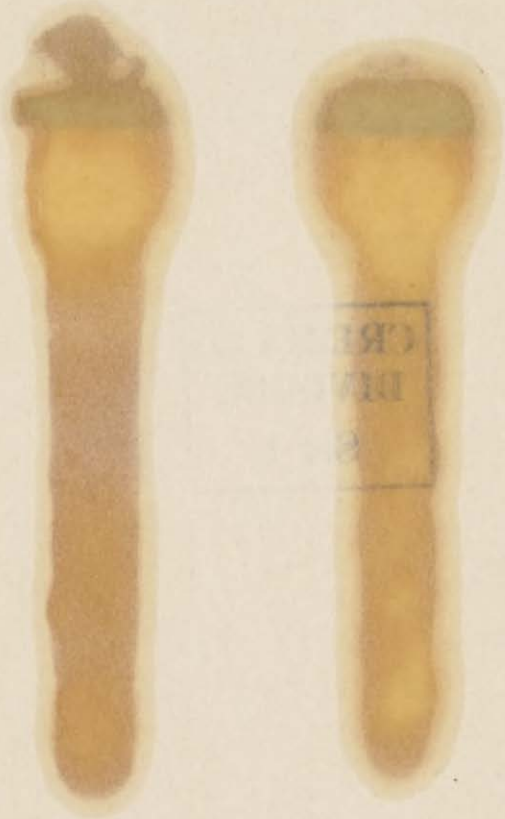

REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

SUPREME COURT

OF THE

UNITED STATES,

FEBRUARY TERM 1825.

By HENRY WHEATON,

COUNSELLOR AT LAW.

VOL. X.

FOURTH EDITION.

EDITED, WITH NOTES AND REFERENCES TO LATER DECISIONS,

BY

FREDERICK C. BRIGHTLY,

AUTHOR OF THE "FEDERAL DIGEST," ETC.

THE BANKS LAW PUBLISHING CO.
NEW YORK
1911

JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

DURING THE PERIOD OF THESE REPORTS.

Hon. JOHN MARSHALL, Chief Justice.

" BUSHROD WASHINGTON,
" WILLIAM JOHNSON,
" THOMAS TODD,
" GABRIEL DUVALL,
" JOSEPH STORY,
" SMITH THOMPSON,

} Associate Justices.

WILLIAM WIRT, Esq., Attorney-General.

MEMORANDUM.—Mr. Justice TODD was absent during the whole of the present term, from indisposition.

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OF THE

NAMES OF THE CASES REPORTED IN THIS VOLUME.

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OF THE

CASES CITED IN THIS VOLUME.

The references are to the Star *pages.

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CASES DETERMINED

IN THE

SUPREME COURT OF THE UNITED STATES.

FEBRUARY TERM, 1825.

WAYMAN and another *v.* SOUTHARD and another.

Practice in the federal courts.

Congress has, by the constitution, exclusive authority to regulate the proceedings in the courts of the United States; and the states have no authority to control those proceedings except so far as the state process acts are adopted by congress, or by the courts of the United States under the authority of congress.[1]

The proceedings on executions, and other process, in the courts of the United States, in suits at common law, are to be the same in each state, respectively, as were used in the supreme court of the state in September 1789, subject to such alterations and additions as the said courts of the United States may make, or as the supreme court of the United States shall prescribe by rule to the other courts.[2]

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[1] It is provided by the revised statutes, substantially re-enacting the provisions of the act of 1st June 1872 (17 U. S. Stat. 197), that the practice, pleadings and forms, and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings and forms and mode of proceeding existing at the time, in like causes, in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding. R. S. § 914. The effect of this act is, to adopt the state code of practice in common-law cases; and the state statutes and practice are to be resorted to, in order to determine the regularity of the proceedings. Republic Ins. Co. *v.* Williams, 3 Biss. 370. But it has not abolished the distinction between legal and equitable rights; and therefore, an equitable defence cannot be set up in a suit at law, though allowed by the practice of the state courts. Butler *v.* Young, 1 Flipp. 276. Nor does it authorize the commencement of an action by a summons in the name of the plaintiff 's attorney, though such be the practice in the state courts. Martin *v.* Criscuola, 10 Bl. C. C. 211. Nor the service of process by a private person, in accordance with the state practice. Schwabacker *v.* Reilly, 2 Dill. 127. But the manner of service must conform to the state practice; the court has no power to make an order for a substituted service. Perkins *v.* Watertown, 5 Biss. 320.

[2] The revised statutes provide, that the party recovering a judgment in any common-law cause, in any circuit or district court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment-debtor, as are now provided in like causes by the laws of the state in which such court is held, or by any such laws hereafter enacted, which may be adopted by general rules of

Wayman v. Southard.

A state law regulating executions, enacted subsequently to September 1789, is not applicable to executions issuing on judgments rendered by the courts of the United States, unless expressly adopted by the regulations and rules of those courts.

The 34th section of the judiciary act of 1789, c. 20, which provides, "that the laws of the several states except," &c., "shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply," does not apply to the process and practice of the courts; it is a mere legislative recognition *of the principles of universal jurisprudence, as to the operation of the *lex loci*. *2]

The statutes of Kentucky concerning executions, which require the plaintiff to indorse on the execution, that bank-notes of the Bank of Kentucky, or notes of the Bank of the Commonwealth of Kentucky, will be received in payment, and, on his refusal, authorize the defendant to give a replevin-bond for the debt, payable in two years, are not applicable to executions issuing on judgments rendered by the courts of the United States.

The case of Palmer *v.* Allen (7 Cranch 550) reviewed, and reconciled with the present decision.

CERTIFICATE of Division from the Circuit Court of Kentucky. This cause came up from the circuit court for the district of Kentucky, upon a certificate of a division of opinion between the judges of that court, on several motions, which occurred on a motion made by the plaintiffs to quash the marshal's return on an execution issued on a judgment obtained in that court, and also to quash the replevin-bond taken on the said execution, for the following causes:

1. Because the marshal, in taking the replevin-bond, and making said return, has proceeded under the statutes of Kentucky, in relation to executions; which statutes are not applicable to executions issuing on judgments in this court, but the marshal is to proceed with such executions, according to the rules of the common law, as modified by the acts of congress, and the rules of this court, and of the supreme court of the United States.

2. That if the the statutes of Kentucky, in relation to executions, are binding on this court, viz.: the statute which requires the plaintiff to indorse on the execution, that bank-notes of the Bank of Kentucky, or notes of the Bank of the Commonwealth *of Kentucky, will be received in payment, or that the defendant may replevy the debt for two years, are in violation of the constitution of the United States, and of the state of Kentucky, and void. *3]

3. That all the statutes of Kentucky which authorize a defendant to give a replevin-bond, in satisfaction of a judgment or execution, are unconstitutional and void.

4. Because there is no law obligatory on the said marshal, which authorized or justified him in taking the said replevin-bond, or in making the said return on the said execution.

The court below being divided in opinion on the points stated in the motion, at the request of the plaintiffs, the same were ordered to be certified to this court.

March 15th, 1824. The cause was argued by *Cheves* and *Sergeant*, for the plaintiffs; and by *Bibb* and *Monroe*, for the defendants, at the last term.

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such circuit or district court; and such courts may, from time to time, by general rules, adopt such state laws as may hereafter be in force in such state, in relation to remedies upon judgments, as aforesaid, by execution or otherwise.

R. S. § 916. A sale by the marshal, not conforming to the state practice, is irregular and void, and conveys no title to the purchaser. Smith *v.* Cockrill, 6 Wall. 756. And see Moncure *v.* Zunts, 11 Id. 416.

On the part of the *plaintiff's*, it was insisted, that the executions issued by the courts of the United States for the district of Kentucky, are to be regulated and governed by the laws of the United States, and not by the law of the state of Kentucky. It was not necessary to analyze the particular provisions of the state laws, because the questions that would arise were of a general nature, and rendered any such statement unnecessary. These questions were: 1. Whether, by the constitution of the United *States, [*4
congress has the power to regulate the proceedings of the federal courts? 2. Whether congress has regulated those proceedings, and in what manner?

1. That congress has the power, was too plain to admit of a doubt. If they have not, they have no power at all, and the whole of that interesting portion of the constitution is inoperative. The clause in question is the third article of the constitution, which establishes and regulates the judicial power. It is a simple text, but it is a very comprehensive one, or it is nothing. It does nothing more, in terms, than authorize congress to establish courts, and declare the cases over which they shall have jurisdiction. The grounds of decision are, of course, comprehended. They are to be according to the law of the case. The means for arriving at the decision, or for giving it effect, are not expressly provided. But as the means are indispensable to the attainment of the end, which is the administration of justice, they are necessarily included in the grant; and the power to provide them is, of course, implied in the power to establish judicial tribunals. A court is a place where justice is judicially administered. Co. Litt. 58. To say merely that courts should be established, would be entirely idle. To say, therefore, that courts shall be established, means that all the needful and usual incidents to courts shall be established. This proposition was so self-evident *as not to admit of any support from argument or illus- [*5
tration, nor to require any aid from the clause in the first article, giving congress power to make all laws necessary and proper for carrying into execution the other powers expressly granted, or vested in the government of the United States, or in any department or officer thereof. That it was so understood is plain, from the fifth, sixth and seventh articles of the original amendments, which are limitations of the generality of a power otherwise unlimited.

That it was not the design of the constitution finally and irrevocably to adopt any existing system of state legislation as to process, by reference thereto, is quite certain, because there is no such reference. It could not refer, by implication, to the means employed in the state courts, because they were many, and no one could say which was referred to. It would have been unwise, because it would have made the system invariable, and capable of no amendment. It could not have meant to refer to the varying forms adopted by the state courts, for it was impossible to anticipate, how they would be distributed; these are subjects of jurisdiction, for which the state institutions could afford no example, because they had no such tribunals, the jurisdiction being exclusive; and it would have made the existence of the national judiciary dependent upon state legislation. It must, therefore, be taken for granted, that the power of congress in arranging the federal judicial tribunals, and the means to be employed *by them for effectuating the [*6
design of their establishment, was plenary, and subject to no excep-

tions but those which the constitution itself has made. The acts of congress, to be referred to, would show that this had been the uniform understanding. Nor is the power of congress on this subject greater in cases where the United States are a party, than in other cases, where the controversy is between individuals.

2. The next question was, what had been done by congress? The act of the 24th of September 1789, c. 20, establishes the judicial tribunals. The 34th section enacts, that "the laws of the several states, except where the constitutions, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." But this merely gives the ground of decision; it does not give the means of attaining the decision, or of giving it effect. The powers of the courts are conferred by the sections from 13 to 17 inclusive. The courts being thus established, their jurisdiction defined, or to be defined, and the nature of their proceedings distinguished, the power to issue the common-law writs of *mandamus* and prohibition, is vested in the supreme court, by the latter part of the 13th section. The 14th section then gives them power to issue "writs of *scire facias*, *habeas corpus*, and all other writs not specially pro-
*7] vided for by statute, which may be necessary for *the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." This is to be taken *ad referendum*, according to the function they were to perform. They were to be common-law courts, proceeding according to the course of the common law, with power to issue writs agreeable to the principles and usages of that law. The common-law remedies were, therefore, adopted by the judiciary act of 1789, c. 20, and it has been judicially determined, that these remedies are to be, not according to the varying practice of the state courts, but according to the principles of the common law, as settled in England.(*a*) This, of course, is to be understood with the exception of such modifications as have been made by acts of congress, the rules of court made under those acts, and the state laws in force in 1789. The 18th section, considering that there would be an immediate right of execution by the previous provisions, gave a limited stay. There are further provisions to the same effect in the 23d, 24th and 25th sections. There are various other provisions, but the result is, in all but the excepted cases, to give an immediate right of execution, or after a limited delay.

This act was followed immediately by the process act of the 29th of September 1789, c. 21. The second section enacts, "that the forms of writs, except their style and modes of process," &c., "in the circuit and district
*8] courts, in suits at common law, shall be the same in each state, respectively, as are now used or allowed in the supreme courts of the same." The act was limited to the end of the next session. It was continued by an act of the 26th of May 1790; and by the act of the 8th of May 1792, c. 137, its provisions were made permanent.

Whether these acts, in their terms, are to be understood as embracing the forms of process only, or also as describing the effect, was not, perhaps, very material to inquire. The words, understood in their natural sense, comprehend the whole. The proviso as to executions shows that they were

(*a*) See Robinson *v.* Campbell, 3 Wheat. 221.

so understood. But it is entirely certain, that by the conjoint operation of the judiciary act, and the process act, the means to be used in the administration of justice, as to their nature, form and effect, were fixed upon a permanent basis; subject to alteration by no other legislative power than that of congress, and by the power given to the courts of the United States in the second section of the act of the 8th of May 1792, c. 137. With the exception of changes since made by congress, and by the court, the remedies now to be used are the same as were used in September 1789. Whoever would know what are the remedies in a given case, must inquire what they were in the particular state, at that time. And these remedies are of exactly the same efficacy, and have the same power and operation, now, as then. Any thing short of this would be inadequate to the end to be accomplished. The process is nothing *but for the effect; the court is nothing without its process. To leave this dependent upon state legislation, [*9
would be to leave the administration of justice in the federal courts at the mercy of the states. Congress has made many changes, and many more are wanting; the courts of the United States have made rules for regulating the practice. But in no case have changes in any of these particulars been introduced into the courts of the Union, either by the legislation of the states, or the rules of the state courts.

But independent of these general considerations, the question has been repeatedly subjected to judicial determination, both in the circuit courts and in this court. Thus, in the *United States* v. *Wonson*, 1 Gallis. 5, 18,(*a*) it was held, that the provision in the 34th section of the judiciary act of 1789, c. 20, making the state laws rules of decision in the courts of the Union, did not apply to the process and practice of the federal courts. In *Robinson* v. *Campbell*, 3 Wheat. 212, 221, this court held, that the remedies in the courts of the United States, both at common law and in equity, are to be, not according to the fluctuating practice of the state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles. The case of *Palmer* v. *Allen*, 7 Cranch 550, *also confirms [*10
the principle for which the plaintiffs insisted.

The value of the process of execution depends upon the time when it may be had, and the manner in which it may be executed, and the subjects upon which it may be levied. If it should be asked, whether a state may not withdraw certain kinds of property from execution, the answer would be, that this was not the question here, and it was not necessary to go out of the case. If the power to establish a judiciary necessarily include the power to confer upon it the authority to use the needful remedies, it must certainly be allowed, that the states cannot hinder and destroy the process of execution. Such a right is wholly incompatible with the power of the Union in congress assembled. If it may withhold one process, it may withhold all. If it can modify, *i. e.*, impair or weaken, the efficacy of the process, the consequence is the same. The courts would be then left with the power to adjudicate, but without the power to enforce their decisions. But here, the property sought to be reached is subject to execution by the laws

(*a*) See also, Peters C. C. 484.

of the state; and where the end is permitted, the means of attaining it must be left free.

It was also insisted, that the statutes of Kentucky in question were repugnant to the constitution of the United States, as impairing the obligation of contracts, and as being tender-laws. But as the court intimated
*11] that the cause might *be decided upon the other points, the argument upon the constitutionality of the act was not pressed.

On the part of the *defendants*, it was insisted, 1. That congress has no power, under the constitution, to enact an execution law, governing the substance of the proceedings on executions from the federal courts, in suits between private individuals. 2. That, supposing congress to possess such a power, it could not delegate its authority to the supreme and other courts of the United States. 3. That the acts of congress applicable to this subject, do not attempt to delegate that authority to the courts of the Union. 4. That congress has not attempted to establish a uniform execution law throughout the United States, nor adopted the laws of the states in force at any particular period, but left the process of execution to be regulated, from time to time, by the local state laws.

In support of the first point, a distinction was drawn between cases arising from the character of the parties, such as citizens of different states, aliens, &c., and cases arising from the nature of the controversy, as involving the constitution, laws and treaties of the Union, and over which the federal courts had either an original or appellate jurisdiction. The first class of cases arose either under foreign or municipal law, which must be applied as the rule of decision. The remedy followed, as part of the local law of the state where the suit was brought. It was not necessary for congress to
*12] exercise any legislative *power over this class of cases, as it was over the other, depending upon the constitution, laws and treaties of the Union. The grant of judicial power was here more extensive than the legislative. It was not necessary that congress should have the power of establishing a civil code for the decision of this class of cases. Neither was it necessary that congress should regulate the substance of the remedies, which might safely be left with the state legislatures, so long as they made no laws prohibited by the constitution, respecting contracts. The power delegated in the third article of the constitution was exclusively judicial, and therefore, congress, whose powers are legislative only, are necessarily excluded. The power given to congress in the first article, "to constitute tribunals inferior to the supreme court," does not include the power of regulating the remedies as to this class of cases. In making these regulations, congress must either have the power to authorize the selling all property under the process of the federal courts, or it is restricted to such as the state legislatures think fit to subject to execution. If the former, the power includes an extensive control over the civil legislation of the states as to property and contracts, which the constitution never contemplated. If the latter, it is an illusory power, since, if the states may exempt from, or subject to, execution, in their discretion, they may also regulate the manner of levying it, in all other respects. As to the power to make all laws necessary and proper
*13] to carry into effect the other powers, &c., it *applied only to those conferred for national purposes, and not to mere judicial power, which

must be exercised according to the municipal law applicable to the case. Congress had so determined, in the 34th section of the judiciary act, by which the state laws were made "rules of decision in trials at common law, in the courts of the United States, in cases where they apply." They do apply in the decision of all controversies between citizens of different states, or between aliens and citizens.

2. In support of the second point, that congress could not delegate its authority of regulating process (whatever might be the extent of it) to the courts of the Union, it was argued, that by the general principles of all free and limited government, as well as the particular provisions of the federal constitution, the legislative, executive and judicial powers are vested in separate bodies of magistracy. All the legislative power is vested exclusively in congress. Supposing congress to have power, under the clause, for making all laws necessary and proper, &c., to make laws for executing the judicial power of the Union, it cannot delegate such power to the judiciary. The rules by which the citizen shall be deprived of his liberty or property, to enforce a judicial sentence, ought to be prescribed and known; and the power to prescribe such rules belongs exclusively to the legislative department. Congress could not delegate this power to the judiciary, or to any other department of the government. The right to liberty and property is a *sacred vested right, under the constitution and laws of the Union and states. The regulations by which it is to be divested, for the [*14
purpose of enforcing the performance of contracts, are of vital importance to the citizen. The power of making such regulations is exclusively vested in the legislative department, by all our constitutions, and by the general spirit and principles of all free government. It is the office of the legislator, to prescribe the rule, and of the judge, to apply it; and it is immaterial, whether it respects the right in controversy, or the remedy by which it is to be enforced. The mere forms and style of writs and other process may, indeed, be regulated by the courts, but the regulation of the substantive part of the remedy belongs to the legislature. The power to establish courts, with the jurisdiction defined by the constitution, does not involve, by necessary implication, the authority of delegating any portion or incident of that power to the courts themselves. That authority is not expressly given; consequently, it does not exist.

3. Congress has not, in fact, delegated this authority to the court. The several process acts passed by congress, regulate the forms only; they give to the courts the power to regulate the forms only. The expressions in the 2d section of the act of 1792, c. 137, "subject, however, to such alterations as the said courts respectively shall, in their discretion, deem expedient, or to such regulations as the supreme court of the United States shall think proper, *from time to time, by rule, to prescribe to any circuit or district court," apply only to "the forms of writs, executions and other [*15
process, and the forms and modes of proceeding in suits." Every court has, like every other public political body, the power necessary and proper to provide for the orderly conduct of its business. This may be compared to the separate power which each house of congress has to determine the rules of its proceedings, and to punish contempts. This is altogether different from the general legislative power, which congress cannot delegate, and never has attempted to delegate, to either house, separately, or to the execu-

tive and judicial departments of the government. To construe the power to regulate the forms of process and modes of proceeding, into a power in the courts to make execution laws, would be to suppose congress intended to violate the constitution, by delegating their legislative power to the judiciary. The laws of the states on the subject of executions are various and contradictory. Did congress mean to give to this court the power to make a uniform execution law throughout the Union, or to adopt the common law of England, and thus to repeal the statutes of all the states regulating what shall, and what shall not, be subject to execution? The forms of process are distinct from the rights and duties to be observed in their execution. The usual form of a *fi. fa.* is a mandate to the the marshal to make the money of
*16] the goods and chattels of the defendant; *but what property may or may not be levied, and how, and when, and where it is to be sold, and whether the same is to be subject to redemption by the debtor, are all of the substance of the remedy.

4. In support of the position that congress intended to leave the process of execution to be regulated, from time to time, by the state laws, it was argued, that the process act of 1792, c. 137, omits the words contained in the 2d section of the process act of 1789, c. 21, "*and modes of process*," used after the words "forms of writs and executions," &c. The expressions which seem to occupy, in the act of 1792, the place of these omitted words are the following, "and modes of proceeding in suits," which are too unequivocal to require comment. "Modes of proceeding in suits," made use of in connection with the preceding words, "writs, executions," &c., plainly refer to those acts in court which relate to the determination of the controversy, in opposition and contradistinction to the forms of the mesne process and also of the process of execution by which the judgment is enforced after the termination of the suit. Proceedings after judgment are always distinguished by law-writers, both from the mesne process, and from the proceedings in the suit. 3 Bl. Com. 24–6. There is a plain difference between the forms of writs, and their effects, with the powers and duties conferred under
*17] them; between the modes *of proceeding in suits, and the laws of execution to enforce the judgment. The only clause in the process act of 1789, c. 21, which favored the notion that it was the intention of congress to prescribe the effect of any writ of execution, had been omitted in the process act of 1792, c. 137. The concluding paragraph in the 2d section of the act of 1789, c. 21, "and be at liberty to pursue the same, until a tender of the debt and costs in gold and silver shall be made," was entirely omitted in the subsequent act. And the circumstance of this act having been confined in its duration to one year, and that, at the two succeeding sessions, it had been continued for the same term only, and when the permanent act was passed, this clause, as well as the indefinite expression, "modes of process," were both excluded, showed, that they were purposely excluded, so that no effect should be given to writs of execution, other than what they would receive from the local laws of the states.

The provision in the 34th section of the judiciary act of 1789, c. 20, making the state laws rules of decision in cases where they apply, furnishes the rules by which this case is to be determined. The question is, whether the marshal has conducted himself according to law in executing this process. The mere form of the writ, is insufficient to determine it. If you apply the

state execution laws, as existing in 1789 or 1792, nearly all the western states will be left without an execution law, applicable in the federal courts, since they were admitted into the *Union subsequent to the enactment of the process acts. [*18

Congress has itself given a legislative exposition of the acts now in question, evidently considering the execution laws of the states to be the laws of execution for the federal courts. By the judiciary act of 1793, c. 167, § 8, it is provided, "that where it is now required, by the laws of any state, that goods taken in execution on a writ of *fieri facias*, shall be appraised, previous to the sale thereof," the like proceedings are to be had on executions issuing out of the courts of the United States. So also, by the act of May 7th, 1800, c. 199, regulating sales of lands, on judgments obtained by the United States, it is enacted (§ 1), "that where the United States shall have obtained judgment in civil actions brought in those states, wherein, by the laws and practice of such states, lands or other real estate, belonging to the debtor, are delivered to the creditor in satisfaction of such judgment," &c., the marshal is to proceed to sell at public auction, and to execute a grant to the highest bidder. These legislative expositions were made, long before the present case arose, and are as binding in fixing the sense of the legislature as any declaratory act which congress could make on the subject.

The process acts regulate the forms of writs, and the modes of proceeding in suits, and give the courts the power to alter both. The 14th section of the judiciary act of 1789, c. 20, gives *to the courts power to issue writs "necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." [*19 Where a court has issued the execution, according to the form provided under the process acts, it has done all that is authorized by the 14th section of the judiciary act, and by the process acts. The rule which is to govern the manner of levying the execution, is to be found in the 34th section of the judiciary act. Various regulations prevail in the states, as to what property is liable to execution. In some, lands are exempt, except upon an *elegit;* in others, certain personal property is exempt; in all, the *ca. sa.* is variously modified. How are all these conflicting regulations to be reconciled, but by resorting to the wise and safe provision contained in the 34th section of the judiciary act, which gives the same rule as to the substance of the remedy which applies to the right in controversy, and the same for the federal courts as is used at the time in the state courts?

To the argument which had been urged for the plaintiffs, that, upon the supposition that executions from the federal courts are to be regulated by the local laws in each state, the state legislatures might entirely defeat the administration of justice in those courts, by exempting all property from execution, it was answered, that congress (supposing them to possess the constitutional power) might, at any time, apply an effectual remedy, by enacting a uniform law on the subject; and that, in the meantime, all regulations *made by the states must apply equally to their own courts; and it was an inadmissible and extravagant supposition, that [*20 any state would thus entirely suspend the course of civil justice. It was the province of every sovereign legislature, to regulate it, so far as the society had not surrendered that right to another power. In the present instance,

even supposing the constitution to be silent on the subject, congress had shown a disposition to leave to the states the power of regulating it, except as to cases arising under the constitution, laws and treaties of the Union, and of peculiar federal cognisance, and excepting that general power of regulating the forms of process and proceedings, which is essential to every court of justice.

The cause was continued to the present term for advisement.

February 12th, 1825. MARSHALL, Ch. J., delivered the opinion of the court, and, after stating the case, proceeded as follows:—Some preliminary objections have been made by the counsel for the defendants, to the manner in which these questions are brought before the court, which are to be disposed of, before the questions themselves can be considered. It is said, that the proceeding was *ex parte*. The law which empowers this court to take cognisance of questions adjourned from a circuit, gives jurisdiction over the single point on which the judges were divided, not over the whole cause. The inquiry, therefore, whether the
*21] parties *were properly before the circuit court, cannot be made, at this time, in this place. The defendants also insist, that the judgment, the execution, and the return, ought to be stated, in order to enable this court to decide the question which is adjourned. But the questions do not arise on the judgment, or the execution; and, so far as they depend on the return, enough of that is stated, to show the court, that the marshal had proceeded according to the state laws of Kentucky. In a general question respecting the obligation of these laws on the officer, it is immaterial, whether he has been exact, or otherwise, in his observance of them. It is the principle on which the judges were divided, and that alone is referred to this court.

In arguing the first question, the plaintiffs contend, that the common law, as modified by acts of congress, and the rules of this court, and of the circuit court by which the judgment was rendered, must govern the officer in all his proceedings upon executions of every description. One of the counsel for the defendants insists, that congress has no power over executions issued on judgments obtained by individuals; and that the authority of the states, on this subject, remains unaffected by the constitution. That the government of the Union cannot, by law, regulate the conduct of its officers in the service of executions on judgments rendered in the federal courts; but that the state legislatures retain complete authority over them.
*22] The court cannot accede to this novel construction. *The constitution concludes its enumeration of granted powers, with a clause authorizing congress to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof. The judicial department is invested with jurisdiction in certain specified cases, in all which it has power to render judgment. That a power to make laws for carrying into execution all the judgments which the judicial department has power to pronounce, is expressly conferred by this clause, seems to be one of those plain propositions which reasoning cannot render plainer. The terms of the clause neither require nor admit of elucidation. The court, therefore, will only

say, that no doubt whatever is entertained, on the power of congress over the subject. The only inquiry is, how far has this power been exercised?

The 13th section of the judiciary act of 1789, c. 20, describes the jurisdiction of the supreme court, and grants the power to issue writs of prohibition and *mandamus*, in certain specified cases. The 14th section enacts, "that all the before-mentioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided by statute, which may be necessary for the exercise of their respective jurisdiction and agreeable to the principles and usages of law." The 17th section authorizes the courts "to make all necessary rules for the orderly conducting business *in the said courts;" and the 18th empowers a court to suspend execution, in order to give time for granting a new trial. These sections have been relied on by the counsel for the plaintiffs. [*23

The words of the 14th are understood by the court to comprehend executions. An execution is a writ, which is certainly "agreeable to the principles and usages of law." There is no reason for supposing that the general term "writs," is restrained by the words, "which may be necessary for the exercise of their respective jurisdictions," to original process, or to process anterior to judgments. The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied. Many questions arise on the process subsequent to the judgment, in which jurisdiction is to be exercised. It is, therefore, no unreasonable extension of the words of the act, to suppose an execution necessary for the exercise of jurisdiction. Were it even true, that jurisdiction could technically be said to terminate with the judgment, an execution would be a writ necessary for the perfection of that which was previously done; and would, consequently, be necessary to the beneficial exercise of jurisdiction. If any doubt could exist on this subject, the 18th section, which treats of the authority of the court over its executions, as actually existing, certainly implies, that the power to issue them had been granted in the 14th section. The same implication is afforded by the 24th *and 25th sections, both of which proceed on the idea that the power to issue writs of execution was in possession of the courts. So too, the process act, which was depending at the same time with the judiciary act, prescribes the forms of executions, but does not give a power to issue them. On the clearest principles of just construction, then, the 14th section of the judiciary act must be understood, as giving to the courts of the Union, respectively, a power to issue executions on their judgments. [*24

But this section provides singly for issuing the writ, and prescribes no rule for the conduct of the officer while obeying its mandate. It has been contended, that the 34th section of the act supplies this deficiency. That section enacts, "that the laws of the several states, except where the constitution, treaties or statutes of the United States, shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." This section has never, so far as is recollected, received a construction in this court; but it has, we believe, been generally considered by gentlemen of the profession, as furnishing a rule to guide the court in the formation of its judgment; not one for carrying that judgment into execution. It is "a rule of decision,"

and the proceedings after judgment are merely ministerial. It is, too, "a
*25] rule of decision in trials at *common law;" a phrase which presents clearly to the mind the idea of litigation in court, and could never occur to a person intending to describe an execution, or proceedings after judgment, or the effect of those proceedings. It is true, that if, after the service of an execution, a question respecting the legality of the proceeding should be brought before the court by a regular suit, there would be a trial at common law; and it may be said, that the case provided for by the section would then occur, and that the law of the state would furnish the rule for its decision. But, by the words of the section, the laws of the state furnish a rule of decision for those cases only "where they apply;" and the question arises, do they apply to such a case? In the solution of this question, it will be necessary to inquire, whether they regulate the conduct of the officer serving the execution; for it would be contrary to all principle, to admit, that, in the trial of a suit, depending on the legality of an official act, any other law would apply than that which had been previously prescribed for the government of the officer. If the execution is governed by a different rule, then these laws do not *apply* to a case depending altogether on the regularity of the proceedings under the execution. If, for example, an officer take the property of A., to satisfy an execution against B., and a suit be brought by A., the question of property must depend entirely on the law of the state. But if an execution issue against
*26] A., as *he supposes, irregularly, or if the officer should be supposed to act irregularly in the performance of his duty, and A. should, in either case, proceed against the officer, the state laws will give no rule of decision in the trial, because they do not apply to the case, unless they be adopted by this section as governing executions on judgments rendered by the courts of the United States. Before we can assume, that the state law applies to such a case, we must show that it governs the officer in serving the execution; and, consequently, its supposed application to such a case is no admissible argument in support of the proposition, that it does govern the execution. That proposition, so far as it depends on the construction of the 34th section, has already been considered; and we think that, in framing it, the legislature could not have extended its views beyond the judgment of the court. The 34th section, then, has no application to the practice of the court, or to the conduct of its officer, in the service of an execution. The 17th section would seem, both from the context and from the particular words which have been cited as applicable to this question, to be confinded to business actually transacted in court, and not to contemplate proceedings out of court.

The act to "regulate processes in the courts of the United States," passed in 1789, has also been referred to. It enacts, "that until further provisions shall be made, and except where by this act, or other statutes of the
*27] United States, *is otherwise provided, the forms of writs and executions, except their style, and modes of process, in the circuit and district courts, in suits at common law, shall be the same in each state respectively, as are now used in the supreme courts of the same. This act, so far as respects the writ, is plainly confined to form. But form, in this particular, it has been argued, has much of substance in it, because it consists of the language of the writ, which specifies precisely what the officer

is to do. His duty is prescribed in the writ, and he has only to obey its mandate. This is certainly true, so far as respects the object to be accomplished, but not as respects the manner of accomplishing it. In a *fi. fa.*, for example, the officer is commanded to make of the goods and chattels of A. B., the sum of money specified in the writ; and this sum must, of course, be made by a sale. But the time and manner of the sale, and the particular goods and chattels which are liable to the execution, unless, indeed, all are liable, are not prescribed.

To "the forms of writs and executions," the law adds the words, "and modes of process." These words must have been intended to comprehend something more than "the forms of writs and executions." We have not a right to consider them as mere tautology. They have a meaning, and ought to be allowed an operation more extensive than the preceding words. The term is applicable to writs and executions, but it is also applicable to every step taken in a cause. *It indicates the progressive course of the business, from its commencement to its termination; and "modes of [*28 process" may be considered as equivalent to modes or manner of proceeding. If, by the word "process," congress had intended nothing more than a general phrase, which might comprehend every other paper issuing out of a court, the language would most probably have resembled that of the first section, where the word "processes," not "process," is used in that sense. But the introduction of the word "modes," and the change of the word "processes" for "process," seem to indicate that the word was used in its more extensive sense, as denoting progressive action; a sense belonging to the noun in the singular number, rather that in the sense in which it was used in the first section, which is appropriate to the same noun in its plural number. This construction is supported by the succeeding sentence, which is in these words: "and the forms and modes of proceedings, in causes of equity, and of admiralty and maritime jurisdiction, shall be according to the course of the civil law." The preceding sentence had adopted the forms of writs and executions, and the modes of process, then existing in the courts of the several states, as a rule for the federal courts, "in suits at common law." And this sentence adopts "the forms and modes of proceedings" of the civil law, "in causes of equity, and of admiralty and maritime jurisdiction." It has not, we believe, *been doubted, that this [*29 sentence was intended to regulate the whole course of proceeding, "in causes of equity, and of admiralty and maritime jurisdiction." It would be difficult to assign a reason for the solicitude of congress to regulate all the proceedings of the court, sitting as a court of equity or of admiralty, which would not equally require that its proceedings should be regulated, when sitting as a court of common law. The two subjects were equally within the province of the legislature, equally demanded their attention, and were brought together to their view. If, then, the words making provision for each, fairly admit of an equally extensive interpretation, and of one which will effect the object that seems to have been in contemplation, and which was certainly desirable, they ought to receive that interpretation. "The forms of writs and executions, and modes of process in suits at common law," and "the forms and modes of proceedings, in causes of equity, and of admiralty and maritime jurisdiction," embrace the same subject, and both relate to the progress of a suit from its commencement to its close.

It has been suggested, that the words "in suits at common law," restrain the preceding words to proceedings between the original writ and judgment. But these words belong to "writs and executions," as well as to "modes of process," and no more limit the one than the other. As executions can issue
*30] only after a judgment, *the words, "in suits at common law," must apply to proceedings which take place after judgment. But the legal sense of the word suit adheres to the case, after the rendition of the judgment, and it has been so decided. Co. Litt. 291; 8 Co. 53 *b*.

This construction is fortified by the proviso, which is in these words: "provided, that on judgments, in any of the cases aforesaid, where different kinds of executions are issuable in succession, a *capias ad satisfaciendum* being one, the plaintiff shall have his election to take out a *capias ad satisfaciendum* in the first instance, and be at liberty to pursue the same, until a tender of the debt and costs in gold or silver shall be made." The proviso is generally intended to restrain the enacting clause, and to except something which would otherwise have been within it, or, in some measure, to modify the enacting clause. The object of this proviso is to enable the creditor to take out a *capias ad satisfaciendum* in the first instance, and to pursue it, until the debt be satisfied, notwithstanding anything to the contrary in the enacting clause. It is perfectly clear, that this provision is no exception from that part of the enacting clause which relates to the "forms of writs and executions," and can be an exception to that part only, which relates to the "modes of process." It secures the right to elect the *capias ad satisfaciendum*, in the first instance, where that writ was at all issuable
*31] under the law of the state; and to pursue it, until the debt and *costs be tendered in gold or silver. It relates to the time and circumstances under which the execution may issue, and to the conduct of the officer while in possession of the execution. These, then, are objects which congress supposed to be reached by the words "modes of process," in the enacting clause.

This law, though temporary, has been considered with some attention, because the permanent law has reference to it, and adopts some of its provisions. It was continued until 1792, when a perpetual act was passed on the subject. This, whether merely explanatory, or also amendatory of the original act, is the law which must decide the question now before the court. It enacts, "that the forms of writs, executions and other process, except their style, and the forms and modes of proceeding in suits in those of common law, shall be the same as are now used in the said courts, respectively, in pursuance of the act entitled, 'an act to regulate processes in the courts of the United States,' except so far as may have been provided for by the act to establish the judicial courts of the United States; subject, however, to such alterations and additions, as the said courts, respectively, shall, in their discretion, deem expedient, or to such regulations as the supreme court of the United States shall think proper, from time to time, by rule, to prescribe to any circuit or district court concerning the same." This act is drawn with more deliberation than the original act; and removes, so far as respects
*32] *the question now under consideration, some doubt which might be entertained in relation to the correctness with which the act of 1789 has been construed. It distinguishes very clearly between the forms of writs, and all other process of the same character, and the forms and modes

of proceedings in suits, and provides for both. It is impossible, to confound "the forms of writs, executions and other process," which are to be attested by a judge, and to be under the seal of the court from which they issue, with "the forms and modes of proceeding in suits;" they are distinct subjects. The first describes the paper which issues from the court, and is an authority to the officer to do that which it commands; the last embraces the whole progress of the suit, and every transaction in it, from its commencement to its termination, which has been already shown not to take place until the judgment shall be satisfied. It may, then, and ought to be, understood, as prescribing the conduct of the officer in the execution of process, that being a part of "the proceedings" in the suit. This is to conform to the law of the state, as it existed in September 1789. The act adopts the state law as it then stood, not as it might afterwards be made.

A comparison of the proviso to the permanent act, with that which had been introduced into the temporary act, will serve to illustrate the idea that the proceedings under the execution were contemplated in the enacting clause, and supposed to be prescribed by the words, "modes of process," *in the one law, and "modes of proceeding," in the other. The proviso to the act of 1789, authorizes the creditor to sue out a *capias ad satisfaciendum*, in the first instance, and to continue it, "until a tender of the debt in gold and silver shall be made." The proviso to the act of 1798, omits this last member of the sentence. The appraisement law existing in some of the states, authorized a debtor taken in execution to tender property in discharge of his person; and this part of the proviso shows an opinion, that the enacting clause adopted this privilege, and an intention to deprive him of it. The enacting clause of the act of 1793, adopts the state law, to precisely the same extent with the enacting clause of the act of 1789; and the omission of the clause in the proviso which has been mentioned, leaves that part of the adopted law, which allows the creditor to discharge his person, by the tender of property, in force. [*33

The subject was resumed in 1793, in the act, entitled, "an act in addition to the act entitled an act to establish the judicial courts of the United States." The 8th section enacts, "that, where it is now required by the laws of any state, that goods taken in execution on a writ of *fieri facias* shall be appraised, previous to the sale thereof, it shall be lawful for the appraisers appointed under the authority of the state, to appraise goods taken in execution on a *fieri facias* issued out of any court of the United States, in the same manner *as if such writ had issued out of a court held under the authority of the state; and it shall be the duty of the marshal, in whose custody such goods may be, to summon the appraisers in like manner as the sheriff is by the laws of the state, required to summon them;" "and if the appraisers, being duly summoned, shall fail to attend and perform the duties required of them, the marshal may proceed to sell such goods without an appraisement." This act refers to the appraisement laws of the respective states, which were in force at the time of its passage, without distinguishing between those which were enacted before, and those which were enacted after, September 1789. The fact, however is understood to be, that they were enacted previous to that time, generally, as temporary laws, and had been continued by subsequent acts. They required, so far as they have been inspected, that appraisers should be appointed by the local tribunals, to appraise the property taken [*34

in execution. Supposing laws of this description to have been adopted by the act of 1789, the regular mode of proceeding under them, would have been, for the courts of the United States, respectively, to appoint appraisers who should perform the same duty with respects to execution issuing out of the courts of the Union, as was performed by appraisers appointed under state authority, with respects to execution issuing out of the courts of the state. It was unquestionably much more convenient, to employ that machinery which was already in operation, for such a *purpose, than to con- *35]
struct a distinct system; it was more convenient, to employ the appraisers, already existing in the several counties of a state than to appoint a number of new appraisers, who could not be known to the courts making such appointments. Accordingly, the section under consideration does not profess to adopt the appraisement laws of the several states, but proceeds on the idea, that they were already adopted, and authorizes the officer to avail himself of the agency of those persons who had been selected by the local tribunals, to appraise property taken in execution. Had these laws been supposed to derive their authority to control the proceedings of the courts of the United States, not from being adopted by congress, but from the vigor imparted to them by the state legislatures, the intervention of congress would have been entirely unnecessary. The power which was competent to direct the appraisement, was competent to appoint the appraisers.

The act, passed in 1800, "for the relief of persons imprisoned for debt," takes up a subject on which every state in the Union had acted previous to September 1789. It authorizes the marshal to allow the benefit of the prison-rules to those who are in custody under process issued from the courts of the United States, in the same manner as it is allowed to those who are imprisoned under process issued from the courts of the respective states. Congress took up this subject in 1792, and provided for it, by a temporary law, which was *continued, from time to time, until the perma- *36]
nent law of 1800. It is the only act to which the attention of the court has been drawn, that can countenance the opinion, that the legislature did not consider the process act as regulating the conduct of an officer, in the service of executions. If may be supposed, that, in adopting the state laws as furnishing the rule for proceedings in suits at common law, that rule was as applicable to writs of *capias ad satisfaciendum*, as of *fieri facias*; and that the marshal would be as much bound to allow a prisoner the benefit of the rules, under the act of congress, as to sell upon the notice, and on the credit prescribed by the state laws. The suggestion is certainly entitled to consideration. But were it true, that the process acts would, on correct construction, adopt the state laws which give to a debtor the benefit of the rules, this single act of superfluous legislation, which might be a precaution suggested by the delicacy of the subject, by an anxiety to insure such mitigation of the hardships of imprisonment, as the citizens of the respective states were accustomed to see, and to protect the officer from the hazard of liberating the person of an imprisoned debtor, could not countervail the arguments to be drawn from every other law passed in relation to proceedings on executions, and from the omission to pass laws, which would certainly be requisite to direct the conduct of the officer, if a rule was not furnished by the process.

*37] *But there is a distinction between the cases, sufficient to justify

this particular provision. The jails in which prisoners were to be confined, did not belong to the government of the Union, and the privilege of using them was ceded by the several states, under a compact with the United States. The jailers were state officers, and received prisoners committed under process of the courts of the United States, in obedience to the laws of their respective states. Some doubt might reasonably be entertained, how far the process act might be understood to apply to them. The resolution of congress, under which the use of the state jails was obtained, "recommended it to the legislatures of the several states, to pass laws, making it expressly the duty of the keepers of their jails, to receive, and safe-keep therein, all prisoners committed under the authority of the United States, until they shall be discharged by due course of the laws thereof." The laws of the states, so far as they have been examined, conform to this resolution. Doubts might well be entertained, of permitting the prisoner, under this resolution, and these laws, to have the benefit of the rules. The removal of such doubts seems to have been a prudent precaution.

