive submission of Portugal to the hostile attacks of France, which involved Portugal, *nolens volens*, as an ally, in the war against France, and consequently, rendered the property of a Portuguese merchant, taken in trade with the common enemy, liable to condemnation in the British prize courts. It cannot be pretended, that the neutral states, whose commerce was affected by the Berlin decree, had participated in the injustice of France, by passively submitting to that measure; since the orders in council were issued, before sufficient time had elapsed to ascertain what would be the conduct either of France, or of those states, in respect to the decree. Nor can the order of the 7th of January 1807, be justified as an original and abstract measure; (*c*) because the trade from the port of one enemy, to the port of another, was always held lawful by the British tribunals. "This sort of traffic, from one of his (the enemy's) ports to the ports of another country, has always been open, and is, in its own nature, subject to the uses of all mankind, who are not in a state of hostility with him. The Dane has a perfect right, in time of profound peace, to trade between Holland and France, to the utmost advantage he can make of such a navigation; and there is no ground upon which any of its advantages can be withheld from him in time of war."(*d*) It is needless, however, to enlarge upon the topics which

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(*a*) Bynkershoek, speaking of the edicts of the States General of Holland, retaliating upon neutrals, certain illegal orders of France and of England, denies that these edicts could be founded upon the law of retortion, which is only applicable to him who has inflicted the injury. *Retorsio non est nisi adversus eum, qui ipse damni quid dedit, ac deindè patitur, non vero adversus communem amicum.* (Q. J. Pub. c. 4.) See also Sir William Scott's remarks, in the case of The Flad Oyen, 1 Rob. 142.

(*b*) Chitty's Law of Nations 152.

(*c*) See Lord Erskine's speech in Parliament, on the Orders in Council. Cobbett's Parl. Debates, vol. 10, p. 945.

(*d*) The Wilhelmina, in note to The Rebecca, 2 Rob. 101.

might be urged against this train of innovations, by which first the trade from neutral countries to the colonies, and from port to port, of the enemy, and then, all neutral traffic whatever with him, was prohibited. It deserves notice, however, that Great Britain and France appropriated to themselves, by means of free ports or licenses, the very commerce they were prohibiting to neutrals, and to their allies, under the pretext of its aiding their enemy in the war.

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