The case of *Palmer* v. *Allen* (7 Cranch 550) may be considered, at first sight, as supporting the opinion, that the acts for regulating processes in the courts of the United States, do not adopt the laws of the several states, as they stood in September 1789, as the rule by *which the officers of the federal courts are to be governed in the service of process issuing [*38 out of those courts; but upon examination of that case, this impression will be removed. In that case, as appears from the statement of the judge who delivered the opinion of this court, Palmer, as deputy-marshal, arrested Allen, on a writ sued out of the district court of Connecticut, by the United States, to recover a penalty under a statute of the United States; bail was demanded, and, not being given, Allen was committed to prison. For this commitment, Allen brought an action of trespass, assault and battery, and false imprisonment, in the state court. Palmer pleaded the whole matter in justification, and, upon demurrer, the plea was held insufficient. The judgment of the state court was brought before this court by writ of error, and was reversed; this court being of opinion, that the plea was a good bar to the action. The demurrer was sustained in the state court, because, by an act of the legislature of Connecticut, the officer serving process, similar to that which was served by Palmer, must, before committing the person on whom it is served to jail, obtain a *mittimus* from a magistrate of the state, authorizing such commitment; and that court was of opinion, that the act of congress had adopted this rule so as to make it obligatory on the officer of the federal court. This court was of opinion, that the plea made out a sufficient justification, and therefore, reversed the judgment of the state court. This *judgment of reversal is to be sustained, for several reasons, without impugning the general principle, that the acts [*39 under consideration adopt the state laws as they stood in September 1789, as giving the mode of proceeding in executing process issuing out of the courts of the United states.

The act of 1792, for regulating processes in the courts of the United States, enacts, that "the modes of proceeding in suits, in those of common law, shall be the same as are now used in the said courts, respectively, in pursuance of the act, entitled, 'an act to regulate processes in the courts of the United States.'" The indorsement of a *mittimus* on the writ had never been

used, as appears by the opinion in the case of *Palmer* v. *Allen*, in the courts of the United States for the district of Connecticut. In connection with this fact, the provision of the act of 1792 subjects the modes of proceeding under the laws of the state, "to such alterations and additions as the said courts, respectively, shall, in their discretion, deem expedient." The uniform course of that court, from its first establishment, dispensing with this *mittimus*, may be considered as the alteration in this particular which the court was authorized by law to make. It may very well be doubted, too, whether the act of congress which conforms the modes of proceeding in the courts of the Union to those in the several states, requires the agency of state officers, in any case whatever, not expressly mentioned. The laws of the Union
*40] may permit *such agency, but it is by no means clear, that they can compel it. In the case of the appraisement laws, already noticed, it was deemed necessary to pass a particular act, authorizing the marshal to avail himself of the appraisers for the state; and the same law dispenses with the appraisement, should they fail to attend. If the *mittimus* should be required by the act of congress, it should be awarded by a judge of the United States, not by a state magistrate, in like manner as an order for bail, in doubtful cases, is indorsed by a judge of the United States, in cases where the state law requires such indorsement to be made by the judge or justice of the court from which the process issues. The *mittimus* is a commitment for want of bail; and the magistrate who awards it, decides, in doing so, that it is a case in which bail is demandable. But in the particular case of Allen, that question was decided by the law. The act of congress (Act of 1799, c. 228, § 65) required, that bail should be given. No application to the judge was necessary. The officer was compelled to arrest the body of Allen, and to detain him in custody, until bail should be given. This act, therefore, dispenses with any order of a judge requiring bail, and with a *mittimus* authorizing a commitment for the want of bail. The officer was obliged to detain the body of Allen in custody, and this duty was best performed by committing him to jail. These reasons operated with the court as additional to the opinion, that the law of Connecticut, requiring a *mitti-*
*41] *mus* in *civil cases, was, in its terms, a peculiar municipal regulation imposing a restraint on state officers, which was not adopted by the process act of the United States, and was a provision inapplicable to the courts of the Union, a provision which could not be carried into effect according to its letter.

The reasons assigned by the court for its decision in the case of *Palmer* v. *Allen*, so far from implying an opinion that the process act does not adopt the laws of the several states, as giving a rule to be observed by the officer in executing process issuing from the courts of the United States, recognises the general principle, and shows why that case should be taken out of its operation. So far as the process act adopts the state laws, as regulating the modes of proceeding in suits at common law, the adoption is expressly confined to those in force in September 1789. The act of congress does not recognise the authority of any laws of this description which might be afterwards passed by the states. The system, as it then stood, is adopted, "subject, however, to such alterations and additions as the said courts, respectively, shall, in their discretion, deem expedient, or to such regulations as the supreme court of the United States shall think proper, from time to time, by

rule, to prescribe to any circuit or district court concerning the same." This provision enables the several courts of the Union to make such improvements in its *forms and modes of proceeding, as experience may suggest, and especially to adopt such state laws on this subject as [*42 might vary to advantage the forms and modes of proceeding which prevailed in September 1789.

The counsel for the defendants contend, that this clause, if extended beyond the mere regulation of practice in the court, would be a delegation of legislative authority which congress can never be supposed to intend, and has not the power to make. But congress has expressly enabled the courts to regulate their practice, by other laws. The 17th section of the judiciary act of 1789, c. 20, enacts, "that all the said courts shall have power,"—"to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States;" and the 7th section of the act, "in addition to the act, entitled, an act to establish the judicial courts of the United States" (Act of 1793, ch. 22, § 7), details more at large the powers conferred by the 17th section of the judiciary act. These sections give the court full power over all matters of practice; and it is not reasonable to suppose, that the process act was intended solely for the same object. The language is different; and the two sections last mentioned have no reference to state laws.

It will not be contended, that congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. *But congress may certainly delegate to others, powers which the [*43 legislature may rightfully exercise itself. Without going further for examples, we will take that, the legality of which the counsel for the defendants admit. The 17th section of the judiciary act, and the 7th section of the additional act, empower the courts respectively to regulate their practice. It certainly will not be contended, that this might not be done by congress. The courts, for example, may make rules, directing the returning of writs and processes, the filing of declarations and other pleadings, and other things of the same description. It will not be contended, that these things might not be done by the legislature, without the intervention of the courts; yet it is not alleged, that the power may not be conferred on the judicial department.

The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions, to fill up the details. To determine the character of the power given to the courts by the process act, we must inquire into its extent. It is expressly extended to those forms and modes of proceeding in suits at common law, which were used in the state courts in September 1789, and were adopted by that act. What, then, was adopted? *We have supposed, that the manner of [*44 proceeding under an execution was comprehended by the words "forms and modes of proceeding in suits" at common law. The writ commands the officer to make the money for which judgment has been rendered. This must be understood, as directing a sale, and, perhaps, as directing a sale for ready money. But the writ is entirely silent with respect to the notice; with respect to the disposition which the officer is to make of the

property, between the seizure and sale; and, probably, with respect to several other circumstances which occur in obeying its mandate. These are provided for in the process act. The modes of proceeding used in the courts of the respective states, are adopted for the courts of the Union, and they not only supply what is not fully expressed in the writ, but have, in some respects, modified the writ itself, by prescribing a more indirect and circuitous mode of obeying its mandate, than the officer could be justified in adopting. In some instances, the officer is permitted to leave the property with the debtor, on terms prescribed by the law, and in others, to sell on a prescribed credit, instead of ready money.

Now, suppose the power to alter these modes of proceeding, which the act conveys in general terms, was specifically given. The execution orders the officer, to make the sum mentioned in the writ, out of the goods and chattels of the debtor. This is completely a legislative provision, which leaves the officer to exercise his discretion respecting the notice. That the
*45] legislature *may transfer this discretion to the courts, and enable them to make rules for its regulation, will not, we presume, be questioned. So, with respect to the provision for leaving the property taken by the officer, in the hands of the debtor, till the day of sale. He may do this, independent of any legislative act, at his own peril. The law considers the property as his, for the purposes of the execution. He may sell it, should it be produced, in like manner as if he had retained it in his personal custody, or may recover it, should it be withheld from him. The law makes it his duty to do, that which he might do in the exercise of his discretion, and relieves him from the responsibility attendant on the exercise of discretion, in a case where his course is not exactly prescribed, and he deviates from that which is most direct. The power given to the court to vary the mode of proceeding in this particular, is a power to vary minor regulations, which are within the great outlines marked out by the legislature in directing the execution. To vary the terms on which a sale is to be made, and declare whether it shall be on credit, or for ready money, is certainly a more important exercise of the power of regulating the conduct of the officer, but is one of the same principle. It is, in all its parts, the regulation of the conduct of the officer of the court, in giving effect to its judgments. A general superintendence over this subject seems to be properly within the judicial province, and has been always so considered. It is, undoubtedly, pro-
*46] per for the legislature to prescribe the manner *in which these ministerial offices shall be performed, and this duty will never be devolved on any other department, without urgent reasons. But in the mode of obeying the mandate of a writ issuing from a court, so much of that which may be done by the judiciary, under the authority of the legislature, seems to be blended with that for which the legislature must expressly and directly provide, that there is some difficulty in discerning the exact limits within which the legislature may avail itself of the agency of its courts. The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily.

Congress, at the introduction of the present government, was placed in a

peculiar situation. A judicial system was to be prepared, not for a consolidated people, but for distinct societies, already possessing distinct systems, and accustomed to laws, which, though originating in the same great principles, had been variously modified. The perplexity arising from this state of things was much augmented by the circumstance that, in many of the states, the pressure of the moment had produced deviations from that course of administering justice between debtor and creditor, which consisted, not only with the spirit of the constitution, and, consequently, with *the views of the government, but also with what might safely be considered as the permanent policy, as well as interest, of the states themselves, The new government could neither entirely disregard these circumstances. nor consider them as permanent. In adopting the temporary mode of proceeding with executions, then prevailing in the several states, it was proper to provide for that return to ancient usage, and just, as well as wise, principles, which might be expected from those who had yielded to a supposed necessity in departing from them. Congress, probably, conceived, that this object would be best effected by placing in the courts of the Union the power of altering the "modes of proceeding in suits at common law," which includes the modes of proceeding in the execution of their judgments, in the confidence, that in the exercise of this power, the ancient, permanent and approved system would be adopted by the courts, at least, as soon as it should be restored in the several states by their respective legislatures. Congress could not have intended to give permanence to temporary laws of which it disapproved; and therefore, provided for their change in the very act which adopted them. [*47

But the objection which gentlemen make to this delegation of legislative power seems to the court to be fatal to their argument. If congress cannot invest the court with the power of altering the modes of proceeding of their own officers, in the service of executions issued on their own judgments, how will gentlemen defend a delegation *of the same power to the state legislatures? The state assemblies do not constitute a legislative body for the Union. They possess no portion of that legislative power which the constitution vests in congress, and cannot receive it by delegation. How, then, will gentlemen defend their construction of the 34th section of the judiciary act? From this section they derive the whole obligation which they ascribe to subsequent acts of the state legislatures over the modes of proceeding in the courts of the Union. This section is unquestionably prospective, as well as retrospective. It regards future, as well as existing laws. If, then, it embraces the rules of practice, the modes of proceeding in suits, if it adopts future state laws to regulate the conduct of the officer in the performace of his official duties, it delegates to the state legislatures the power which the constitution has conferred on congress, and which, gentlemen say, is incapable of delegation. [*48

As construed by the court, this section is the recognition of a principle of universal law; the principle that in every *forum* a contract is governed by the law with a view to which it was made.

But the question respecting the right of the courts to alter the modes of proceeding in suits at common law, established in the process act, does not arise in this case. That is not the point on which the judges at the circuit were divided, and which they have adjourned to this court. The question

really adjourned is, whether the laws of Kentucky respecting executions
*49] *passed subsequent to the process act, are applicable to executions which issue on judgments rendered by the federal courts? If they be, their applicability must be maintained, either in virtue of the 34th section of the judiciary act, or in virtue of an original inherent power in the state legislatures, independent of any act of congress, to control the modes of proceeding in suits depending in the courts of the United States, and to regulate the conduct of their officers in the service of executions issuing out of those courts.

That the power claimed for the state is not given by the 34th section of the judiciary act, has been fully stated in the preceding part of this opinion. That it has not an independent existence in the state legislatures, is, we think, one of those political axioms, an attempt to demonstrate which, would be a waste of argument, not to be excused. The proposition has not been advanced by counsel in this case, and will, probably, never be advanced. Its utter inadmissibility will at once present itself to the mind, if we imagine an act of a state legislature for the direct and sole purpose of regulating proceedings in the courts of the Union, or of their officers in executing their judgments. No gentleman, we believe, will be so extravagant as to maintain the efficacy of such an act. It seems not much less extravagant, to maintain, that the practice of the federal courts, and the conduct of their officers, can be indirectly regulated by the state legislatures, by an act pro-
*50] fessing to regulate *the state courts, and the conduct of the officers who execute the process of those courts. It is a general rule, that what cannot be done directly, from defect of power, cannot be done indirectly. The right of congress to delegate to the courts the power of altering the modes (established by the process act) of proceedings in suits, has been already stated; but, were it otherwise, we are well satisfied that the state legislatures do not possess that power.

This opinion renders it unnecessary to consider the other questions adjourned in this case. If the laws do not apply to the federal courts, no question concerning their constitutionality can arise in those courts.

Certificate.—This cause came on to be heard, on the questions certified from the United States court for the seventh circuit and district of Kentucky, and was argued by counsel: On consideration whereof, this court is of opinion, that the statutes of Kentucky in relation to executions, which are referred to in the questions certified to this court, on a division of opinion of the said judges of the said circuit court, are not applicable to executions which issue on judgments rendered by the courts of the United States; which is directed to be certified to the said circuit court.

*Bank of the United States *v.* Halstead.

Federal process.

The act of assembly of Kentucky, of the 21st of December 1821, which prohibits the sale of property taken under execution for less than three-fourths of its appraised value, without the consent of the owner, does not apply to a *venditioni exponas* issued out of the circuit court for the district of Kentucky.

The laws of the United States authorize the courts of the Union so to alter the form of the process of execution used in the supreme courts of the states in 1789, so as to subject to execution lands and other property, not thus subject by the state laws in force at that time.

Certificate of Division from the Circuit Court of Kentucky. This cause was argued at the last term, by the same counsel with the preceding case of *Wayman* v. *Southard* (*ante*, p. 1), and continued to the present term for advisement.

February 15th, 1825. Thompson, Justice, delivered the opinion of the court.—This case comes up on a division of opinion of the judges of the circuit court of the United States for the district of Kentucky, upon a motion there made to quash the return of the marshal upon a *venditioni exponas* issued in this cause. The writ commanded the marshal to expose to sale certain articles of property therein particularly specified; and among other things, two hundred acres of land of Abraham Venable, one of the defendants. The marshal, in his return, states substantially, that he had exposed to *sale, for cash, the lands mentioned in the writ, no indorsement having been made on the execution, to receive in payment certain [*52 bank-notes, according to the provision of the laws of Kentucky. That the lands had been valued at $26 per acre, and, upon the offer for sale, no more than $5 per acre was bid; which not being three-fourths of the appraised value, the land was not sold: thereby conforming his proceedings under the *venditioni exponas* to the directions of the law of Kentucky of the 21st of December 1821, which prohibits the sale of property taken under execution, for less than three-fourths of its appraised value, without the consent of the owner.

The motion in the court below was to quash this return, and to direct the marshal to proceed to sell the land levied upon, without regard to the act above referred to. Upon this motion, the judges, being divided in opinion, have, according to the provisions of the act of congress in such cases, certified to this court the following questions: 1. Whether the said act of the general assembly of Kentucky, when applied to this case, was, or was not, repugnant to the constitution of the United States? and 2. Whether, if it were not repugnant to the constitution, it would operate upon, and bind, and direct, the mode in which the *venditioni exponas* should be enforced by the marshal, and forbid a sale of the land levied upon, unless it commanded three-fourths of its value when estimated, *according to the provisions of the said act? In examining these questions, I shall in- [*53 vert the order in which they have been certified to this court, because, if the law does not apply to the case so as to regulate and govern the conduct of the marshal, it will supersede the necessity of inquiring into its constitutionality.

It ought to be borne in mind, that this law does not profess, in terms, to extend to marshals, or to executions issued out of the courts of the United

States; and it is only under some general expressions, that either can, by possibility, be embraced within the law. And it ought not, in justice to the legislature, to be presumed, that it was intended, by any general terms there used, to regulate and control that, over which it is so manifest they had no authority. It cannot certainly be contended, with the least color of plausibility, that congress does not possess the uncontrolled power to legislate with respect both to form and effect of executions issued upon judgments, recovered in the courts of the United States. The judicial power would be incomplete, and entirely inadequate to the purposes for which it was intended, if, after the judgment, it could be arrested in its progress, and denied the right of enforcing satisfaction in any manner which shall be prescribed by the laws of the United States. The authority to carry into complete effect the judgments of the courts, necessarily results, by implication, from the power to ordain and establish such courts. *But it does not rest altogether upon such implication; for express authority is given to congress to make all laws which shall be necessary and proper for carrying into execution all the powers vested by the constitution in the government of the United States, or in any department or officer thereof. The right of congress, therefore, to regulate the proceedings on executions, and direct the mode and manner, and out of what property of the debtor satisfaction may be obtained, is not to be questioned, and the only inquiry is, how far this power has been exercised.

*54]

The critical review taken by the chief justice of the various laws of the United States, in the opinion delivered in the case of *Wayman* v. *Southard* (*ante*, p. 20), very much abridges an examination, that might otherwise have been proper in this case. The result of that opinion shows, that congress has adopted, as the guide for the courts of the United States, the processes which were used and allowed in the supreme courts of the several states, in the year of 1789. That the 34th section of the judiciary act, which requires that the laws of the several states shall be regarded as rules of decision in trials at common law, in the courts of the United States, has no application to the practice of the courts, or in any manner calls upon them to pursue the various changes which may take place, from time to time, in the state courts, with respect to their processes, and modes of proceeding under them. The principal *inquiry in this case is, whether the laws of the United States authorize the courts so to alter the form of the process of execution, which was in use in the supreme courts of the several states, in the year 1789, as to uphold the *venditioni exponas* issued in this cause. In the year 1792, when the process act of 1789 was made perpetual, land in the state of Kentucky could not be taken and sold on execution; a law, however, subjecting lands to execution, was passed shortly thereafter, in the same year; and the question now arises, whether the circuit court of the United States for the Kentucky district, could so alter the process of execution as to authorize the seizure and sale of land by virtue thereof.

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For the decision of this question, it is necessary again to recur to some of the acts of congress which were under consideration in the case referred to, for the purpose of ascertaining whether they do not provide as well for the effect and operation, as for the form of process. By the 14th section of the judiciary act (1 U. S. Stat. 81), power is given to the courts of the United States to issue writs of *scire facias*, *habeas corpus*, and all other

writs not specially provided for by statute, which may be neceesary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. That executions are among the writs hereby authorized to be issued, cannot admit of a doubt; they are indispensably necessary for the beneficial exercise of the jurisdiction of the courts; and in subsequent parts of the act, *this writ is specifically named as one to be used, and [*56
the control which the court, in certain cases, is authorized to exercise over it, is pointed out. The precise limitations and qualifications of this power, under the terms, agreeable to the principles and usages of law, is not, perhaps, so obvious. It, doubtless, embraces writs sanctioned by the principles and usages of the common law. But it would be too limited a construction, as it respects writs of execution, to restrict it to such only as were authorized by the common law. It was well known to congress, that there were in use in the state courts, writs of execution, other than such as were conformable to the usages of the common law. And it is reasonable to conclude, that such were intended to be included, under the general description of writs agreeable to the principles and usages of law. If it had been intended to restrict the power to common-law writs, such limitation would probably have been imposed in terms. That it was intended to authorize writs of execution sanctioned by the principles and usages of the state laws, is strongly corroborated by the circumstance, that the process act, passed a few days thereafter, adopts such as the only writs of execution to be used. Can it be doubted, but that, under the power here given in the judiciary act, the courts of the United States, in those states where lands were liable to be taken and sold on execution, would have been authorized to issued a like process? But under this act, the courts are not restricted to the kind of process used in the state *courts, nor bound in any respect [*57
to conform themselves thereto. This latitude of discretion was not deemed expedient to be left with the courts; and the act of the 29th September 1789 (1 U. S. Stat. 93), entitled, "an act to regulate processes in the courts of the United States," modifies and limits this power. So far as is material to the present inquiry, it declares, that the forms of writs and executions, and modes of process, in the circuit and district courts, in suits at common law, shall be the same in each state, respectively, as are now used or allowed in the supreme courts of the same. The form of the writ contains substantially directions as to what is to be done under it. Whether mesne or final process, it is, on its face, so shaped and moulded, as to be adapted to purposes for which it is intended. This act, therefore, adopts the effect as well as the form of the state processes; and as these were various in the different states, it goes further, and adopts the modes of process, which must include everything necessary to a compliance with the command of the writ. The effect and operation of executions must, of course, vary in the different states, according to the different forms which were used and allowed. The mode of proceeding, where lands, for instance, were liable to be taken and sold on execution, was different from that which would be necessary where they were only liable to be extended under an *elegit*. It was, therefore, necessary to adopt the modes of process, if the process itself was adopted. This act was temporary; and continued [*58
*from time to time, until the permanent law of the 8th of May 1792 (1 U. S. Stat. 275), was passed; the second section of which, so far as

relates to the second question, declares, that the forms of writs, executions and other process, except their style, and the forms and modes of proceeding in suits of common law, in the courts of the United States, shall be the same as are now used in the said courts, in pursuance of the act entitled, "an act to regulate processes in the courts of the United States." This section then goes on to prescribe the rules and principles by which the courts of equity, and of admiralty and maritime jurisdiction, were to be governed; and then follows this provision: "subject, however, to such alterations and additions, as the said courts respectively shall, in their discretion, deem expedient, or to such regulations as the supreme court of the United States shall think proper, from time to time, by rule, or to prescribe to any circuit or district court concerning the same." There can be no doubt, that the power here given to the courts, extends to all the subjects in the preceding parts of the section; and embraces as well the forms of process, and modes of proceeding, in suits of common law, as those of equity, and of admiralty and maritime jurisdiction. It will be perceived, that this act presupposes that, in point of practice, the several courts of the United States had carried into execution the provisions of the act of 1789; and had adopted the forms of process, and modes of proceeding thereon, which were then usual, and

*59] *allowed in the supreme courts of the respective states; and it ratifies and continues such practice, and extends it to all the proceedings in suits. This course was, no doubt, adopted, as one better calculated to meet the views and wishes of the several states, than for congress to have framed an entire system for the courts of the United States, varying from that of the state courts. They had in view, however, state systems then in actual operation, well known and understood, and the propriety and expediency of adopting which, they would well judge of and determine. Hence, the restriction in the act, *now* used and allowed in the supreme courts of the several states. There is no part of the act, however, that looks like adopting, prospectively, by positive legislative provision, the various changes that might thereafter be made in the state courts. Had such been the intention of congress, the phraseology of the act would, doubtless, have been adopted to that purpose. It was, nevertheless, foreseen, that changes probably would be made in the processes and proceedings in the state courts, which might be fit and proper to be adopted in the courts of the United States; and not choosing to sanction such changes absolutely, in anticipation, power is given to the courts over the subject, with a view, no doubt, so to alter and mould their processes and proceedings, as to conform to those of the state courts as nearly as might be, consistently with the ends of justice. This authority must have been given to the courts, for some substantial and beneficial

*60] *purpose. If the alterations are limited to mere form, without varying the effect and operation of the process, it would be useless. The power here given, in order to answer the object in view, cannot be restricted to form, as contradistinguished from substance, but must be understood as vesting in the courts authority, so to frame, mould and shape the process, as to adapt it to the purpose intended.

The general policy of all the laws on the subject is very apparent. It was intended to adopt and conform to the state process and proceedings, as the general rule, but under such guards and checks as might be necessary to insure the due exercise of the powers of the courts of the United States.

They have authority, therefore, from time to time, to alter the process, in such manner as they shall deem expedient, and likewise to make additions thereto, which necessarily implies a power to enlarge the effect and operation of the process. The exercise of this power is, to be sure, left in the discretion of the court; but the object and purpose for which it is given, is so plainly marked, that it is hardly to be presumed, the courts would omit carrying it into execution, without some substantial reason. And the better to insure this, authority is given to this court, to prescribe to the circuit and district courts, such regulations on the subject as it shall think proper. And should this trust not be duly and discreetly exercised by the courts, it is at all times in the power of congress to correct the evil by more specific legislation. But so long as *the courts of the United States shall make such alterations or additions in their process of execution as only to [*61 reach property made subject to execution from the state courts, there would seem to be no such ground for complaint. When, therefore, the law of Kentucky made land subject to executions, it was carrying into effect the spirit and object of the act of congress, for the circuit court so to alter and add to the form of its execution, as to authorize the taking and selling the debtor's land.

It is said, however, that this is the true exercise of legislative power, which could not be delegated by congress to the courts of justice. But this objection cannot be sustained. There is no doubt, that congress might have legislated more specifically on the subject, and declared what property should be subject to executions from the courts of the United States. But it does not follow, that because congress might have done this, they necessarily must do it, and cannot commit the power to the courts of justice. Congress might regulate the whole practice of the courts, if it was deemed expedient so to do: but this power is vested in the courts; and it never has occurred to any one, that it was a delegation of legislative power. The power given to the courts over their process is no more than authorizing them to regulate and direct the conduct of the marshal, in the execution of the process. It relates, therefore, to the ministerial duty of the officer; and partakes no more of legislative power, than that discretionary authority intrusted *to every department of the government in a variety of cases. And, as is forcibly observed by the court, in the case of *Wayman* v. [*62 *Southard*, the same objection arises to delegating this power to the state authorities, as there does to intrusting it to the courts of the United States; it is as much a delegation of legislative power in the one case as in the other. It has been already decided, in the case referred to, that the 34th section of the judiciary act has no application to the practice of the courts of the United States, so as in any manner to govern the form of the process of execution. And all the reasoning of the court, which denies the application of this section to the form, applies with equal force to the effect or extent and operation of the process. If, therefore, congress has legislated at all upon the effect of executions, they have either adopted and limited it to that which would have been given to the like process from the supreme courts of the respective states, in the year 1789, or have provided for changes, by authorizing the courts of the United States to make such alterations and additions in the process itself, as to give it a different effect.

To limit the operation of an execution *now*, to that which it would have

had in the year 1789, would open a door to many and great inconveniences, which congress seems to have foreseen, and to have guarded against, by giving ample powers to the courts, so to mould their process, as to meet whatever changes might take place. And if any doubt existed, whether the act of 1792 vests such power in the courts, or with respect to its constitutionality, *the practical construction heretofore given to it, ought to have great weight in determining both questions. It is understood, *63]
that it has been the general, if not the universal practice of the courts of the United States, so to alter their executions, as to authorize a levy upon whatever property is made subject to the like process from the state courts; and under such alterations, many sales of land have no doubt been made, which might be disturbed, if a contrary construction should be adopted. That such alteration, both in the form and effect of executions, has been made by the circuit court for the district of Kentucky, is certain, from the case now before us, as, in 1789, land in Kentucky could not be sold on execution.

If the court, then, had the power so to frame and mould the execution in this case, as to extend to lands, the only remaining inquiry is, whether the proceedings on the execution could be arrested and controlled by the state law. And this question would seem to be put at rest by the decision in the case of *Wayman* v. *Southard*. The law of Kentucky, as has been already observed, does not in terms profess to exercise any such authority; and if it did, it must be unavailing. An officer of the United States cannot, in the discharge of his duty, be governed and controlled by state laws, any further than such laws have been adopted and sanctioned by the legislative authority of the United States. And he does not, in such case, act under the authority of the state law, but under that of the United States, *which adopts such law. An execution is the fruit and end of the suit, and *64]
is very aptly called the life of the law. The suit does not terminate with the judgment; and all proceedings on the execution, are proceedings in the suit, and which are expressly, by the act of congress, put under the regulation and control of the court out of which it issues. It is a power incident to every court from which process issues, when delivered to the proper officer, to enforce upon such officer a compliance with his duty, and a due execution of the process, according to its command. But we are not left to rest upon any implied power of the court, for such authority over the officer. By the 7th section of the act of the 2d of March 1793 (1 U. S. Stat. 335), it is declared, that "it shall be lawful for the several courts of the United States, from time to time, as occasion may require, to make rules and orders for their respective courts, directing the returning of writs and processes, &c., and to regulate the practice of the said courts respectively, in such manner as shall be fit and necessary for the advancement of justice, and especially to the end to prevent delays in proceedings." To permit the marshal, in this case, to be governed and controlled by the state law, is not only delaying, but may be entirely defeating the effect and operation of the execution, and would be inconsistent with the advancement of justice.

Upon the whole, therefore, the opinion of this court is, that the circuit court had authority to alter the form of the process of execution, so as *to extend to real as well as personal property, when, by the laws of Kentucky, lands were made subject to the like process from the *65]
state courts; and that the act of the general assembly of Kentucky does

not operate upon, and bind, and direct the mode in which the *venditioni exponas* should be enforced by the marshal, so as to forbid a sale of the land levied upon, unless it commanded three-fourths of its value, according to the provisions of the said act; and that, of course, the return of the marshal is insufficient, and ought to be quashed. This renders it unnecessary to inquire into the constitutionality of the law of Kentucky.

CERTIFICATE.—This cause came on to be heard, on the transcript, &c., and the points on which the judges of the circuit court of the United States for the seventh circuit and district of Kentucky, were divided in opinion, and which were, in pursuance of the act of congress in that case made and provided, adjourned to this court, and was argued by counsel: On consideration whereof, this court is of opinion, that the act of the general assembly of Kentucky, referred in the said questions, cannot operate upon, bind, and direct the mode in which the said *venditioni exponas* should be enforced by the marshal, and forbid a sale of the land levied upon, unless it commanded three-fourths of its value, when estimated, according to the provisions of the said act; and that this opinion renders it unnecessary to decide whether the said act is, or *is not, repugnant to the constitution of the United States. All which is directed to be certified to the circuit court of the United States for the seventh circuit and district of Kentucky.(a) [*66

(a) In the case of the Bank of the United States *v.* January, also certified from the circuit court of Kentucky, the process was a *capias*, to which the acts of 1789 and 1792, extend in express terms. This court, therefore, determined, that congress must be understood to have adopted that process as one that was to issue permanently from the courts of the United States, whenever it was in use, at the epoch contemplated by those acts, as a state process. A certificate was directed accordingly.

The Antelope: The Vice-Consuls of Spain and Portugal, Libellants.

Slave-trade.—Divided court.—Consuls.

The African slave-trade is contrary to the law of nature, but is not prohibited by the positive law of nations.

Although the slave-trade is now prohibited by the laws of most civilized nations, it may still be lawfully carried on by the subjects of those nations who have not prohibited it by municipal acts or treaties.

The slave-trade is not piracy, unless made so by the treaties or statutes of the nation to whom the party belongs.

The right of visitation and search does not exist in time of peace.[1] A vessel engaged in the slave-trade, even if prohibited by the laws of the country to which it belongs, cannot, for that cause alone, be seized on the high seas, and brought in for adjudication, in time of peace, in the courts of another country; but if the laws of that other country be violated, or the proceeding be authorized by treaty, the act of capture is not in that case unlawful.

*67] *It seems, that in case of such a seizure, possession of Africans is not a sufficient evidence of property, and that the *onus probandi* is thrown upon the claimant, to show that the possession was lawfully acquired.

Africans who are first captured by a belligerent privateer, fitted out in violation of our neutrality, or by a pirate, and then, re-captured and brought into the ports of the United States, under a reasonable suspicion that a violation of the slave-trade acts was intended, are not to be restored, without full proof of the proprietary interest; for, in such a case, the capture is lawful.

And whether, in such a case, restitution ought to be decreed at all, was a question on which the court was equally divided.

Where the court is equally divided, the decree of the court below is, of course, affirmed, so far as the point of division goes.[2]

Although a consul may claim for subjects unknown of his nation, yet restitution cannot be decreed, without specific proof of the individual proprietary interest.

Appeal from the Circuit Court of Georgia. These cases were allegations filed by the vice-consuls of Spain and Portugal, claiming certain Africans as the property of subjects of their nation. The material facts were as follows:

A privateer, called the Columbia, sailing under a Venezuelan commission, entered the port of Baltimore, in the year 1819; clandestinely shipped a crew of thirty or forty men; proceeded to sea, and hoisted the Artegan flag, assuming the name of the Arraganta, and prosecuted a voyage along the coast of Africa; her officers and the greater part of her crew being citizens of the United States. Off the coast of Africa, she captured an American vessel, from Bristol, in Rhode Island, from which she took twenty-five Africans; she captured several Portuguese vessels, from which she also took Africans; and she captured a Spanish vessel, called the Antelope, in

*68] which she *also took a considerable number of Africans. The two vessels then sailed in company to the coast of Brazil, where the Arraganta was wrecked, and her master, Metcalf, and a great part of his crew, made prisoners; the rest of the crew, with the armament of the Arraganta, were transferred to the Antelope, which, thus armed, assumed the name of the General Ramirez, under the command of John Smith, a citizen of the United States; and on board this vessel were all the Africans, which had been captured by the privateer in the course of her voyage. This vessel, thus freighted, was found hovering near the coast of the United States by

[1] The Tigris, 3 Law Rep. 428.

[2] Etting *v.* United States Bank, 11 Wheat. 59. And see Durant *v.* Essex County, 7 Wall. 107; Hannauer *v.* Woodruff, 10 Id. 482.

the revenue-cutter, Dallas, under the command of Captain Jackson, and finally brought into the port of Savannah for adjudication. The Africans, at the time of her capture, amounted to upwards of 280.

On their arrival, the vessel, and the Africans, were libelled, and claimed by the Portuguese and Spanish vice-consuls, reciprocally. They were also claimed by John Smith, as captured *jure belli*. They were claimed by the United States, as having been transported from foreign parts, by American citizens, in contravention of the laws of the United States, and as entitled to their freedom by those laws, and by the law of nations. Captain Jackson, the master of the revenue-cutter, filed an alternative claim for the bounty given by law, if the Africans should be adjudged to the United States; or to salvage, if the whole subject should be adjudged to the Portuguese and Spanish consuls. *The court dismissed the libel and claim of John Smith. They dismissed the claim of the United States; except as to that portion of the Africans which had been taken from the American vessel. The residue was divided between the Spanish and Portuguese claimants. [*69

No evidence was offered to show which of the Africans were taken from the American vessel, and which from the Spanish and Portuguese: and the court below decreed, that, as about one-third of them died, the loss should be averaged among these three different classes; and that sixteen should be designated, by lot, from the whole number, and delivered over to the marshal, according to the law of the United States, as being the fair proportion of the twenty-five, proved to have been taken from an American vessel.

February 26th, 28th and 29th. The *Attorney-General*, for the appellants, stated, that the cases of the respective allegations of the Spanish and Portuguese consuls, upon which distinct appeals had been taken, which had been separately docketed in this court,(*a*) were so blended together, that it was thought most proper to bring on the hearing in both cases at the same time.

Marshall, Ch. J., stated, that the appellants, in the argument of No. 12, might refer to the evidence in No. 13; they might invoke it into this cause, so far as it was necessary for their purpose, and the court would take notice *of the facts which appeared in the other transcript; but that the two causes must come on separately, and in their order. But it has been thought most expedient to report the two arguments together. [*70

The reasons assigned in the appellants' case, for reversing the decrees of the court below, were as follows: 1. That the possession of these Africans, by the claimants, before the capture by the privateer, affords no presumption that they were their property; that they must show a law entitling them to hold them as property. 2. That if these Africans are to be considered as having been in a state of slavery, when in the Spanish and Portuguese vessels from which they were taken, and if the court shall consider itself bound to restore them to the condition from which they were taken, this can be done only by placing them in the hands of those who shall prove themselves to have been the owners; and that this purpose cannot be

(*a*) The Spanish case as No. 12, and the Portuguese as No. 13.

answered by restoring them by the consuls of Spain and Portugal. 3. That if some of these Africans were the property of the claimants, yet some were uot; and failing to prove which were theirs, the decree is erroneous, in determining by lot, a matter which the claimants were bound to establish by proof.

Key, for the appellants, argued, that the facts of the case presented the question to be considered in a point of view, peculiarly favorable *to
*71] the appellants. A piratical vessel was found hovering near our coast apparently meditating a violation of our laws. It was brought, with the persons on board, into the custody of the court, by an act of seizure, not only lawful, but meritorious towards the claimants, since it rescued what they claim as their property, from the grasp of pirates. If the claimants had not interposed, the course of the court would have been obvious. The illegal and piratical capture by our citizens, gave *them* no rights; and even if it did, they instantly forfeited them, under our laws, which they intended to violate. But the claimants demand restitution of the Africans found on board this vessel, alleging them to be their property, lawfully acquired on the coast of Africa, and piratically taken from them by the Arraganta. This demand is resisted by the government of the United States, upon the ground, that the persons in question are not, by our laws, to be considered as slaves but as freemen. These laws the court must administer, and not the laws of Spain. Our national policy, perhaps, our safety, requires, that there should be no increase of these species of population within our territory. The acts of congress provide, that however brought here, they shall be set free, and sent back to their own native country. The Spanish and Portuguese claimants demand them as their property. We repel the claim, by asserting their right to liberty. The demand of restitution is inconsistent
*72] with our policy, as declared in our statutes and other public *acts.(*a*) These declarations gave fair warning to those engaged in the slave-trade, that though we did not intend to interfere with them on the high seas, yet, if their victims should come within the reach of our laws, we should protect them. These acts constitute a solemn pledge to all nations interested in the suppression of this inhuman traffic, and to Africa herself, that if the objects of it should seek our protection, where they may lawfully receive it, within our territorial jurisdiction, and at the feet of our tribunals of justice, they should be entitled to that protection. Therefore, admitting the facts as alleged by the claimants, what they claim as justice, in a matter of property, cannot be done to them, without disregarding our own policy, endangering our own safety, infringing our own laws, and violating the plighted faith of the couutry.

But supposing they have a right to insist on restitution of their property, what proof ought to be required, and what proof do they give, of their proprietary interest? It is material also here to consider, that those human beings, who are claimed as property, come into the jurisdiction of the court, not by any wrongful act of ours, but lawfully, providentially; and are to be treated just as if they were thrown upon our shore by a storm. The Spanish owners show, as proof of property, their previous possession; and

(*a*) See Appendix, Note I. p. 3.

the possessor of goods, it is said, is to be presumed the lawful owner. This is true as to *goods*, because they have universally and necessarily an *owner. But these are *men*, of whom it cannot be affirmed, that they have universally and necessarily an owner. In some particular and [*73 excepted cases, depending upon the local law and usage, they may be the subjects of property and ownership; but by the law of nature, all men are free. The presumption that even black men and Africans are slaves, is not a universal presumption. It would be manifestly unjust, to throw the *onus probandi* upon them, to prove their birthright. Whatever may have once been the condition of Africa, and of the African slave-trade, the authentic information on this subject will show, that it is now impossible to determine, by the fact of possession, whether the party has been lawfully acquired or not. There must be an overwhelming probability of the lawfulness of such acquisition, to raise such a presumption. This is instanced by the different presumptions allowed in different parts of our own country, in respect to this description of persons. In the southern states, there is the highest degree of probability, from universal practice and well-known law, that such persons are slaves. But in the northern states, the probability is just the contrary, and the presumption is reversed. And in the present state of the slave-trade, Africans, in a slave-ship, on the high seas, are in no such circumstances, as to raise a presumption, that they are lawfully held in slavery. For if there be a permitted slave-trade, there is also a prohibited slave-trade; and the prohibition is much more extensive than the permission. *The claimants must, consequently, show something more than [*74 mere possession. They must show a law, making such persons property, and that they acquired them under such law. In order to maintain their title, they show the municipal law of Spain; but the operation of that law can only extend throughout the territory of Spain, and to Spanish vessels on the high seas. These persons are now within the jurisdiction of our conflicting law; and they are brought here, without any violation of the sovereign rights of Spain. Our own law, which is in force here, must prevail over the law of Spain, which cannot have an extra-territorial operation. There is no reason of comity, or policy, or justice, which requires us to give effect to a foreign law, conflicting with our own law on the same subject. Besides, the Spanish law is not only contrary to ours, but is inconsistent with the law of nature, which is a sufficient reason for maintaining the supremacy of our own code. If this municipal law of Spain were allowed to prevail against our law, in our own territory, and before our own courts, the same effect must be given to the law of every other country, under the same circumstances. If, instead of these Africans, there had been taken by the same illegal capture, Spanish slaves, from an Algerine corsair, and afterwards brought, in the same manner, into our ports, they might, upon the same principle, be reclaimed by the representative of Algiers, who could easily show, that, by the law prevailing among the Barbary states, they were slaves.

The municipal law of Spain, then, is insufficient *to maintain the [*75 title set up by the claimants. They are driven to the necessity of invoking the aid of the law of nations, as sanctioning their asserted right to property in these human beings. But if the law of nations is silent upon this subject; if it neither sanctions nor forbids the traffic in African slaves;

if it is municipal law alone which determines in what manner private property is acquired and lost, then, the claimants have no law to stand upon in asserting their claim. Supposing, however, this idea not to be correct, it is incumbent on the claimants to show, positively, that the slave-trade, as now practised, has the sanction of the law of nations, as now understood by the civilized and Christian nations of the world. That it once had that sanction, may, perhaps, be admitted; but it must also be admitted, that there was once a time when it had not that sanction. The permission began by general assent and usage. The king of Spain, in the preamble to his edict of 1817, admits, that it was incorporated into the code of nations as an exception to the general principles on which that code is founded.(*a*) When the practice was adopted by the general, not universal, assent, of civilized nations, it became a part of the law of nations. In the same manner, a general, and not a universal, denunciation of the practice, is sufficient to make it cease to be a part of the law of nations. In the great moral and legal revolution which is now going on in the world respecting this trade, the
*76] *time must come, when it will cease to have a legal existence, by the universal concurrence of nations. In the meantime, the question must be discussed, as it arises under various circumstances, until we reach the desired period, when the universal sentiment of the wise and the good shall become the rule of conduct sanctioned by authority capable of enforcing it. All the modifications and improvements in the modern law of nations have been gradually introduced. The writers upon that law explain the manner in which these changes have been made and sanctioned. Vattel, *Droit des Gens*, ch. prelim. § 25–27, 56; liv. 1, ch. 23, § 293; Burlam. 165; Martens, lib. 9, § 5, lib. 11, § 1. The documents to be laid before the court will show the present state of the world's opinion and practice upon this subject, and will prove that the time is at hand, if it has not already arrived, when the slave-trade is not only forbidden by the concurrent voice of most nations, but is denounced and punished as a crime of the deepest dye. This is shown by the declarations contained in the treaties of Paris and Ghent; by the acts and conferences at the congresses of Vienna, London and Aix la Chapelle; by the treaties between Great Britain and Spain and Portugal; by the negotiations between the United States and Great Britain; and by the reports of the committees of the house of commons, and the house of representatives in congress. We contend, then, that whatever was once the fact, this trade is now condemned by the general consent
*77] of nations, who have publicly *and solemnly declared it to be unjust, inhuman and illegal. We insist, that absolute unanimity on this subject is unnecessary; that, as it was introduced, so it may be abolished, by general concurrence. This general concurrence may not authorize a court of justice to pronounce it a crime against all nations, so as to make it the duty of all to seek out and punish offenders, as in the case of piracy. No decision has yet gone that length, nor is it necessary in this case to contend for such a principle. But in a case where the Africans are lawfully brought before a court of the law of nations, and are claimed as property, by those who must be considered as actors in the cause, and who must, consequently,

(*a*) See Appendix, Note I. p. 32.

prove their title as alleged, the fair abstract question arises; and their claim may well be repudiated, as founded in injustice and illegality.

The learned counsel here commented upon the different cases in England and this country, with the view of reconciling them, and showing that they were all consistent with the principle he maintained. In the cases of *The Amedie*, Acton 240; *The Fortuna*, 1 Dods. 81; and *The Donna Marianna*, Ibid. 91, the ship and persons on board were lawfully brought into the custody of the court, either as being captured *jure belli*, or taken under circumstances which warranted a seizure as for a municipal offence. The claims were accordingly rejected, upon the ground of the unlawfulness of the trade. In the subsequent cases of *The Louis*, 2 Dods. 210, 264, and of *Madrazo* v. *Willes*, 3 B. & Ald. 353,(*a*) *the original seizure was held to be unjustifiable, and consequently, restitution was decreed. [*78 But none of the important principles settled in the other cases, are overruled in these cases, which turn exclusively upon the point, that the wrong first done in the unlawful seizure must be redressed. In the case of *La Jeune Eugenie*, 2 Mason 499, the claim of a French subject was rejected, as being founded in a breach of the municipal law of his own country, and the subject-matter in controversy was delivered up, with the consent of the executive government of this country, to the sovereign of France, to be dealt with as he should think fit. All these latter cases show, that where the court has rightfully obtained possession of human beings, who are claimed as slaves, it will not restore them to their alleged proprietors, although it may not go so far as to punish those who are engaged in the trade, by the confiscation of the vehicle in which it is carried on.

But another view may be taken of this subject. The king of Spain, in his edict of 1817 (before referred to), informs us, that the slave-trade originated in motives of humanity, and was intended to avoid the greater evils growing out of the barbarous state of the African continent. Suppose this to be a just representation, and that the trade formerly consisted merely in the transportation of persons who were slaves in Africa, to be slaves elsewhere; it is at last discovered, by the *evidence taken before the British house of commons in 1790, by the investigations of the African Institution, and by the reports of the British and American naval officers, to have entirely changed its character. Slaves are no longer acquired, merely by capture in war, or by trade; but free persons are seized and carried off by the traders and their agents. Wars are instigated by them, for the mere purpose of making slaves. The persons thus enslaved are clandestinely brought away, under circumstances of extreme cruelty, aggravated by the necessity of concealment, and smuggled into every country where the cupidity of avarice creates a demand for these unhappy victims. May it not be asked, is this trade? Is it lawful? Has it not so changed its nature as to have become prohibited? [*79

Again, supposing the slave trade not yet to have become generally illegal; still it has become so to the subjects of those countries who have issued declarations against the trade. To such, the *argumentum ad hominem* may be fairly applied, as Sir W. Scott says in *The Louis*. Spain and Port-

(*a*) The several cases cited, will be found in the Appendix to the present volume of these reports, p. 40–48.

ugal are among the countries who have issued the most formal declarations against this trade, although they have not yet taken the most effectual measures to suppress it By the treaties between these powers and Great Britain, they have stipulated the entire abolition of the slave-trade north of the equator. But their authentic declarations pronounce it to be unlawful and inhuman, wherever carried on ; and the permission to continue it south
*80] of the line can only *affect them, and their subjects, and the powers with whom they have made such treaties. Their subjects cannot avail themselves of the permission, so far as other nations are concerned. Those nations have a right to look to the declarations, as authentic evidence of the understanding of the Spanish and Portuguese governments, as to the law of nations. But suppose they can avail themselves of the permission to trade in slaves within the limits prescribed by the treaties ; the *onus probandi* is thrown upon them to bring themselves within those limits. This they have failed to do, by satisfactory evidence.

And even if the law was in their favor, and they had shown the trade in which they were engaged to be within the limits permitted by the treaties, such a general claim could not be given in, by the consuls of Spain and Portugal, for their fellow-subjects. The court has a right to the oath of the individual owners, as to their proprietary interest, and to explain the other circumstances of the case. As to the Portuguese claim, the owners are still unknown, and it is impossible that restitution can be made to the consul, or even to his government, merely upon evidence that the Africans were taken from a vessel sailing under Portuguese flag and papers, without any specific proof of the individual proprietary interest.

Lastly, if some of these Africans were the property of the claimants, some were not ; and, failing to identify their own, they are not entitled
*81] *to restitution of any as slaves, since among them may be included some who are entitled to their freedom. The proof, by lot, which was substituted by the court below for ordinary legal proof, is not satisfactory, especially, where a claim to freedom conflicts with a claim to property.

Berrien, for the respondents, stated, that a reference to the transcript would show, that of all the parties to this cause in the court below, the United States, and the Spanish and Portuguese vice-consuls are alone before this court ; and that the United States, acquiescing in all the residue of the decree, have appealed from only so much as directs restitution to the Spanish and Portguese vice-consuls.

The allowance of these claims is resisted on various grounds. One prominent proposition pervades the whole of the opposite argument. Unless we can meet and resist it, we must submit to be its victims. It asserts, that the United States have acquired the possession of these negroes lawfully, without wrong ; that with the possession so acquired, they have incurred the obligation to protect them ; that all presumptions are *in favorem libertatis ;* and, whatever the laws of other countries may tolerate or ordain, having ourselves declared the slave-trade to be contrary to the principles of humanity and justice, we are bound, *primâ facie*, to hold that there can be no
*82] property in a human being. *This proposition suggests the following inquiries : 1. Was the possession lawfully acquired? 2. If so, does

the right which is asserted necessarily follow? 3. With a view to their own peculiar condition, can the United States exercise such a power?

1. The lawfulness of the possession will be determined, by considering the capacity of the seizing officer to make the seizure, in connection with the liability of the thing seized. The seizure was made by John Jackson, commander of the revenue-cutter Dallas, belonging to the district of Georgia; and was made off the coast of Florida, while that was yet a province of Spain. The right of Captain Jackson must have resulted from the authority given by his commission, and the laws of the United States. *The Louis*, 2 Dods. 238. It did not result from the act of 1799, providing for the establishment of revenue-cutters; for this only authorizes them to board vessels on the coasts of their respective districts, or within four leagues thereof; nor from the acts forbidding the slave-trade, for these are directed only against vessels of the United States, or foreign vessels intending to violate our laws by introducing negroes into the United States. The president is, indeed, authorized to employ the armed vessels of the United States, to cruise on the coasts of the United States, or territories thereof, or of *Africa, or elsewhere, and to instruct them to bring in all vessels found contravening those acts. [*83 But the laws of the United States can operate only on American vessels, on American citizens on board of foreign vessels, or on such vessels within the limits and jurisdiction of the United States. Besides, it is not pretended, that the revenue-cutter Dallas had been selected as a cruising vessel, under these acts, or that Captain Jackson had received any instructions from the president of the United States. Neither can the seizer derive any aid from the acts to preserve the neutral relations of the United States: for although the courts of the United States will restore property taken in violation of these acts, when it is found within their jurisdiction, yet they do not authorize the cruisers of the United States to rove the ocean in search of objects on which that jurisdiction may be exercised.

So far, then, as it depends on the official character of the seizer, the act was lawless. The thing seized was a Spanish vessel, in the possession of persons, some of whom were American citizens, who had captured it *jure belli*, under the flag of Artegas, or of Venezuela, and in a vessel which had been fitted out, or whose armament had been increased, in the United States. The right to seize for a violation of the acts to preserve the neutral relations of the United States, has been already spoken of; but the adverse argument considers these captors as pirates, and asserts the right of every individual to war *against them, as enemies of the human race. The answer is, 1. The seizure by Captain Jackson was not made on that [*84 ground. The libel alleges the seizure to have been made for a violation of the act of 1818, prohibiting the slave trade. 2. The courts of the United States have declined to decide, that such an act would amount to piracy. 3. To put himself in a situation to make this seizure, Captain Jackson abandoned the duty enjoined upon him by his commission, and the laws of the United States, by leaving the limits intrusted to his vigilance. If he had lost his vessel, could he have justified himself before a court martial. 4. But if these men were pirates, and lawfully brought in, then the Spanish property was, from the moment of its introduction, under the protection of the ninth article of the treaty of San Lorenzo el Real.

Neither have the United States acquired any rights to enforce against these foreigners their own speculative notions on this subject, in consequence of being actors. All parties are actors in a court of admiralty, and these parties only became so, after their property had been taken into the custody of the marshal, and at the suit of the United States. But they were entitled, under the treaty, to have restitution of their property, without being put to other proof than that it was found in their possession.

*85] 2. If the possession had been lawfully acquired, *could the court refuse restitution, on the ground suggested? The great case on this subject, is that of *The Louis*, 2 Dods. 243, 249, 264, our adversaries agree to refer the question to its decision. It is a singular mistake, to suppose that Sir W. Scott directed restitution, solely on the ground of the unlawfulness of the seizure; and thence to infer, that if the seizure had been lawful, he would have condemned. On the contrary, admitting the lawfulness of the seizure, he decides expressly that restitution must notwithstanding be awarded.

3. With a view to their own peculiar situation, could the United States maintain the doctrines contended for? It is said, that, having promulgated our policy in relation to this subject, we have thereby given a warning to slave-traders, which they are bound to respect—a pledge to the rest of the world which we are bound to redeem. But what is this policy, which we have thus notified to the world? It is to be found in our laws, inhibiting the slave-trade. The penalties of these are denounced against our own vessels, and our own citizens, who shall engage in this traffic anywhere; and against foreigners and their vessels, who pursue it for the purpose of introducing negroes into the United States. There is no warning to the subjects of Spain and Portugal, quietly pursuing this traffic under the sanction of

*86] their own laws. *The notion of the pledge is equally visionary. I find it difficult to form a conception of a pledge, which the party making it can at any time capriciously recall; and yet no one doubts that an act of the American congress can, at any moment, throw open the slave-trade.

These considerations apart, would it become the United States to assume to themselves the character of censors of the morals of the world of this subject? to realize the lofty conception of the adverse counsel, and consider themselves as the ministers of heaven, called the wipe out from among the nations the stain of this iniquity? Might not the foreign claimant thus rebuke them, in the strong language of truth? For more then thirty years you were slave-traders; you are still extensively slave-owners. If the slave-trade be robbery, you were robbers, and are yet clinging to your plunder. For more than twenty years, this traffic was protected by your constitution; exempted from the whole force of your legislative power; its fruits yet lie at the foundation of that compact. The principle by which you continue to enjoy them, is protected by that constitution, forms a basis for your representatives, is infused into your laws, and mingles itself with all the sources of authority. Relieve yourselves from these absurdities, before you assume the right of sitting in judgment on the morality of other nations. But this you cannot do. Paradoxical as it may appear, they constitute the very bond

*87] of your union. The shield of your constitution protects them from your touch. *We have no pretence, then, to enforce against others

our own peculiar notions of morality. The standard of morality, by which courts of justice must be guided, is that which the law prescribes. *The Louis*, 2 Dods. 249.

The learned counsel here proceeded to examine the evidence of proprietary interest, and insisted that (besides the other testimony) the official interposition of the Portuguese government supplied the place of proof of individual interest, and established the legality of the traffic. *The Bello Corrunes*, 6 Wheat. 152.

The objection to the decree of the circuit court, on the ground, that the distribution of the negroes was directed to be made by lot, was answered by the following considerations: 1. It appearing that the negroes found on board the Antelope consisted of three distinct parcels, taken from American, Spanish and Portuguese vessels, the obligation to protect the former, was equal to, and not greater than, that which required the restoration of the latter. The capture by Smith being considered, as in the argument of our adversaries it is considered, as piratical, the right of the Spanish claimant to restoration under the treaty, was the primary right, as founded on the treaty, which is the supreme law; and in the fair construction of that treaty, it extended to everything found on board the Spanish vessel. Then, the proof which should diminish that right, was to be furnished by those who sought to diminish it. *2. It being ascertained, [*88 that these negroes were property, they were liable to distribution as other property; and notwithstanding the assertion to the contrary, the lot is often and legally resorted to, to separate undivided interests. 3. As between the Spanish and Portuguese claimants, no question on this point can arise here, because they have not appealed. 4. The United States cannot question this part of the decree, because they have not only not appealed from it, but have actually proceeded to enforce it *ex parte*, and have received restitution by lot of the negroes taken from the American vessel.

The United States have, then, derived no right to refuse restution, from the manner in which they have acquired possession. They are not entitled, by law, or the stipulations of treaty, to apply their speculative notions of morality to the subjects of Spain and Portugal. They have ill-grounded pretensions in reference to this ill-fated subject, to set themselves up as the moral censors of the civilized world. Here is evidence of a proprietary interest to satisfy the mind beyond a reasonable doubt, and it is wholly uncontradicted; and the passport of the King of Spain, and the interposition of the government of Portugal, show, if there be any necessity for it, the legality of the traffic, as to their respective subjects.

On what ground, then, is restitution refused? *It is said, the slave- [*89 trade is unlawful, contrary to the principles of the justice and humanity; and that no right can be derived from so nefarious a traffic. Our inquiry is, by what law, which this court is competent to enforce, is it inhibited? 1. Is it contrary to the law of the nations? 2. Is it contrary to the laws of the sovereigns of the claimants? and can this court refuse restution for that cause? 3. Is it contrary to the laws of the United States? and can those laws be enforced against these claimants?

I. What is the slave-trade, considered as a subject on which the law of nations can operate? Slavery exists, and has from all time existed, in Africa, and in many other countries. Where it exists, there will, of course,

be an interior traffic in slaves, which the law of nations cannot touch. It is only on the transportation of negroes between two countries mutually tolerating slavery, that this operation is contended for. But this transportation is but an incident to the original sin of slavery. If humanity nerves the arm of the law, why is its force spent on the incident? Why is it powerless in relation to the principal wrong? If the traffic in slaves be considered as increasing the number of victims, by affording a market for them, what is it then but an aggression by the subjects of one nation on the rights of another? If the nation forbids it, the offender is punished by the municipal law; if
*90] the nation *permits it, she herself becomes the aggressor. In either case, how does it concern other nations?

The law of nations may be defined to be a collection of rules deduced from natural reason, as that is interpreted by those who adopt them, and resting in usage, or established by compact, for regulating the intercourse of nations with each other. Rights and obligations are interior between sovereign and people, and are regulated by the municipal law; or exterior, between nations considered as moral persons; and these are regulated by the law of nations. Now, the slave-trade is not contrary to the natural law of nations, because, until recently, it was universally tolerated and encouraged. It is not contrary to the positive law of nations; because there is no general compact inhibiting it; and nothing is more certain, than that the usage, or compact, even of a majority of nations, cannot produce rights or obligations among others. To what other evidences of the law of nations can we resort, except those of usage and compact; the former interpreting the rules of natural reason, the latter stipulating those of positive institution? From this general view, it would seem, that the slave-trade is untouched by the law of nations. Let us render our inquiries more particular.

Is this traffic considered to be contrary to the law of nations, by the
*91] statesmen and jurists of Europe and America? *We are all aware of the conferences of the European powers on this subject, at Vienna, at Aix la Chapelle, and at London. But all the efforts of Great Britain to have it so denounced, were ineffectual. The marginal references point to the answers of the several powers respectively, and to the note and the answer of Lord Castlereagh; and all of them distinctly show, that the inhibiting of this traffic finds no place in the code of international law. 4th Report African Institution; Russia, 20, 21; France, 23, 24; Austria, 26; Prussia, Ibid.; Lord Castlereagh, 19, 20, 31, 32. The reports of various committees of congress in the United States, also clearly prove, that, in the view of American statesmen, this traffic is not inhibited by the law of nations, since the object of them all is to devise means by which it may be so inhibited.(*a*) After all, these conferences are only valuable, as evidence of opinion, since they could not effect any change in the law of nations. On this subject, the opinion of Sir W. Scott is distinctly expressed, in the case of *The Louis*, 2 Dods. 252–3. Among jurists, we find the judges of the K. B., in England, denying that the slave-trade is contrary to the law of nations. *Madrazo* v. *Willes*, 3 B. & Ald. 353. And the same doctrine is announced by Sir W.

(*a*) See Appendix, Note I. p. 3–32.

Scott, after the most elaborate investigation, in the case of *The Louis*, 2 Dods. 210.

*The only opposing cases are those of *The Amedie*, 1 Acton 240, and *La Jeune Eugenie*, 2 Mason 409. And first, of *The Amedie*. It [*92 is most obvious, that this case has not been considered by the statesmen of Europe as establishing the doctine contended for. The conferences to which we have just referred, look to a general compact among nations, as the only mode by which this traffic can be inhibited, and propose, by general suffrage, to declare it piracy, admitting, at the same time, that their views may be defeated by the refusal of any one state. But if the British ministry had so considered this case, they would most surely have availed themselves of it in these conferences. That it was not so viewed by Sir W. Scott is most certain; or, bound as his judicial conscience was by the decision of the court of appeals, he could not have pronounced the opinion given in the case of *The Louis*. The argument in the case of *The Amedie*, is founded entirely on the effect of the British act of parliament. Before the passing of that act, the learned judge declares, that no court in England could have pronounced the slave-trade to be illegal; *since*, it is *primâ facie* illegal everywhere, and on principles of universal law, a claimant is not entitled to be heard in any court. We inquire—

1. If, before the enactment of the British act of parliament, the slave-trade was not forbidden, how that act could have changed the universal; *law? It is said, that that act, *proprio vigore*, rendered it, *primâ facie*, illegal everywhere, incapable, abstractly, of having a legal exis- [*93 tence. Are these not mere caballistic terms, too occult for the apprehension of a legal mind? Consider the operation ascribed to this act of parliament. Jurisdiction, derived from place, is confined to the territory of the sovereign, from the person, to his own subjects; but here is an act of the British parliament, which, according to Sir Wm. Grant, operates locally throughout all space, and personally over every individual in the various communities of nations. Sir W. Scott holds a doctrine directly opposite to this, in the case so often cited. 2 Dods. 239. It did not arise from the locality of the tribunal; for it was solemnly held, in the case of *The Maria*, 1 Rob. 350 (the Swedish convoy), that this could not influence its decisions.

2. By what rule, other than that of *sic volo sic jubeo*, did the master of the rolls throw the burden of proof on the claimanls? It is said, because the slave-trade is illegal, contrary to justice and humanity, that human beings are not the subjects of property. The obvious answer is, this is a *petitio principii*. It assumes the very question in controversy. The case admits, and so the fact was, that up to the time when this act was passed, with the exception of America, this traffic was everywhere lawful; that property *was acquired by it. If, at that time, it had become [*94 otherwise, the change must have been effected by some positive act. The assertion that such an act existed, was an affirmative proposition. He who made it, was bound to prove it. Such is the opinion of Sir W. Scott and of Sir J. Mackintosh, 2 Dods. 242; 27 Parl. Deb. 253–4. Nay, in the case of *La Jeune Eugenie*, it is admitted, that a prohibitory act of the country of which the claimant is a subject, must concur with the general law of nations, to authorize the forfeiture. Now, if the *onus* be on the claimant, it is certainly not necessary for the libellant to show a prohibitory act; all that in

such case is essential is, that the claimant should fail to prove a permissive one. The opinion of Sir W. Scott, in relation to this case, will be found in *The Fortuna*, *The Diana* and *The Louis*, 1 Dods. 85, 95; 2 Ibid. 210, 260.

3. How can even the rigid rule laid down by that court be availed of? The court expressly decline to decide what will be the effect of the proof, if made, declaring that a claimant, under such circumstances, is not entitled to be heard in any court. *La Jeune Eugenie*, 2 Mason 409. Of what avail, then, is the proof?

4. I find a difficulty in understanding what principles of the law of nations are not general in their operation, and yet the inhibition of the slave-trade is said not to be one of the general principles of that law.

*95] 5. The argument seems to me to be self-destructive. *It admits, that this novel principle cannot be enforced against the subjects of those nations whose municipal regulations permit it. One of two things seems to follow. Either the slave-trade is not contrary to the law of nations, or the municipal law may permit what the law of nations forbids. Can any single nation control the universal law? strike piracy from the law of nations? or deprive a belligerent of the rights of contraband, or of blockade? The learned judge, in the case of *La Jeune Eugenie*, thus solves this difficulty. If a nation permits this traffic, the wrong is confined to the nation injured; and other nations are neither bound nor permitted to interfere. But the question recurs, what is the consequence, if a nation inhibit it? The offence must be against the power inhibiting, not, surely, against other nations, who, *ex concessis*, had no power either to inhibit or to permit. On this point, also, we are fortified by the opinion of Sir W. Scott. 2 Dods. 251. The case of *The Amedie* may, then, we think, be considered as an experiment; a trial of the legal intelligence of Europe and America, and affords no safe guide for the decisions of this tribunal.

It is obvious to remark, that the case of *La Jeune Eugenie* is referred to by our adversaries, under circumstances of some singularity. The principles advanced by the learned judge, in delivering his opinion in that case,

*96] are maintained *by our opponents, while they revolt from the conclusion to which those principles conducted him. What we ask in this case, is precisely what was done in the case of *La Jeune Eugenie*, that the property should be restored to the consular agents of Spain and Portugal; and yet that very case is relied upon as an authority against this concession.

The proposition, that the slave-trade is inconsistent with the law of nations, is maintained on the following, among other grounds, in the case of *La Jeune Eugenie:* 1. Its accumulated wrongs, and consequent inconsistency with that code. "It is of this traffic, in the aggregate of its accumulated wrongs, that I would ask" (says the learned judge), "if it can be consistent with the law of nations?" To us, the inquiry seems to be vain and nugatory. The *gravamen* of the question is equally applicable to any other act of atrocity, and to any other code of laws. Murder, robbery, &c., are attended with accumulated wrong. They, too, are inconsistent with the principles of justice and humanity, which lay at the foundation of international law. Do the laws which forbid these crimes, therefore, form part of that universal law? are they governed by it, or punished by it?

2. Again, it is said, the law of nations is deduced from the general princi-

ples of right and justice; that whatever can be deduced from these principles, as applicable to nations, and to the *nature of moral obligation, exists theoretically in the law of nations, and may be enforced. [*97
It seems to us, that nothing is gained by the first of these propositions. The principles of right and justice, it is most certain, are capable of being applied equally to the law of nations and to the municipal law; to nations and to individuals. But the question here is, whether, in their application to the concerns of individuals, by the act of one or more nations, or of any number less than the whole, they do not rather constitute a part of the municipal law of the nations applying them, than of the general law of nations? The second proposition appears to us to be too broad. Without doubt, it is the right and duty of every nation to prohibit crimes, and among others, this crime. It is entirely consistent with moral obligation, that they should do so. What then? Is the act of a single nation, fulfilling this duty, less simply municipal, because the morality of the act which it performs is of universal obligation, equally affecting all nations?

3. It is urged, moreover, that the slave-trade is in violation of some of the first principles which ought to govern nations. The assertion is unquestionable. But may not the same thing be said of many acts, which are confessedly the objects of municipal regulations alone? Smuggling often begins in perjury. It is prosecuted in violation of the duty of the citizen. Its tendency is to corrupt the morals of the community. It sometimes eventuates in murder. Is it an *offence cognisable by the law of nations, as an infraction of that law? [*98

For these reasons, we submit to the court, that restitution cannot be refused, on the ground that the slave-trade is contrary to the law of nations.

II. Is the traffic contrary to the laws of Spain and Portugal; and can the court enforce those laws by refusing restitution? 1. The preceding argument, the decision in *The Louis*, and even that of *La Jeune Eugenie*, are referred to, to prove that, as to this point, the burden of proof is on the appellants. They must show a prohibitory act. 2. If the burden of proof be with us, we have furnished the evidence. The royal passport, and the order of the Portuguese government are decisive on this point. The sanction of the colonial governor was considered sufficient, in the case of *The Diana*, 1 Dods. 95. 3. The laws of Spain and Portugal are merely municipal, and from the very nature of their provisions, incapable of enforcement by the courts of the United States. 4th Report African Inst. Abstract, &c. 26. 4. Each sovereign has a right to the forfeiture, from the time of the commission of the act. He has the right of remission, and of pardon. Especially, he has a right to decide, in his own tribunals, on the conduct of his own subjects, in relation to his own laws. 2 Dods. 256. A monarch, or a nation, *stripped of these necessary attributes of sovereignty, would cease to be sovereign. The attempt by the United States to enforce these laws would be a usurpation. [*99

III. Can this court apply the laws of the United States to this claim of foreign subjects? 1. The question has been answered in the preceding argument. The laws of the United States are strictly municipal, confined to citizens of the United States, to persons committing offences on board vessels of the United States, to foreigners seeking to introduce negroes into the

United States; the claimants are not within these provisions. 2. Though the law of the United States has made this traffic piracy, it has not, therefore, made it an offence against the law of nations. The jurisdiction of the circuit court of the United States is exclusive for the punishment of this offence. Besides, no particular nation can increase or diminish the list of offences punishable by the law of nations. Rutherforth 488, 491. Such, in the opinion of the judge of the high court of admiralty in England, is the only legitimate operation of the British act of parliament on this subject. 2 Dods. 239. Such, in the opinion of congress, is the necessary limitation of ours.(*a*)

*100] *C. J. Ingersoll*, on the same side, insisted, *that there was no evidence in the cause which sustained the allegation, that this vessel was found hovering on the coasts of the United States, when she was seized; and if it were so, that would furnish no sufficient reason for refusing restitution to the Spanish and Portuguese claimants, who were unaffected by the misconduct of the piratical captors of their property. *The Josefa Segunda*, 5 Wheat. 338. Here, the capturing vessel was illegally equipped in our ports, and the libellants have established their claim to the property in question, under the laws of their own country. The original capture was not only made in violation of our neutrality, but was an act of piracy, and the duty of making restitution becomes imperative, under the treaty with Spain. It appears from the treaties and edicts which have been referred to, that the slave-trade was then tolerated by Spain and Portugal, south of the equator; and, consequently, the presumption is, that Africans, obtained within the permitted limits, are legitimately held as slaves. This presumption is as strong as that which prevails in those states of the Union where slavery exists. None of the judicial decisions cited have gone the length of asserting, that the nations who have prohibited the slave-trade can compel others to join in that prohibition. The case of *The Amedie* itself, as explained by Sir W. Scott in *The Diana*, 1 Dods. 98–9, does not extend the principle

*101] by which the general prohibition *is to be enforced in the courts of another country, to the case of claimants engaged in the trade permitted by the law of their own country.

Is, then, the slave-trade contrary to the law of nations? That law is a body of political ethics applied to nations. Not being reduced to a written code, we must seek for it in the elementary writings of publicists; in judicial precedents; and in general usage and practice. *United States* v. *Smith*, 5 Wheat. 160. Sir W. Scott adds to these ample sources, the more limited and appropriate standard of ancient and admitted practice, not only by treaties, but by the laws, ordinances and former transactions of civilized states. *Le Louis*, 2 Acton 249. The great men who drew up the report upon the Silesia loan, declare the law of nations to be "founded on justice, equity, convenience and the reason of the thing, and confirmed by long usage."

As to the judicial precedents, they neutralize each other, if, indeed, the authority of the original case of *The Amedie* be not entirely subverted by

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(*a*) See Appendix, Note I. p. 3–24; Report of Committee of the House of Representatives, 1824, 1825.

that of *Madrazo* v. *Willes*, and the admirable judgment of Sir W. Scott in *The Louis*. To the new conventional law which is now attempted to be established in the world, the United States have not yet become parties. We cannot enforce the treaties between other powers, by which the African slave-trade is denounced *as contrary to humanity and justice, and is prohibited to their subjects. No jurist has been cited, from the earliest to the most recent, who has pronounced the trade contrary to the positive law of nations. So that the court is left entirely to the light of reason, in determining the question whether it be contrary to the law of nature, as properly applied to the conduct of nations and states. If this prohibition be a part of the law of nations, it must be of the modern law of European nations. Are the United States parties to that law? And if they are, can they enforce its penal sanctions against other nations not parties to it? [*102

Many principles have been, at various periods, asserted by confederacies of nations, which have ultimately failed to obtain a place in the general code of nations. The principles of the armed neutrality of 1780, were maintained by nearly all the powers of Europe against Great Britain alone; and yet her doctrines have not ceased to regulate the conduct of nations engaged in war. It is, at least, doubtful, which is the true law of nations. The supposed inconsistency of the slave-trade with the law of nature, will not alone condemn it in the view of a court of justice, so as to authorize all nations to treat it as a crime, or to enforce its prohibition by the confiscation of the property of those engaged in it. It becomes all reflecting men to think seriously, and speak cautiously, on the subject of the illegality of a trade. which was once universally participated in by the civilized nations of Europe and America. *This fact is avowed by all the speakers on both sides of the abolition question, in the British parliament. It is matter of notorious history, that both in ancient and modern Europe, the condition of slavery, and the commerce in slaves, were sanctioned by the universal practice, and law of nations. 4 Hallam's Middle Ages 221; 1 Gibbon's Decline and Fall 63. The very definition of slavery, in the civil law, which has been copied by writers on public law, shows, that it was an institution established by positive law, against the law of nature: *Servitus est constitutio juris gentium, qua quis dominio alieno contra naturam subjicitur.* Domat, Loix Civ., Prel. tit. 2, § 2; Wood's Inst. Imp. & Civ. Law, Introd. 93; Grotius, de Jure Belli ac Pacis, ch. 2, c. 5, § 27; Puffend. b. 3, 2, § 8; 1 Rutherf. b. 1, c. 20, p. 474; Bynk. Quæst. Jur. Pub. lib. 1, c. 3, p. 20, Du Ponceau's Transl. The old common-law writers are full of the subject of villeinage, which, it is well known, was not abolished in England, until after the period when the African slave-trade commenced. The offence of vagrancy was punished with slavery by the statute 1 Edw. VI., c. 3; 4 Reeves' Hist. Law, 451. The first case relating to the African slave-trade, is that of *Butts* v. *Penny*, determined in the 29 Charles II., being trover for negroes. The special verdict found, that they were usually bought and sold in India. 3 Keb. 785; 2 Lev. 201. In a subsequent case, trover was brought for a negro, in England. Holt, C. J., said, that trespass was the kind of action, but that trover *would lie, "if the sale was in Virginia." Other cases turn upon questions as to the form of action, but they all concur in establishing the right to this species of property. 2 Salk. 666; 1 Ld. Raym. 146; [*103 [*104

5 Mod. 185 ; Carth. 596. In 1689, all the judges of England, with the eminent men who then filled the offices of attorney and solicitor general, concurred in opinion, that negroes were "merchandise," within the general terms of the navigation act. 2 Chalmers' Opinions 263. The famous *Case of Somerset*, 20 Cobbett's State Trials 1, whilst it determined, that negroes could not be held as slaves in England, recognised the existence of slavery in the colonies, as does the whole legal policy, both of that country and of France. Valin, Ord. de la Mar. lib. 2, tit. 1, du Capitaine, art. 16. The slave-trade was long the subject of negotiations, treaties and wars between different European states, all of which consider it as a lawful commerce. The very declarations in the recent European congresses, and the negotiations between Great Britain and the United States, all show that the slave-trade has not yet been prohibited by anything like the unanimous consent of nations, so as to make it absolutely unlawful in the view of a court of the law of nations.

The United States have done all in their power, consistently with their constitution, to abolish the trade. But they have sought to abolish it by municipal means only. They have prohibited it to their own citizens, not
*105] only by the ordinary *penal sanctions of revenue and trade laws ; but they have made it a criminal offence, and punished it as piracy. No treaty has yet been ratified with any foreign power, by which they engage to co-operate with the United States in the prohibition ; and yet the court is called on to anticipate, by judicial legislation, the exercise of the treaty-making power, and to refuse restitution to the subjects of Spain and Portugal, of that which they claim as their property, under the laws of their own country. This property has been brought into our jurisdiction, in consequence of its having been taken from the possession of the original owners, by armaments fitted out in our ports, in violation of our neutrality. The duty of restitution is, therefore, plain, under the laws and treaties of the Union, and the uniform decisions of this court.

The learned counsel also entered into a minute and elaborate examination of the proofs of proprietary interest, and reiterated many of the grounds of argument insisted on by his associate. But as they have been already fully stated in the report of Mr. Berrien's argument, it has not been thought necessary to repeat them.

The *Attorney-General*, for the appellants, in reply, answered the objection, that the only question presented by the pleadings, on the part of the United States, was, whether this was a trade in breach of the slave-trade acts ? He insisted, that as the libels filed by the Spanish and Portuguese con-
*106] suls, demanded restitution, upon the *ground of the illegal armament in our ports, and the claim, or defensive allegation, given in by the United States, resisted that demand upon two specific grounds : 1st. That the Africans were taken on board with intent to import the same, &c.; and 2d. That the vessel was found hovering on the coast, with the same persons on board ; if the testimony disclosed a case on which it would be proper for the United States to interpose, which was not reached by the pleadings, the consequence would be, not that the decrees should be affirmed, but that the cause would be remanded, with directions to amend. And supposing the United States to have made no case by their pleadings, the ques-

tion was, have the libellants made a case which justifies the decree? The Africans are parties to the cause, at least, such of them as are free; and even if the other parties had colluded to make a case for restitution, they would still have been entitled to the protection of the court.

As to the seizure of the revenue-cutter, he insisted that it was justifiable, under the slave-trade act of the 2d of March 1807, § 7, which forfeits "any ship or vessel found hovering on the coast of the United States, having on board any negro, mulatto or person of color, for the purpose of selling them as slaves, or with intent to land the same in any port or place within the jurisdiction of the United States." This act made no distinction as to the national character of the ship, whether it belonged to citizens or foreigners. So also, the act of the 15th of May 1820, c. 113, § 5, makes the slave-trade *piracy, where it is carried on by citizens of the United States. So that, whether we regard the predicament of the vessel, or of the persons engaged in the transaction, the seizure was fully warranted by the laws applicable to the case. Captain Jackson performed only an act of duty, in capturing and bringing in the vessel for adjudication. [*107

The question, then, recurs, what was the condition of the Africans thus brought in, as defined by our laws; which must be the rule to guide the determination of the court. They are placed under the protection of those laws, and are, *primâ facie*, free. On whom, then, is the *onus probandi* thrown? Being here rightfully, they are under the protection of our laws and courts of justice. No person can claim a right to take them from the custody of the court, and carry them away into slavery, but those who can prove them to be slaves; who can prove it, by such evidence as ought alone to be held sufficient in a question of freedom or slavery. This view of the case settles the question of the burden of proof. He who would seek to disturb the apparently rightful condition of things, assumes the burden of proving his own right. This is the ordinary doctrine of the court of admiralty, if the seizure has been rightful, and the case is *primâ facie*, a case for condemnation, the *onus probandi* is thrown upon the claimant to prove his property, and his right to restitution. But in the present case, the rule is peculiarly applicable, and the clearness and fulness of the *proof ought to be in proportion to the importance of the matter in controversy. The case is one of human liberty. The Africans stand before the court, as if brought up before it upon a *habeas corpus*. Suppose them here, on such a process, asserting their freedom, and claiming your protection; what kind of proof would you exact from those who claim to hold them in slavery? Most certainly, you would not demand inferior evidence to that which you require in a case of life or death. The witnesses must present themselves fairly before you. Their statements must be clear and consistent, and such as to command the confidence of the court. They must be sustained by the documentary evidence; and, where any doubt is left, the decision should be *in favorem libertatis*. [*108

The claimants wish the court to consider this as a question exclusively between Spain on one side, and the United States on the other, in which these persons are to be considered as "effects," and "merchandise," taken by pirates, and as such liable to restitution under the stipulations of the treaty of 1795. But is the court at liberty so to consider them, under the laws of our own country? Some of them are confessedly free, because the

decree has established the fact. Which of them are slaves, it is impossible to determine, by any rule of evidence known to our practice. The claimants must prove their property; and this involves the necessity of proving that these persons are property. They must prove that they are property, and
*109] that they are *their* property. Possession may be a sufficient *indicium* of property, in those places where the local law makes a particular subject property. The local laws of some of the states, generally, make persons of color, *primâ facie*, slaves, and throw the burden of proof upon them to show the contrary. But even in those states, the possession of a newly-imported African would not be evidence of property. The question, therefore, recurs, is it enough, to justify the court in delivering up these persons to the parties for whom they are claimed, to show a possession on the high seas? Is the mere possession of such persons, a sufficient evidence of their slavery, to justify it in restoring them as claimed? The question is not, whether the cruisers of the United States have a right to seize a Spanish slave-ship upon the high seas, bring her in for adjudication, and throw the burden of proof of proprietary interest upon the claimants; any such right of interference with foreign states, their subjects or people, is disclaimed. But these people are here, in the custody of the court, without any invasion of the sovereignty of foreign nations on our part; for the piratical vessel, which took them out of other vessels, sailing under Spanish and Portuguese colors, was not acting under the authority, or upon the responsibility of the United States. They are brought here by a seizure authorized by our own laws, and perfectly consistent with the sovereignty and independence of Spain and Portugal. The laws, under which they
*110] were seized and brought *in, declare them to be entitled to their freedom. Can the court surrender them as slaves, upon no other proof than mere naked possession? Is the possession of Africans, on the coast of Africa, sufficient evidence of title, *per se*, without connecting that possession with any law, international or municipal, to justify the court in taking an active part in consigning to slavery these persons, thus placed under its protection? It is unnecessary for the United States to show, that the possession was *primâ facie* wrongful. The opposite parties, who call upon the active aid of the court to maintain that possession, must prove that it was rightful.

The real question, then, is, whether the mere possession, under such circumstances, is sufficient evidence of title, not as against the United States, but as against these Africans? The court will not shut their eyes to what is passing in the world. Such a possession may be evidence of title, in some of the states of this Union, and in the European colonies. It might have been so, formerly, on the coast of Africa. Both it is not so now, even under the municipal laws of Spain and Portugal. Both of these powers have prohibited the slave-trade on the coast of Africa, to the north of the line, since 1815. It was prohibited, long before, by the United States and Great Britain, on every part of the coast, and of the world. It has been prohibited by France, Holland and all the principal maritime states of Europe. Under these circumstances, it is impossible for the court to say, that possession on the coast of *Africa is so habitually found in connection with
*111] right, under the municipal laws of the country to which the vessel belongs, as to constitute *primâ facie* evidence of property. The presump-

tion ought rather to be reversed. The natives of Africa, however imperfect may be their civilization, compose an independent nation. By the general law of nations, they are as free as the Spaniards or the Portuguese. Hence, it may be seen, that the mere possession of an African, claiming him as a slave, by a Spanish ship, on the coast of Africa, would no more prove the African a slave, than the possession of a Spaniard, by an African ship, on the coast of Spain, would prove the Spaniard a slave. The actual possessor must, therefore, show some other right than mere possession. The Spaniard alleges, that it has been the practice of the civilized and Christian nations of Europe, to make slaves of Africans, for three centuries; and hence, that, by the law of nations, he has a right to make slaves of them. The African opens the volume of the law of nations, and shows, that the foundations of that code are laid in justice and humanity, and that no legitimate right can grow out of a violation of these principles. If he is answered, that the trade had its origin in humane motives, he may well upbraid us for such a vindication. Nor does the existence of slavery in the United States form any excuse or palliation, for perpetuating and extending the guilt and misery of the slave-trade. Slavery was introduced among us, during our colonial state, against the solemn remonstrance *of our legislative assemblies. Free America did not introduce it; she led the way in [*112 measures for prohibiting the slave-trade. The revolution which made us an independent nation, found slavery existing among us. It is a calamity entailed upon us by the commercial policy of the parent country. Hargrave's Argument, in *Somerset's Case*, 11 State Trials. There is no nation which has a right to reproach us with the supposed inconsistency of our endeavoring to extirpate the slave-trade as carried on between Africa and America, whilst, at the same time, we are compelled to tolerate the existence of domestic slavery under our own municipal laws.

It may well be asked, whether Africa is without the pale of the law of nations. Are not Africans, in their own country, under the protection of that law? If it be answered, that the condition of slavery has existed from time immemorial, growing out of the exercise of the rights of war, as understood and practised in that barbarous country, it may be replied, that those very wars have been stimulated by the arts and avarice of the slave-traders. This fact is shown by the most conclusive evidence, in the examinations before the house of commons, in 1791. It appears also by the more recent reports of the American and British naval officers, and the agents of the London African Institution, and American Colonization Society. Unless, therefore, the slave-traders can derive a right, founded *upon wrong practised at their instigation, this argument cannot avail them. [*113

Their possession, then, derives no support from the law of nations. Supposing that by the municipal law of Spain, these persons are slaves, whilst by your law, they are free; being brought into this country, without any trespass on the sovereign rights of Spain, is the court bound to restore them, from comity? If the general law of nations binds us to do this, it also binds us to deliver up persons charged with crimes, or even with political offences. But this is a principle which has been repudiated by all nations. *Somerset's Case*, 11 State Trials 339, 346. The stipulation in the Spanish treaty, by which we are bound to restore the ships and effects, or merchandise, of Spanish subjects, when captured within our territorial jurisdiction,

or by pirates on the high seas, does not apply. These Africans are not "effects," or "merchandise." To say that they are so, is to beg the whole question in controversy. The opinions of the twelve judges of England, and of the law-officers of the crown, in 1689, which have been cited to show that negroes were considered as merchandise, within the terms of the navigation act, only prove that they were so considered at that time with reference to the British colonies, into which their importation was then permitted. Even at that period, negroes, in England, were not considered as merchandise, or the objects of traffic, or liable to be held in servitude. Everything must
*114] depend upon the law *prevailing at the time and place. By the law applicable to this case, these persons are free ; they cannot, therefore, be considered as merchandise or effects, within the treaty.

March 18th, 1825. Marshall, Ch. J., delivered the opinion of the court, and after stating the case, proceeded as follows :—In prosecuting this appeal, the United States assert no property in themselves. They appear in the character of guardians, or next friends, of these Africans, who are brought, without any act of their own, into the bosom of our country, insist on their right to freedom, and submit their claim to the laws of the land, and to the tribunals of the nation. The consuls of Spain and Portugal, respectively, demand these Africans as slaves, who have, in the regular cause of legitimate commerce, been acquired as property, by the subjects of their respective sovereigns, and claim their restitution under the laws of the United States.

In examining claims of this momentous importance—claims in which the sacred rights of liberty and of property come in conflict with each other—which have drawn from the bar a degree of talent and of eloquence, worthy of the questions that have been discussed, this court must not yield to feelings which might seduce it from the path of duty, and must obey the mandate of the law.

That the course of opinion on the slave-trade should be unsettled, ought to excite no surprise. The Christian and civilized nations of the world,
*115] *with whom we have most intercourse, have all been engaged in it. However abhorrent this traffic may be to a mind whose original feelings are not blunted by familiarity with the practice, it has been sanctioned, in modern times, by the laws of all nations who possess distant colonies, each of whom has engaged in it as a common commercial business, which no other could rightfully interrupt. It has claimed all the sanction which could be derived from long usage and general acquiescence. That trade could not be considered as contrary to the law of nations which was authorized and protected by the laws of all commercial nations ; the right to carry on which was claimed by each, and allowed by each.

The course of unexamined opinion, which was founded on this inveterate usage, received its first check in America ; and, as soon as these states acquired the right of self-government, the traffic was forbidden by most of them. In the beginning of this century, several humane and enlightened individuals of Great Britain devoted themselves to the cause of the Africans ; and by frequent appeals to the nation, in which the enormity of this commerce was unveiled and exposed to the public eye, the general sentiment was at length roused against it, and the feelings of justice and humanity,

regaining their long-lost ascendency, prevailed so far in the British parliament, as to obtain an act for its abolition. The utmost efforts of the British government, as well as of that of the United States, have since been assiduously *employed in its suppression. It has been denounced by both, [*116
in terms of great severity, and those concerned in it are subjected to the heaviest penalties which law can inflict. In addition to these measures, operating on their own people, they have used all their influence to bring other nations into the same system, and to interdict this trade by the consent of all. Public sentiment has, in both countries, kept pace with the measures of government; and the opinion is extensively, if not universally, entertained, that this unnatural traffic ought to be suppressed. While its illegality is asserted by some governments, but not admitted by all; while the detestation in which it is held, is growing daily, and even those nations who tolerate it, in fact, almost disavow their own conduct, and rather connive at, than legalize, the acts of their subjects, it is not wonderful, that public feeling should march somewhat in advance of strict law, and that opposite opinions should be entertained on the precise cases in which our own laws may control and limit the practice of others. Indeed, we ought not to be surprised, if, in this novel series of cases, even courts of justice should, in some instances, have carried the principle of suppression further than a more deliberate consideration of the subject would justify.

The Amedie (1 Acton 249), which was an American vessel employed in the African trade, was captured by a British cruiser, and condemned in the vice-admiralty court of Tortola. *An appeal was prayed; and Sir [*117
William Grant, in delivering the opinion of the court, said, that the trade being then declared unjust and unlawful by Great Britain, "a claimant could have no right, upon principles of universal law, to claim restitution in a prize court, of human beings carried as his slaves. He must show some right that has been violated by the capture, some property of which he has been dispossessed, and to which he ought to be restored. In this case, the laws of the claimant's country allow of no right of property such as he claims; there can, therefore, be no right of restitution. The consequence is, that the judgment must be affirmed." *The Fortuna* (1 Dods. 81), was condemned on the authority of *The Amedie*, and the same principle was again affirmed.

The Diana (1 Dods. 95) was a Swedish vessel, captured, with a cargo of slaves, by a British cruiser, and condemned in the court of vice-admiralty, at Sierra Leone. This sentence was reversed on appeal, and Sir William Scott, in pronouncing the sentence of reversal, said, "the condemnation also took place on a principle which this court cannot in any manner recognise, inasmuch as the sentence affirms, 'that the slave-trade, from motives of humanity, hath been abolished by most civilized nations, and is not, at the present time, legally authorized by any.' This appears to me to be an assertion by no means sustainable." The ship and cargo were restored, on the principle that the trade was allowed by the laws of Sweden. *The [*118
principle common to these cases is, that the legality of the capture of a vessel engaged in the slave-trade, depends on the law of the country to which the vessel belongs. If that law gives its sanction to the trade, restitution will be decreed; if that law prohibits it, the vessel and cargo will be condemned as a good prize.

This whole subject came on afterwards to be considered in *The Louis* (2 Dods. 238). The opinion of Sir WILLIAM SCOTT, in that case, demonstrates the attention he had bestowed upon it, and gives full assurance that it may be considered as settling the law in the British courts of admiralty so far as it goes. The Louis was a French vessel, captured on a slaving voyage, before she had purchased any slaves, brought into Sierra Leone, and condemned by the vice-admiralty court at that place. On an appeal to the court of admiralty, in England, the sentence was reversed. In the very full and elaborate opinion given on this case, Sir WILLIAM SCOTT, in explicit terms, lays down the broad principle, that the right of search is confined to a state of war. It is a right strictly belligerent in its character, which can never be exercised by a nation at peace, except against professed pirates, who are the enemies of the human race. The act of trading in slaves, however detestable, was not, he said, "the act of freebooters, enemies of the human race, renouncing every country, and ravaging every country, in its coasts and vessels, indiscriminately." It was not piracy. *He also said, *119] that this trade could not be pronounced contrary to the law of nations. "A court, in the administration of law, cannot attribute criminality to an act, where the law imputes none. It must look to the legal standard of morality; and, upon a question of this nature, that standard must be found in the law of nations, as fixed and evidenced by general, and ancient, and admitted practice, by treaties, and by the general tenor of the laws and ordinances, and the formal transactions of civilized states; and looking to those authorities, he found a difficulty in maintaining that the transaction was legally criminal."

The right of visitation and search being strictly a belligerent right, and the slave-trade being neither piratical, nor contrary to the law of nations, the principle is asserted and maintained with great strength of reasoning, that it cannot be exercised on the vessels of a foreign power, until permitted by treaty. France had refused to assent to the insertion of such an article in her treaty with Great Britain, and, consequently, the right could not be exercised on the high seas by a British cruiser on a French vessel. "It is pressed as a difficulty," says the judge, "what is to be done, if a French ship laden with slaves, is brought in? I answer, without hesitation, restore the possession which has been unlawfully divested; rescind the illegal act done by your own subject, and leave the foreigner to the justice of his own coun- *120] try." This reasoning goes far in support of the proposition, *that in the British courts of admiralty, the vessel even of a nation which had forbidden the slave-trade, but had not conceded the right of search, must, if wrongfully brought in, be restored to the original owner. But the judge goes further, and shows that no evidence existed, to prove that France had, by law, forbidden that trade. Consequently, for this reason, as well as for that previously assigned, the sentence of condemnation was reversed, and restitution awarded.

In the United States, different opinions have been entertained in the different circuits and districts; and the subject is now, for the first time, before this court. The question, whether the slave-trade is prohibited by the law of nations has been seriously propounded, and both the affirmative and negative of the proposition have been maintained with equal earnestness. That it is contrary to the law of nature, will scarcely be denied. That every

man has a natural right to the fruits of his own labor, is generally admitted ; and that no other person can rightfully deprive him of those fruits, and appropriate them against his will, seems to be the necessary result of this admission. But from the earliest times, war has existed, and war confers rights in which all have acquiesced. Among the most enlightened nations of antiquity, one of these was, that the victor might enslave the vanquished. This, which was the usage of all, could not be pronounced repugnant to the law of nations, which is certainly to be tried by the test of general *usage. That which has received the assent of all, must be the law of all. Slavery, then, has its origin in force ; but as the world has [*121 agreed, that it is a legitimate result of force, the state of things which is thus produced by general consent, cannot be pronounced unlawful.

Throughout Christendom, this harsh rule has been exploded, and war is no longer considered, as giving a right to enslave captives. But this triumph of humanity has not been universal. The parties to the modern law of nations do not propagate their principles by force, and Africa has not yet adopted them. Throughout the whole extent of that immense continent, so far as we know its history, it is still the law of nations, that prisoners are slaves. Can those who have themselves renounced this law, be permitted to participate in its effects, by purchasing the beings who are its victims ? Whatever might be the answer of a moralist to this question, a jurist must search for its legal solution, in those principles of action which are sanctioned by the usages, the national acts, and the general assent, of that portion of the world of which he considers himself as a part, and to whose law the appeal is made. If we resort to this standard, as the test of international law, the question, as has already been observed, is decided in favor of the legality of the trade. Both Europe and America embarked in it ; and for nearly two centuries, it was carried on, without opposition, and without centure. A jurist could *not say, that a practice, thus supported, was illegal, and that [*122 those engaged in it might be punished, either personally or by deprivtion of property. In this commerce thus sanctioned by universal assent, every nation had an equal right to engage. How is this right to be lost? Each may renounce it for its own people ; but can this renunciation affect others ?

No principle of general law is more universally acknowledged, than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality, that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone. A right, then, which is vested in all, by the consent of all, can be divested only by consent; and this trade, in which all have participated, must remain lawful to those who cannot be induced to relinquish it. As no nation can prescribe a rule for others, none can make a law of nations ; and this traffic remains lawful to those whose governments have not forbidden it. If it be consistent with the law of nations, it cannot in itself be piracy. It can be made so only by statute ; and the obligation of the statute cannot transcend the legislative power of the state which may enact it.

If it be neither repugnant to the law of nations, nor piracy, it is almost superfluous to say, in this court, that the right of bringing in for adjudication, in time of peace, even where the vessel belongs to a nation which [*123 has prohibited the trade, *cannot exist. The courts of no country

execute the penal laws of another ; and the course of the American government, on the subject of visitation and search, would decide any case in which that right had been exercised by an American cruiser, on the vessel of a foreign nation, not violating our municipal laws, against the captors. It follows, that a foreign vessel engaged in the African slave-trade, captured on the high seas, in time of peace, by an American cruiser, and brought in for adjudication, would be restored.

The general question being disposed of, it remains to examine the circumstances of the particular case. The Antelope, a vessel unquestionably belonging to Spanish subjects, was captured, while receiving a cargo of Africans, on the coast of Africa, by the Arraganta, a privateer which was manned in Baltimore, and is said to have been then under the flag of the Oriental republic. Some other vessels, said to be Portuguese, engaged in the same traffic, were previously plundered, and the slaves taken from them, as well as from another vessel then in the same port, were put on board the Antelope, of which vessel the Arraganta took possession, landed her crew, and put on board a prize-master and prize-crew. Both vessels proceeded to the coast of Brazil, where the Arraganta was wrecked, and her captain and crew either lost or made prisoners. The Antelope, whose name was changed
*124] to the General Ramirez, after an ineffectual attempt *to sell the Africans on board, at Surinam, arrived off the coast of Florida, and was hovering on that coast, near that of the United States, for several days. Supposing her to be a pirate, or a vessel wishing to smuggle slaves into the United States, Captain Jackson, of the revenue-cutter Dallas, went in quest of her, and finding her laden with slaves, commanded by officers who were citizens of the United States, with a crew who spoke English, brought her in for adjudication. She was libelled by the vice-consuls of Spain and Portugal, each of whom claim that portion of the slaves which were conjectured to belong to the subjects of their respective sovereigns ; which claims are opposed by the United States, on behalf of the Africans.

In the argument, the question on whom the *onus probandi* is imposed, has been considered as of great importance, and the testimony adduced by the parties has been critically examined. It is contended, that the Antelope, having been wrongfully dispossessed of her slaves by American citizens, and being now, together with her cargo, in the power of the United States, ought to be restored, without further inquiry, to those out of whose possession she was thus wrongfully taken. No proof of property, it is said, ought to be required ; possession is in such a case evidence of property. Conceding this as a general proposition, the counsel for the United States deny its applica-
*125] tion to this case. A distinction is taken between *men, who are generally free, and goods, which are always property. Although, with respect to the last, possession may constitute the only proof of property which it demandable, something more is necessary where men are claimed. Some proof should be exhibited, that the possession was legally acquired. A distinction has been also drawn between Africans unlawfully taken from the subjects of a foreign power, by persons acting under the authority of the United States, and Africans first captured by a belligerent privateer, or by a pirate, and then brought rightfully into the United States, under a reasonable apprehension that a violation of their laws was intended. Being rightfully in the possession of an American court, that court, it is contended,

must be governed by the laws of its own country; and the condition of these Africans must depend on the laws of the United States, not on the laws of Spain and Portugal.

Had the Arraganta been a regularly commissioned cruiser, which had committed no infraction of the neutrality of the United States, her capture of the Antelope must have been considered as lawful, and no question could have arisen respecting the rights of the original claimants. The question of prize or no prize belongs solely to the courts of the captors. But having violated the neutrality of the United States, and having entered our ports, not voluntarily, but under coercion, some difficulty exists respecting the extent of the obligation to restore, on the mere *proof of former possession, which is imposed on this government. If, as is charged in [*126 the libels of both the consuls, as well as of the United States, she was a pirate, hovering on the coast, with intent to introduce slaves, in violation of the laws of the United States, our treaty requires that property rescued from pirates shall be restored to the Spanish owner, on his making proof of his property.

Whether the General Ramirez, originally the Antelope, is to be considered as the prize of a commissioned belligerent ship of war, unlawfully equipped in the United States, or as a pirate, it seems proper to make some inquiry into the title of the claimants. In support of the Spanish claim, testimony is produced, showing the documents under which the Antelope sailed from the Havana, on the voyage on which she was captured; that she was owned by a Spanish house of trade in that place; that she was employed in the business of purchasing slaves, and had purchased and taken on board a considerable number, when she was seized as prize by the Arraganta. Whether, on this proof, Africans brought into the United States, under the various circumstances belonging to this case, ought to be restored or not, is a question on which much difficulty has been felt. It is unnecessary to state the reasons in support of the affirmative or negative answer to it, because the court is divided on it, and, consequently, no principle is settled. So much of the decree of the circuit court as directs *restitution to the Spanish [*127 claimant, of the Africans found on board the Antelope when she was captured by the Arraganta, is affirmed.

There is some difficulty in ascertaining their number. The libel claims 150 as belonging to the Spanish subjects, and charges that 100 or more of these, were on board the Antelope. Grondona and Ximenes, Spanish officers of the Antelope, before her capture, both depose positively to the number of 166. Some deduction, however, is to be made from the weight of Grondona's testimony, because he says, in one of his depositions, that he did not count the slaves, on the last day when some were brought on board, and adds, that he had lost his papers, and spoke from memory, and from the information he had received from others of the crew, after his arrival in the Havana. Such of the crew as were examined, concur with Grondona and Ximenes as to numbers.

The depositions of the Spanish witnesses on this point, are opposed by those of John Smith, the Captain of the General Ramirez, and William Brunton, one of the crew of the Arraganta, who was transferred to the Antelope. John Smith deposes, that 93 Africans were found on board the Antelope, when captured, which he believes to have been Spanish property.

He also says, that 183 were taken out of Portuguese vessels. William
*128] Brunton deposes, that more slaves *were taken out of the Portuguese ship than were in any other, and that ninety odd were represented by the crew to have been on board the Antelope when she was captured. If, to the positive testimony of these witnesses, we add the inference to be drawn from the statement of the libel, and the improbability that so large a number of Africans as are claimed could have been procured, under the circumstances in which the Antelope was placed, between the 13th, when she was liberated by the first pirate who seized her, and the 23d, when she was finally captured, we are rather disposed to think the weight of testimony is in favor of the smaller number. But supposing perfect equality in this respect, the decision ought, we think, to be against the claimant.

Whatever doubts may attend the question whether the Spanish claimants are entitled to restitution of all the Africans taken out of their possession, with the Antelope, we cannot doubt the propriety of demanding ample proof of the extent of that possession. Every legal principle which requires the plaintiff to prove his claim in any case, applies with full force to this point; and no countervailing consideration exists. The *onus probandi*, as to the number of Africans which were on board, when the vessel was captured, unquestionably lies on the Spanish libellants. Their proof is not satisfactory, beyond 93. The individuals who compose this number must be designated to the satisfaction of the circuit court.

*129] *We proceed next to consider the libel of the vice-consul of Portugal. It claims 130 slaves, or more, "all of whom, as the libellant is informed and believes," are the property of a subject or subjects of his Most Faithful Majesty; and although "the rightful owners of such slaves be not at this time individually and certainly known to the libellant, he hopes and expects soon to discover them." John Smith and William Brunton, whose depositions have already been noticed, both state, that several Africans were taken out of Portuguese vessels; but neither of them state the means by weich they ascertained the national character of the vessels they had plundered. It does not appear, that their opinions were founded on any other fact than the flag under which the vessel sailed. Grondona also states the plunder of a Portuguese vessel, lying in the same port, and engaged in the same traffic with the Antelope, when she was captured; but his testimony is entirely destitute of all those circumstances which would enable us to say, that he had any knowledge of the real character of the vessel, other than was derived from her flag. The cause furnishes no testimony of any description, other than these general declarations, that the proprietors of the Africans now claimed by the vice-consul of Portugal, were the subjects of his king; nor is there any allusion to the individuals to whom they belong. These vessels were plundered in March 1820, and the libel was filed in
*130] August of the same year. From *that time to this, a period of more than five years, no subject of the crown of Portugal has appeared to assert his title to this property, no individual has been designated as its probable owner. This inattention to a subject of so much real interest, this total disregard of a valuable property, is so contrary to the common course of human action, as to justify serious suspicion that the real owner dares not avow himself.

That Americans, and others who cannot use the flag of their own nation,

carry on this criminal and inhuman traffic, under the flags of other countries, is a fact of such general notoriety, that courts of admiralty may act upon it. It cannot be necessary to take particular depositions, to prove a fact which is matter of general and public history. This long, and otherwise unaccountable, absence, of any Portuguese claimant, furnishes irresistible testimony, that no such claimant exists, and that the real owner belongs to some other nation, and feels the necessity of concealment.

An attempt has been made to supply this defect of testimony, by adducing a letter from the secretary to whose department the foreign relations of Portugal are supposed to be intrusted, suggesting the means of transporting to Portugal those slaves which may be in the possession of the vice-consul, as the property of his fellow-subjects. Allow to this document all the effect which can be claimed for it, and it can do no more than supply the want of an express power *from the owners of the slaves, to receive them. It cannot be considered as ascertaining the owners, or [*131 as proving their property. The difficulty, then, is not diminished by this paper. These Africans still remain unclaimed by the owner, or by any person professing to know the owner. They are rightfully taken from American citizens, and placed in possession of the law. No property whatever in them is shown. It is said, that possession, in a case of this description, is equivalent to property. Could this be conceded, who had the possession? From whom were they taken by the Arraganta? It is not alleged, that they are the property of the crown, but of some individual. Who is that individual? No such person is shown to exist, and his existence, after such a lapse of time, cannot be presumed. The libel, which claims them for persons entirely unknown, alleges a state of things which is *primâ facie* evidence of an intent to violate the laws of the United States, by the commission of an act which, according to those laws, entitles these men to freedom. Nothing whatever can interpose to arrest the course of the law, but the title of the real proprietor. No such title appears, and every presumption is against its existence.

We think, then, that all the Africans, now in possession of the marshal for the district of Georgia, and under the control of the circuit court of the United States for that district, which were brought in with the Antelope, *132] otherwise *called the General Ramirez, except those which may be designated as the property of the Spanish claimants, ought to be delivered up to the United States, to be disposed of according to law. So much of the sentence of the circuit court as is contrary to this opinion, is to be reversed, and the residue affirmed.

Decree.—This cause came on to be heard, &c.: On consideration whereof, this court is of opinion, that there is error in so much of the sentence and decree of the said circuit court, as directs the restitution to the Spanish claimant of the Africans in the proceedings mentioned, in the ratio which 166 bears to the whole number of those which remained alive at the time of pronouncing the said decree; and also in so much thereof, as directs restitution to the Portuguese claimant; and that so much of the said decree ought to be reversed, and it is hereby reversed and annulled. And this court, proceeding to give such decree as the said circuit court ought to have given, both direct and order, that the restitution to be made to the Spanish

claimant, shall be according to the ratio which 93 (instead of 166) bears to the whole number, comprehending as well those originally on board the Antelope, as those which were put on board that vessel by the captain of the Arraganta. After making the apportionment according to this ratio, and deducting from the number the ratable loss which must fall on the slaves to which the Spanish claimants were originally entitled, the *133] *residue of the said 93 are to be delivered to the Spanish claimant, on the terms in the said decree mentioned; and all the remaining Africans are to be delivered to the United States, to be disposed of according to law; and the said decree of the said circuit court is, in all things not contrary to this decree, affirmed.[1]

The Plattsburgh: Marino, Claimant.

Slave-trade.

A question of fact, under the slave-trade acts, as to a vessel claimed by a Spanish subject, as having been engaged in the trade, under the laws of his own country, but proved to have been originally equipped in the United States for the voyage in question.

Under the slave-trade act of 1794, c. 11, the forfeiture attaches, where the the original voyage is commenced in the United States, whether the vessel belong to citizens or foreigners, and whether the act is done *suo jure*, or by an agent, for the benefit of another person who is not a citizen or resident of the United States.

Circumstances of a pretended transfer to a Spanish subject, and the commencement of a new voyage, in a Spanish port, held not to be sufficient to break the continuity of the original adventure, and to avoid the forfeiture.

It is not necessary, to incur the forfeiture under the slave-trade acts, that the equipments for the voyage should be completed; it is sufficient, if any preparations are made for the unlawful purpose.

Appeal from the Circuit Court for the Southern District of New York. This was a seizure of the schooner Plattsburgh, otherwise called the Maria Gertrudes, on the coast of Africa, made by the United States ship of war, the Cyane, in the year 1820.

*134] The *vessel was brought into the port of New York for adjudication, and a libel of information was filed in the district court, under the acts of congress of 1794, c. 11, and of 1800, c. 205, prohibiting the slave-trade. A claim was given in on behalf of Juan Marino, a Spanish subject, and a resident merchant of St. Jago de Cuba. Upon the proofs taken, a decree of condemnation was pronounced in the district court, which was affirmed in the circuit court *pro formâ*, and the cause was brought by appeal to this court.

March 15th. The cause was argued by *Jones* and *Mayer*, for the appellants,(*a*) and by the *Attorney-General*, for the respondents.(*b*) The argument turned principally upon the question of fact, as to the origin of the adventure in the United States, and the alleged subsequent transfer to a

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(*a*) They cited The Diana, 1 Dods. 95; The Louis, 2 Ibid. 228.

(*b*) Citing, The Fortuna, 1 Dods. 81, 86; The Donna Marianna, Ibid. 91; The St. Jago de Cuba, 9 Wheat. 409. The cases cited from the English admiralty reports, will be found in the Appendix to the present volume, p. 40–84.

[1] See s. c. 11 Wheat. 413; 12 Id. 546.

Spanish subject, so as to change the property, and break the continuity of the voyage. The same grounds of law were also insisted on by both parties as in the argument of the preceding case of *The Antelope;* but as the present cause was determined by the court exclusively upon the facts respecting the alleged sale and change of voyage, it has not been thought necessary to report the arguments of counsel.

March 18th, 1825. STORY, Justice, delivered the opinion of the court.—This is a libel founded on the several acts of congress for the [*135 prohibition of the slave-trade, and contains various distinct allegations, and especially counts framed on the slave-trade acts of 1794, ch. 11, and 1800, ch. 205. It is unnecessary to enter upon a minute examination of the pleadings, because the whole case turns upon the question, whether, in point of fact, the voyage was originally undertaken from the United States, or was undertaken by the claimant, Mr. Marino, from the island of Cuba, after a *bonâ fide* purchase made by him, altogether disconnected from the original enterprise.

The Plattsburgh was duly registered at Baltimore, as an American vessel, owned by Messrs. Sheppard, D'Arcy & Didier, jun., of that place, in October 1817. She cleared out of the custom-house, under the command of Captain Joseph F. Smith, in December 1819, having what it called an assorted cargo on board, on a voyage ostensibly for St. Thomas, in the West Indies, but in reality, for St. Jago, in the island of Cuba. Up to this period, the ownership remained, upon the ship's papers, wholly unchanged. But it is now asserted, that the shares of D'Arcy and Didier were purchased by Sheppard for the sum of $6000, and that the voyage was wholly undertaken on his account.

The first remark which arises upon this state of the case is, how it should come to pass, if the purchase were *bonâ fide*, that the requisite alterations were not made *in the ship's papers, since, by the act of congress, [*136 unless registered anew, upon such sale, the vessel forfeits her American character? Sheppard, in his testimony, gives an extraordinary reason for the occurrence, declaring that he was insolvent, at the time of the purchase, and so could not give the usual bond for the proper use and delivery up of the registry, upon any future sale. Yet, according to his own showing, and that of the other part-owners, he was, at this time, the owner of one-half of the Plattsburgh, valued at $6000, and of an interest in another vessel, valued at $4000. Sheppard further states, that one of his inducements to purchase the Plattsburgh, was an offer made to him by one George Stark (who became a conspicuous character in the subsequent proceedings) to get for her $12,500, in St. Jago de Cuba, Stark asserting that he was authorized to purchase a vessel at that place. Accordingly, Sheppard determined to intrust Stark with the negotiation, and a bill of sale of the schooner was executed to Stark, by all the owners, to enable him to convey the same to any purchaser. The cargo of the Plattsburgh, as contained in the manifest, consisted principally of goods belonging to various shippers, who are not in the slightest degree implicated in any part of the guilt of this transaction; and upon the sales of the same at St. Jago de Cuba, the proceeds were regularly remitted to them. These shippers all contracted with Stark for the shipment and freight of their goods, and he informed [*137 one of *them, that he had purchased the schooner for certain persons

in the island of Cuba, and that he had no interest in her himself, but was to receive $2000 for delivering her at that port. How far this statement is reconcilable with the account given of the transaction, by the owners of the Plattsburgh, it is unnecessary to examine.

At the time of the equipment of the Plattsburgh, at Baltimore, there was another vessel, the brig Eros, which was also fitting out at that port, for St. Jago de Cuba, with a cargo suited for the slave-trade, under the management of Stark, as charterer for the voyage. This vessel was at first detained by the collector, upon suspicion, but he, being satisfied, upon inquiry, that the owner of the Eros had no intention of having her engaged in the slave-trade, afterwards released her, taking out some few of her equipments. The Plattsburgh first dropped down the Chesapeake bay, and afterwards (if the witnesses are to be believed), some grape, canister and round shot were taken on board, and on stowing them away, a barrel of irons or handcuffs was discovered, which was not contained in the manifest of the cargo. The vessel then sailed down to New Point Comfort, and there waited ten or twelve days for the Eros, and as soon as the latter appeared, after taking on board Mr. Stark, the Plattsburgh sailed, in company with the Eros, directly for St. Jago de Cuba. The crew on board are represented to have distinctly understood, soon afterwards, that the voyage was designed ultimately for the African coast, for slaves.

*138] *In due time, both vessels arrived at the port of destination, and unladed their cargoes. And here the sale to Mr. Marino is alleged to have taken place, in entire good faith, for the sum of $12,000, although, upon the production of the bill of sale, the sum is there asserted to be $8000 only. Both of the vessels were consigned to a Mr. Wanton, at St. Jago, through whom the negotiation seems to have been made. After the ostensible sale, the Plattsburgh underwent repairs, under the agency of Wanton, and was in due form made a Spanish ship, with Spanish national documents; and the usual preparations were made, and the usual passports obtained, to equip her for a slave-voyage to the coast of Africa, under her new owners. A part of the cargo of the Eros was taken on board of the Plattsburgh, and particularly about 300 casks of gunpowder. The original crew were, apparently, discharged, but Captain Smith, two of the mates, and six or eight of the men, together with Stark, still remained on board, and accompanied the vessel to the coast of Africa, she being during that voyage, under the nominal command of a Mr. Gonzalez, with the assumed name of the Maria Gertrudes. She was captured, while lying on the coast of Africa, north of the line, by the boats of the United States ship of war Cyane, under Lieutenant Stringham, and was brought into the port of New York for adjudication, and was there finally condemned by the district and

*139] circuit courts; and the present appeal is from *the decree pronounced, *pro formâ*, by the latter.

Such is a general outline of the circumstances of the case, upon which it is material to observe, that if the original object of the equipment and voyage from Baltimore, was for the purpose of carrying on the African slave-trade, the forfeiture equally attaches, whether the schooner was then owned by American citizens, or by a foreigner. The act of 1794, ch. 11, expressly declares, that no citizen or resident in the United States shall, for himself, or any other person whatsoever, either as master, factor or owner, build, fit,

equip, load or otherwise prepare, any vessel, within any port of the United States, nor cause any vessel to sail from any port, within the same, for the purpose of carrying on any trade or traffic in slaves, to any foreign country, &c., under the penalty of forfeiture. Under this act, it is immaterial to whom the ownership belongs, and whether the act is done *suo jure*, or for the benefit of another person. If, therefore, the Plattsburgh was equipped at Baltimore, by the owners, or by the master, or by Stark, as factor or agent, to carry on the slave-trade for the benefit of Marino, the case falls directly within the prohibitions of the act. And in this view, the declarations of Sheppard and Stark, respecting the sale, are not without considerable significance. But, there is no pretence to say, upon the facts in proof, that the actual ownership, at the commencement of the voyage, was not in Sheppard and his partners, or in Stark. We *find the latter travelling with the vessel, through all her subsequent wanderings, with a considerable cargo on board, which belonged to himself when she left Baltimore, and which was, at St. Jago, transshipped from the Eros; we find the original master, and mates, with efficient authority, on board, on the coast of Africa; we find all parties yielding obedience to them, and to Stark; we find the master resorting to subterfuges and concealments, after the capture, and the log-book kept in the English language; and if the testimony of two of the crew is admitted (and one of them is not in the slightest degree discredited), we find the most decisive proofs, that the original voyage was conceived and executed solely with a view to the slave-trade. Whatever exceptions may be taken to the testimony of Ferver (and it is certainly open to much animadversion, from his first prevarications), it has the merit of standing supported, as to its main facts, by all the other circumstances of the case. The natural, nay, the almost necessary, inference from those circumstances is, that they belong to a meditated infringement of the acts prohibiting the slave-trade. [*140

It has been asked, in what manner the original intention can be deduced from the facts, since the Plattsburgh had on board an innocent cargo, when she left Baltimore. That, however, is not quite certain, for though nothing noxious appeared on the face of the manifest, yet, if Ferver and Flower are believed, there was a barrel of handcuffs concealed in the run, demonstrating, in no *equivocal manner, the objects of the parties. But assuming that the equipments were all innocent in their own nature, that would not help the case, if there were positive proof of a guilty intention. The law does not proceed upon the notion, that provisions or equipments which are adapted to ordinary voyages, are not within the forfeiting clause, if they are intended for carrying on the slave-trade. Nor is it necessary, that there should be complete equipments for this purpose. It is sufficient, if any preparations are made for the unlawful purpose. Such was the doctrine of this court in the cases formerly adjudged, which were cited at the bar. *The Emily* and *The Caroline*, 9 Wheat. 381. [*141

But there is no pretence to separate the voyage of the Plattsburgh from that of the Eros. Both were undertaken by the same party, and for the same object. The Eros carried out the cargo adapted to carry on the traffic, and for the purpose of concealment, the Plattsburgh was made to assume the garb of innocence. It was an ingenious device to lull suspicions, and escape the penalties of the law; but the intention is just as strongly mani-

fested, as though all the offensive articles had been laden on board the Plattsburgh. In short, the Eros may be considered as the mere tender of the Plattsburgh, and subservient to all the objects of the latter. Her cargo found its way on board, after the arrival at St. Jago, under the direction of Stark, who, true to his original purpose, remained with the Plattsburgh as
*142] the **dux facti.* It is impossible, upon any reasonable grounds, to assume his intention to have been a purely lawful traffic at St. Jago. If it had been so, why should he have been found on board on the coast of Africa? Men do not, ordinarily, take upon themselves such an odious and dangerous post, surrounding themselves with penalties and suspicions, without causes deeply connected with their own private interests and purposes.

But we are told, that here was a genuine sale to a Spaniard, who was authorized, by the laws of his country, to carry on the slave-trade, and however immoral or inhuman it may be, the court are to decide his case upon principles of law, and not merely upon principles of justice or morality. Certainly, the court have nothing to do with the conscience of the Spanish claimant, if he has established a *bonâ fide* legal ownership. But that is the very point in controversy. This is not the case of an ordinary trade, where no disguise is necessary or useful. It is the case of a trade, prohibited to American citizens, under very heavy penalties—penalties which have since been aggravated to the infliction of capital punishment. It is a trade, odious in our country, and carries a permanent stain upon the reputation of all who are concerned in it, and is watched by the severest vigilance of the government. Under such circumstances, it is obvious, that it cannot be carried on under our flag, but at the greatest hazards, and with few chances
*143] of escaping detection. If carried on at all, it must, therefore, *be carried on by Americans, under the disguise of foreign flags; and it is notorious, that in the colonial ports of Spain, there is little difficulty in procuring all the apparatus for the use of the national flag. The existence of such a flag is not, when circumstances of just suspicion occur, any decisive proof of innocence, for it is just such a cover as must accompany the fraud. And these considerations cannot fail to attract the attention of a *bonâ fide* Spanish purchaser. He cannot but know, that American cruisers are in search of those who violate our laws respecting this traffic; and he would deem it the highest imprudence, to place his property in a situation in which it might justly be suspected of an admixture of American interests. He would studiously exclude from his ship all Americans, lest they should involve him in serious losses. Of course, he would, *à fortiori*, exclude from his employment the original American master and owner from whom he had purchased. He could not, without the grossest rashness, be presumed to forget, that an American owner and master, on board of a vessel recently under their control, and recently purchased, would jeopard the whole adventure, for, upon the search of a cruiser, they would excite very strong presumptions of guilt. How, then, can we reconcile with the notion of a *bonâ fide* purchase, in this case, the continued employment of the owner, the master, the mates and a large proportion of the crew of the Plattsburgh? Does it not necessarily diminish the credibility of such a claim?

*What, then, are the explanations attempted to be given upon this
*144] subject? It is said, that Smith and Stark were employed by Wanton, to go to the coast of Africa, to transact business for him, and that they were

mere passengers. But what was the business of Wanton? None is proved, or attempted to be proved. And who, in fact, is Wanton? He is the consignee of Stark, both for the Plattsburgh and the Eros. He is the shipper of the cargo for the coast of Africa, and upon the face of the bill of lading, no other person appears as owner; and it is now said, that he is what is called an actionist, or share-holder, in the voyage; and by the Spanish laws, or course of trade, such persons do not appear as owners on the papers. It is remarkable, that if such be the law, Marino's name should not appear on the bill of lading, and that Wanton's alone is stated. The ambiguous fact is alleged, that no freight is payable, because the vessel and cargo are united for the voyage. Surely, it must have been in the power of the claimant, to have given much more full and exact information on this point.

Then, as to Captain Smith's being a mere passenger, on which so much reliance is placed by the claimant, how does it comport with the facts upon the record? At the time of the capture, he appeared as a principal personage, and evidently conducted himself differently from a person who had no interest in the voyage, and was a mere spectator. But what is decisive, to show that this is a mere disguise, too thin not to be *easily seen through, is the letter found on board, written by him, to the mate, a [*145 short time before the vessel sailed from St. Jago, in which the mask is stripped off, and he appears in his natural character as master. It is as follows:

"Sir: I wish you to get the schooner down to Moro, in the morning, and get the men quartered to the guns, and station them on the tops and forecastle, the same as on board armed ships, and get all ready for going to sea to-morrow night. After you get down to the Moro, send the boat, with four men, for me. Yours, Jos. Smith."

Nothing can be more unlike the character or authority of a passenger, than these directions. They belong to one who has a right to command, and knows he is to be obeyed. The language imports a right to control the voyage, and could be dictated only by one in possession of the effective command. It would be absurd, for an American passenger to address such a note to an American mate, who was responsible to a Spanish master for all his orders and conduct. It would be an exercise of credulity, far beyond any just claims of the evidence, to lead the court to the belief, that Captain Smith was a mere passenger. The circumstances of the case are at war with the supposition, and the positive testimony of Ferver and Flower completely overturns it.

Without going more at large into the evidence, in which there is much matter open to observation, it is sufficient to state, that in the opinion of the court, the reality of the asserted sale to Marino is not established by the proofs, and our *conclusion is, that the unlawful enterprise had its [*146 origin at Baltimore.

Decree affirmed with costs.

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THOMAS, appellant, *v.* GABRIELLE BROCKENBROUGH, JOHN HARVIE, EDWIN HARVIE, JACQUELINE HARVIE, JULIA ANN HARVIE, heirs-at-law and devisees of JOHN HARVIE, respondents.

Bill of review.—Limitation.

Although bills of review are not strictly within the statute of limitations, yet courts of equity will adopt the analogy of the statute, in prescribing the time within which they shall be brought.[1]

Appeals in equity causes being limited by the judiciary acts of 1789, § 22, and of 1803, § 2, to five years after the decree, the same period of limitation is applied to bills of review.[2]

Quære? Whether a bill of review, founded upon matter discovered since the decree is also barred by the lapse of five years?

It is in the discretion of the court, to grant leave to file a bill of review for that cause.

APPEAL from the Circuit Court of Kentucky. The appellant, Thomas, filed in that court, at the November term 1818, a bill to review and reverse a final decree of the same court, pronounced at the May term 1810, by which the plaintiff in the bill of review, and defendant in the original suit, was decreed to convey *to the heirs of John Harvie, the plaintiffs in *147] the original suit, a certain tract of land, which formed the subject of controversy in that suit.

The bill of review, after stating the substance of the original bill, which was filed by John Harvie, and the bill of revivor, after his death, in the name of the present respondents, in whose favor the decree was passed, assigned the following errors in the said decree, as causes for its reversal. 1. That the entry of James Clark, under whom the said John Harvie claimed the land in dispute, was void for uncertainty. 2. That before the final decree was passed, the said Harvie died, leaving a will, by which he devised the land in controversy to his sons, Edwin and Jacqueline, two of the plaintiffs in the bill of revivor, of which will the plaintiff was wholly ignorant, until long after the final decree was entered. 3. That the said Edwin Harvie died previous to the said decree, and his right in the said land descended to his heirs-at-law, John and Lewis, who were no parties to the said suit, of which facts the plaintiff was wholly ignorant, until long after the decree complained of.

To this bill of review, the defendants pleaded in bar, the decree passed and enrolled in the original suit, and the prosecution by the plaintiff, Thomas, of a writ of error to the supreme court to reverse the same, which was dismissed, and then demurred to so much of the bill as sought to review or reverse the said decree. Upon argument of the plea and demurrer, the *148] court below *dismissed the bill of review, and the cause was brought, by appeal, to this court.

February 10th. *Talbot*, for the appellant, argued upon the merits of the original cause, to invalidate the title of the plaintiff in that cause, founded upon the entry of Clark; and also upon the other errors assigned in the bill of review. He insisted, that there was no period of limitation to bills of review, by the act of congress, and that, in this case, the bill of review being

[1] See Kennedy *v.* Georgia State Bank, 8 How. 586; Whiting *v.* United States Bank, 13 Pet. 6; Lupton *v.* Janney, Id. 381; Massie *v.* Graham, 3 McLean 41.

[2] Neill's Appeal, 93 Penn. St. 177.

founded upon newly-discovered evidence, and having been permitted by the court below, in its discretion, to be filed, it must be determined by the error in the original decree. In England, it is usual to recite all the important facts of the cause in the decree. In this country, this is not done, and therefore, the pleadings, exhibits and proofs must be resorted to, in order to discover the errors apparent upon the face of the original decree.

Bibb, contrà, insisted, that the first error assigned upon the merits of the original cause, was no ground for a bill of review. The errors in law must be apparent on the face of the decree. If a fact be mistaken at the hearing, and in the decretal order, it must be rectified by a rehearing, which rehearing cannot be after decree enrolled. *Combs* v. *Proud*, Cas. Ch. 54; 3 Bl. Com. 454. The other errors assigned did not prejudice the appellant, nor had he any interest in correcting them. But the conclusive *objection to the whole proceeding was, that here is an attempt, by a bill of [*149
review, to revise the original decree, after the appeal is barred by the limitation of five years, prescribed in the acts of congress. In England, writs of error are limited by statute to twenty years, and the courts of equity have limited appeals and bills of review to the same period, by analogy to that statute. Stat. 10 & 11 Wm. III., c. 14, 3 Stat. at Large 2043; Viner's Abr. tit. Limitation, 105; *Smith* v. *Clay*, Ambl. 645; but much better reported in note to *Deloraine* v. *Browne*, 3 Bro. C. C. 639.

February 18th, 1825. WASHINGTON, Justice, delivered the opinion of the the court, and after stating the case, proceeded as follows:—The first error assigned in the bill of review, involves the merits of the original cause, and was intended to induce a re-examination of the title of the plaintiffs in that cause, the validity of which had been established by the decree. But previous to an investigation of that subject, a preliminary question has been suggested by the counsel for the appellee, which the court is called upon to consider. The record shows, that the order of the court, permitting the bill to be filed, was granted eight years subsequent to the final decree in the original cause; and the question to be decided is, whether this remedy was not barred by length of time?

It must be admitted, that bills of review are not strictly within any act of limitations prescribed by congress; but it is unquestionable, that *courts of equity, acting upon the principle, that *laches* and neglect [150
ought to be discountenanced, and that in cases of stale demands, its aid ought not to be afforded, have always interposed some limitation to suits brought in those courts. It is stated by Lord CAMDEN, in the case of *Smith* v. *Clay* (Ambl. 645, 3 Bro. C. C. 639 note), "that as the court of equity has no legislative authority, it could not property define the time of bar, by a positive rule; but that, as often as parliament had limited the time of actions and remedies to a certain period, in legal proceedings, the court of chancery adopted that rule, and applied it to similar cases in equity." Upon this principle it is, that an account for rents and profits, in a common case, is not carried beyond six years, or a redemption of mortgaged premises allowed, after twenty years' possession by the mortgagee, or a bill of review entertained, after twenty years, by analogy to the statute which limits writs of error to that period.

These principles seem to apply, with peculiar strength, to bills of review, in the courts of the United States, from the circumstance, that congress has thought proper to limit the time within which appeals may be taken in equity causes, thus creating an analogy between the two remedies, by appeal, and a bill of review, so apparent, that the court is constrained to consider the latter as necessarily comprehended within the equity of the provision respecting the former. For it is obvious, that if a bill of review to reverse
*151] a decree, on the ground of error apparent *on its face, may be filed at any period of time beyond the five years limited for an appeal, it will follow, that an original decree may, in effect, be brought before the supreme court for re-examination, after the period prescribed by law for an immediate appeal from such decree, by appealing from the decree of the circuit court, upon a bill of review. In short, the party complaining of the original decree would, in this way, be permitted to do indirectly, what the act of congress has prohibited him from doing directly.

Whether a bill of review, founded upon matter discovered since the decree, is, in like manner, barred by the lapse of five years after such decree, is a question which need not be decided in the present case, since we are all of opinion, that it is in the discretion of the court to grant leave to file a bill of review for that cause, and that such leave ought not to be granted, in a case where it appears that the plaintiff is not aggrieved by the decree, on account of the error so assigned; or, that being granted, the court ought to dismiss the bill, where no other error is assigned.

In this case, the court below decided, in the original cause, that the title to the land in controversy was vested in the heirs of John Harvie, and decreed the appellant to convey the same to them. If Thomas, then, had no title to the land, of what consequence was it to him, that the conveyance was
*152] decreed to be made to all the complainants *in that cause, as being the heirs of Harvie, rather than to two of them, who, he alleged, were entitled to the land as devisees? If they did not complain of the decree (and that they did not, is proved by their plea and demurrer to the bill of review), and if the plaintiff in this bill was not injured by it, the court is at a loss to conceive, upon what legal or equitable ground, that decree could have been reversed for the errors growing out of the after-discovered evidence. These observations apply equally to the second and third errors assigned.

Decree affirmed, with costs.

Elmendorf, appellant, *v.* Taylor and others, respondents.

Limitation.—Adverse possession.—Parties.—Decisions of state courts.—Land-law of Kentucky.

Although the statutes of limitation do not apply, in terms, to courts of equity, yet the period of limitation which takes away a right of entry, or an action of ejectment, has been held, by analogy, to bar relief in equity, even where the period of limitation for a writ of right, or other real action, had not expired.[1]

Where an adverse possession has continued for twenty years, it constitutes a complete bar in equity, wherever an ejectment would be barred, if the plaintiff possessed a legal title.

The rule which requires all the parties in interest to be brought before the court, does not affect the jurisdiction, but is subject to the discretion of the court, and may be modified according to circumstances.

In the courts of the United States, wherever the case may be completely decided as between the litigant parties, an interest existing *in some other person, whom the process of the court cannot reach, as, if such party be a resident of another state, will not prevent a decree upon the merits.[2] [*153

The courts of every government have the exclusive authority of construing its local statutes, and their construction will be respected in every other country.

This court respects the decisions of the state courts upon their local statutes, in the same manner as the state courts are bound by the decisions of this court in construing the constitution, laws and treaties of the Union.

In Kentucky, a survey must be presumed to be recorded, at the expiration of three months from its date, and an entry dependent on it is entitled to all the notoriety of the survey, as a matter of record.

An entry in the following words, " W. D. enters 8000 acres, beginning at the most south-westwardly corner of D. R.'s survey of 8000 acres, between Floyd's Fork and Bull Skin ; thence along his westerly line to the corner ; thence the same course with J. K.'s line, north 2° west, 964 poles, to a survey of J. L. for 22,000 acres ; thence, with Lewis' line, and from the beginning, south 7° west, till a line parallel with the first line will include the quantity," is a valid entry.

Such an entry is aided by the notoriety of the surveys which it calls to adjoin, where those surveys had been made three months anterior to its date.

Appeal from the Circuit Court of Kentucky. This was a bill in equity, brought by the appellant, Elmendorf, in the court below, to obtain a conveyance of lands held by the respondents under a prior grant, and under entries which were all older than his entry. But the defendants below relied entirely on their patent ; and the case, consequently, depended on the validity of the plaintiff's entry.

This entry was made on the 19th of April, 1784, as follows : " Walker Daniel enters 8000 acres, beginning at the most south-westwardly corner of Duncan Rose's survey of 8000 acres, between Floyd's Fork and Bull Skin ; thence along his westwardly line to the *corner ; thence, the same course with Granville Smith's lower line, to John Lewis' corner ; [*154 thence, with Lewis' line, and from the beginning, south 7° west, till a line parallel with the first will include the quantity." This entry was afterwards explained and amended, on the 1st of July 1784, so as to read as follows : " Walker Daniel enters 8000 acres, beginning at the most south-westwardly corner of Duncan Rose's survey of 8000 acres, between Floyd's Fork and

[1] Hunt *v.* Wickliffe, 2 Pet. 201 ; Lewis *v.* Marshall, 5 Id. 470 ; Peyton *v.* Stith, Id. 485 ; Miller *v.* McIntyre, 6 Id. 61 ; Coulson *v.* Walton, 9 Id. 62 ; United States Bank *v.* Daniel, 12 Id. 33 ; Rhode Island *v.* Massachusetts, 15 Id. 233 ; Bowman *v.* Wathen, 1 How. 189 ; Pindell *v.* Mullikin, 1 Black 585.

[2] Mallow *v.* Hinde, 12 Wheat. 193 ; Vattier *v.* Hinde, 7 Pet. 252.

Bull Skin; thence along his westwardly line to the corner; thence the same course with James Kemp's line, north 2° west, 964 poles, to a survey of John Lewis for 22,000 acres; thence, with Lewis' line, and from the beginning, south 7° west, till a line parallel with the first line will include the quantity."

The plaintiff's bill was dismissed by the court below, and the cause brought by appeal to this court. It was argued, at a former term, by *Clay* and *Talbot*, for the appellant, and by *Bibb*, for the respondents, and was again argued, at the present term, by the same counsel.

February 20th. On the part of the *appellant*, it was contended, that the survey referred to in the amended entry, was, at the time, an object of sufficient notoriety to give validity to the entry, which called for one of its corners as a beginning. The land law of Virginia prescribes, that surveys shall be returned to the office, and recorded in a record book, to be kept for that purpose by the principal surveyor, within three months from the time
*155] *of their being made. This survey had thus become a matter of record: and subsequent purchasers were bound to know its position, in the same manner as they are bound to know the position of entries. The book of surveys has every quality of a record, except that the surveyor is restrained from granting copies, until the time limited by law for the return of surveys to the land-office has expired; and the notoriety attached to the record of survey, does not entirely depend on the right to demand a copy of it. The right to inspect it still exists, and this right has been considered by the legislature as giving sufficient notice, to all persons interested, to enter a *caveat* against the issuing of a patent. Were the question of novel impression, there could be no doubt. But it had been settled by a long series of decisions in the local tribunal, and had become a settled rule of property, which this court would respect, in the same manner as it always respected the interpretation of local statutes by the state courts.(*a*)

On the part of the *respondents*, it was insisted, that the prohibition in the statute to give a copy of the survey, excludes the idea of that notoriety which is ascribed to a record. Though inserted for preservation in a book, which is termed a book of record, it does not become substantially a matter of record, until it becomes public and accessible to all the world. Even if
*156] an inspection of *the book was demandable as a matter of right, such an inspection would, from the nature of things, be of no avail, unless an office-copy could be obtained. The notoriety of the surveys referred to in the entry, would not, therefore, be inferred from the fact, that the three months, within which they were directed by the statute to be recorded, had expired before making the entry. It was, also, insisted, that the appellant's claim did not entitle him to maintain the bill, in his own name, for the land in question. He was a tenant in common with others, and could not be allowed to sue in equity, without making his co-tenants parties to the bill. Hinde Pr. 2; 16 Ves. 325; 6 Johns. Ch. 450; 3 Bro. C. C. 229; 2 Ves. sen. 312; 4 Johns. Ch. 199. The length of time since which the plaintiff's title had accrued, was also insisted on as an equitable bar. More

(*a*) The cases cited are enumerated in the opinion of the court.

than twenty years had elapsed, and the principle was well settled, that a court of equity would adopt the analogy of the statute of limitations, applied to bar an entry, or an ejectment, as the rule to be applied to equitable rights and remedies. Francis' Max. X, p. 38; *Smith* v. *Clay*, 3 Bro. C. C. 639, note; *Jenner* v. *Tracy*, 3 P. Wms. note *b*; 2 Eq. Cas. Abr. tit. "Length of Time;" *Cook* v. *Arnham*, 3 P. Wms. 283; *Bond* v. *Hopkins*, 1 Sch. & Lef. 413; *Hovenden* v. *Lord Annesley*, 2 Ibid. 607; 1 Vern. 196, 362; 1 Ch. Rep. 105; 3 Atk. 225; 2 Ves. sen. 226; 2 Atk. 83; *Cholmondeley* v. *Clinton*, 2 Jacobs & Walker 138. The statute of limitations is made to protect against ancient claims, whether well or ill founded, the *evidences of which may have been lost, or obscured by time. *Clementson* v. *Williams*, 8 Cranch 72; *Shipp* v. *Miller*, 2 Wheat. 324. [*157

March 5th, 1825, MARSHALL, Ch. J., delivered the opinion of the court. —This suit was brought by the appellant, Elmendorf, in the court for the seventh circuit and district of Kentucky, to obtain conveyance of lands held by the defendants under a prior grant, and under entries which are also older than the entry of the plaintiff. As the defendants do not adduce their entries, and rely entirely on their patent, the case depends on the validity of the plaintiff's entry. That was made in April 1784, and was afterwards, in July of the same year, explained or amended, so as to read, as follows: "Walker Daniel enters 8000 acres, beginning at the most south-westwardly corner of Duncan Rose's survey of 8000 acres, between Floyd's Fork and Bull Skin; thence along his westwardly line to the corner; thence, the same course with James Kemp's line, north 2° west, 964 poles, to a survey of John Lewis for 22,000 acres; thence with Lewis's line, and from the beginning, south 7° west, till a line parallel with the first line will include the quantity."

As this entry begins at "the most south-westwardly corner of Duncan Rose's survey of 8000 acres, between Floyd's Fork and Bull Skin," the first inquiry is, whether this survey was, as the time, an object of sufficient notoriety to give validity *to an entry calling for one of its corners as a beginning. It is not pretended, that the survey itself had acquired this notoriety; but the plaintiff contends, that it had become a matter of record; and that subsequent purchasers were, on that account, bound to know its position, in like manner, as they are bound to know the position of entries. The land-law prescribes that surveys shall be returned to the office, and recorded in a record book, to be kept for that purpose by the principal surveyor, within three months from the time of their being made. They are to be returned to the land-office, in twelve months from their date, during which time the surveyor is forbidden to give a copy to any person other than the owner. [*158

It is contended by the defendants, that this prohibition to give a copy of the plot and certificate of survey, excludes the idea of that notoriety which is ascribed to a record. Though inserted for preservation in a book which is denominated a book of record, it does not become, in fact, a record, until it shall partake of that characteristic quality of a record, on which the obligation to notice it is founded, being accessible to all the world. Were even an inspection of the book demandable as matter of right, which the defendants deny, that inspection would, they say, from the nature of the

thing, be of no avail, unless a copy was also attainable. They insist, therefore, that the notoriety of these surveys is not to be implied, from the fact that the three months had expired, during which they were directed by law to be recorded.

*159] *The plaintiff contends, that the book of surveys has every characteristic of a record except that the surveyor is restrained from granting copies, until the time limited by law for the return of surveys to the land-office shall have expired; and denies, that the notoriety attached to a record is dependent entirely on the right to demand a copy of it. He maintains the right to inspect it, and insists that this right has been considered by the legislature as giving sufficient notice to all persons interested in the property, to enter a *caveat* against the issuing of a patent, from which he implies, that it is intended as a record to give notice, although a copy of it cannot be obtained.

Were this question now for the first time to be decided, a considerable contrariety of opinion respecting it would prevail in the court; but it will be unnecessary to discuss it, if the point shall appear to be settled in Kentucky. This court has uniformly professed its disposition, in cases depending on the laws of a particular state, to adopt the construction which the courts of the state have given to those laws. This course is founded on the principle, supposed to be universally recognised, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus, no court in the universe, which professed to be governed by principle, would, we presume, undertake to say, that the courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and

*160] therefore erect *itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation, as the true sense of the law, and feel ourselves no more at liberty to depart from that construction, than to depart from the words of the statute. On this principle, the construction given by this court to the constitution and laws of the United States is received by all as the true construction; and on the same principle, the construction given by the courts of the several states to the legislative acts of those states, is received as true, unless they come in conflict with the constitution, laws or treaties of the United States. If, then, this question has been settled in Kentucky, we must suppose it to be rightly settled.

The defendants contend, that conflicting opinions have been given in the state, and that the question is still open; while the plaintiffs insists, that the real question, that is, the notoriety of a survey, after being made three months, has never been determined in the negative. The first case of which we have any knowledge, is *Sinclair* v. *Singleton* (Hughes 92). The decision of the court was in favor of the validity of an entry which calls for the lines of a survey. The court is not in possession of the book in which the case is reported; but, judging from the references made to it in subsequent cases, the entry must have been made within twelve, and, probably, within three months of the date of the survey. The next case in which the question was

*161] directly *made, is *Key* v. *Matson* (Hardin 70), decided in the fall term of 1806. The survey had not been made three months, at the date of the entry; and the court determined, that it was not an object of

notoriety. A rehearing was moved for, and, according to the course of the court of appeals of Kentucky, errors were assigned in the original decree. The first was, that "the court has decided, that an entry dependent on a survey not made three months, is void; whereas, according to law, and former decisions, such an entry ought to have been valid." The court adhered to its first decision, and used expressions, which, though applied to a case in which the entry was made before the expiration of three months after the survey on which it depended, yet indicated the opinion, that an entry, made after the expiration of three months from the date of the survey, would be equally invalid. *Moore* v. *Whitledge* (Hardin 89), and *Respass* v. *Arnold* (Ibid. 115), decided in the spring of 1807, were on the authority of *Key* v. *Matson*, and were also cases in which the entries were made a few weeks after the surveys. The case of *Cartright* v. *Collier* (Ibid. 179), decided in the spring of 1808, was one in which the entry was made only fifteen days after the survey.

In *Ward* v. *Lee* (1 Bibb 27), decided in 1808, the entry called for a survey which had been made twenty-three days, of the return of which, to the office, there was no proof. The judge adds, "if it had been returned and recorded, *yet no person was entitled to a copy." This last observation is indicative of the opinion, that a survey, though recorded, [*162 would not become an object of notoriety, until a copy of it was demandable; but it was made in a case in which that point did not occur. The case of *Cleland's Heirs* v. *Gray*, decided at the same time, is of the same character. The survey was made sixteen days before the entry which called to adjoin it. The judge says, "it is clear, that no description in this certificate of Evan Shelby's survey, can aid Weeden's entry, because it does not appear, that the certificate was even made out, or deposited in the surveyor's office, at the date of Weeden's entry. But if it had been recorded, yet it was inaccessible to holders of warrants. They were not entitled to a copy, until twelve months after the making of the survey; nor was the surveyor himself bound to record it in less than three months after the survey was made."

In the case of *Galloway* v. *Neal et al.* (1 Bibb 140), the judge who delivered the opinion of the court, states the law thus: "If the holder of a warrant adopts a survey previously made upon another warrant, as the basis of a location, he must prove the notoriety of tne survey at that period, otherwise, his location cannot be supported. If he has adopted such survey at a period earlier than that at which the law has opened the record thereof for copies, he must prove its notoriety by evidence *aliunde*." This plain declaration of the opinion of the court on this point, was, however, made in a *case in which it did not arise. The survey had preceded the entry [*163 which called for it, more than twelve months. The cases of *Davis* v. *Bryant* (2 Bibb 113), and *Davis* v. *Davis* (2 Ibid. 137), decided in the spring of 1810, were, each of them, cases in which the surveys preceded the entries calling for them, less than three months.

It is, then, true, that from 1806 to 1810, inclusive, the prevailing opinion of the court of Kentucky was, that an entry could derive no aid from the description contained in the plat and certificate of a survey for which it called, until that survey had been made twelve months; but, it is also true,

that this opinion has been advanced only in cases in which the point did not occur.

The first case in which the point actually occurred, was *Carson* v. *Hanway* (3 Bibb 160). The entry was made on the 9th of February 1784, and called for a survey made on the 15th of February 1783. The entry was supported, on the principle, that the plat and certificate of survey constituted a part of it. In delivering the opinion of the court, the judge said, "when the survey has been so long made, that the law requires it to be of record, it will be presumed to be so, and a call for its lines, in an entry, will render it a part of the description of such entry." At the preceding term, before the same judges, the case of *Bush* v. *Jameson* (3 Bibb 118) was argued, and the court determined, that an entry could not be aided by the description contained in a survey, which had been made only seven days
*164] *prior to the entry which called to adjoin it. In giving its opinion, the court says, "how far a subsequent adventurer would have been bound by a description given in the survey, of its beginning corner, if the survey had been of record, is not material to inquire; for there is no proof that the survey was, in fact, of record; and, as the law did not require that it should have been recorded, at the date of the entry, a presumption that it was cannot be indulged, according to any rule of probability, or on any principle recognised in former adjudications of this court." These cases, decided so near each other, by the same judges, show clearly, by the terms in which they are expressed, that the distinction between a survey, neither recorded in fact, nor in presumption of law, was in the mind of the court; and that its former adjudications were considered.

Reed's Heirs v. *Denwiddie* (3 A. K. Marsh. 185) was decided in the year 1820. In that case, an entry called for a survey which had been made six months, and the court determined, that the person claiming under this entry might avail himself of the notoriety contained in the certificate of survey, "which, from its date, must have been of record." *Jackman's Heirs* v. *Walker's Heirs* (3 Litt. 100) is the last case which has been cited. It was decided in 1823. The surveys were made about ten months before the entry, which called to adjoin then, and the court allowed to the entry all
*165] the aid which could be derived from the *description contained in the next certificate of survey; because, "from the length of time they had been made, before the date of the entry in question, the law required them to be of record, and, of course, they must be presumed to be so."

From the year 1813, then, to the present time, the courts of Kentucky have uniformly decided, that a survey must be presumed to be recorded, at the expiration of three months from its date; and that an entry dependent on it is entitled to all the notoriety which is possessed by the survey. We must consider the construction as settled finally in the courts of the state, and that this court ought to adopt the same rule, should we even doubt its correctness.

We think, then, that the entry under which the plaintiff claims, is aided by the notoriety of the surveys which it calls to adjoin, if those surveys have been made three months anterior to its date. This depends on the question whether it is to date from April or July 1784. The defendants insist, that the amendment or explanation, of the first of July, does not change the ground originally occupied, and is, therefore, not to be con-

sidered as having any influence on the date of the entry, or as connecting it with the surveys mentioned in the amendment or explanation. We cannot think so. This amendment would be seen by subsequent locators, and would give them as full notice that the entry adjoined the surveys of Duncan Rose, James Kemp and John Lewis, as they would have received, had the *original entry been made on that day. Were it then to be conceded, that the original entry, calling for Greenville Smith's line, instead of [*166 James Kemp's, would have been construed to cover the same ground which it now covers, still we perceive no substantial reason for refusing to the change made in its terms, any advantage belonging to the date of that change. We think, then, for the purpose of the present inquiry, the entry is to be considered as if made on the first of July 1784, and is entitled to all the notoriety of the surveys for which it calls.

This being established, we do not understand, that any controversy remains on the question of notoriety. Some of the objects called for in the surveys are so well known, as to fix incontrovertibly the beginning of the entry made by Walker Daniel; and its validity is not questioned on any other ground. The validity of the plaintiff's entry being established, it remains to consider the other objections which are made to a decree in his favor.

2. It is contended, that he is a tenant in common with others, and ought not be permitted to sue in equity, without making his co-tenants parties to the suit. This objection does not affect the jurisdiction, but addresses itself to the policy of the court. Courts of equity require, that all the parties concerned in interest shall be brought before them, that the matter in controversy may be finally settled. This equitable rule, however, is framed by *the court itself, and is subject to its discretion. It is not, like the description of parties, an inflexible rule, a failure to observe which [*167 turns the party out of court, because it has no jurisdiction over his cause; but being introduced by the court itself, for the purposes of justice, is susceptible of modification, for the promotion of those purposes. In this case, the persons who are alleged to be tenants in common with the plaintiffs, appear to be entitled to a fourth part, not of the whole tract, but of a specially described portion of it, which may, or may not, interfere with the part occupied by the defendants. Neither the bill nor answer allege such an interference, and the court ought not, without such allegation, to presume it. Had the decree of the circuit court been in favor of the plaintiff, and had this objection to it been deemed sufficient to induce this court to reverse it, and send back the case for the examination of this fact, it could never have justified a dismissal of the bill, without allowing the plaintiff an opportunity of showing that he was the sole owner of the lands in dispute. In addition to these observations, it may be proper to say, that the rule which requires that all persons concerned in interest, however remotely, should be made parties to the suit, though applicable to most cases in the courts of the United States, is not applicable to all. In the exercise of its discretion, the court will require the plaintiff to do all in his power to bring every person concerned in interest before the court. But if the case may be completely decided *as between the litigant parties, the circumstance that an interest exists in some other person, whom the process of the court [*168 cannot reach, as, if such party be a resident of some other state, ought not

prevent a decree upon its merits. It would be a misapplication of the rule, to dismiss the plaintiff's bill, because he has not done that which the law will not enable him to do.(*a*)

3. The third point in the defence is, the length of time which has elapsed since the plaintiff's equitable title accrued. His patent was issued on the 11th of February 1794, and those of the defendants are of prior date His bill was filed on the 28th of December 1815. Several of the defendants, in their answers, claim the benefit of the length of time.

From the earliest ages, courts of equity have refused their aid to those who have neglected, for an unreasonable length of time, to assert their claims, especially, where the legal estate has been transferred to purchasers, without notice. Although the statutes of limitation do not, either in England, or in these states, extend to suits in chancery; yet the courts, in both countries, have acknowledged their obligation. Their application, we believe, has never been controverted; and in the recent case of *Thomas* v. *Brockenbrough* (*ante*, p. 146), decided at this term, it was expressly recog-
*169] nised. But the statute of limitations, which *bars an ejectment after the laps of twenty years, constitutes no bar to a writ of right, even where the tenant counts on his own seisin, until thirty years shall have elapsed. Whether a court of equity considers an equitable claim to land as barred, when the right of entry is lost, or will sustain a bill so long as the mere right may be asserted, is a question of some difficulty, and of great importance. The analogy of a bill in equity to actions founded on a right of entry, seems to derive some title to consideration, from the circumstance, that the plaintiff does not sustain his claim on his own seisin, or that of his ancestor, but on an equity, not necessarily accompanied by seisin, whereas, seisin is an indispensable ingredient in a writ of right. But the case must depend upon precedent, and if the one rule or the other has been positively adopted, it ought to be respected.

In the case of *Jenner* v. *Tracy* (3 P. Wms. 287, note), the defendant demurred to a bill to redeem mortgaged premises, of which the defendant had been in possession more than twenty years, and the demurrer was sustained; the court observing, that "as twenty years would bar an entry or ejectment, there was the same reason for allowing it to bar a redemption." It is added, that "the same rule was agreed in the case of *Belch* v. *Harvey*, by the Lord Talbot. In 3 Atk. 225, the court expressed an opinion unfavorable to a demurrer in such a case, because the plaintiff ought to be at liberty, in his replication, to show, that he is within the exceptions of
*170] *the statute; but supported the bar, when pleaded. The same principle is recognised in 3 Atk. 313. The rule appears to have been laid down in 1 Ch. Cas. and to have been observed ever since. In 3 Johns. Ch. 135 Chancellor Kent said, "It is a well-settled rule, that twenty years' possession by the mortgagee, without account or acknowledgment of any subsisting mortgage, is a bar to a redemption, unless the mortgagor can bring himself within the proviso in the state of limitations."

These decisions were made on bills to redeem mortgaged premises; but as no reason can be assigned why an equity of redemption should be barred in a shorter time than any other equity, they appear to us to apply with

(*a*) As to who are necessary parties to a bill in equity, see 8 Wheat. 451, note *a*.

equal force to all bills asserting equitable titles. We have seen no *dictum* asserting that the rule is not applicable to other equitable rights, and we should not feel justified in drawing a distinction which has never heretofore been drawn. But we think the rule has been applied to equitable rights generally.

In the 2d vol. of Eq. Cas. Abr. title "Length of Time," it is said, generally, "that possession for more than twenty years, under a legal title, shall never be disturbed in equity." The case of *Cook* v. *Arnham* (3 P. Wms. 283) was a bill brought to supply the want of a surrender of copyhold estate to the use of the will; and it was objected, that the application to the court had been unreasonably delayed. The Lord Chancellor said, that "the length of time was not *above fourteen years, which, as it would not bar an [*171 ejectment, so neither could it bar a bill in equity." The case of *Bond* v. *Hopkins et al.* (1 Sch. & Lef. 413) was a suit brought by a person claiming to be the heir, to set aside a will alleged to be obtained by fraud, to obtain possession of title papers, and to remove impediments out of the way in a trial at law. Length of possession was set up as a bar to the relief prayed for in the bill; and the question, which was discussed at the bar by very eminent counsel, was profoundly and deliberately considered by Lord REDESDALE. The testator died in November 1754, and the bill was filed in June 1792, so that thirty-eight years had elapsed between the death of the testator and the filing of the bill. As this time was not sufficient to bar a writ of right, no question could have arisen respecting the act of limitations, had the rule of granting relief in equity depended on the ability of the plaintiff to maintain a writ of right. But the rule was clearly understood, both at the bar and by the court, to be, that the equitable rule respecting length of time had reference to twenty years, the time during which the right of entry was preserved, not to the time limited for maintaining a writ of right. In the very elaborate and very able opinion given by the chancellor, in this case, in which he investigates thoroughly the principles which govern a court of equity in its decisions on the statute of limitations, it is not insinuated, that it acts in any case from *analogy to a writ of [*172 right, but is assumed as an acknowledged and settled principle, that it acts from analogy to a writ of ejectment. In this case, a suit had been instituted by John Bond, the grandfather of the plaintiff, as early as 1755, and a decree pronounced in 1770. The full benefit of this decree was not obtained, and John Bond took forcible possession of a part of the property, of which he was dispossessed by order of the court, on a bill for that purpose, brought by the defendant. The said John Bond died in prison, in 1774, having first devised the property in dispute to his son Thomas, then an infant, for life, with remainder to his first and other sons, in strict settlement. Soon after his death, an ejectment was brought by the defendant, to recover part of the property in possession of Bond; and in 1776, a bill was filed by Thomas Bond, then a minor, to enjoin the defendants from proceeding in their ejectment, and to have the will delivered up. Various orders were taken; and in June 1792, an original bill, in the nature of a bill of revivor, was filled by Thomas Bond, and his eldest son Henry. In discussing this case, so far as respected length of time, no doubt was entertained that the plaintiffs would have been barred of all relief in equity, by a quiet acquiescence in the possession of the defendants for

twenty years. It was a strong case of fraud, but an acquiescence of twenty years would have closed the court of equity against the plaintiffs. This was not questioned; but it was insisted, that the pendency of suits,
*173] from the year 1755, when John *Bond, the son and heir of the testator, returned from America, had preserved the equity of the plaintiffs, unaffected by the lapse of time; and of this opinion was the court.

The case of *Hovenden* v. *Lord Annesley* (2 Sch. & Lef. 607), was a bill filed in May 1794, to set aside a conveyance made in July 1726, alleged to have been fraudlently obtained. There were some circumstances on which the plaintiff relied, as relieving his case from the *laches* justly imputable to him for permitting such a length of time to elapse; but they need not be noticed, because they were deemed insufficient by the chancellor, and the bill was dismissed. In discussing this point, Lord REDESDALE reviewed the cases which had been determined, and said, "that it had been a fundamental law of state policy, in all countries, and at all times, that there should be some limitation of time, beyond which the question of title should not be agitated. In this country, the limitation has been fixed (except in writs of right, and writs depending on questions of mere title) at twenty years." "But it is said, that courts of equity are not within the statute of limitations. This is true, in one respect; they are not within the words of the statutes, because the words apply to particular legal remedies; but they are within the spirit and meaning of the statutes, and have been always so considered." After reasoning for some time on this point, and citing several cases to show "that wherever the legislature has limited a period for law
*174] proceedings, equity will, in analogous *cases, consider the equitable rights as bound by the same limitation," he says, "a court of equity is not to impeach a transaction, on the ground of fraud, where the fact of the alleged fraud was within the knowledge of the party sixty years before. On the contrary, I think the rule has been so laid down, that every right of action in equity, that accrues to the party, whatever it may be, must be acted upon, at the utmost, within twenty years."

This question was fully discussed, and solemnly, and, we think, finally decided, in the case of *Marquis Cholmondeley* v. *Lord Clinton et al.*, 2 Jacobs & Walker 138. In that case the title accrued in December 1791, and the bill was filed in June 1812. Other points were made; but the great question on which the cause depended, was the length of time which had been permitted to elapse; and this question, after being argued with great labor and talent at the bar, was decided by the court, upon a full review of all the cases which are to be found in the books. It was considered, and was treated by the court, as one of the highest importance; and the opinion was unequivocally expressed, that "both on principle and authority, the *laches* and non-claim of the rightful owner of an equitable estate, for a period of twenty years (supposing it the case of one who must, within that period, have made his claim in a court of law, had it been a legal estate), under no disability, and where there has been no fraud, will constitute a bar to equitable relief, by analogy to the statute of limitations,
*175] *if, during all that period, the possession has been held under a claim unequivocally adverse, and without anything having been done or said directly or indirectly, to recognise the title of such rightful owner by the

adverse possessor." Upon this ground alone, the bill was dismissed. The plaintiff appealed to the House of Lords, and the decree was affirmed. The Lord Chancellor, in delivering his opinion in the House of Lords, took a distinction, as to length of time, between trusts, "some being express and some implied." "In the case of a strict trustee, it was his duty to take care of the interest of his *cestui que trust*, and he was not permitted to do anything adverse to it; a tenant also had the duty to preserve the interests of his landlord; and many acts, therefore, of a trustee, and a tenant, which, if done by a stranger, would be acts of adverse possession, would not be so in them, from its being their duty to abstain from them." In a case of actual adverse possession, however, as was that before the house, his lordship considered twenty years as constituting a bar. Lord REDESDALE was of the same opinion, and, in the course of his address, remarked, that "it had been argued, that the Marquis Cholmondeley might, at law, have had a writ of right. That was a writ to which particular privileges were allowed, but courts of equity had never regarded that writ, or writs of *formedon*, or others of the same nature. They had always considered the provision in the statute James, which applied *to rights, and titles of entry, and in which the period of limitation was twenty-nine years, as that by which they were bound, and it was that upon which they had constantly acted." [*176

This is not an express trust. The defendents are not, to use the language of the Lord Chancellor in the case last cited, "strict trustees, whose duty it is to take care of the interest of *cestuis que trust*, and who are not permitted to do anything adverse to it." They hold under a title in all respects adversary to that of the plaintiff, and their possession is an adversary possession. In all cases where such a possession has continued for twenty years, it constitutes, in the opinion of this court, a complete bar in equity. An ejectment would be barred, did the plaintiff possess a legal title. This point has been decided in the same manner by the courts of Kentucky. The counsel for the plaintiff insist, that those decisions are founded on the peculiar opinions entertained by that court respecting writs of right. We do not think so. Their doctrine on that subject is, indeed, used as an auxiliary argument; but it is merely auxiliary to an opinion formed without its aid.

The decree of the circuit court is to be reversed, and the cause remanded to that court, with instructions, that the entry under which the plaintiff claims is valid; but that the adversary possession of the defendants, respectively, constitutes a complete bar to the plaintiff's bill, *wherever it would constitute a bar to an ejectment, did the plaintiff possess the legal title.(*a*) [*177

(*a*) Although, in general, length of time is no bar to an express trust, clearly established to have once existed; yet, as length of time necessarily obscures all human evidence, and deprives parties of the means of ascertaining the nature of the original transactions, it operates, by way of presumption, in favor of innocence, and against the imputation of fraud. It was, therefore, held by this court, that the lapse of forty years, and the death of all the original parties, would discharge and extinguish a trust proved once to have existed by strong circumstances; by analogy to the rule of law, which, after the lapse of time, presumes the payment of a debt, surrender of a deed, and extinguishment of a trust, where circumstances require it. (Prevost *v.* Gratz, 6

*Decree.—This cause came on, &c.: on consideration whereof, this court is of opinion, that there is error in the decree of the said circuit *178] *court, in this, that the said court determined, that the entry in the

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Wheat. 481, 497.) In the case of Hillary *v.* Walker (12 Ves. 265), the whole subject of presumptions from the lapse of time is gone fully into by Lord ERSKINE, both as applicable to incorporeal hereditaments, and where there is a written title. He states the doctrine to be founded in reason, the nature and character of man, and the result of human experience. "It resolves itself into this, that a man will naturally enjoy what belongs to him." "It has been said, you cannot presume, unless you believe. But it is because there are no means of creating belief or disbelief, that such general presumptions are raised upon subjects, of which there is no record or written muniment. Therefore, upon the weakness and infirmitiy of all human tribunals, judging of matters of antiquity, instead of belief, which must be the foundation of the judgment upon a recent transaction, where the circumstances are incapable of forming anything like belief, the legal presumption holds the place of particular and individual belief." Although some of the principles laid down in this decision seem to be questioned by Mr. Sugden, in his treatise on the Law of Vendors and Purchasers (p. 250), yet it was cited with entire approbation, and its doctrine adopted by this court in determining the above case of Prevost *v.* Gratz, 6 Wheat. 504.

In the case of Smith *v.* Clay (3 Bro. C. C. 639, note), and which is also cited and adopted by this court in the case of Thomas *v.* Brockenbrough (*ante*, p. 146) Lord CAMDEN says, "A court of equity, which is never active in relief, against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his right, and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive, and does nothing. *Laches* and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court." After applying this principle to limit a bill of review and appeal, by analogy to the statute concerning writs of error, he proceeds to cite the maxim, *expedit reipublicæ ut sit finis litium*, and to state, that it had prevailed in the court of equity, in all times, without the help of an act of parliament. "But as the court has no legislative authority, it could not properly define the time of bar, by a positive rule, to an hour, a minute or a year; it was governed by circumstances. But as often as parliament had limited the time of actions and remedies, to a certain period, in legal proceedings, the court of chancery adopted that rule, and applied it to similar cases in equity. For where the legislature had fixed the time at law, it would have been preposterous for equity, which, by it own proper authority, always maintained a limitation, to countenance *laches* beyond the period that law has been confined to by parliament. Therefore, in all cases, where the legal right has been barred by parliament, the equitable right to the same thing has been concluded by the same bar. Thus, the account of rents and profits, in a common case, shall not be carried beyond six years. Nor shall redemption be allowed, after twenty years possession in a mortgagee." So also, this court, in the case of Hughes *v.* Edwards (9 Wheat. 489, 497), adopted the same principle in relation to the effect of the lapse of time upon the respective rights of mortgagor and mortgagee, and of purchasers claiming under the former.

The great case of Cholmondeley *v.* Clinton, cited in the text, was that of an estate, subject to a mortgage in fee, being in settlement, with an ultimate limitation to the right heirs of S. R.; A., on the expiration of the previous estate, entered, claiming to be entitled, under the limitation; and he, and after his death, his son, continued in quiet possession, paying interest on the mortgage, for twenty years. It was finally determined, after such litigation, that the devisee of the person really entitled under the limitation, was barred by the length of time. The case, as first decided in the court of chancery, will be found reported in 2 Meriv. 173, 357, where it was deter-

bill mentioned, made by Walker Daniel, on the first day of April 1784, *and explained on the first day of July of the same year, on which the plaintiff's title is founded, is invalid; whereas, this court is of opinion, *that the same is a valid entry. It is, therefore, ordered and decreed, [*181 that the decree of the said circuit court, dismissing the plaintiff's bill,

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mined, by Sir W. GRANT, M. R., that the lapse of time was no bar, by analogy to the statute of limitations. Upon its afterwards coming on before his successor, Sir T. PLUMER, the latter delivered a learned and elaborate judgment, which will be found reported in 2 Jacobs & Walker 138, tending to show, that wherever in the claim of a legal estate, the remedy is barred in a court of law, by the statute of limitations, the remedy for an equitable estate will be equally barred, by the lapse of the same period of time, in a court of equity. An appeal was taken to the house of lords, and in moving the judgment of the house, Lord ELDON adverted to the general principles adopted by courts of equity on the subject of length of time, and observed on "the vast difference between trusts, some being express, some implied; some, relations formed between individuals in the matter in which they deal with each other, and in which it could hardly be said, that one was trustee, and the other *cestui que trust*, and yet it could not well be denied, that for some purposes they were so. Of this kind, he took the relation between mortgagor and mortgagee to be. In the case of a strict trustee, it was his duty to take care of the interest of his *cestui que trust*, and he was not permitted to do anything adverse to it; a tenant also had a duty to preserve the interests of his landlord; and many acts, therefore, of a trustee and tenant, which, if done by a stranger, would be acts of adverse possession, would not be so in them, from its being their duty to abstain from them. But the case of a mortgagee was different, he being at liberty to hold possession, and not becoming strictly a trustee, until the money was tendered to him, and having a right, if he continued in possession for twenty years, without acknowledging the mortgage, to turn round on the mortgagor, and say that the estate was his own. His lordship could not agree to, and had never heard of such a rule, as that adverse possession, however long, would not avail against an equitable estate; he meant, where there was no duty which the person who has it has undertaken to discharge for him against whom he pleads adverse possession. The possession of Lord Clinton was adverse; it had been said, that it was taken by consent, founded on mistake; but that did not make the possession the less adverse, because Lord Clinton took, and kept it for himself, where he owed, as it appeared to him, no duty to Lord Oxford. He concluded, by stating his opinion to be, that adverse possession of an equity of redemption for twenty years, was a bar to another person claiming the same equity of redemption, and worked the same effect, as disseisin, abatement, or intrusion, with respect to legal estates; and that, for the quiet and peace of titles, and the world, it ought to have the same effect. Lord REDESDALE concurred, and the decree was affirmed.

Although, in general, lapse of time is not a bar to a direct trust, as between trustee and *cestui que trust*, so long as there is a continuing and subsisting trust acknowledged and acted upon between the parties, yet this must be understood as applying to such trusts only as are the creatures of a court of equity, or strict technical trusts, and not to those which are within the cognisance of a court of law; for, in regard to all these trusts which are the ground of an action at law, and where there is a concurrent jurisdiction at law and in equity, the rule is the same, and the statute is a bar, both in a court of law and equity. (Kane *v.* Bloodgood, 7 Johns. Ch. 90, 127.) And though in cases of trusts peculiarly and exclusively of equity jurisdiction, the statute does not apply; yet, if the trustee denies the right of the *cestui que trust*, and the possession of the property becomes adverse, lapse of time may constitute a bar in equity. (Id.) And where a person takes possession of property in his own right, and is, afterwards, by evidence or construction, changed into a trustee, he may insist on the lapse of time as a bar. (Decouche *v.* Savetier, 3 Johns. Ch. 190.)

ought to be, and the same is hereby, reversed and annulled. And this court is further of opinion, that in cases of adversary title, such an adversary possession as would bar an ejectment, did the plaintiff possess the legal title, constitutes also a bar to a bill in equity. It is, therefore, further ordered and decreed, that this cause be remanded to the said circuit court, with instructions to take such further proceedings therein, comformable to this opinion, as may be agreeable to equity and good conscience. All which is ordered and decreed accordingly.

CARNEAL and others, appellants, *v.* BANKS, respondent.

BANKS, appellant, *v.* CARNEAL and others, respondents.

Jurisdiction.—Parties.—Issue.—French treaty.

The joinder of improper parties, as, citizens of the same state, &c., will not affect the jurisdiction of the circuit courts in equity, as between the parties who are properly before the court, if a decree may be pronounced as between the parties who are not citizens of the same state.[1]

A decree must be sustained by the allegations of the parties, as well as by the proofs in the cause, and cannot be founded upon a fact not put in issue by the pleadings.[2]

*182] *The treaty of 1778, between the United States and France, allowed the citizens of either country to hold lands in the other; and the title once vested in a French subject, to hold land in the United States, was not divested by the abrogation of that treaty, and the expiration of the subsequent convention of 1800.

Bill to rescind a contract for the exchange of lands dismissed, under the special circumstances of the case.

APPEALS from the Circuit Court of Kentucky.

February 20th, 1825. These causes were argued by *Jones*, for Banks; and by *Bibb*, for Carneal and others.

February 25th. MARSHALL, Ch. J., delivered the opinion of the court.—These appeals are from a decree of the circuit court for the district of Kentucky, in which Carneal's heirs were decreed to pay Henry Banks $2500, for failing to perform a contract entered into between Thomas Carneal, their ancestor, and the said Henry Banks.

The bill filed by Henry Banks, charges, that his agent, Cuthbert Banks, entered into a contract with Thomas Carneal, whereby he agreed to transfer to Carneal the right of the said Banks in 30,000 acres of land, purchased by him from John Harvie, for which right said Carneal "agrees to give a tract of 2000 acres of land on Green river, patented for Philip Philips, which was sold out of a tract of 22,100 acres, by Philips, to Michael Lacassaign, deceased, by said Lacassaign to said Carneal, on the 30th of July 1797, for which land said Carneal is to make a general warranty deed, whenever thereunto required." The bill further charges, that Carneal *183] was guilty of fraud in pretending to have a good title *to the said 2000 acres of land, the whole being covered with better titles, and in representing the land as much more valuable than it really is. The

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[1] Vattier *v.* Hinde, 7 Pet. 252; Boon *v.* Chiles, 8 Id. 532; Bowman *v.* Wathen, 2 McLean 376.

[2] Harding *v.* Handy, 11 Wheat. 103; Piatt *v.* Vattier, 9 Pet. 405; Harrison *v.* Nixon, Id. 483; Boone *v.* Chiles, 10 Id. 177; Walden *v.* Bodley, 14 Id. 156; Hobson *v.* McArthur, 16 Id. 182.

bill prays, that the contract may be rescinded, and that the plaintiff may be reinstated in his rights to the said 30,000 acres of land, or have the value thereof in damages. And that the heirs of John Harvie, deceased, in whom the legal title to the said 30,000 acres remains, may be decreed to convey the same to him.

The heirs of T. Carneal deny all fraud in his representation of the value of the land sold to the plaintiff, and insist on their ability to convey the same. They admit, that the deed from Lacassaign to him was not recorded within the time limited by law, one of the three subscribing witnesses then required for its proof, having died before it was offered to the court. In consequence of this circumstance, Carneal, in 1779, instituted a suit in chancery against Lacassaign, to perfect his title, which abated by his death. The law being so changed as to admit deeds to record, on the oath of two subscribing witnesses, this deed was recorded in 1814, and the defendants are willing to convey, if directed so to do. The defendants further state, that the plaintiff's original claim on the said 30,000 acres of land, was to only a moiety thereof, the other moiety being the property of the locator, which has been transferred to the defendants. The said Banks assigned the survey to J. Harvie, that the patent might issue in his name, in trust for the person entitled to the locator's moiety, and the title still *re- [*184
mains in Harvie's heirs, incumbered by debts due from Banks to Harvie, and by an obligation in which Harvie was bound to Thomas Madison, as surety for Banks, for the conveyance of military lands north-west of the Ohio. To obtain a title from Harvie, the said Carneal, in September 1799, bound himself to pay the debt due from Banks, with Harvie as his security, to Madison, on condition that Banks would deliver him military land-warrants to the amount of 4300 acres; and it was expressly stipulated, that Carneal should retain the title to the said 2000 acres of land, until Banks should perform this contract. He requires the plaintiff to show how he has performed it. They understand that Harvie's heirs have a claim on the estate of their ancestor, of which they know nothing certain, and aver, that the title to the locator's moiety of the said 30,000 acres of land, remains in the said heirs. The defendants, then, pursuing a practice authorized by law in the state courts of Kentucky, pray that their answer may be received as a cross-bill; and that Harvie's heirs, as well as Banks, may be made defendants to it, and may answer it; and that the whole controversy may be settled.

On the 20th of September 1799, J. Harvie conveyed to T. Carneal the moiety of the said patent for 30,000 acres which had been sold by the said Banks to Carneal. On the same day the following agreement was entered into:

"Thomas Carneal agrees to pay John Preston, or John Harvie, 3200 acres of military land, *lying on the north-west side of the river Ohio, [*185
surveyed on or before the 10th day of October 1795, to satisfy a bond executed by the said John Harvie, as security for Henry Banks, to Thomas Madison, deceased, dated the 6th day of December 1795; provided the said Carneal shall receive from Cuthbert Banks, in Kentucky, 4300 acres of military continental land-warrants, within ninety days after the said Carneal shall make demand of them of Cuthbert Banks, in Lexington, in Kentucky; and provided the said Carneal shall not receive the warrants, he will not

afterwards be bound to take them, unless he pleases. Henry Banks agrees that he will furnish the said 4300 acres of military land-warrants, through the agency of Cuthbert Banks, within the time above mentioned; and if he fails to do so, and the said Thomas Carneal satisfy the bond for military land, due the estate of the said Thomas Madison, as aforesaid, by the said H. Banks and J. Harvie, in such case, the said H. Banks obliges himself to satisfy and pay off the said obligation, according to its true value, upon the application of the said Thomas Carneal, or still to give the 4300 acres of military land-warrants, at the option of the said Carneal." Signed by H. Banks and T. Carneal.

There are letters from J. Harvie to T. Carneal, the last dated the 3d of March 1802, not long before his death, urging T. Carneal to satisfy the debt to the estate of T. Madison.

The answer of Banks to what it termed the cross-bill, states, that he has sued Madison's representatives in Virginia, to compel them to receive
*186] *a compensation in money for the military lands he was bound to pay, there being no lands which are within the description of the obligation; and that the suit is still depending. The parties agree that the debt to Madison is not satisfied, and that the representatives of J. Harvie hold an obligation of T. Carneal, deceased, for payment of the same, or as indemnification to Harvie, as referred to in the answer and pleadings in the same.

In May 1819, the plaintiff filed an amended bill, stating that Michael Lacassaign was an alien, and never became a citizen of the United States. That his deed, being proved by only two witnesses, could not pass the title to T. Carneal. That Carneal knew his title to be defective, when he sold to Banks. That Lacassaign left no heirs in this country, and has made some person in France his residuary legatee. That there are debts and judgments against him to a large amount, which bind the land. The answer admits Lacassaign to have been a Frenchman, but not an alien. That he emigrated early to this country, before and at the close of the war, and continued a citizen till his death. They insist that the legal title passed, by the deed of the said Lacassaign, and deny that the land is incumbered.

The circuit court was of opinion, that the contract between Banks and Carneal required that the tract of 2000 acres, which Carneal bound himself to convey to Banks, should be a tract lying on Green river, and that as the
*187] land did *not touch the river in any part, it did not correspond with, and could not satisfy the contract. The court therefore directed an issue to ascertain the average value of 2000 acres, part of the land granted to Philips, to bound on the river; and on receiving the verdict of the jury, directed its amount, with interest thereon, to be paid to the plaintiff.

From this decree both parties have appealed; and the counsel for Carneal's heirs assign for error: 1. That the circuit court had no jurisdiction. 2. That there is no allegation that the land does not, in point of location, fit the description of it in the contract. 3. That the plaintiff has no right to relief in equity, until he releases Carneal's representatives from their undertaking to Harvie; and Carneal's heirs have a right in equity to retain the land as an indemnity for that undertaking. 4. If Banks can recover on the agreement, his remedy is at law. 5. The decree against the heirs personally is erroneous. They are not named in the contract, and the statute of Kentucky does not authorize a suit against them personally, in such a case.

Carneal v. Banks.

1. The objection is to the jurisdiction of the court is founded on this; that Banks states himself, in his bill, to be a citizen of Virginia, and does not state the heirs of Harvie to be citizens of Kentucky: they are, in truth, citizens of Virginia. *If the validity of this objection, so far as respects Harvie's heirs, be unquestionable, it cannot affect the suit against the Carneal's heirs, unless it be indispensable to bring Harvie's heirs before the court, in order to enable it to decree against Carneal's heirs. This is not the case. Harvie had conveyed to Carneal, Banks's moiety of the 30,000 acre tract of land, so that his heirs have no lien upon it; and they never had a claim on the 2000 acre tract. They are made defendants by Banks under the idea that the title to the land sold by him to Carneal was in them; but this is a mistake. The title to that land was in Carneal's heirs; and Banks can have no claim on the locator's moiety, title to which seems to have been retained by Harvie. The bill, therefore, as to Harvie's heirs, may be dismissed, without in any manner affecting the suit against Carneal's heirs. That they have been improperly made defendants in his bill, cannot affect the jurisdiction the court as between those parties who are properly before it. It is the matter contained in what is termed the cross-bill, which may bring Harvie's heirs into the cause; and in that suit, they would be proper parties, were they to appear, because the plaintiffs in it are all citizens of Kentucky, and the defendants appear to be all citizens of Virginia. (*a*) [*188

2. The second error assigned has more weight. The variance between the location of the land *sold by Carneal to Banks, and the description of it in the contract, is not averred in the bill, and is, consequently, not put in issue. The maxim, that a decree must be sustained by the allegations of the parties, as well as by the proofs in the cause, is too well established, to be disregarded. It is on this fact only, that the circuit court has rescinded the contract, and we do not think there is any other in the cause which would justify its being set aside. The alleged alienage of Lacassaign constitutes no objection. Had the fact been proved, this court decided, in the case of *Chirac* v. *Chirac* (2 Wheat. 259), that the treaty of 1778, between the United States and France, secures the citizens and subjects of either power the privilege of holding lands in the territory of the other; and the omission to record the deed in time, may involve the title in difficulty, but does not annul it. That circumstance might oppose considerable obstacles to a decree for a specific performance, if sought by Carneal's heirs, but does not justify a decree to set aside the contract. There is no subsequent purchaser, nor is it certain, that the title which Carneal's heirs can make, will, or can, ever be disturbed by the creditors of Lacassaign. In such a state of things, there is, perhaps, no sufficient cause for the interference of a court of equity. Did this court, then, concur with the circuit court in its construction of the contract between Banks and Carneal, the decree could not be affimed, because the parties have not put that fact in issue. But the majority is rather disposed *to the opinion, that the words, "lying on Green river," as used in this contract, with reference to a specific conveyance expressly mentioned, which contains within itself infor- [*189 [*190

(*a*) See Wormley *v.* Wormley, 8 Wheat. 451, and note *a*; Kerr *v.* Watts, 7 Ibid. 558; Cameron *v.* McRoberts, 3 Ibid. 591; Russell *v.* Clarke, 7 Cranch 92.

mation which could not fail to suggest the idea that the land did not, in fact, bound on the river, may be satisfied with the land actually conveyed by Lacassaign to Carneal. The omission of Banks to charge Carneal with a misrepresentatation in this respect, countenances this explanation. At all events, the fact, if relied upon by him, ought to have been put in issue, so as to give Carneal's heirs an opportunity of controverting it, and of bringing before the court such facts as might shed light upon it. Were this construction to be established, and were there no equitable objections to allowing Banks the full benefit of his contract, a specific performance might be decreed; but the bill seeks to rescind the contract, and contains no prayer for general relief. There are, too, on the part of Carneal's heirs, weighty objections to such a decree at this time.

3. The third error assigned is, that Banks has no right to relief in equity, until he releases Carneal's representatives from their undertaking to Harvie; and Carneal's heirs have a right in equity to retain the title to the 2000 acres of land, as an indemnity for that undertaking. The testimony on this part of the cause is far from being satisfactory. The contract of the 20th of September 1799, is expressed in such vague terms as to leave it in *some measure doubtful, whether Carneal would not have been discharged from the obligation it imposed, on the failure of Cuthbert Banks to deliver the military land-warrants for which it stipulates, within ninety days after they should be demanded in Lexington. But it does not appear that they have ever been demanded; and the fact that Harvie's conveyance of the land sold by Banks to Carneal, was executed on the same day with this contract, goes far in showing, that the parties understood the obligation of Carneal to be absolute. The subsequent letters of Harvie to Carneal, show his opinion, that the obligation of the contract continued; and the admission of Banks, in the cause, goes to the same point. The court must, therefore, consider Carneal's heirs as still liable for the debt due from Banks, with Harvie as his security, to Madison's estate.

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It is alleged, that Banks agreed, that the title to the 2000 acres of land should remain in Carneal, as an indemnity for this undertaking; but this allegation is totally unsupported by evidence. Carneal's heirs also charge, that they, or some of them, have purchased the interest of the locator in the 30,000 acre tract, and that Harvie's heirs retain the title till Madison's claim shall be adjusted; but of there is no proof. Since, however, the legal title to the land sold by Carneal to Banks, remains in the heirs of the vendor, the court is not satisfied that equity will force it from them, or compel them to made compensation in money for any breach of the contract, *until Banks shall indemnify them for the undertaking of their ancestor on his account.

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It is unnecessary to proceed further in the examination of this case, because the court is of opinion, that for errors already stated, the decree of the circuit court ought to be reversed, and the bill be dismissed, without prejudice.

Decree reversed.

McCormick and Wife, and others, appellants, *v.* Sullivant and others, respondents.

Judgments of circuit courts.—Lex loci rei sitæ.

The courts of the United States are courts of *limited*, but not of *inferior* jurisdiction. If the jurisdiction be not alleged in the proceedings, their judgments and decrees may be reversed for that cause, on a writ of error and appeal; but, until reversed, they are conclusive evidence between parties and privies.[1]

The title and disposition of real property is governed by the *lex loci rei sitæ*.

The title of lands can only pass by devise, according to the laws of the state or country where the lands lie; the probate in one state or country, is of no validity as effecting the title to lands in another.[2]

Appeal from the Circuit Court of Ohio. The appellants filed their bill in equity, in the court below, setting forth, that William Crawford, *deceased, the father of the female appellants, being, in his life- [*193 time, a colonel in the Virginia line, on continental establishment, and, as such, entitled to the quantity of 6666⅔ acres of land, to be laid off between the Scioto and Little Miami rivers, on the north-west side of the river Ohio, departed this life, having first duly made and published his last will and testament, bearing date the 16th of June 1782, whereby he devised all his estate, not otherwise disposed of by said will, to be equally divided between his three children, John Crawford, and the female complainants, and their heirs for ever. That this will was proved and recorded in Westmoreland county, in the state of Pennsylvania, on the 10th of September in the same year. That a warrant for the above quantity of land was afterwards issued, in the name of the said John Crawford, as heir-at-law of his father, under which the following entries were made: one for 800 acres, which was surveyed and patented to Lucas Sullivant, of which quantity 400 acres are claimed by Bernard Thompson; another for 955⅔ acres which was surveyed and patented to John Armat, but then claimed by William Winship; another for 956 acres, patented to some person unknown, but claimed by Samuel Finley; another for 955 acres, patented to some person unknown, but believed to be claimed and possessed by Lucas Sullivant. The bill then proceeded to interrogate the above parties, who were made defendants, severally, as to their knowledge of the above will, and of the *title [*194 of the female complainants, and required of them to set forth and describe the lands severally claimed by them, from whom they purchased, at what time, and for what price the same were purchased, and when the purchase-money was paid. The prayer was for a conveyance, by each defendant, of two-thirds of the land claimed by them, respectively, and for possession.

The answer of the heirs of Winship stated, that the land to which they claimed title was purchased, for a valuable consideration, of Thomas Armat, by their father, to whom a conveyance was made, in the year 1807. That a bill was filed by the present complainants, against the said Thomas Armat, in the district court of Ohio, exercising the powers and jurisdiction of a cir-

[1] Ex parte Watkins, 3 Pet. 193; Kennedy *v.* Georgia State Bank, 8 How. 586; Huff *v.* Hutchinson, 14 Id. 586.

[2] Darby *v.* Mayer, *post*, p. 465; United States *v.* Fox, 94 U. S. 315; Brine *v.* Insurance Co., 96 Id. 627.

cuit court, for the land now in controversy, to which the said Armat filed his answer, asserting himself to be a *bonâ fide* purchaser of the land, for a valuable consideration, and without notice, and that, the cause coming on to be heard, the bill was dismissed, without costs, after which decree, the purchase was made of Armat, by the defendant's father. They insisted upon, and prayed to be protected by the said decree.

Finley answered, and alleged himself to be a *bonâ fide* purchaser, for a valuable consideration, of 500 acres, part of the 956 acres mentioned in the bill, from one Beauchamp, who claimed as assignee of Dyal, who was assignee of John Crawford, for which he paid, and received a patent, before notice of the claim of the plaintiffs, or of the will of William Crawford.

*195] *The heirs of Thompson filed a plea in bar, alleging, that the complainants, in the year 1804, filed their bill in the district court of Ohio, exercising the powers and jurisdiction of a circuit court, against B. Thompson, their ancestor, under whom they claimed, setting forth the same title, and, substantially, the same matters, as in their present bill, to which the said Thompson answered, and the complainants replied, and upon a hearing of the cause, the bill was dismissed, with costs, which decree was in full force, &c. Sullivant filed a similar plea, and the bill was dismissed, as to him, by agreement.

A general replication was put in to the answers of Finley and Winship's heirs, and a special replication to the plea in bar, setting forth the record in the former suit, and alleging that the proceedings in that suit were *coram non judice*, the record not showing that the complainants and defendant in that suit, were citizens of different states. Upon the hearing, the bill was dismissed, and an appeal taken to this court.

March 5th. *Doddridge*, for the appellants, argued, that the former proceedings in the district court of Ohio, pleaded in bar of the present suit, were absolutely null and void, the record not showing that the parties to that suit were citizens of different states, and consequently, the suit was *coram non judice*. The courts of the United States are all courts of limited

*196] jurisdiction, and the presumption is, that a case is without their *jurisdiction until the contrary appears. *Turner* v. *Bank of North America*, 4 Dall. 8. The jurisdiction must appear on the record, either as arising out of the character of the parties, or the nature of the controversy. If it arises from the character of the parties, as being citizens of different states, aliens, &c., the citizenship or alienage of the respective parties must be set forth. *Bingham* v. *Cabot*, 3 Dall. 82; *Mossman* v. *Higginson*, 4 Ibid. 12; *Abercrombie* v. *Dupuis*, 1 Cranch 343; *Wood* v. *Wagnon*, 2 Ibid. 1. He also contended, that the probate of the will of W. Crawford, in Westmoreland county, now a part of the state of Pennsylvania, but then claimed by Virginia, as being within its territorial limits, was sufficient to pass the title to the lands in question; but if this were not so, that the probate and record of the will was notice to all the world, and affected, in the view of a court of equity, the consciences of the grantees, and all those claiming under them. He, however, concluded by asking, that in case the decree of the court below should be affirmed, that it might be without purjudice.

Scott, contrà, insisted, that the appellants had entirely failed in establishing any title to the lands in question, under the will of W. Crawford,

they not having exhibited a probate either in the state of Virginia, or of Ohio, which then constituted a part of Virginia. By the law of Virginia, then in force, it was necessary, that a will of lands should be duly proved and admitted to *record in the court of the county where the testator had his residence at the time of his decease; or, if he had no place [*197 of residence in the state, then in the county court of the county where the lands devised were situate; or, if the land was of a certain value, it might be proved in the general court. Virg. Rev. Code, 1769, c. 3, p. 159. The will of W. Crawford, whether executed in Virginia or elsewhere, could not have the effect to pass his real estate, situate in that state, unless made and proved in conformity with its laws. It belongs to the sovereign power of every state, to prescribe the rules by which real property within its territory shall be transferred. No courts but those of Virginia or Ohio, could have jurisdiction of this will, because the probate must depend upon the legality of the execution, and that again must depend upon the *lex loci*. The probate of a court of competent jurisdiction is, by the local law, conclusive evidence of the due execution of a will of real as well as personal estate. But the court of Westmoreland county could have no jurisdiction of the probate of this will, because that court was not established under the authority of Virginia, and because the lands did not lie in that county, nor was the testator resident there. A mere contested claim to the territorial jurisdiction, could never lay the foundation to establish the validity of this probate, which was, in fact, made in a foreign country. It is laid down, by the text-writers on this subject, that "if a will be made in a foreign country, disposing of goods in England, *it must be proved there." Toller on Executors 72. *A fortiori*, would it be required to be proved there (if [*198 by the English law probate of a will of lands were conclusive), where it related to real property. Robertson on Wills 50.(*a*) If this will could not pass the legal title to the lands in controversy, neither could the respondents be affected with constructive notice, by the probate in Pennsylvania. Had it been duly proved and recorded in the state where the lands are situate, it is so vaguely drawn, as not to designate, with certainty, the particular lands in question. The claim of the appellants would, therefore, still be but a latent equity, and the purchaser from the heir would be protected. *Lewis* v. *Madison*, 1 Munf. 303. He also insisted, that the respondents were protected by the former decree in the district court. Although the courts of the United States are courts of limited jurisdiction, so that their judgments will be reversed on error, unless the jurisdiction appears upon the face of the record, yet they are not inferior courts, in a technical sense: and so long as their judgments remain unreversed, they are conclusive. Their judgments may be reversed in an appellate court, for this cause; but they are not mere nullities. *Kempe* v. *Kennedy*, 5 Cranch 173.

March 16th, 1825. WASHINGTON, Justice, delivered the opinion of the court, and after stating the case, proceeded as follows:—*The question which the plea of Thompson's heirs, and the answer of Winship's [*199 heirs, presents, is, whether the general decree of dismissal of the bill in

(*a*) See also 11 Vin. Abr. 58, 59; 1 Vern. 391; 1 Ld. Raym. 251; 3 Mass. 518; 16 Ibid. 441; Kerr *v.* Moon, 9 Wheat. 565, 570.

equity, filed by the present plaintiffs in the federal district court of Ohio, against the ancestor of these defendants, under whom they respectively claim title, is a bar of the remedy which is sought to be enforced by the present suit? The reason assigned by the replication, why that decree cannot operate as a bar, is, that the proceedings in that suit do not show that the parties to it, plaintiffs and defendants, were citizens of different states, and that, consequently, the suit was *coram non judice*, and the decree void.

But tnis reason proceeds upon an incorrect view of the character and jurisdiction of the inferior courts of the United States. They are all of limited jurisdiction; but they are not, on that account, inferior courts, in the technical sense of those words, whose judgments, taken alone, are to be disregarded. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may, upon a writ of error or appeal, be reversed for that cause. But they are not absolute nullities. This opinion was strongly intimated, if not decided, by this court, in the case of *Kempe's Lessee* v. *Kennedy* (5 Cranch 185), and was, afterwards, confirmed by the decision made in the case of *Skillern's Executors* v. *May's Executors* (6 Ibid. 267). That suit came before this court upon a writ of
*200] error, where the decree *of the court below was reversed, and the cause remanded for further proceedings to be had therein. After this, it was discovered by that court, that the jurisdiction was not stated in the proceedings, and the question was made, whether that court could dismiss the suit for that reason? This point, on which the judges were divided, was certified to the supreme court, where it was decided, that the merits of the cause having been finally decided in this court, and its mandate only requiring the execution of its decree, the court below was bound to carry that decree into execution, notwithstanding the jurisdiction of that court was not alleged in the pleadings. Now, it is very clear, that, if the decree had been considered as a nullity, on the ground that jurisdiction was not stated in the proceedings, this court could not have required it to be executed by the inferior court. We are, therefore, of opinion, that the decree of dismissal relied upon in this case, whilst it remains unreversed, is a valid bar of the present suit, as to the above defendants.

The next question is presented by the answer of Finley. At the death of William Crawford, in the year 1782, he was entitled to a certain quantity of land, to be laid off between the rivers Scioto and Little Miami, under a promise contained in an act of the legislature of Virginia. His interest in this land was purely an equitable one. After his death, a warrant to survey the same was granted to John Crawford, his only son and heir-at-law, who
*201] assigned to one Dyal a certain tract *which had been surveyed under the warrant, and the defendant claims a part of the tract so surveyed, under Beauchamp, who purchased from Dyal. He alleges, in his answer, that he made the purchase *bonâ fide*, paid the purchase-money, and obtained a grant for the land, before he had notice of the will of William Crawford, or of the claim of his daughters under it.

Crawford's will, under which the female complainants claim title, was proved in some court in the county of Westmoreland, in the state of Pennsylvania, and was there admitted to record; but it does not appear, nor is it even alleged, to have been at any time proved in the state of Virginia, or in

the state of Ohio, where the lands in controversy lie. At the time of the death of William Crawford, lands lying in Virginia were transmissible by last will and testament, in writing, the same being signed by the testator, or by some person in his presence, and by his direction, and if not wholly written by himself, being attested by two or more credible witnesses, in his presence. But to give validity and effect to such will, it was necessary, that it should be duly proved, and admitted to record, in the court of the county where the testator had his residence at the time of his decease, or, if he had no place of residence in that state, then in the court of the county where the land devised lay, or it might be proved in the general court, where the land was of a certain value. Subsequent to the death of William Crawford, an act of assembly was passed, which permitted *authenticated copies of wills, proved in any other state of the Union, or abroad, to be offered [*202 for probate in the general court, or in the circuit, county or corporation court, where the whole of the estate lies.

By the law of the state of Ohio, lands lying in that state may be devised by last will and testament, in writing; but, before such will can be considered as valid in law, it must be presented to the court of common pleas of the county where the land lies, for probate, and be proved by at least two of the subscribing witnesses. If the will be proved and recorded in another state, according to the laws of that state, an authenticated copy of the will may be offered for probate in the court of the county where the land lies, without proof by the witnesses; but it is liable to be contested by the heir-at-law, as the original might have been.

It is an acknowledged principle of law, that the title and disposition of real property is exclusively subject to the laws of the country where it is situated, which can alone prescribe the mode by which a title to it can pass from one person to another. For the establishment of this doctrine, it will be sufficient to cite the cases of the *United States* v. *Crosby* (7 Cranch 115) and *Kerr* v. *Moon* (9 Wheat. 565). It follows, therefore, that no estate could pass to the daughters of William Crawford, under his will, until the same should be duly proved, according to the laws of Virginia, where the land to which he was entitled lay, at the time of his death, or *of the territory of Ohio, after the cession by Virginia to the United States, [*203 under the ordinance of congress of the 13th of July 1787, or according to the law of that state, which has already been recited. The probate of the will in the state of Pennsylvania, gave it no validity whatever in respect to these lands, as to which this court is bound to consider Crawford as having died intestate, and, consequently, that they descended to John Crawford, his only son and heir-at-law, according to the law of Virginia, as it stood in the year 1782. The court below, then, could do no less than dismiss the bill as against this defendant, upon the ground, that the complainants had shown no title whatever, legal or equitable, to the land in controversy.

This court might be induced to yield to the application of the counsel for the appellants, that, in case of an affirmance, it should be without prejudice, if we could perceive, from the record, that the complainants could, in another suit, present their case under a more favorable aspect. But this the answer of Finley will not permit us to anticipate; for, even if an authenticated copy of Crawford's will should hereafter be offered for prob-

ate, and admitted to record, in the state of Ohio, still, the title to be derived under it could not be permitted to overreach the legal title of this defendant, founded, as it is, upon an equitable title, acquired *bonâ fide*, and for a valuable consideration paid, which purchase, payment and acquisition of legal title, were made before he had either legal or constructive notice of the
*204] *will, or of the claim of the daughters, for we are all of opinion, that the probate of the will in Pennsylvania cannot be considered as constructive notice to any person, of the devise of the lands in controversy. The decree of the court below must, therefore, be affirmed generally, with costs.

Decree affirmed.

WRIGHT, Plaintiff in error, *v.* DENN *ex dem.* PAGE, Defendant in error.

Devise.—Estate for life.—Charge of legacy on lands.

J. P., by his last will, after certain pecuniary legacies, devised as follows; "Item. I give and bequeath unto my loving wife, M., all the rest of my lands and tenements whatsoever, whereof I shall die seised, in possession, reversion or remainder, provided she has no lawful issue: Item. I give and bequeath unto M., my beloved wife, whom I likewise constitute, make and ordain my sole executrix of this my last will and testament, all and singular my lands, messuages and tenements, by her freely to be possessed and enjoyed," &c.; "and I make my loving friend, H. J., executor of this my will, to take care and see the same performed, according to my true intent and meaning," &c.; the testator died seised, without issue, and after the death of the testator, his wife M. married one G. W., by whom she had lawful issue: *Held*, that she took an estate for life only, under the will of her husband, J. P.

Where there are no words of limitation to a devise, the general rule of law is, that the devisee takes an estate for life only, unless, from the language there used, or from other parts of the will, there is a plain intention to give a larger estate.[1]

To make a pecuniary legacy a charge upon lands devised, there must be express words, or a plain implication from the words of the will.[2]

Page *v.* Wright, 4 W. C. C. 194, affirmed.

*205] *ERROR to the Circuit Court of New Jersey. This was an action of ejectment brought in the court below. The sole question arising upon the state of facts in the cause, was upon the construction of the will of James Page, made on the 15th of February 1774. By that will, after the usual introductory clause, the testator proceeded as follows:

"Item. I give and bequeath unto my beloved sister, Rebecca, 100 pounds, proclamation money, to be paid in four years after my decease. Item. I give and bequeath unto my beloved sister Hannah, the sum of 50 pounds, proclamation money, to be paid when she is of age. Item. I give and bequeath unto my sister, Abigail, the like sum of 50 pounds, proclamation money, to be paid when she arrives at age. Item. I give and bequeath unto my loving wife Mary, all the rest of my lands and tenements whatsoever, whereof I shall die seised, in possession, reversion or remainder, provided she has no lawful issue. Item. I give and bequeath unto Mary, my beloved wife, whom I likewise constitute, make and ordain, my sole executrix of this my last will and testament, all and singular my lands, messuages

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[1] S. P. Abbott *v.* Essex Co. 18 How. 202; King *v.* Ackerman, 2 Black 408; Clayton *v.* Clayton, 3 Binn. 476; Burr *v.* Sim, 1 Whart. 272; Holme *v.* Harrison, 2 Id. 283.

[2] Brandt's Appeal, 8 Watts 198; Montgomery *v.* McElroy, 3 W. & S. 370; Buchanan's Appeal, 72 Penn. St. 448; Reynolds *v.* Reynolds, 16 N. Y. 257.

and tenements, by her freely to be possessed and enjoyed; and I do hereby utterly disallow, revoke and disannul all and every other former testaments, wills, legacies and bequests, by me in any ways before made, willed and bequeathed, ratifying and confirming this, and no other, to be my last will and testament. And I make *my loving friend, Henry Jeans, of the county and province aforesaid mentioned, executor of this my will, to [*206 take care and see the same performed, according to my true intent and meaning; and for his pains," (leaving the sentence incomplete.) "In witness whereof," &c. (in the common form of attestation.)

The testator was seised of the land in controversy, at the time of the will, and died seised, without issue, on the 10th day of October 1774, leaving his wife Mary, the devisee, who, afterwards, married one George Williamson, by whom she had lawful issue, still living, and died in the year 1811. The lessor of the plaintiff was the brother of the testator, and his only heir-at-law. The defendant claimed title to the premises as a purchaser under Mary, the wife of the testator.

The title of the testator to the premises was derived from a devise in the will of his father, John Page, dated the 11th of November 1773. That will, among other things, contained the following clause: "Item. I give and devise unto my son James, one equal half part of my land (comprising the land in controversy), with all my plantation, utensils, &c., to him, his heirs and assigns for ever." He then gave the other moiety of the land to his son John, to him, his heirs and assigns. He then bequeathed several legacies to his daughters, Sarah and Mary, and added: "Item. I give and bequeath to my three daughters, Rebecca, Hannah and Abigail, Rebecca the sum of 50 pounds, Hannah and Abigail the sum of 50 pounds each of them. Likewise *it is my will, that my son James do pay Hannah and Abigail the said sum of fifty pounds each, when they come of age." He then [*207 concluded his will by appointing an executor, and revoking all former wills, &c.; and died soon afterwards. James (the son) left no other real estate than that devised to him by this will. What personal estate he or his father left at the times of their decease, was not found in the case; and therefore, it did not appear whether or not it was sufficient to pay the legacies in their wills.

The court below gave judgment for the lessor of the plaintiff, who was the heir-at-law of the testator, and the cause was brought, by writ of error, to this court.

February 21st. *Wood*, for the plaintiff in error, contended, that Mary, the wife of the testator, took a fee-simple under the devise. It was admitted, that a devise of land, without any technical words of limitation, or explanatory words, gives only an estate for life. But the intention of the testator will supersede this rule, and is the polar star to guide in the construction of wills. The local legislature were so impressed with the good sense of this principle, that, in 1783, a few years after the making this will, they passed a statute, declaring that a devise of lands should pass a fee, unless it was expressed to be for life only. Courts ought, therefore, to be liberal, in considering the explanatory words and circumstances relied on, to show an intention to devise the fee; by so doing, they further the intention *of the testator. *Richardson* v. *Noyes*, 2 Mass. 59; *Doe* v. *Richards*, [*208

3 T. R. 359; Willes 140; *Goodright* v. *Allen*, 2 W. Bl. 1042. Greater certainty is not attained by a rigid, than by a liberal, construction of devises. The only mode of arriving at certainty is, by admitting a general devise to pass a fee, or by requiring strict technical words of limitation. The notion that descent is the general rule, and devise the exception, is more specious than solid. They are both distinct, co-ordinate rules.

He would first examine the clauses of the devise in question separately, and then consider their combined operation. The words, "all the rest of my lands and tenements, whatsoever, whereof I shall die seised, in possession, reversion or remainder," &c., are sufficient to pass a fee. The words rest, and in reversion or remainder, ought not to be rejected, if a meaning can be discovered for them. The devise of all the rest of his lands to his wife, clearly imports, that the previous pecuniary legacies shall be a charge on the lands, and that his wife shall be entitled to whatever interest remains, after the legacies are paid. A charge on lands may be implied in a will. *Smith* v. *Tyndall*, 2 Salk. 685; 1 Ves. jr. 440; Prec. in Ch. 430; *Alcock* v. *Sparhawk*, 2 Vern. 229; 2 Dall. 131. An estate-tail in lands may be created by implication from a proviso (*Chapman's Case*, Dyer 333; *King* v. *Rumball*, Cro. Jac. 448), *à fortiori*, a charge may be
*209] implied. *These lands were already charged in the hands of the testator with the payment of other legacies, by the will of his father, John Page, and which were not then due. The clause in question then is, as it purports to be, a general residuary clause, in which the testator means to devise all his remaining interest in his real property. He could not have meant the rest of his lands, by way of local description, for he had devised none before; but he meant all the remaining interest in the lands, after the legacies were deducted. Wherever it appears, that the testator intended to devise all his interest in land, a fee-simple passes. *Lambert* v. *Paine*, 3 Cranch 97; *Sargent* v. *Town*, 10 Mass. 305. This rule applies with increased force to residuary clauses, in which a greater latitude of construction is allowed. *Willis* v. *Bucher*, 2 Binn. 464; *Lambert* v. *Paine*, 3 Cranch 129; *Hogan* v. *Jackson*, Cowp. 299; *Grayson* v. *Atkinson*, 1 Wils. 333. Though the words "lands and tenements" are strictly descriptive of locality, yet, in connection with other expressions, especially, in a residuary clause, they may refer to the quantity of interest or estate. *Cooke* v. *Gerrard*, 1 Lev. 212; *Ludcock* v. *Willows*, Carthew 50; 2 Ventr. 285; *Wheeler* v. *Waldron*, Aleyn 28; *Chester* v. *Chester*, 3 P. Wms. 46; *Strode* v. *Russel*, 2 Vern. 621; *Rooke* v. *Rooke*, Ibid. 461. The words, "in remainder or reversion," aid the construction. Though the testator might not have been acquainted with the precise technical distinction between them, yet they must have known
*210] they *meant an estate in expectancy. The case of *Norton* v. *Ladd*, Lutw. 755, is very analogous to the present, and shows that a fee was intended. If it be established, that the testator referred to his interest or estate in the farm in question, in this clause, it carries all his interest, *i. e.*, a fee-simple, because it is residuary, and the language is broad and comprehensive enough for the purpose.

Again, the proviso, "provided she has no lawful issue," shows an intention in the testator to give a fee to his wife. This is a condition precedent, to take effect at the time of his death; 1. Because the terms used ordinarily import a condition precedent. Where there is nothing in the nature of the

proviso, or in respect to the time of its performance, to show that a condition subsequent was intended, it is always construed a condition precedent. 2. All the circumstances of the case show, that the testator intended the condition to take effect at his death, and to be precedent; for then the issue the devisee might have, would be his own child and heir. If it be contended, that this proviso refers to children the devisee might have by a future husband, the testator is made guilty of the absurdity of intending, that if his wife should marry again, she might retain the land, but if she should have issue by such marriage, she should forfeit it. The devise to the wife in this case, was intended to be a substitute for the descent to the *heir. Whenever a devise of land is intended as a substitute for a fee, the [*211 substituted devise is a fee. *Moone* v. *Heaseman*, Willes 152; *Green* v. *Armsteed*, Hob. 65; *Ibbetson* v. *Beckwith*, Cas. temp. Talb. 157. A court may discover, in a condition, the effect of which is, in a certain event, to defeat the estate, an intent, when the estate actually vests, to enlarge the disposition to a fee. Thus, as before shown, a devise may be enlarged to an estate-tail by the terms of a condition. *Chapman's Case*, Dyer 333; *King* v. *Rumball*, Cro. Jac. 448.

But to leave no doubt of his intention, the testator, in the next sentence, gives the devisee his land, "to be by her freely possessed and enjoyed." He drops the peculiar phraseology of the former clause, and takes up new language, manifestly for the purpose of enlarging the subject of his bounty. A life-estate is susceptible only of a partial and limited enjoyment. The words "freely to be enjoyed," have been held sufficient to carry a fee. *Loveacre* v. *Blight*, Cowp. 352; *Willis* v. *Bucher*, 2 Binn. 464. The idea, that these words, as used in the present case, give a life-estate, dispunishable for waste, is wholly inadmissible. It would be creating a state of things which would make the interest of the tenant at variance with the permanent improvement of the soil, and, consequently, of the best interest of the country. It would be his interest to commit waste, and to destroy the property. The testator could not have meant that the devisee should hold the lands *as tenant for life, dispunishable for waste, merely; for that would only exempt the property devised from one kind of [*212 restriction, when he manifestly contemplates a free enjoyment, generally, without any restriction whatever. The free enjoyment is not annexed to the estate devised, but to the land. It is the land which is to be freely enjoyed. The estate is only the technical medium through which that free enjoyment is secured, and the court will see that the devisee takes such an estate as is compatible with a free enjoyment.

But even supposing these different clauses, taken separately, should be deemed inadequate to pass a fee, yet, taken conjointly, they form a body of evidence, strong and conclusive, to show that the testator intended to devise his entire interest in the lands. It is impossible to suppose, that a plain man would have used such phraseology merely to give his farm to his wife for her life. All the clauses may be taken together, and receive their full, combined effect. *Juncta valent.* *Frogmorton* v. *Holyday*, 1 H. Bl. 540.

Webster and *Coxe*, contrà, contended, that under the will of James Page, nothing more passed to the devisee than an estate for life. The plaintiff below claimed as heir-at-law. The title was, *primâ facie*, in him. It was

admitted on all hands, that the devise contains no words of limitation sufficient to pass the inheritance. It is a general rule, that in order to create an estate in *fee, words of inheritance, as "heirs," must be employed. *213] Wherever an estate is granted, either specifically for the life of the grantee, or without any limitation, the legal presumption is, that the design was to create an estate for life only. In wills, a greater latitude has been allowed. The intention of the testator, expressed in clear, unambiguous terms, will carry the fee. But the rules of conveyance at common law still operate, although not so rigorously, even in regard to wills; and before the heir can be disinherited, there must be, not merely an intention, but an intention legally perceptible, in an instrument legally executed. The only difference between wills and deeds is, that in the latter, certain specific technical terms are essential; in the other, any words legally indicating the clear intention of the testator, are sufficient. The intent must be clearly expressed, for it is a fundamental rule in the construction of wills, that the heir cannot be disinherited, without express words, or necessary implication. Cro. Car. 368; 2 W. Bl. 839; 2 Bos. & Pul. 267; 2 Doug. 736; Cowp. 235. This intention must also be expressed in language at least *quasi* technical; for it is perfectly immaterial, how plain it may be, that the design of the testator was to pass a larger estate, unless that intention be manifest to the legal eye. Cowp. 355; 3 T. R. 359; 5 Bos. & Pul. 349.

As the construction now contended for by the plaintiff in error would disinherit the heir-at-law, *and vest the inheritance in a stranger, it *214] is incumbent upon him to establish one or the other of these two propositions: 1. That there are express words creating an estate in fee in the devisee (which is not pretended, and which, if actually existing, would preclude all argument), or 2. An intent, so clearly expressed as to require, by necessary implication, that such an estate should pass.

The circumstance, that no words exist in this will, which, by their intrinsic force, carry any larger estate than for life, raises a legal presumption, that no larger interest was intended to pass. If the testator had designed the heirs or issue of his wife, as the objects of his bounty, some language, indicating such an intention, would have been used. If, in addition to this negative circumstance, we find, that these persons, in that capacity, were present to the mind of the testator, and yet are not made objects of his bounty, it superadds a positive weight to the legal presumption, that they were not designed to be so, and that their omission was not merely accidental.

There being, then, no express words carrying the fee, let us examine those particular expressions which are relied upon to show the actual intent that the fee should pass. These words are, 1. "All the rest of my lands and tenements;" 2. The words "reversion or remainder;" 3. The words "freely to be possessed and enjoyed."

1. As to the words, "all the rest of my lands *and tenements." *215] One of the earliest cases in which the effect of similar words came under consideration, was that of *Wilkinson* v. *Merryland*, Cro. Car. 447, 449. There, A. being seised of divers lands in A., B. and C., the lands in C. being in him by mortgage forfeited, devised the lands in A. and B. to several persons, and then devised "all the rest of the goods, chattels, leases, estates and mortgages, whereof he was possessed," to his wife, after his

debts and legacies paid, made his wife executrix, and died. The question was, whether the fee passed to his wife by this devise; and it was held, that an estate for life only passed. In that case, there were several circumstances rendering it stronger in favor of a fee than the present. 1. There was a previous clause devising part of the property, and there was, therefore, an antecedent to which the word rest could relate. Here, there is no such prior clause, and the word "rest" is senseless, or the testator attaches to it his own peculiar signification. 2. The devise of the real property is there, in the same clause which contains a bequest of the personalty; and therefore, the inference as to the testator's intention was irresistible, that he designed to give the same interest, *i. e.*, an absolute interest, in all the subjects of the devise. 4. In the case cited, the word *estate* is employed, as the descriptive term, which is a word frequently held sufficient of itself, *proprio vigore*, to carry a fee.

*The case of *Canning* v. *Canning*, Moseley 240, is very similar to the present. There, the words of the will were, "all the rest, residue and remainder of my messuages, lands or hereditaments, &c., after my just debts, legacies and funeral expenses first paid, I give to my executors, in trust for my daughters." It was adjudged, that the executors took only an estate for life; and notwithstanding the general character of Moseley, as an inaccurate reporter, this case has been frequently recognised as law. 2 Bos. & Pul. 251. This is evidently a much stronger case than the one now before the court. 1. It is properly a residuary devise; this is not. 2. It contained the term hereditaments, emphatically embracing the inheritance, according to the opinion of many eminent lawyers. 3. The estate was devised "after debts, legacies and funeral expenses first paid." Yet, under all these circumstances, it was held, that the words "rest, residue and remainder of my messuages, lands or hereditaments," so much stronger and more comprehensive that those of the present testator, were merely descriptive. The ground of that determination was, that the words rest, residue and remainder, being unaccompanied by any words of limitation, could not operate on the inheritance. 2 Bos. & Pul. 251, *per* MACDONALD, C. B. This applies, with at least equal force, to the present case. In *Peiton* v. *Banks*, 1 Vern. 65, where one devised to his wife for life, and the *reversion to A. and B., to be equally divided, &c., it was decreed, that they were tenants in common for life only. That case, and the one referred to by Sergeant Maynard, were stronger than the present, since the freehold having been already disposed of, it might have been plausibly argued, that the term "reversion" there used, *ex vi termini*, necessarily included the inheritance. In this case, no such argument would apply, the word *rest* being without an antecedent, and being a term more appropriate, as descriptive of the subject, than of the quantity of interest. In *Doe* v. *Richards*, 3 T. R. 356, where, after bequeathing a certain leasehold estate, the testator devised "all the rest, residue and remainder of my messuages, lands, tenements, hereditaments, goods, chattels and personal estate whatsoever," the court held, that these words were not sufficient to carry the fee. The property thus devised being, however, made subject to a charge, this circumstance was held sufficient, although the propriety of that part of the decision seems to have been questioned. 5 Bos. & Pul. 349.

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But the authority of the case, so far as it determines that these words were insufficient, of themselves, to pass the fee, has never been controverted. In that case, the clause was properly a reversionary clause, a previous devise having been made, leaving a reversionary interest to be disposed of. There also the word "hereditament" was used; neither of which circumstances exist here.

*218] *The next case is that of *Denn* v. *Mellor*, 5 T. R. 558, which deserves the more weight as an authority, because a second action was afterwards brought on the same title; the judgment rendered in the K. B., reversed in the Exchequer (1 Bos. & Pul. 558); and that judgment afterwards reversed in the House of Lords, and the original judgment in the K. B. affirmed. (2 Ibid. 247.) It may, therefore, be presumed to have been thoroughly examined and considered. In that case, the testator having first devised a life-interest in a copyhold messuage, then uses these words, "all the rest of my lands, tenements and hereditaments, either freehold or copyhold, whatsoever and wheresoever, my goods, chattels and personal estate, of what nature or kind soever, after payment of my just debts and funeral expenses, I give, devise and bequeath the same unto my wife S. C., and I do hereby nominate and appoint her, my said wife, sole executrix of this my will." In delivering the opinion of the twelve judges, MACDONALD, C. B., states the question arising under that will to be, "whether the words are materially distinguishable from those used in other wills, and which have been held not to denote an intention so expressed by the testator, as to enlarge that which would, otherwise, be an estate for life only, into a fee?" He then states, that this would depend upon the effect of the word "rest," of the word "hereditaments," and of the provision "after pay-

*219] ment of my just *debts and funeral expenses." He considers *Canning* v. *Canning* as decisive of the question on the two first words. These two cases must, therefore, be considered as decisive in settling the construction to be given to this part of the present will; in which, the phraseology used is still less indicative of an intent to pass the inheritance. The word "hereditaments," found there, is wanting here; a word which, in *Lydcott* v. *Willows*, POWELL, J., considered as sufficient to carry the fee, and this opinion was unanimously confirmed in the exchequer chamber. 2 Vent. 285. So also, Lord HOLT considered it as sufficient to pass the fee, in *Smith* v. *Tindal*, 11 Mod. 103; and in *Frogmorton* v. *Wright*, Lord C. J. DE GREY held, it might have that operation. 3 Wils. 418. Notwithstanding these decisions, however, the law, as recognised in *Canning* v. *Canning*, is considered as settled in Westminster Hall, and the word "hereditaments" is now held insufficient to pass the fee.

The case of *Marhant* v. *Twisden*, Gilb. Rep. 30, is, in many respects, analogous to that now before the court. A., having settled all his freeholds on his wife for life, as a jointure, bequeathed several legacies, and then says, "all the rest and residue of my estate, real and personal, I give to my wife, whom I make sole executrix:" *held*, that the reversion of the jointure lands did not pass, but the personal estate only. The reason assigned

*220] *appears decisive of the present question, "for, as the testator devised not real estate, there could be no residue." So, in the present case, the whole effect to the words "rest, remainder and reversion" (if it should be thought that in themselves they have any to denote an estate larger than one for life) is destroyed: 1. By the circumstance, that there was no pre-

vious disposition of any real estate in the will, and therefore, this is not a residuary clause. 2. By the circumstance, that the testator was seised of no estate in reversion or remainder, which could pass under these words, and therefore, they are wholly inoperative. 3. It is perfectly manifest, that the words in question were used simply as descriptive of the subject-matter, and not of the interest in that subject-matter. In this view, the case has a strong resemblance to *Pettiward* v. *Prescott*, 7 Ves. 541, where the testator devised at follows: "I give to R. P. my copyhold estate at P., consisting of three tenements, and now under lease to A. B." The master of the rolls, after showing, from variety of adjudged cases, that the word *estate* is sufficient to carry the fee in general, yet decides that the devisee took only a life-interest, on the ground, that the testator, by the word in that case, did not mean to speak of the quantity of the legal interest, but merely of the *corpus* or subject in the disposition.

As corroborating the construction of the words "reversion and remainder," now insisted on, it may *be observed, in the statute of wills of [*221
32 Hen. VIII., c. 1, it was enacted, "that all and every person and persons having manors, lands, tenements or hereditaments, may give and dispose of them," &c. Afterwards, the statue 34 & 35 Hen. VIII., c. 5, entitled, "an act for the explanation of wills," was passed. This statute recites, that several doubts, questions and ambiguities had arisen upon the previous statute, and enacts, that "all and singular persons having a sole estate, or interest in fee-simple, &c., of or in any manors, lands, tenements, rents or other hereditaments, in possession, reversion, remainder, &c., shall have full and free liberty to give, dispose, will," &c. In the first statute, it seemed to be thought, that the language implied a present vested estate in the devisor, in order to give validity to this form of disposition. The ambiguity was removed by the second statute, which gave the right, whether the party was seised in possession or in expectancy. The statute, then, authorizes a testator to devise an estate in which he has no present, but only a reversionary interest; but the same language must be used to carry the fee, as if the estate were in possession. The subjects capable of being devised are enlarged, but the form of the instrument is not altered. A reversionary interest, like a possessory interest, may be for life, for years, in tail, or in fee; and it is equally important, that these different quantities of interest should be designated by the will, in the one case, as in the other. The *case of *Ager* v. *Pool*, 3 Dyer 371, shows this construction to be [*222
correct; and *Peiton* v. *Banks*, 1 Vern. 65, is to the same effect. Both of these cases are stronger than the present, for in each of them the testator had such a future interest as he described.

As to the words "provided she has no lawful issue," the argument on the other side is, that they imply a condition precedent. To this it is answered: 1. That if a condition precedent to the vesting of any estate in the wife, the proviso would be entirely at variance with the whole design of the testator. He evidently intended an immediate interest to pass to the wife, which could not take place, if the fact that she should have no lawful issue is to be a condition precedent. That could only be ascertained by her dying without issue. 2. If it be a condition precedent, she took no estate, because she, in point of fact, had lawful issue. To obviate these conclusions, an interpolation is made in the will, and the testator is presumed to

have said, lawful issue by himself. The answer is, that such a presumption is not warranted by the language employed. The case of *Norton* v. *Ladd*, turns upon the extent to be given to the expression "whole remainder," after a disposition of a life-estate in all the lands, and the interest of an heir-at-law was not involved. *Lambert's Lessee* v. *Paine*, turns upon the meaning to be attached to the word "estate." *Wheeler* v. *Waldron* is
*223] deprived *of much of its authority by a remark made in a note to *Chester* v. *Chester*, 3 P. Wms. 56.

As to the second clause of the will, which contains the words "to be by her freely possessed and enjoyed," the legal signification of this phraseology has been frequently settled. In *Loveacres* v. *Blight*, Cowp. 352, is a clause to this effect: "Item, to my two sons, T. M. and R. M., whom I make and ordain my sole executors, all my lands and tenements, freely to be possessed and enjoyed alike." In this case, there were, 1. Introductory words, which Lord MANSFIELD always considered as entitled to much weight. 2. There was a charge, and he thought it but reasonable to infer an intention to pass a fee, because that alone would enable the devisees to comply with the testator's directions fully and completely. 3. "Freely to be enjoyed," he considered, in that case, as meaning absolutely, because, having charged the estate, it could not mean free from incumbrances. None of these circumstances exist here, and therefore, the case is not analogous, and cannot warrant the same construction. The case of *Goodright* v. *Barron*, 11 East 220, more nearly resembles the case before the court. There, after the introductory words "as touching my worldly estate," the testator devised to B., whom he made his executrix, "all and singular his lands, messuages and tenements, by her freely to be possessed and enjoyed." These are the
*224] identical words here employed, and no other distinction *exists between the cases, than that here are no introductory words (sometimes so important), yet the court held that the fee did not pass.

The only other ground on which it can be presumed that the testator intended a fee, is the circumstance, that this devise is after certain legacies; and it is said, that "all the rest," &c., means, that the devisee was to take the real estate, subject to the payment of these legacies. Admitting, that wherever the testator employs language of an indefinite kind, prescribing no limits to the estate devised, and burdens the devisee with a gross, but certain charge, the fee will pass, that rule of construction is inapplicable here, because: 1. There is no disposition of the personal estate, the appropriate fund for the payment of legacies. 2. There is, at most, only an implied charge upon the real estate; and it seems unreasonable, to require the court to imply a charge, for no other purpose than to furnish a ground for raising another implication still more serious. Admitting the verbal construction of the opposite counsel to be correct, the case of *Jackson* v. *Harris*, 8 Johns. 141, is decisive against the conclusion they would infer from it. If a charge at all, it is a contingent charge. The personal property is applicable, in the first instance, and there is only a possibility that it will prove insufficient. A contingent charge is not sufficient to carry a fee. Besides, supposing the
*225] whole of these legacies *to be payable out of the real estate, the conclusion contended for would not result. The rule of law is, that where the charge is upon the estate, and not upon the person of the devisee in respect of the estate, no fee passes by implication. *Jackson* v. *Bull*, 10

Johns. 148 ; *Doe* v. *Allen*, 8 T. R. 497 ; *Merson* v. *Blackmore*, 2 Atk. 341. So much of the estate as is sufficient to raise the sum required, is not given to the devisee at all. The residue is devised perfectly unfettered. *Canning* v. *Canning*, *Denn* v. *Moor* and *Denn* v. *Allen*, were all cases in which the real estate was given, after payment of debts, &c., and yet held not a fee.

March 4th, 1825. STORY, Justice, delivered the opinion of the court, and after stating the case, proceeded as follows :—The principal question arising in this case is, what estate Mary, the wife of James Page, took under his will ; whether an estate for life, or in fee. If the former, then the judgment of the circuit court is to be affirmed ; if the latter, then it is to be reversed.

Some reliance has been placed upon the will of John Page, the father, to show the predicament of the land, in the possession of his son James, and thence to draw aid in the construction of the will of the latter. Without doubt, James took a fee in the moiety devised to him by his father (which includes the land in controversy), for it is given "to him, his heirs and *assigns." But it is argued, that the land came into his hands charged with the legacies payable to his sisters Hannah and Abigail, and as [*226 these legacies were not payable, until they came of age, they remained a charge upon the land, in the hands of James, at his death. Whether the sisters were of age at his death, or not, or had received their legacies, or not, does not appear from the statement of facts, and nothing can be presumed either way. But what is there to show that these legacies were a charge on the land? The direction in the will is, that "James do pay Hannah and Abigail the said sum of 50 pounds each, when they come of age ;" but it is not said or implied anywhere in the will, that these legacies shall be a charge on the land. The direction is personal, and must be a charge on the person only, unless it can be shown, from other parts of the will, that the testator intended a charge on the land. A testator may devise lands, with a view to legacies, and make them a charge on the land, or on the person of the devisee, or on both ; (*a*) and whether a particular legacy be in either predicament, must depend upon the language of the will. In the large class of cases which have been decided on the subject, and which has principally arisen from questions respecting the quantity of the estate taken by the devisee, the ground assumed has been, that the will must speak expressly, or by fair implication, *that the testator intends the lega- [*227 cies to be a charge on the land. When, therefore, the testator orders legacies to be paid out of his lands, or where, subject to legacies, or after payment of legacies, he devises his lands, courts have held the land charged with the legacies, upon the manifest intention of the testator. But here there is no such language. There is no direction that the devisee shall pay the legacies out of the land. The charge is personal ; and the case falls directly within the authority of *Reeves* v. *Gower*, in 11 Mod. 208.

We may, then, proceed to the consideration of the will of James Page, inasmuch as that of his father affords no light to guide us in the construction. The grounds mainly relied on to establish that Mary, the wife of the

(*a*) See Roe *ex dem.* Peter *v.* Daw, 3 M. & S. 518 ; 5 East 87 ; 4 Ibid. 495.

testator, took a fee, are, that the legacies given to his sisters are a charge on his real estate in the hands of his widow ; that all the rest of his "lands and tenements," in possession, reversion and remainder, are given ; that the devise is subject to the proviso ; "that she has no lawful issue," which is not a condition merely, but a substitution for an estate intended for his children ; and finally, that the lands, &c., are devised to her "freely to be possessed and enjoyed," which words are best satisfied upon the supposition of a fee.

Before proceeding to the particular examination of the legal effect of these different clauses in the will, it is necessary to state, that, where there are no words of limitation to a devise, the general rule of law is, that the *228] devisee takes an *estate for life only, unless, from the language there used, or from other parts of the will, there is a plain intention to give a larger estate. We say, a plain intention, because, if it be doubtful or conjectural, upon the terms of the will, or if full legal effect can be given to the language, without such an estate, the general rule prevails. It is not sufficient, that the court may entertain a private belief that the testator intended a fee ; it must see that he has expressed that intention, with reasonable certainty, on the face of his will. For the law will not suffer the heir to be disinherited upon conjecture. He is favored by its policy ; and though the testator may disinherit him, yet the law will execute that intention only when it is put in a clear and unambiguous shape.

In the present case, there is no introductory clause in the will, expressing an intention to dispose of the whole of the testator's estate. Nor is it admitted, that such a clause, if it were inserted, would so far attach itself to a subsequent devising clause, as *per se* to enlarge the latter to a fee, where the words would not ordinarily import it. Such a doctrine would be repugnant to the modern as well as ancient authorities. The cases of *Frogmorton* v. *Wright* (2 W. Bl. 889), *Right* v. *Sidebotham* (2 Doug. 759), *Child* v. *Wright* (8 T. R. 64), *Denn* v. *Gaskin* (Cowp. 657), *Doe* v. *Allen* (8 T. R. 497), and *Merson* v. *Blackmore* (2 Atk. 341), are full to the point. The most that can be said is, that where the words of the devise admit of passing *229] a greater interest than for life, courts will lay *hold of the introductory clause, to assist them in ascertaining the intention. The case of *Hogan* v. *Jackson* (Cowp. 297), admits this doctrine. That case itself did not turn upon the effect of the introductory clause, but upon the other words of the will, which were thought sufficient to carry the fee, particularly the words, "all my *effects*, both real and personal." The case of *Grayson* v. *Atkinson* (1 Wils. 333), admits of the same explanation ; and besides, the inheritance was there charged with debts and legacies.

There is no doubt, that a charge on lands may be created by implication, as well as by an express clause in a will. But then the implication must be clear upon the words. Where is there any such implication in the present will ? The testator has not disposed of the whole of his personal estate, which is the natural fund for the payment of legacies ; *non constat*, how much or how little he left. For aught that appears, the personal estate may greatly have exceeded all the legacies ; and if it did not, that would be no sufficient reason to charge them on the land. It is not a sound interpretation of a will, to construe charges, which ordinarily belong to the personalty, to be charges on the realty, simply because the original fund is insuffi-

cient. The charge must be created by the words of the will. Now, from what words are we to infer such a charge in this case? It is said, from the words "all the rest;" but, "all the rest" of what? Certainly, not of the personal estate, because the words immediately *following are, "of my lands and tenements," which exclude the personalty. The words, [*230 "all the rest," have then no appropriate meaning, in reference to the personal estate, for the connection prohibits it. Can they then be supposed to import "all the rest of my lands, &c., *after* payment of the legacies," and so be a charge on them? This would certainly be going much further than the words themselves authorize, and much further than any preceding clause requires or justifies. A charge of legacies on land would not be a devise of the real estate, in the ordinary understanding of men, nor in the contemplation of law. It would make them a lien on, and payable out of, the land; but it would still be distinguishable from an estate in the land. But it is sufficient for us to declare, that we cannot make these legacies a charge on the land, except by going beyond, and not by following, the language of the will; we must create the charge, and not merely recognise it. The case of *Marhant* v. *Twisden* (Gilb. Rep. 30), was much stronger than the present. There, the testator had settled all his freeholds on his wife for life, as a jointure; and by his will, he bequeathed several legacies, and then followed this clause, "all the rest and residue of my *estate*, chattels, real and personal," I give to my wife, who I make sole executrix. But the court held, that the wife did not take the reversion of the jointure, by the devise, for as the testator had not, in the preceding part of the will, devised any *real estate, there could be no residue of real estate, on which the [*231 clause could operate.

But admitting that the present legacies were a charge on the lands of the testator, this would not be sufficient, to change the wife's estate into a fee. The clearly established doctrine on this subject is, that if the charge be merely on the land, and not on the person of the devisee, then the devisee, upon a general devise, takes an estate for life only. The reason is obvious. If the charge be merely on the estate, then the devisee (to whom the testator is always presumed to intend a benefit) can sustain no loss or detriment, in case the estate is construed but a life-estate, since the estate is taken subject to the incumbrance. But if the charge be personal on the devisee, then if his estate be but for life, it may determine before he is reimbursed for his payments, and thus he may sustain a serious loss. All the cases turn upon this distinction. *Canning* v. *Canning* (Moseley 240), *Loveacres* v. *Blight* (Cowp. 352), *Denn ex dem. Moor* v. *Mellor* (5 T. R. 558, and 2 Bos. & Pul. 247), *Doe* v. *Holmes* (8 T. R. 1), *Goodtitle* v. *Maddem* (4 East 496), all recognise it. And *Doe & Palmer* v. *Richards* (3 T. R. 356) proceeds upon it, whatever exception may be thought to lie to the application of it in that particular case. We are then of opinion, that there is no charge of the present legacies on the land; and if there were, no inference could be drawn from this circumstance, to *enlarge [*232 the estate of the wife to a fee, since they are not made a personal charge upon her.

The next consideration is, whether the words, "all the *rest* of my lands and tenements," &c., import a fee. In the first place, this clause is open to the objection, that it is not a residuary clause in the will, for no estate in

the lands is previously given, and consequently, if it operates at all on the fee, it gives the entire inheritance, and not a mere residuum of interest. And if a devise of "all the rest and residue of lands," in a clear residuary clause, was sufficient to carry a fee, by their own import, it would follow, that almost every will containing a residuary clause, would be construed, without words of limitation, to pass a fee. Yet, the contrary doctrine has most assuredly been maintained. In *Canning* v. *Canning* (Moseley 240), the testator devised as follows: "all the rest, residue and remainder of my messuages, lands, &c., after my just debts, legacies, &c., are fully satisfied and paid, I give to my executors, in trust for my daughters;" and the question was, whether these words passed an estate in fee or for life, to the executors. The court decided that they passed a life-estate only. The authority of this case was fully established in *Moor* v. *Denn ex dem. Mellor* (2 Bos. & Pul. 247), in the House of Lords, where words equally extensive occured; and the authority of this last case has never been broken in upon.

The cases which seem at first view to interfere with and control this
*233] doctrine, will be *found, upon close examination, to turn on other points. Thus, in *Palmer* v. *Richards* (3 T. R. 356), where there was a devise of "all the rest and residue of the testator's lands," &c., his legacies and personal expenses being thereout paid; Lord KENYON admitted, that the words "rest and residue," &c., were not sufficient to carry a fee; but he relied on the subsequent words, "legacies, &c., being thereout paid," which he considered as creating a charge upon the lands in the hands of the devisee, of such a nature as to carry a fee. In this opinion the court concurred; and though this case has been since questioned, on its own circumstances, its general doctrine remains untouched. So, in the case of *Norton* v. *Ladd* (1 Lutw. 755, 759), where the devise was to A. C., his sister, for life, of all his lands, &c,, after the decease of his mother; then to J. C., his brother, "the whole remainder of all those lands and tenements," given to A. C. for life, if he survived her; and if not, then "the whole remainder and reversion of all the said lands, &c., to his sisters, C. E., and A., and to their heirs for ever;" the court held, that a fee passed to J. C., under the devise, upon the ground, that taking the whole will, the words "whole remainder" properly referred to the estate or interest of the testator undisposed of to his sister, A. C.; and that the words could not relate to the quantity of lands, which the testator intended to devise to his brother, J. C., for he had plainly devised all his lands to his sister, A. C., and all the lands he had devised to
*234] A. C. he had devised to J. C.; *so that the words naturally and properly had relation to the quantity of estate which the testator intended to give J. C., that is, all the remainder, which is the same in effect as all his estate. If the words were merely to be referred to the lands he intended to devise to J. C., they would be ineffectual, for it was impossible that he could have any remainder of lands, when he had devised all to A. C.; so that they must refer to the estate in the lands. Such is the substance of the reasoning of the court; upon which it is unnecessary to say more, than that the case turned upon the supposed incongruity of construing the testator's words otherwise than as importing the whole remaining interest in the lands, upon all of which lands a life-estate was already attached. And the final devise over, which carried a plain fee to the sisters, being a substitution for the

former estate to J. C., in the event of his death before the testator, greatly fortifies this interpretation. This case has been much relied on by the plaintiff in error, upon the present argument; but it is very distinguishable from that before the court. There, a life-estate was given, and the terms, "whole remainder," had a natural meaning, as embracing the whole remaining interest. Here, on the contrary, there is no preceding interest given in the real estate, and therefore, the terms, "all the rest," are not susceptible of that sense. There, a substituted estate in fee, was clearly given; here, no clause occurs, leading necessarily to such a conclusion. All that the case in Lutwyche, taken as the fullest authority, *establishes, is, that the words "rest and residue" may, in certain connections, carry a fee.(a) [*236 This is not denied or doubted; but when the words attain their force from their juxta-position with other words, which fix the sense in which the testator has used them. In *Farmer* v. *Wise* (3 P. Wms. 294), the residuary clause was of "all the rest of his estate, real and personal," and the word "estate" has long been construed to convey a fee. This court have carried the doctrine still further, and adjudged a devise of "all the estate called Marrowbone," to be a devise of the fee, construing the words, not as words merely of local description, but of the estate or interest also in the land. *Lambert's Lessee* v. *Paine* (3 Cranch 79). *Murry* v. *Wyse* (2 Vern. 564, s. c. Prec. in Ch. 246) contained a devise, after a legacy, of all the residue of his real and personal estate, and rests on the same principle, as do *Beachcroft* v. *Beachcroft* (2 Vern. 690) and *Ridon* v. *Pain* (3 Atk. 494). In *Willows* v. *Lydcott* (Carth. 50, 2 Vent. 285), the residuary devise was to A. and her assigns for ever, which latter words indicate a clear intention to pass a fee. In *Grayson* v. *Atkinson* (1 Wils. 333), there was an introductory clause, purporting the intention of the testator to dispose of all his temporal estate, then several legacies were given, and a direction to A. to sell any part of his real and *personal estate, for payment of debts and legacies; and then the will says, as to the rest "of my goods and chattels, [*236 real and personal, movable and immovable, as houses, gardens, tenements, my share in the copperas works, &c., I give to the said A." Lord HARDWICKE, after some hesitation, held it a fee in A., relying upon the introductory clause, and the charge of the debts and legacies on the land, and upon the language of the residuary clause. Whatever may be the authority of this decision, it certainly does not pretend to rest solely on the residuary clause; and its containing a mixed devise of real and personal estate, was not insignificant, in ascertaining the testator's intention.

It may also be admitted, that the words "lands and tenements," do sometimes carry a fee, and are not confined to a mere local description of the property. But in their ordinary sense, they import the latter only; and when a more extensive signification is given to them in wills, it arises from the context, and is justified by the apparent intention of the testator to use them in such extensive signification. The cases cited at the bar reach to this extent and no further. Their authority is not denied; but their application to the present case is not admitted.

We may, then, take it to be the general result of the authorities, that the words, "all the rest of my lands," do not of themselves, import a devise of

(a) See Lord HARDWICKE's comments on this case, in Bailis v. Gale, 2 Ves. 48.

the fee; but unless aided by the context, the devisee, whether he be a sole
*237] or a residuary *devisee, will, if there be no words of limitation, take only a life-estate.

We next come to the effect of the words, "in possession, reversion or remainder," and, as incidental thereto, the effect of the wore "tenements." That the term "remainder" may, in some cases, connected with other clauses, carry a fee, has been already admitted, and was the very point in 1 Lutw. 755. The same is true, in respect to the word "reversion." This is affirmed in the case of *Bailis* v. *Gale* (2 Ves. 48), where the devise was, "I give to my son, C. G., the reversion of the tenement my sister now lives in, after her decease, and the reversion of those two tenements now in the possession of J. C." Lord HARDWICKE, in pronouncing judgment, relied on the legal signification of the word "reversion," and that its use by the testator was fairly to be inferred to be in its legal sense, as the whole right of reverter; and he adverted to the circumstance, that the devise was to a child, to whom it could scarcely be presumed the parent intended to give merely a dry reversion, or to split up his interest in it, into parts. But in that case, as in 1 Lutw. 755, there were antecedent estates created or existing in the land; and the devise was of a "reversion," and not, as in this case, of "all the rest of my lands, &c., in reversion," &c. The land now in controversy was not held by the testator as a reversionary estate, but as an estate in possession; and in no way, therefore, can the doctrine help the present case. But there are cases, which are contrary to *Bailis* v. *Gale*, and
*238] *somewhat clash with its authority. In *Peiton* v. *Banks* (1 Vern. 65), the case was, that a man devised his lands to his wife for life, and he gave the reversion to A. and B., to be equally divided betwixt them. The court decided, that A. and B., took an estate as tenants in common for life only. And Sergeant Maynard stated a similar decision to have been made about twenty years before that time. It is not material, however, to enter upon the delicate inquiry, which of these authorities is entitled to most weight, because the present case does not require it.

In respect to the word "tenements," it is only necessary to observe, that is has never been construed in a will, independently of other circumstances, to pass a fee. In *Canning* v. *Canning*, Moseley 240, and *Doe ex dem. Palmer* v. *Richards*, 3 T. & R. 356, and *Denn ex dem. Moor* v. *Mellor*, 5 Ibid. 558; s. c. 2 Bos. & Pul. 247, the same term occurred, as well as the broader expression, "hereditaments;" in neither case, was the term "tenement," supposed to have any peculiar effect; and the argument, attempting to establish a fee upon the import of the word "hereditaments," even in a residuary clause, was deliberately overruled by the court. The same doctrine was held in *Hopwell* v. *Ackland*, Salk. 239.

If, then it is asked, what interpretation the court put upon the words "all the rest," in connection with "lands and tenements?" the answer is,
*239] that no definite meaning can, in this will, be *annexed to them. It is our duty to give effect to all the words of a will, if, by the rules of law, it can be done. And where words occur in a will, their plain and ordinary sense is to be attached to them, unless the testator manifestly applies them in some other sense. But if words are used by him, which are insensible in the place where they occur, or their common meaning is deserted, and no other is furnished by the will, courts are driven to the necessity of

deeming them as merely insignificant, or surplusage, and to find the true interpretation of the will without them.[1] In the present case, the words, "all the rest of my lands and tenements," stand wholly disconnected with any preceding clause. There is nothing to which "the rest" has relation, for no other devise of real estate is made. We have no certain guide to the testator's intention in using them. We may indulge conjectures; but the law does not decide upon conjectures, but upon plain, reasonable, and certain expressions of intention found on the face of the will.

The next clause is, "provided she has no lawful issue." The probable intention of this proviso was, "provided she has no lawful issue" by me. Men do not, ordinarily, look to remote occurrences, in the structure of their wills, and especially unlearned men. The testator was young, and his wife young, and it was natural for them not to despair of issue, although, at the time of the will, he was in ill health. In case of leaving children, posthumous or otherwise, he might *think, that the gift to his wife of the whole of his real estate, would be more than conjugal affection could [*240 require, or parental prudence justify. In that event, he might mean to displace the whole estate of his wife, and to leave her to her dower at the common law, and the children to their inheritance by descent. This interpretation would afford a rational exposition of the clause, and, perhaps, ought not to be rejected, although there is no express limitation in the words. In this view, it is not very material, whether it be considered as a condition precedent or subsequent, though the general analogies of the law would certainly lead to the conclusion, that it was in the latter predicament. But even in this view, which is certainly most favorable to the plaintiff's in error, it falls short of the purposes of the argument. As a condition, in the event proposed, the prior estate of the wife would be defeated; but there would be no estate devised to the issue. They would take by descent as heirs, and not by devise. It would be going quite too far, to construe mere words of condition to include a contingent devise to the issue; to infer from words defeating the former estate, an intent to create a new estate in the issue, and that estate a fee, and a clear substitute for the former. No court would feel justified, upon so slender a foundation, to establish so broad a superstructure. Nor can any intention to give a fee to the wife be legally deduced from the proviso, in any way of interpreting the terms, because it is as perfectly consistent with the intention *to defeat a life-estate, as a fee in the whole of the lands. The testator, with a limited property, might [*241 justly think it too much to take from his own issue the substance of their inheritance, during a long minority, in favor of a wife, who might live many years, and form new connections. In such an event, leaving her to the general provision of law, as to dower, would not be unkindness or injustice. But it is sufficient to say, that the words are too equivocal to enable the court to ascertain from them the clear purpose of establishing a fee. And if the proviso refers to any lawful issue by any other husband, then it must be deemed a condition subsequent; and in the events which have happened, the estate of the wife, whether it be for life or in fee, has been defeated, and the plaintiffs in error are not entitled to reverse the present judgment. *Quacunque via data est*, the proviso cannot help the case.

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[1] See Mütter's Estate, 38 Penn. St. 314; Seibert *v.* Wise, 70 Id. 147.

It remains now to consider the succeeding clause of the will, in which the testator repeats his devise, and gives to his wife "all his lands," &c., dropping the words "the rest," and therefore, showing that he did not understand them as having any other or stronger import than the will presented without them. Then follow the words, "by her freely to be possessed and enjoyed;" upon which great stress has been laid at the bar. If these words had occurred in a will devising an estate for years, or for life, or in fee, in express terms, they would not, probably, have been thought to have any distinct auxiliary signification, but to be merely a more full annunciation
*242] *of what the law would imply. Occurring in a clause where the estate is undefined, they are supposed to have a peculiar force; so that, "freely to possess and enjoy," must mean to possess and enjoy, without any limitation or restriction as to estate or right. The argument is, that a tenant for life is restricted in many respects. She can make no permanent improvements or alterations; she is punishable for waste, and is subject to the inquisition of the reversioner. But if this argument be admitted, it proves, not that a fee is necessarily intended, but that these restrictions on the life-estate ought to be held to be done away by the words in question; they admit of quite as natural an interpretation, by being construed to mean, free of incumbrances; and in this view, are just as applicable to a life-estate as a fee. Perhaps, the testator himself may have entertained the notion, that the legacies in his will, or that of his father, were incumbrances on the estate; and if so, the words would indicate an intention, that the wife should be disincumbered of the burden. But in what way are we to reconcile the argument deduced from this clause, with that drawn on the same side from the preceding proviso? How could the testator intend, that the wife should "freely possess and enjoy" the lands in fee, when, in one event, he had stripped her of the whole estate, and that by a condition inseparably annexed as an incumbrance to her estate? We ought not to suppose, that he intended to repeal the proviso, under such a general phrase.

*243] The *case of *Loveacres* v. *Blight* (Cowp. 352) has been supposed to be a direct support of the argument in favor of a fee. In that case, the testator made the following devise: As touching such worldly estate wherewith it hath pleased God to bless me in this life, I give," &c., "in the following manner and form: First of all, I give and bequeath to E. M., my dearly-beloved wife, the sum of five pounds, to be paid yearly out of my estate, called G., and also one part of the dwelling-house, being the west side, with as much wood-craft, home at her, as she shall have need of, by my executors hereafter named. I give," &c., "unto my son, T. M., the sum of five pounds, to be paid in twelve months after my decease. I give unto my grand-daughter E., the sum of five pounds, to be paid twelve months after my decease. Item. I give unto J. M., and R. M., my two sons, whom I make my ——— and ordain my sole executors," &c., "all and singular my lands, messuages, by them freely to be possessed and enjoyed alike." The question was, whether, by this clause, the sons took an estate for life, or in fee. The court held, that they took a tenancy in common in fee. Lord MANSFIELD, in delivering the opinion of the court, admitted, that if the intention were doubtful, the general rule of the law must take place. But he laid stress upon the circumstance, that the

estate was charged with an annuity to his wife, so that the testator could not mean by the word "freely," to give it free of incumbrances. He thought the free enjoyment must, therefore, mean, free from *all limitations, that is, the absolute property of the estate. He also thought the introductory clause not unimportant; and that the blank after *my* was intended to be filled with "heirs;" and it can scarcely escape observation, that it was a case where the sons of the testator were the devisees. These considerations may well lead to a doubt, whether Lord MANSFIELD intended to lay down any general principle of construction in relation to the words, "freely to be enjoyed," &c. But if he did, the subsequent case of *Goodright* v. *Barron* (11 East 220) has manifestly interfered with its authority. In that case, there was an introductory clause, "as touching such worldly estate wherewith it hath pleased God to bless me," &c.; and the testator then proceeded as follows: "I give and bequeath to my brother T. D., a cottage-house, and all belonging to it, to him, and his heirs, for ever — W. C. tenant. Also, I give and bequeath to my wife E., whom I likewise make my sole executrix, all and singular my lands, messuages, and tenements, by her freely to be possessed and enjoyed." The court held, that the wife took an estate for life only; that the words, being ambiguous, did not pass a fee against the heir, but might mean free from incumbrances or charges, free from impeachment for waste; and that the introductory clause could not be brought down into the latter distinct clause to aid it, though, if joined, it might have had that effect. The court distinguished that case from the case before Lord MANSFIELD, because, in the latter, as the testator had already *incumbered the estate, the words must have meant to pass a fee, or they would have no meaning at all. Mr. Justice LE BLANC added, that the words used were not inconsistent with a life-estate only; and he distinguished between them and the words, "freely to be disposed of," admitting that the latter would pass a fee. So that, taking both these cases together, the fair deduction is, that the words, "freely to he possessed," &c., are too uncertain, of themselves, to raise a fee, but they may by aided by other circumstances. [*244 [*245

The case before us is far less strong than either of the foregoing cases, for there is no introductory clause, showing an intention to dispose of the whole property, as there was both in *Goodright* v. *Barron*, and *Loveacres* v. *Blight;* nor is there any incumbrance created by the testator on the land, which was the decisive circumstance that governed the latter.

Upon the whole, upon the most careful examination, we cannot find a sufficient warrant in the words of this will to pass a fee to the wife. The testator may have intended it, and probably did, but the intention cannot be extracted from his words, with reasonable certainty; and we have no right to indulge ourselves in mere private conjectures.

Judgment affirmed, with costs.

*United States *v.* Morris, Marshal of the Southern District of New York.

Remission of forfeiture.

The secretary of the treasury has authority, under the remission act of the 3d of March 1797, c. 361, to remit a forfeiture or penalty accuring under the revenue laws, at any time before or after a final sentence of condemnation or judgment for the penalty, until the money is actually paid over to the collector for distribution.[1]

Such remission extends to the shares of the forfeiture or penalty, to which the officers of the customs are entitled, as well as to the interest of the United States.[2]

In a plea of justification by the marshal, for not levying an execution, setting forth a remission by the secretary of the treasury, of the forfeiture or penalty on which the judgment was obtained, it is not necessary to set forth the statement of facts upon which the remission was founded.

United States *v.* Morris, 1 Paine 209, affirmed.

Error to the Circuit Court for the Southern District of New York.

This was an action brought against the defendant, in the court below, as marshal of the southern district of New York, for a misfeasanse, in neglecting to proceed on a *venditioni exponas* issued out of the district court of the United States for the district of Maine, requiring him to sell the goods and chattels of Andrew Ogden, Abraham K. Smedes and Thomas C. Butler, which he had levied upon by virtue of certain executions issued against them, in favor of the United States, on a judgment recovered in the said district court of Maine, and which goods and chattels remained in his hands
*247] for want *of buyers, according to his return on said executions. The misconduct, or neglect of duty, alleged against the marshal, was, that he did not sell the property so levied upon, according to the command of the writ, but delivered the same up to the defendants, discharged from the execution. The declaration stated the judgment to have been recovered in the September term of the court, in the year 1817, for $22,361.75 damages, and which, in part, to wit, in the sum of $11,180.87, remained in full force, not reversed, paid off, or satisfied, to the plaintiffs, and that execution to that amount remained to be done. The *venditioni exponas*, as was alleged, was put into the hands of the marshal on the 13th day of August 1819.

The pleadings in the cause showed, that Andrew Ogden, of the city of New York, in or about the month of June, in the year 1813, imported into Portland, in the district of Maine, certain goods and merchandise, in the brig Hollen, which vessel, as well as the goods, belonged to him. These goods, together with the brig, were thereupon seized as forfeited to the United States, on the ground that the goods had been imported in that vessel, in violation of the non-intercourse acts, then in existence. The goods and vessel were libelled in the district court of Maine, on the 6th of July 1813, and on the 19th of the same month, were delivered up to Andrew Ogden, after having been regularly appraised, upon his having executed, together with Abraham K. Smedes and Thomas C. Butler, a bond for their
*248] appraised *value, The vessel and goods were, afterwards, on the 27th of May 1817, condemned as forfeited to the use of the United

[1] McLane *v.* United States, 6 Pet. 404.

[2] United States *v.* Lancaster, 4 W. C. C. 64; See United States *v.* Harris, 1 Abb. U. S. 110.

States. And such proceedings were thereupon had, that, in the following September term of the court, a judgment was entered upon the bond of appraisement, for $22,361.75, with costs. (1 Mason 431.)

The defendant, Morris, pleaded the general issue, and a special plea in justification, that the forfeitures had been remitted by the secretary of the treasury, setting out *in hæc verba*, two warrants of remission, which were duly served upon him, before the return-day of the *venditioni exponas*, and averring a compliance on the part of the defendants, with all the terms and conditions required by the warrants of remission. All which were duly set forth in the return to the *venditioni exponas*, before the commencement of the present suit.

To this special plea, a replication was filed, stating, in substance, that at the time of the forfeiture, seizure and condemnation of the brig Hollen, and the goods imported in her; and also at the time of their condemnation, and the entering up to the judgment on the bond of their appraised value, and of the issuing of the several writs of execution, and at the time of the making and issuing the said warrants of remission, and of the service thereof on the defendant, &c., Isaac Ilsley and James C. Jewett were the collector and surveyor of the port of Portland, and as such entitled to one-half of the said forfeiture; and that the said several executions *were issued for their benefit, and solely to collect the said sum of $11,180.87, for their own [*249 separate use, and that the defendant had notice thereof, when the said several writs of execution were delivered to him to be executed; setting out also two indorsements on the execution, one signed by the district-attorney of Maine, notifying the defendant, that the execution was for the benefit of the said collector and surveyor, and directing the marshal to collect the same by their order. The other was signed by the collector and surveyor, requiring the marshal to collect the execution forthwith, and deposit the money, agreeable to the command of the writ, and notifying him, that the property in the execution was in them, and directing him to receive orders from them, and from no other person whatsoever, in whatever related to the said execution. And it was then averred, that the present suit was for the purpose of enabling the collector and surveyor to recover their damages for the injury they had sustained by reason of the misfeasance of the defendant, in the declaration mentioned, and not for the benefit, use or behoof of the said plaintiffs.

To this replication the defendant demurred specially, and stated the following causes of demurrer: 1. For that the replication is a departure from the declaration, in this, that the declaration proceeds upon a cause of action in favor of the United States; whereas, the replication proceeds upon a cause of action in favor of the said Ilsley and Jewett, &c. 2. For that the *replication discloses no lawful and sufficient authority for the said Ilsley and Jewett to prosecute the said action against the [*250 said T. Morris, &c., and in the name of the United States. 3. For that the declaration proceeds upon the ground, that the several writs of execution therein respectively mentioned, were issued upon a judgment obtained for the use of the United States, and therefore, according to the act in such case made, &c., might lawfully run and be executed in any other state or territory of the United States, than the said district of Maine, in which the said judgment was obtained. Whereas, the replication discloses the fact,

that the said judgment was not obtained for the use of the said United States, but for the use and benefit of the said Ilsley and Jewett, and therefore, could not run and be executed in any other state, &c. 4. That the suit is prosecuted in the name of the United States, by an attorney on record, other than the district-attorney of the United States for the southern district of New York.

A joinder in demurrer having been filed, judgment was given for the defendant in the court below, and the cause brought by writ of error to this court. On the part of the plaintiff in error, it was contended, that the judgment ought to be reversed: 1. Because the secretary of the treasury had no power to remit the share of the forfeiture which belonged to the custom-house officers. 2. Because the action was rightly brought in the name of
*251] the United States, by an attorney of *the court below, specially authorized to prosecute the suit, by an order of one of the judges of that court. 3. Because the replication is not a departure from the declaration, proceeding upon a different cause of action from that stated in the declaration.

Wheaton, for the plaintiffs in error, stated the principal question in the cause to be, whether, after a definitive sentence of condemnation, in a revenue cause, the secretary of the treasury has a right, under the remission act of the 3d of March 1797, c. 361,(*a*) to remit the forfeiture, so as
*252] *to affect the right of the officers of the customs, under the collection act of 1799, c. 128, §§ 89, 91,(*b*) to a moiety of the fines, penalties

(*a*) Which provides (§ 1.), "That wherever any person, or persons who shall have incurred any fine, penalty, forfeiture or disability, or shall have been interested in any vessel, goods, wares or merchandise, which shall have been subject to any seizure, forfeiture or disability, by force of any present or future law of the United States, for the laying, levying or collecting any duties or taxes, or by force of any present of future act, concerning the registering and recording of ships or vessel, or any act concerning the enrolling and licensing ships or vessels employed in the coasting-trade or fisheries, and for regulating the same, shall prefer his petition to the judge of the district in which such fine, penalty, forfeiture or disability shall have accrued, truly and particularly setting forth the circumstances of his case; first causing reasonable notice to be given to the person or persons claiming such fine, penalty or forfeiture, and to the attorney of the United States for such district, that each may have an opportunity of showing cause against the remission or mitigation thereof; and shall cause the facts which shall appear upon such inquiry to be stated and annexed to the petition, and direct their transmission to the secretary of the treasury of the United States, who shall, thereupon, have power to mitigate or remit such fine, forfeiture or penalty, or remove such disability, or any part thereof, if, in his opinion, the same shall have been incurred without wilful negligence, or any intention of fraud in the person or persons incurring the same; and to direct the prosecution, if any shall have been instituted for the recovery thereof, to cease and be discontinued, upon such terms or conditions as he may deem reasonable and just." § 3. "That nothing herein contained shall be construed to affect the right or claim of any person to that part of any fine, penalty or forfeiture incurred by the breach of any of the laws aforesaid, which such person shall or may be entitled to, by virtue of the said laws, in cases where a prosecution has been commenced, or information has been given, before the passing of this act, or any other act relative to the mitigation or remission of such fines, penalties or forfeitures; the amount of which right and claim shall be assessed and valued by the proper judge or court, in a summary way."

(*b*) Which provides (§ 89.), That all penalties accruing by any breach of this act,

*and forfeitures recovered under the act. He insisted, that the right of the collector, &c., accruing by the seizure, was consummated by the final sentence of condemnation, and became an absolutely vested right, which could not be divested by the remission after such sentence. This had been expressly determined in the circuit court for the first circuit (*The Margaretta*, 2 Gallis. 515, 522 ; *The Hollen*, 1 Mason 431); and though the case had not hitherto been presented to this court, there were other analogous cases, which settled the doctrine, that, as between the representatives of a deceased collector, and his successor in office, or as between a removed collector and such successor, the share of the forfeiture to which he is entitled attaches, and is consummated by the sentence of condemnation. *Jones* v. *Shore*, 1 Wheat. 462 ; *Van Ness* v. *Buel*, 4 Ibid. 74. This went upon the principle, that it became an absolutely vested right, by relation back to the time of seizure. If it were an absolutely vested right, it must be vested as against the government. It is not vested, even as against the government, at the time of the seizure. That only gives an inchoate right, which may never become absolute, for want of a condemnation, or may be intercepted by a remission before condemnation. The *forfeiture has, for certain purposes, relation back to the commission of the offence. As [*254 between the offender and all persons claiming as purchasers of the property, and the government, the forfeiture attaches at the moment of *delictum*. 8 Cranch 398, 417. But this proceeds from the necessary strictness of all fiscal regulations, and does not prevent a remission before condemnation. The *delictum* does, indeed, divest the proprietary interest from the owner, so as to overreach the claims of subsequent purchasers ; but it does not, therefore, follow, that the share to which the officers of the customs may become entitled, vests in them *eo instanti*. Their title may never vest, by reason of three contingencies : 1. There may be no seizure. 2. There may be a remission after the offence, and before condemnation. 3. There may be no condemnation. If there be no seizure, of course, no title vests. If there be a remission before condemnation, as no title has yet vested except against subsequent purchasers, it purges the offence entirely, by relation back to the

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shall be sued for and recovered, with costs of suit, in the name of the United States of America, in any court competent to try the same; and the trial of any fact which may be put in issue, shall be within the judicial district in which any such penalty shall have accrued; and the collector within whose district the seizure shall have been made, or forfeiture incurred, is hereby enjoined to cause suits for the same to be commenced, without delay, and prosecuted to effect ; and is, moreover, authorized to receive from the court, within which such trial is had, or from the proper officer thereof, the sum or sums so recovered, after deducting proper charges, to be allowed by the said court ; and on receipt thereof the said collector shall pay and distribute the same, without delay, according to law," &c. § 91. "That all fines, penalties and forfeitures, recovered by virtue of this act, and not otherwise appropriated, shall, after deducting all proper costs and charges, be disposed of as follows: 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 in the said district ; and in districts where only one of the aforesaid officers shall have been established, the said moiety shall be given to such officer," &c.

delictum. If there be no condemnation, the inchoate title is never ripened into maturity. But if there be a remission after condemnation, the rights of the seizing officers have become absolute, and the remission purges the offence (if it has any effect at all) only so far as the government is concerned.

This would appear from the plain reading of the collection act of 1799, c. 128, *§§ 89, 90, 91, which directs the collector to prosecute for *255] breaches of the revenue laws, and to receive the sums recovered, and to pay and distribute the same among the different persons entitled. It must be admitted, on all hands, that the right must absolutely vest at some period. The court have already rejected the notion that it does not vest until the actual receipt and payment over of the money. *Jones* v. *Shore*, 1 Wheat. 470. There could, therefore, be no other epoch but that of the sentence of condemnation, which if definitive, or unappealed from, fixes and ascertains the rights of all parties. Admitting, for the sake of the argument, that the government may afterwards remit, so far as its own rights are exclusively concerned; it cannot certainly be concluded, from the terms of the remission act, that the government intended to revoke its bounty, conferred absolutely upon its officers, by a solemn statute, for great purposes of public policy. It is immaterial, what the secretary of the treasury intended to do. The question is, what was he authorized to do by the law under which he acted?

All the analogies of the common law would be found to repel the idea that the remission could divest the rights which had become ascertained and fixed by the sentence of condemnation. Pardon and remission are synonymous terms, and their legal effect upon the rights of parties must be the same. "Pardon" is defined to be "a work of mercy, whereby the king *256] forgiveth any *offence, &c., right, title, debt or duty." 3 Inst. 233. The power which is given to the president by the constitution, of granting pardons for offences, may, or may not, extend to revenue cases; but whether the pardon be granted by the president, or by his minister, is immaterial. It is still the act of the government, and it can have no greater effect in the one case than in the other. It is laid down, that a pardon does not discharge the thing in which the subject has a property or interest; as if a suit be in the spiritual court for tithes, a legacy contract, or matrimony, &c. (5 Co. 51 *a*), or for dilapidation. 3 Mod. 56. So, if an incumbent accept a plurality, the interest of the patron to present is not discharged by a general pardon. Cro. Car. 357–58. A penalty, upon a conviction for deer-stealing, is not discharged by a pardon; for it is a forfeiture to the party grieved. 1 Salk. 233–34. The king cannot, by his pardon, discharge an action commenced *qui tam* upon a penal statute, except for the king's moiety or part. 3 Inst. 238. Nor penalties to be divided between the informer and the poor of the parish. 2 Str. 1272. So, a pardon does not discharge a thing consequent or incident, in which the subject has an interest vested in him; as, costs taxed in the spiritual court, a pardon of the offence does not discharge the costs. 5 Co. 51 *b*; Cro. Jac. 159; Cro. Car. 199. And this, though the party appeals, after the taxation of costs, so that the sentence is suspended by the appeal. 5 Co. 51 *b*. So, if the party appeals, *257] *after costs taxed, and then the pardon comes, and upon the appeal, the former sentence is annulled, and costs given to to appellant;

these costs are not discharged by the pardon; for the the costs being taxed in the original suit, the party had a right of appeal, which was not taken away by the pardon; and, consequently, has a right to the costs. Cro. Car. 47. So, on a proceeding *in rem*, in the exchequer, the crown's share only of a forfeiture is pardoned, by an act of general pardon, but not the informer's, on an information previously filed. Parker 280. And in prize proceedings, the condemnation is held to vest the right in the captors so absolutely, that the government cannot release. Thus, in the case of *The Elsebe* (one of the famous Swedish convoys), Sir W. SCOTT determined, that the crown might interpose to release the captured vessels before, but not after, a final adjudication. 5 Rob. 173.

As to the technical questions which had been raised by the special demurrer upon the pleadings, they were all involved in the question upon the merits. If the remission was void as to the custom-house officers, they had a right to sue in the name of the United States; or, rather, the latter are suing in their own name, to give effect to their own bounty granted to those officers, who are prosecutors from the beginning, in the name of the United States. They are not only privies, but parties, and are concluded by a sentence *of acquittal as well as of condemnation. *Gelston* v. *Hoyt*, 3 Wheat. 319. But they may also be considered as the assignees of [*258 the United States, and then the question whether they are to sue in their own name, or in that of the United States, will depend upon the forms of proceeding in analogous cases. By the civil law, on the cession of a debt, the assignor impliedly ceded to the assignee all his rights of action, as incidental to the cession. The assignee became what was called *procurator in rem suam*, and sued in the name of his assignor. So, in England, and in this country, it has long since been settled, that the assignee of a *chose in action* may sue in the name of the assignor, who has no right to interfere with the suit. 1 Johns. Cas. 411; 2 Ibid. 121; 3 Johns. 425; *Bottomley* v. *Brooke*, 2 W. Bl. 1271; 1 Wheat. 233; 1 T. R. 619, 621–2. By the ancient common law, the king could assign a *chose in action*, though a subject could not. But the assignee of the king took it with all the high prerogative remedies. Thus, it is laid down, that the king's grantee may sue an obligation, &c., granted to him, in his own name, or may prosecute in the king's name; "for the grant of the statute or debt, is a warrant to him to prosecute process in the king's name." Cro. Jac. 82. Thus, where a debt due to an outlawed person was granted by the king; held, that the grantee might levy it in his own name, or by extent, in the king's name "although he hath not any words in his *grant to sue in the name of the king, as [*259 is usual in such cases." Cro. Jac. 179–80; Com. Dig. tit. Assignment, D.

As to the alleged departure in pleading, which is relied on as one of the causes of demurrer, the objection is, that the replication sets up a cause of action in the custom-house officers, whilst the declaration proceeds on a cause of action for the United States. The answer is, that the suit being here brought in the name of the United States, whose duty and interest it is to prosecute for the benefit of the officers (who are their grantees), notwithstanding the remission, the cause of action stated in the replication is just as much in favor of the United States as that set up in the declaration. How, then, stand the pleadings? 1. The declaration setting up a cause of

action in favor of the United States. 2. A plea of remission by the United States. 3. A replication, admitting the fact of remission, and affirming the cause of action in favor of the United States, as set up in the declaration, with a new circumstance, viz., a right of third persons, which invalidates the remission so far as they are concerned. This new matter is asserted, not by the officers, but by the United States themselves, who sue precisely as if the parties had not performed the conditions on which the remission was granted, and it had become totally void. It was not necessary, that this new
*260] matter should have been stated in the *declaration. In declaring, it is only necessary to set out enough to maintain the action. In an action for not executing a writ of execution, it is sufficient to set out the judgment, execution and facts of neglect or misfeasance. Even stating the judgment is merely inducement. It is sufficient, to state concisely the circumstances which gave rise to the defendant's particular duty or liability. 1 Chit. Pl. 369. The remission was a matter of defence which it was incumbent on the defendant to set forth. Successive pleadings are designed for this very purpose. The office of the declaration is to set forth the cause of action merely, of the plea, to avoid it, and of the replication, to avoid the plea. Thus, in debt on bond for the performance of covenants, the plaintiff declared for the penalty ; the defendant craved *oyer*, and pleaded general performance ; the plaintiff replied, setting forth particular breaches, and it was held good. *Postmaster-General* v. *Cochran*, 2 Johns. 413. The declaration in the present case pursues the most approved forms, and with more substantiality than usual. (See 2 Chit. Pl. 203–6.) Departure is where the plea contains subsequent matter, which does not maintain or fortify the matter in the declaration. Co. Litt. 304 *a*. But here, it does maintain it, and at the same time, avoids the bar. The bar is remission ; the replication
*261] shows, that it is no answer to the declaration. *In *Winch* v. *Keeley*, 1 T. R. 619, in *assumpsit*, defendant pleaded, that plaintiff had become a bankrupt, and assigned all his effects, under the statute, to his legal assignees ; plaintiff replied, that the suit was brought by him for the use of another party, to whom he had transferred the debt before the bankruptcy ; the replication was held good, and the objection of departure was not even mentioned at the bar.

On the part of the *defendant*, it was insisted, that the judgment ought to be affirmed, for the following reasons :

1. Because the secretary of the treasury had a right to remit the forfeiture in question, notwithstanding the judgment of condemnation perviously rendered, as stated in the pleadings.

2. Because the whole case on the part of the collector and surveyor of Portland, proceeds on the ground, that the remission by the secretary is binding upon the United States, and discharges their moiety of the forfeiture ; but has not that effect on the other moiety claimed by them ; thus giving a construction to the remission, inconsistent with its own terms, and the act under which it was granted. According to that act, the remission must be valid to the whole extent of the power exercised under it, or not at all; as it is admitted, therefore, to be good in part, it follows, that it is good for the whole.

3. Because such a remission is not like a pardon, nor is it to be governed

by the same rule; *but is equivalent to the judgment or decree of a competent tribunal, that no forfeiture should be enforced, inasmuch as it was without wilful negligence, or any intention of fraud, in the person or persons incurring the same.

4. Because, so far at least as it relates to the act of congress, vesting in the secretary of the treasury the remitting power, as therein mentioned, the custom-house officers have no vested rights in any forfeiture, until not only condemnation, but the receipt of the money produced by a sale of the forfeiture, or collection of the bond substituted for it, before which time the secretary has full power to remit; and, having exercised it in this case, the collector and surveyor of Portland are equally bound by it as the United States.

5. Because, if the said collector and surveyor of Portland had any vested rights in the forfeiture in question, notwithstanding the remission, then they ought to have enforced them by an action in their own name, and not in that of the United States.

6. Because the condemnation of the brig and goods being to the use of the United States, and the recovery in the bond being also in the name of the United States, they became trustees for the collector and surveyor of Portland, for whatever rights or interest they had therein; and these, whatever they were, were discharged by the remission of the secretary, inasmuch as the release of a trustee is, at *law, a bar of the rights or interest of his *cestui que trust*, and especially, in a case where fraud is neither charged nor pretended. [*263

7. Because this being an action to recover damages for a misfeasance, if the United States themselves could sustain it, yet, it being, in its nature, incapable of assignment, they could not transfer to the said collector and surveyor, such right of action, and authorize its prosecution in their name; much less can it be prosecuted without any such assignment or authority.

8. Because, if the United States could themselves sustain such an action, the said collector and surveyor would be entitled to no part of the damages recovered; for such damages would not be the forfeiture, nor the proceeds of the bond which was substituted for it; to a share of which only they are by law entitled. Of course, therefore, they cannot sustain the present action to recover damages for their own private benefit, in the name of the United States, which, if recovered by the United States, they would be entitled to no share of.

Emmet and *D. B. Ogden*, for the defendant, stated, upon the first point, that it was remarkable, and might be useful for interpreting the law, that the question as to the power of the secretary to remit, after sentence, was never raised, until subsequently to the judgment of this court in *Jones* v. *Shore*, 1 Wheat. 462, and more especially, *until after what fell from Story, J., in *The Margaretta*, 2 Gallis. 516. That no such doubt was [*264 conceived to exist at the bar, before the case of *Jones* v. *Shore*, appears from the arguments of all the counsel in that case, which admit, that the right was not so vested as not to be defeated by a remission. An expression there attributed to Mr. Pinkney (1 Wheat. 462), as to the president's power of pardoning, leads to an examination of the distinction between this power of remission and the pardoning power. The power of pardoning is a prerogative given to the president by the constitution, analogous to that

exercised by the British and other sovereigns. It is an act of grace and mercy, founded on the fact of guilt and crime, but exercised from other considerations than those which govern a remission by the treasury. It is laid down, that "the king, by his prerogative, may grant his pardon to all offenders attainted or convicted of a crime, where he has hope of their amendment." Com. Dig. Pardon, A. The remission proceeds on the ground of moral innocence, and is to be only a consequence of it. The secretary of the treasury has no power whatever, except where, in his opinion, from the judicial statement of facts, the forfeiture "shall have been incurred without wilful negligence, or any intention of fraud, in the person or persons incurring the same." A pardon being an act of grace and mercy to an acknowledged criminal, it is but just, *that it should not disturb the rights *265] of others, founded on the fact of that guilt, and their industry in detecting it; but where the remission is founded on moral innocence, the justice of the case is the other way. In this respect, there ought to be no difference whether a condemnation was had or not; for, although a sentence of condemnation may establish a violation of the letter of the revenue laws, the remission proceeds on the ground, that it establishes no guilt, and the petition for the remission must admit all the facts on which conviction could be founded. The remission is intended to be, and is, in fact, a judicial decision. It is the policy of the revenue laws, to make certain acts subject to forfeiture and penalties. It adopts this course, in order to relieve the government from the *onus* of proving, that those acts were coupled with a criminal intent; and to oblige the party suffering to prove the innocence of his mind, by such evidence as would satisfy the proper officer of the government itself. In analogy to the jurisdiction of a court of equity to take cognisance of a judgment at law, and relieve against it, on principles which the courts of law could not have taken into consideration, the secretary of the treasury is empowered to administer equitable relief, on principles which the revenue courts could not apply; but which go to the entire destruction of all guilt, and ought, therefore, to go to the entire remission of all punishment. The preliminary proceedings are all judicial, by petition to the district judge, and by examinations before him; *and, like an analogous *266] suit in equity, all parties interested are brought before the court to assert their rights, and contest the justice of the application. The officers of the customs, having notice, and the liberty of contesting the matter, are parties to the suit or application, and can no more complain that they are deprived of vested rights, than they could, where a court of equity decreed a perpetual injunction on a judgment at law.

The statute, having thus provided for making all persons interested parties to the suit, uses the most general language possible to cover the entire remission of the forfeiture. The prayer of the petition extends to the remission of the whole, and the power given to the secretary is to remit "such fines," &c. The proviso in the 3d section shows the extent to which it was intended to protect vested interests, or to consider them as vested, viz., where a prosecution had been commenced, or information given, before the passing of the act. Every information, seizure or prosecution, subsequent to the passing of the act, was followed up, subject to the provisions of that act. It formed a limitation upon the extent of vesting the interests of the prosecutors, or, to use the expression of one of the counsel, in *Jones* v. *Shore*,

1 Wheat. 467, "it is a condition originally attached by the law," and attached, whether the interest became originally vested by the seizure, the condemnation, or the recovery and receipt of the money.

*To what extent is the vesting? It is decided in *Van Ness* v. *Buel*, [*267
4 Wheat. 74, that the collector acquires an inchoate right by the seizure, which, by the subsequent decree of condemnation, gives him an absolute vested title to his share in the forfeiture; and it is also determined, in *Jones* v. *Shore*, 1 Wheat. 467, that the right to share in the forfeitures and penalties is given to the collector who made the seizure, and not to him in office on the receipt of the money. These adjudications were as between officers themselves, and not between an officer and the owner of the thing seized. But they establish the principle, that the right made absolute by condemnation was that, and only that, which had become inchoate by seizure. That inchoate right was, under the statute subject to be destroyed by remission, according to its provisions, and therefore, that made absolute must be subject to the same provisions.

But the vesting of the right, as laid down in the case of *The Margaretta*, 2 Gallis. 522, does not take place before a *final* judgment or sentence; and the same epoch is assigned in the case of *The Elsebe*, 5 Rob. 155 (Am. ed.), for the vesting of prize interests in cases of capture. Now, prize courts can take notice of all equitable considerations, but a revenue court cannot. Notwithstanding condemnation, then, it remains to be inquired, whether there was any criminal intent. If innocence be alleged, and the proper proceedings founded on it be instituted, *until those proceedings are decided [*268
upon, there is no final adjudication, within the spirit and meaning of the act.

Another consideration shows that the remission must operate to extinguish the rights of the officers of the customs. They could maintain no action for the forfeiture, as in their own names. The forfeiting party has nothing to do with them: he forfeits only to the United States, and it is only as between the United States and the officers, that the latter have any claim. In this respect, there is a material difference between our act and the British revenue laws. By the British statute, one-half is forfeited to the use of the crown, and the other to the use of the informer. In the exchequer, the form of proceeding is to adjudge a moiety of the forfeiture to the seizers, or informer, by the sentence itself, and it becomes a vested right in them, by relation back to the filing the information. *Weddel* v. *Thurlow*, Parker 280. But in this country, the utmost that can be said is, that the United States are, *pro tanto*, trustees for them; but as to the forfeiting party, the government is the only legal actor. There must be a right of releasing somewhere. A release by the officers of the customs would not prevent the United States from recovering the whole penalty. Thus, in debt on a single bond, made to A., to the use of him and B., the defendant pleaded a release made to him by B., on which the plaintiff demurred; and without difficulty, it was adjudged *for the plaintiff: for B. is no party to the [*269
deed, and therefore, can neither sue nor release it. But it is an equitable trust for him, and suable in the chancery, if A. will not let him have part of the money: and the Year Book of Edw. III. cited, that he might release in such case, was denied to be law. *Offly* v. *Warde*, 1 Lev. 235; s. c. 2 Keb. 333. Since there must be a power of releasing somewhere, and the

officers could not do it, the power must reside in the United States, and the remission is such a release. *Bayley* v. *Lloyd*, 7 Mod. 250.

Cases have been cited on the other side, in which courts of law have taken notice of equitable interests, and have permitted them to be pleaded or replied, so as to protect them. All these cases proceed on the ground of fraud and collusion, which cannot be charged here. As to *Bottomley* v. *Brook*, and *Rudge* v. *Birch* (cited 1 T. R. 621–2), they are said by Mr. Maryatt, in *Schooley* v. *Mears* (7 East 153), to have been overruled in the exchequer, in the case of *Lane* v. *Chandler;* and in *Wake* v. *Tinkler*, Lord ELLENBOROUGH says, "I am much more inclined to restrain than to extend the doctrine of these cases." And BAILEY, J., says, "we have nothing to do in this case with any other than legal rights." So, in *Bauerman* v. *Radenius*, 7 T. R. 662, Mr. Erskine (*arguendo*) states a case before Lord MANSFIELD, where an action was brought in the name of a nominal plaintiff, by persons beneficially *270] *interested, for whom he was a trustee. At the trial, the defendant produced a release from the plaintiff, which Lord MANSFIELD held to be conclusive; but said, the court of chancery, upon application, would make the trustee pay the principal, the debt, if well founded, and the costs of suit. And LAWRENCE, J., cites a case from Salkeld (*Anon.*, 1 Salk. 260), where Lord HOLT said, that if the plaintiff in ejectment, who is conisdered only as a trustee for the lessor, released the action, he might be committed for a contempt of the court: "but he did not say the release would not defeat the action." So, in *Payne* v. *Rogers*, 1 Doug. 407, where the tenant, a nominal plaintiff, having given a release to the plaintiff, the court, on application of the landlord, ordered it to be given up; clearly, because, if used, it would defeat the action. And in *Legh* v. *Legh*, 1 Bos. & Pul. 447, the obligor of a bond, after notice of its being assigned, took a release from the obligee, and pleaded it to an action brought by the assignee, in the name of the obligee; the court, on motion, set the plea aside, EYRE, C. J., saying, "the only question is, whether the assignee must not seek relief in a court of equity." Clearly showing, as the whole case does, that the plea could not be replied to at law.

But why should the custon-house officers be entitled to maintain this action in the name of the United States, notwithstanding their release, and *271] having no possible interest in the result? *Why should they have the benefit of not being liable to costs for a false action? They are not assignees of the United States, if that would protect them. There can be no assignment of a tort. The injury by the marshal's return is directly to themselves, and the United States have barred themselves from regarding it as an injury to them, by the remission. The right to sue in the name of another only existed, where the action would not lie in the name of the party actually interested. But in every case where the unlawful act of one person does an injury to another, an action on the case lies for the injury. Can the United States, who are not injured, sustain this action? If they could, is such a right of action assignable? Here, however, is no actual assignment; and it can only be considered as analogous to the assignment of a *chose in action*. But how can the real plaintiffs entitle themselves to the damages recovered in the name of the United States, without such assignment? The law only gives them half the forfeiture or proceeds. How, then, can they, notwithstanding the release or remission by the Uni-

ted States, recover, in their name, damages which they are not legally entitled to participate in? and do so, for their own benefit, when, if they have sustained damages, they may sue in their own name?

And this brings us to consider some of the special causes of demurrer. The replication is a departure from the declaration, not only by not bringing forward matter pursuant to it, and fortifying it, but by bringing forward matter showing *no right of action in the plaintiffs, and showing, that if it exists anywhere, it exists in third persons; and that [*272 this matter was known, and might be made available, before action brought. Departure is defined to be, "when the second plea containeth matter not pursuant to his former, and which fortifieth not the same, and therefore, it is called *decessus*, because he departed from his former plea." Co. Litt. 304 *a;* Doct. Pl., tit. Departure, 119. Thus, where the defendant pleads in bar a lease for fifty years made by a corporation; plaintiff replies, that it was made while a former lease was in existence, and shows the statute 21 Hen. VIII., and that the lease for fifty years was void; not setting forth the proviso making such leases good for twenty-one years; defendant, in his rejoinder, pleads the proviso of the statute 21 Hen. VIII., which make such leases good for twenty-one years: held, that this pleading of the proviso was a departure, because it neither goes with, nor enforces the bar before. *Fulmerston* v. *Stuard*, Dyer 102 *b*, 103 *a*. So, in a *præcipe quod reddat*, the tenant pleads, that the land was devised to him, and the plaintiff replies, that the devisor was an infant; to this the defendant says, that, by the custom, infants may devise; and, *per Curiam*, this is a departure, for he ought to have pleaded the special matter first. Doct. Pl. 123; 37 Hen. VI. 5. So, in Doct. Pl. 124, *per* KEBLE, *nota*, where general matter is pleaded, and where the special matter might have been *pleaded at the commencement, the [*273 party, afterwards, shall not maintain the general matter with the special matters. And if the defendant justifies by distress for rent, and the plaintiff replies, that he used and sold them, to which the defendant rejoins, that he sold the distress pursuant to the statute 2 W. & M., it will be a departure; for it should have been alleged so at first. Com. Dig. Pleader, B. 8. Defendant, in a plea, justifies taking cattle *damage feasant*, and afterwards rejoined, that they were taken surcharging the common; held to be a departure; and one of the reasons was, that the surcharge might have been pleaded first, because the defendant then knew the plaintiff's right. *Ellis* v. *Bowles*, Willes 638. So, when a man, in his former plea, pleadeth an estate made by the common law, in the second plea, regularly, he shall not make it good by an act of parliament. So, when, in his former plea, he entitleth himself, generally by the common law, in his second plea, he shall not enable himself by a custom, but should have pleaded it at first. Co. Litt. 304 *a*.

As to the third cause of demurrer, the statute only enables the issuing of a writ of execution to another district, upon judgments "obtained for the use of the United States." The present judgment was obtained in their name, but for the use of other parties. It is contended, that if the judgment was for the use of the United States, the execution need not be so. But the privilege *obviously attaches to the execution, and not to the [*274 judgment. It was for the benefit of the government, and was not imtended to be communicable to citizens, in cases where the United States

have no interest. All the rules for construing statutes will bear out this interpretation. Bac. Abr. tit. Statute, J. 5 ; Plowd. 18.

Webster, for the plaintiffs, in reply, insisted, that the authority to sue in the name of the United States could not be disputed by the defendant in this court. The government was here represented by the attorney-general, and if he did not interfere with the suit, it might well be maintained. It was novel doctrine, that an appearance by a wrong attorney was a ground of demurrer. If it had been intended to take advantage of that objection, a summary application should have been made to the court below, by whom the attorney on the record had been appointed to prosecute this suit, the district-attorney having refused to prosecute it. The discretionary power exercised by the court below, in this instance, was essential to the administration of justice, whenever the district-attorney refuses to act, or is interested, or in case of his death. But, even if this court should be of opinion, that the order made in the present case was irregular, it would not, on that account, give judgment against the sufficiency of the plaintiff's replication as pleaded. It would merely direct the pleadings to be amended, by inserting the name *of the district-attorney in the place of the present attorney on the record. The plaintiff's declaration is admitted to be good, and it is unnecessary to consider the replication, since the plea contains the first fault (if any) in the pleadings. It cannot be pretended, that it is a good plea, because the plaintiff has declared by a wrong attorney. If this judgment be affirmed, it is a perpetual bar as against the United States, and all others interested. While the cause is allowed to stand on the calendar, the rights of the parties, as stated in the pleadings, must alone be regarded. But the officers of the customs have a right to use the name of the United States ; the cases cited in the opening sufficiently show it. Wherever the subject has an interest in a prosecution, in which the king's name is necessary as a formal party, the subject has a legal right to use it. All cases of information, not *ex officio*, are of this sort, such as those by the master of the crown office, in *quo warranto*, of intrusion to office, &c. The prerogative of the supreme magistrate is held, not for purposes of ostentation, but for the substantial benefit of society, and its aid may be invoked, as often as necessity requires it.

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The plea is bad, because the marshal, who is a mere ministerial officer, was not a competent judge of the validity or effect of the remission. He is the officer of the court, and not of the treasury. He is to collect the money, and bring it into court. When it is received in the registry, distribution is to be made of it, according to *law ; or if the forfeiture has been remitted, the conditions of the remission are to be complied with, under the directions of the court. If the marshal had levied the money upon the execution, and no remission had been obtained, he could only be compelled to pay it over, by a motion to compel him to return the process. If the remission had been unconditional, and could divest the share of the custom-house officers, he had nothing to do with carrying it into effect. It is by the court only, that the rights of the parties are to be ascertained, and their respective claims to be satisfied.

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The plea is also bad, because it does not set forth, with proper averments, the facts and circumstances stated in the petition to the secretary of

the treasury, upon which the remission of the forfeiture was granted. It is an inflexible rule of pleading, that whenever a justification is set up, under a special or limited authority, everything should be set forth, to show the case to be within the protection of the authority relied on. The statement of facts on which the remission was grounded, is essential to be known, in order to see whether the secretary of the treasury, who also acts merely as a ministerial officer, has pursued his authority. It has, indeed, been argued, that the secretary acts judicially in those cases, and that his decision is an adjudication binding on all the world, and especially, on the officers of the customs, who are both parties and privies. But how can that be a judicial power, which is merely of executive discretion? The *secretary *may* remit under the statute, whenever it is proved to his satisfaction, that [*277 the offence was committed "without wilful negligence, or an intention of fraud;" but he is not bound to remit, even in case of innocence, ever so clearly proved. All judicial power, under the constitution, is vested in one supreme court, and such inferior tribunals as congress shall establish. How, then, can any portion of that power be vested in the treasury department, or in any other executive department?

The plea is bad, because it alleges the remission, after a final sentence of condemnation, and a summary judgment upon the appraisement bond. The remission act of congress was evidently copied from the British statute of the 27 Geo. III., c. 27; and under that statute, the commissioners of the customs have never exercised the power of remitting a forfeiture, after judgment. Chit. Cr. Law 798. This defect of authority having been found, in some respects, inconvenient, the power of remitting after judgment was expressly given (not to the commissioners of the customs, but to a higher authority) the Lords of the Treasury, by the 54 Geo. III., c. 171. When it is said, that the rights of the custom-house officers are vested, from the time of the judgment or sentence, it is not meant, that they are vested, independent of the act of congress, but under the act, and according to the act. If the law authorizes a remission after judgment, it is idle to speak of *rights being vested by the judgment. The question is, what does [*278 the act mean? And it is contended, that it limits the power to cases before condemnation. Every clause and phrase of the act is applicable, and alone applicable, to such cases. The persons entitled to the benefit of the act, are those who "shall have incurred any fine, forfeiture or disability, or shall have been interested in any vessel, goods, wares or merchandise, which shall have been subject to any seizure, forfeiture or disability," &c. This cannot refer to things already forfeited; goods forfeited and condemned, are not subject to forfeiture; they are actually forfeited. So, the words, "incurred any forfeiture." No man incurs a forfeiture by a judgment against him; it is the offence by which the forfeiture is incurred. So also, the summary inquiry which is to be made by the district judge, into the facts and circumstances of the case, shows, that the law supposes that no trial had yet been had. It would be an absurd provision, upon any other supposition. The act authorizes the secretary to direct the prosecution, if any shall have been instituted, for the recovery of the forfeiture, to cease and be discontinued. It supposes a prosecution either pedning, or not yet brought. The prosecution cannot be said to be pending, in a general sense, after judgment. There is not a single expression in the act applicable to a

judgment. But here are two successive judgments, one against the goods, and the other against the claimants, upon the appraisement bond. How can
*279] the remission discharge *this second judgment? Why was not the remission shown, when the application was made for that judgment, so as to prevent its being entered? There is nothing in the act, to authorize the remission of a judgment. The subjects to be remitted are, "fines, penalties, forfeitures and disabilities." Besides, the phraseology applicable to judgments would be, released or vacated; not remitted or mitigated. There must be some limit in point of time, and in the order of the proceedings, to the exercise of this power of remission. If the rights of all parties are not fixed and ascertained by the judgment, it will be difficult to discover when they are consummated. The receipt of the money by the officers may change the possession, but it cannot alter the right. That idea is expressly rejected by the court in *Jones* v. *Shore*, 1 Wheat. 470.

The argument on the other side, that there must be a power of releasing somewhere, and since the custom-house officers cannot do it, the power must reside in the United States, and may, therefore, be exercised by the secretary of the treasury, is founded upon an entire misapprehension of the distinct powers of the different branches of the government. There is no authority given by law to any department or officer of the executive government to release a debt due by judgment. The secretary of the treasury may remit a forfeiture or penalty, before judgment, or may discharge the debtor as to
*280] his *person, but nothing short of the legislative power of congress, specially exercised, can discharge the debt. The usual course of the treasury has been, to refuse to remit after judgment, and to refer to the president for the exercise of the pardoning power. It may well be doubted, whether that power extends, under the constitution, to cases arising under the revenue laws. But the practice shows the sense entertained by the treasury of the limitation to its authority. Whether the president's pardoning power extends to such cases or not, there is a close analogy between a pardon and a remission; and there is no more reason why one should affect private rights and interests actually vested, more than the other. Both suppose legal guilt, and some consideration which makes it consistent with the public good that it should be forgiven. A pardon, as well as a remission, often supposes moral innocence.

As to the execution running out of the district of Maine, not only was the judgment "for the use of the United States," but the execution was for their use. If the forfeiture could not be remitted after judgment, the whole debt is still due, and the United States have a direct interest in a moiety of it. If the forfeiture might be remitted, so far as the share of the United States is concerned, they have still an interest in enforcing the demand, since it is intended to secure to their officers a part of their legal compensation. But this question cannot arise upon the pleadings. The
*281] defendant admits that he has *executed the process, so far as the remission did not prohibit it, and he is, therefore, estopped by his plea, from insisting that it is a void process.

March 15th, 1825. Thompson, Justice, delivered the opinion of the court, and after stating the case, proceeded as follows:—The judgment of this court being placed upon the validity of the plea, and the merits of the

defence therein set up, it is unnecessary particularly to notice any other questions that have been discussed at the bar. To guard, however, against an inference, not intended by the court to be admitted, that the execution in this case, was properly issued from the district court of Maine to the marshal of New York, it is proper to observe, that this must depend on the construction to be given to the act of congress of the 3d of March 1797, entitled, "an act to provide more effectually for the settlement of accounts between the United States and the receivers of public money." Independent of this act, it has not, and certainly cannot be pretended, that an execution from the district court of Maine could run into any other state. The sixth section of that act declares, "that all writs of execution upon any judgments obtained for the use of the United States, in any of the courts of the United States, in one state, may run and be executed in any other state, but shall be issued from, and made returnable to, the court where the judgment was obtained." The pleadings in this case show conclusively, that although the *judgment is nominally in favor of the United States, yet it is substantially and beneficially for the use of the custom-house [*282 officers of Portland; and that the execution was issued solely and exclusively for their benefit, and not for the use of the United States. If it was necessary to decide this point, it might be difficult to maintain, that this case came within the true intent and meaning of the act; but as the decision of the cause is put upon a point more extensive in its practical application, this is passed by, without the expression of any opinion upon it. Nor is it deemed necessary to notice any objections taken to the replication. The argument has been confined principally to the plea, as being the first error on the record. The plaintiff having replied, without taking any exceptions to the plea, he cannot now avail himself of any defect, that would not have been fatal on the general demurrer.

The objections to the plea may be considered under the following heads: 1. That it does not set forth, with proper averments, the facts and circumstances stated in the petition to the secretary of the treasury, and upon which the remission of the forfeiture was granted. 2. That the secretary of the treasury had no power to remit, after condemnation.

The first objection supposes the case to fall within the rule, that where a justification is set up under a special or limited authority, everything should be set out, to show the case to be *within the jurisdiction of the authority whose protection is claimed and relied upon. It may be [*283 observed, preliminarily, that this objection, coming so late, and at this stage of the cause, is not entitled to much indulgence. If well founded, and it had been made at an earlier day, the plea could have been amended, and much expense and litigation prevented. Every reasonable intendment, therefore, in favor of the plea, ought now to be made. It by no means follows, that in order to sustain this plea, it is necessary to show that it would have been held good on general demurrer. For it is a rule, founded in good sense, and supported by the settled doctrines of pleading, that many defects are waived and cured, by pleading over, that might have been fatal on demurrer.

But it is far from being admitted, that this plea would not have stood the test of a general demurrer. The defendant was a ministerial officer, and placed in a situation, in which he was obliged to judge and determine,

whether to obey the command of the execution, or that of the warrant of remission from the secretary of the treasury. The latter is set out *in hæc verba* in the plea, and upon its face refers to the law under which it was issued, which was a public act; and in which warrant the secretary of the treasury sets forth, that a statement of facts, with the petition of Andrew Ogden, touching the forfeiture, had been transmitted to him by the district judge of the district of Maine, pursuant to the statute of the United States, entitled, "an *act to provide for mitigating or remitting the forfeitures, penalties and disabilities, accruing in certain cases therein mentioned," as by the said statement of facts, and petitions remaining in the treasury department of the United States may fully appear; and that he, having maturely considered said statement of facts, it appeared to his satisfaction, that the said forfeitures were incurred, without wilful negligence or any intention of fraud, and thereupon, remitted all the right, claim and demand of the United States, and of all others whomsoever, upon certain conditions therein specified. This warrant, therefore, upon its face, contained everything required by the law, and which was necessary to bring the case within the cognisance of the secretary of the treasury; and to require anything more from a ministerial officer for his justification, would be imposing upon him great hardship.

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This plea, by setting out the warrant at large, adopts and asserts all the facts therein set forth, and must be taken as alleging, that a statement of facts had been made by the proper officer, and transmitted to the secretary of the treasury, and is, therefore, an averment of that fact. It is not, to be sure, a formal, but is a substantial, averment; which is nothing more than a positive statement of facts, in opposition to argument or inference. It would be altogether useless, and mere surplusage, to set forth such statement of facts in the plea; they would not be traversable. It is not competent for any other tribunal, collaterally, to call in question the competency of the evidence, *or its sufficiency, to procure the remission. The secretary of the treasury is, by the law, made the exclusive judge of these facts, and there is no appeal from his decision. The law declares, that on receiving such statement, he shall have power to mitigate or remit such fine, forfeiture or penalty, or remove such disability, or any part thereof, if, in his opinion, the same shall have been incurred, without wilful negligence, or any intention of fraud, in the person or persons incurring the same. The facts are submitted to the secretary, for the sole purpose of enabling him to form an opinion, whether there was wilful negligence, or intentional fraud, in the transaction; and the correctness of his conclusion therefrom, no one can question. It is a subject submitted to his sound discretion. It would be a singular issue to present to a jury for trial, whether the facts contained in such statement were sufficient or not to satisfy the secretary of the treasury, that there was no wilful negligence or intentional fraud. If the plea, by setting out the warrant at large, contains, as I have endeavored to show, an averment, that a statement of facts had been transmitted to the secretary by the proper officer, as required by the law, it was all that was necessary. This gave the secretary cognisance of the case, and which was sufficient to give him jurisdiction. But what effect that statement of facts would, or ought to have, upon his opinion, whether the for-

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feiture was incurred without wilful negligence, or any intention of fraud, is a matter that could not be inquired into.

But should any doubt remain on this point, it *is removed, by the admissions in the replication; which begins by saying, that although [*286 true it is, that the said William H. Crawford, as such secretary of the treasury of the United States, did make and issue the said warrants of remission, as in the said plea of the said defendant is alleged, yet, &c., proceeding to set out facts and circumstances, to show that the legal effect and operation of such remission cannot take away the moiety of the custom-house officers, but affirming its validity as to the moiety of the United States, and thereby admitting the authority and jurisdiction of the secretary of the treasury, and placing the avoidance of the operation of the remission on the rights of the custom-house officers, on a totally distinct ground. The only purpose for which the statement of facts upon which the secretary acted, could be required to be set out in the plea, would be, to show his jurisdiction; and if the replication admits this, it must certainly work a cure or waiver of the defect. It is laid down by Chitty (Chitty on Plead. 547), and for which he cites adjudged cases which support him, that, as a defective declaration may be aided at common law by the plea, so a defective plea may be aided, in some cases, by the replication. As if, in debt or bond, to make an estate to A., the defendant pleads, that he enfeoffed another to the use of A. (which is not sufficient, without showing that A. was a party, or had the deed), yet, if the plaintiff reply that he did not enfeoff, this aids the bar. So, if the defendant plead an award, without sufficient *certainty, and [*287 the plaintiff makes a replication which imports the award to have been made, in aids the uncertainty of the bar. And this rule is not confined to matters of form merely, but extents to matters of substance. Thus, in an action of trespass for taking goods, not stating them to be the property of the plaintiff; this defect will be aided, if the defendant, by his plea, admits the plaintiff's property. So, where several acts are to be performed by the plaintiff, as a condition precedent, and he does not aver performance of all, if it appear by the plea, that the act omitted to be stated was, in fact, performed, the defect is cured. (6 Binn. 24; Chitty 402.) We may, then, conclude, that the plea is not, in the present stage of the cause, to be deemed defective, on account of the first exception taken to it.

And the remaining, and more important inquiry is, whether the secretary of the treasury has authority to remit the share of the forfeiture claimed by the custom-house officers. And this must depend on the contruction to be given to the act under which the power was exercised. The authority of the secretary to remit, at any time before condemnation of the property seized, is not denied on the part of the plaintiff; and it cannot be maintained, that congress has not the power to vest in this officer authority to remit after condemnation; and the only inquiry would seem to be, whether this has been done by the act referred to. (1 U. S. Stat. 506.) The present case ought not, perhaps, to be considered *altogether as a remission [*288 after condemnation. For it appears, by the warrant of remission, that the statement of facts, by the district judge, upon which the remission is founded, bears date on the 13th of June 1814, and the condemnation did not take place until May 1817; and although the remission was not actually granted until January 1819, yet, as the facts on which it was founded were

judicially ascertained, three years before the condemnation, there would be some plausibility in maintaining, that the remission should relate back to the time when the application was made to the secretary. But we think, a broader ground may be taken, and that the authority to remit is limited only by the payment of the money to the collector for distribution.

It may safely be affirmed, that the question now presented, has never received any judicial decision in this court. Nor has any case been cited at the bar, recollected by the court to have been decided here, containing any principle at variance with the construction of the act now adopted. In the case of *Jones* v. *Shore's Executors* (1 Wheat. 462), no such question was involved. The United States there asserted no claim. Nor had the secretary of the treasury exercised any authority, under the act in question. The money was in court for distribution, and the sole question before this court was, whether the then collector and surveyor, who were the actual incumbents in office, or the representatives of the late collector and surveyor, in right of
*289] their testator *and intestate, were entitled to the money, and it was decided in favor of the latter. The same principle governed the case of *Van Ness* v. *Buel* (4 Wheat. 75). But these cases decide no more, than that the right of the custom-house officers to forfeitures *in rem*, attaches on seizure, and to personal penalties, on suits brought; and in each case, this right is ascertained and consummated by the judgment, as between such officers and the party who has incurred the forfeiture or penalty. But they decide nothing with respect to the right, or the control of the United States, over such penalties and forfeitures. The rights and interests of these officers must necessarily be held subordinate to the authority of the United States over the subject. And that such is the light in which they are viewed, is evident from what fell from the court in the case of *Gelston* v. *Hoyt* (3 Wheat. 319). It is there said, the seizing officer is the agent of the government, from the moment of the seizure, up to the termination of the suit. His own will is bound up in the acts of the government in reference to the suit. By the very act of seizure, he agrees to become a party to the suit under the government; for, in no other manner, can he show an authority to make the seizure, or to enforce the forfeiture. If the government refuse to adopt his acts, or waive the forfeiture, there is an end to his claim; he cannot proceed to enforce that which the government repudiates.

It is not denied, but that the custom-house officers have an inchoate
*290] interest, upon the seizure, *and it is admitted, that this may be defeated by a remission, at any time before condemnation. But if this is not the limitation put upon the authority to remit, by the act giving the power, it is difficult to discover any solid ground upon which such limitation can be assumed. If the interest of the custom-house officers, before condemnation, is conditional, and subject to the power of remission, the judgment of condemnation can have no other effect than to fix and determine that interest, as against the claimant. Those officers, although they may be considered parties in interest, are not parties on the record; and it cannot with propriety be said, they have a vested right, in the sense in which the law considers such rights. Their interest still continues conditional, and the condemnation only ascertains and determines the fact on which the right is consummated, should no remission take place. This is

evidently the scope and policy of the laws on this subject. The forfeiture is to the United States, and must be sued for in the name of the United States. (1 U. S. Stat. 695, § 89.) It is made the duty of the collector to prosecute, and he is authorized to receive the money, and on receipt thereof is required to distribute the same according to law. In all this, however, he acts as the agent of the government, and subject to the authority of the secretary of the treasury, who may direct the prosecution to cease. And the act creating the right of the custom-house officers to a portion of the forfeiture, does not *vest any absolute right in them until the money is received. (§ 91.) It declares, that all fines, penalties and forfeitures, recovered by virture of this act, shall, after deducting all proper costs and charges, be paid, one moiety into the treasury, and the other moiety divided between the collector, naval-officer and surveyor. No part of the act warrants the conclusion, that the right of these officers becomes absolute, by the condemnation. But, on the contrary, the plain and obvious interpretation is, that the right does not become fixed, until the receipt of the money by the collector. [*291

Unless, therefore, the act under which the remission is allowed (1 U. S. Stat. 506) limits the authority of the secretary of the treasury to the time of condemnation, the custom-house officers have no right to question the remission. That the act does not, in terms, so limit the power, is very certain; nor is such a construction warranted by the general object and policy of the law, which is intended to provide equitable relief, where the forfeiture has been incurred without wilful negligence or intentional fraud. It presupposes, that the offence has been committed, and the forfeiture attached, according to the letter of the law, and affords relief for inadvertencies and unintentional error. And why should such relief be foreclosed by the condemnation? The law was made for the benefit of those who had innocently incurred the penalty, and not for the benefit of the custom-house officers. If any prosecution has been instituted, the secretary has authority to direct it to cease *and be discontinued, upon such terms or conditions as he may deem reasonable and just. This enables him to do ample justice to the custom-house officers, not only by reimbursing all costs and expenses incurred, but rewarding them for their vigilance, and encouraging them in the active and diligent discharge of their duty in the execution of the revenue laws. But, to consider their right to a moiety of the forfeiture as absolute, and beyond the reach of the law, after condemnation, would be subjecting the innocent to great and inequitable losses, contrary to the manifest spirit and intention of the law. The secretary is authorized to direct the prosecution to cease and be discontinued. This, undoubtedly, gives him a control over the execution. The suit, or prosecution, does not end with the judgment, but embraces the execution, and it has so been considered by this court at the present term. And that such is the sense in which the term prosecution is used in these laws, is evident from the 89th section of the collection act, where the collector is required to cause suits to be commenced and prosecuted to effect. But the prosecution would be to very little effect, unless it extended to and included the execution. The provision in the third section of the act under which the remission is allowed, affords a very strong inference, that the rights of the custom-house officers are conditional, and subordinate to the authority to remit. It declares, that nothing herein con- [*292

tained shall be construed to affect the right or claim of any person, to that
*293] part of any *fine, penalty or forfeiture to which he may be entitled, when a prosecution has been commenced, or information has been given, before the passing of this act, or any other act relative to the mitigation or remission of such fines, penalties or forfeitures; thereby clearly showing, that before such power to remit was given, the right of the custom-house officers attached, upon the commencement of the prosecution, and could not be divested; but that such right was now modified, and made conditional. This provision is contained in the first law which passed in the year 1790 (1 U. S. Stat. 122), giving authority to the secretary of the treasury to remit penalties and forfeitures. This act was temporary, but continued from time to time until the 8th of May 1795, when it expired, and was not revived until March 1797, leaving a period of two years, when the power to remit was not vested in the secretary of the treasury, and to which period the provision in the third section of the act of 1797 probably refers.

The powers of the secretary of the treasury have been supposed analogous to those of the commissioners of the customs, in England, under the statute 27 Geo. III., c. 32, § 15. But it is very obvious, on reference to that statute, that the authority of the commissioners to remit, was limited to the condemnation. These powers were afterwards, by statute 51 Geo. III., c. 96, extended, but still limited to remissions before condemnation. It was
*294] probably not deemed advisable, to confer more enlarged powers *upon the commissioners of customs, but that a power somewhere to remit after judgment of condemnation was proper and necessary; and, accordingly, by statute 54 Geo. III., c. 171, this power is transferred to the commissioners of the treasury. The two former acts are recited, and the recital then proceeds thus: "Whereas, it is expedient, that the provisions of the said acts should be further extended, and that the commissioners of his Majesty's treasury should be empowered to restore, remit or mitigate any forfeiture or penalty incurred under any laws relating to the revenue, or customs or excise, or navigation or trade, either before or after the same shall have been adjudged in any court of law, or by or before any commissioner of excise, or justice of the peace;" and it is then enacted, that the commissioners of the treasury may order any goods seized as forfeited, to be restored, on the terms and conditions mentioned in the order, and may mitigate or remit any penalty or forfeiture which shall have been incurred under the revenue laws, and upon such terms and conditions, as to costs or otherwise, as under the circumstances of the case shall appear reasonable. The enacting clause in this statute is general, like our act. It does not, in terms, give the power to the commissioners of the treasury to remit, after condemnation, and yet there can be no doubt the power extends to such cases; and if this be so, what becomes of the rights of informers, which have been sup-
*295] posed to become, by the judgment of condemnation, *so vested, as not to be divested even by a pardon.

The powers given by this statute to the commissioners of the treasury, are very analogous to those given by our act to the secretary of the treasury, and the phraseology employed to confer such powers is nearly the same in both. Neither the one nor the other, in terms, extends the power to remission after condemnation; and there can be no reason why the same con-

struction should not be given to both. No vested rights of informers, or custom-house officers, are violated in either case. These rights are conditional, and subordinate to the power of remission, and to be provided for in the terms and conditions upon which the remission is granted.

The practical construction given at the treasury department to our act, has not been particularly inquired into. It is understood, however, that until within a few years, remissions were granted as well after as before condemnation, but that, latterly, this power is not exercised after condemnation, nor will the remission be granted before condemnation, unless the petitioner will admit the forfeiture has been incurred. This practice is probably founded on the impression, that the equitable powers of the secretary ought not to be interposed, until the legal guilt of the petitioner is ascertained. But the rights of the custom-house officers would seem to be as much affected under such a practice, as to remit after condemnation. Those rights are said to be inchoate by seizure, and to be consummated *by the condemnation. The confession of the forfeiture, before condemnation, remaining on the record of the treasury department, although not a judicial condemnation, might well be said to consummate the rights of the custom-house officers, if they are to be considered as becoming absolute, when the forfeiture is ascertained. The condemnation does no more than to determine that question, so far as respects the right of those officers; for the condemnation is not to them, but to the United States; they are no parties to the judgment; and their rights must depend upon, and be governed and controlled by, the acts of congress, which create and regulate such rights; and by these acts, those rights, in the opinion of the court, do not become fixed and absolute, by the condemnation, but are subject to the power of remission by the secretary of the treasury, until the money arising from the forfeiture is received by the collector for distribution. The warrant of remission, therefore, in this case, when served upon the marshal, operated as a *supersedeas* to the execution, and justified a discharge and restoration of the property levied upon, and exonerates him from all claim to damages by the custom-house officers. [*296

JOHNSON, Justice.—I entirely concur with my brethren in the opinion, that the power of the secretary to remit extends as well to cases after as before judgment rendered. The question is one which I have had to consider repeatedly in my circuit, and which I so decided more than *twelve years ago. The reasons on which I then founded, and still adhere to this opinion, were briefly these: [*297

I consider the contrary doctrine as neither consistent with the words nor the spirit of the act of 1796. The unavoidable consequence of it would be, that the suitor for grace is shut out of every legal defence; and it would be difficult to assign a reason why justice should be refused by the hand that tenders mercy. Many defences are not only consistent with the claim for remission, but furnish in themselves the best ground for extending the benefit of the act to the party defendant. He who supposes his case not to come within the construction of a law, or that the law is repealed, expired or unconstitutional, cannot be visited with moral offence, either in the act charged, or the defence of it. Yet, how is the question of right ever to be decided, unless he is permitted to try the question before a court of law?

In such a case, pertinacious adherence to his offence cannot be imputed to him, since, resisting the suit on the one hand, while he sues for remission on the other, amount to no more than this, that he denies having violated the law; but if the court thinks otherwise, he then petitions for grace, on the ground of unaffected mistake; a point on which, of course, he must satisfy the secretary, before he can obtain a remission.

If the question be tested by the letter of the law, it will be found, I think, to lead to the same conclusion. The words are, "whenever any *person, who shall have incurred any fine, penalty, forfeiture or dis- *298] ability, or shall have been interested in any vessel, goods, wares or merchandise, which shall have been subject to any seizure, forfeiture or disability, by force of any present or future law of the United States, for laying or collecting any duties or taxes, or by force of any present or future act concerning the registering and recording of ships or vessels, &c., shall prefer his petition to the judge of the district in which such fine, penalty, forfeiture or disability shall have accrued, truly and particularly set forth," &c., then, &c., the power of remission may be exercised by the secretary, and the prosecution, if any, ordered to be stayed. On perusing this act, it must be conceded, that the terms are sufficiently general to extend the powers of the secretary, without limit, to the cases of fine, forfeiture or disability, occurring under the several laws specified. The limitation, therefore, must be sought for, either in some principle of construction, or in some principle *aliunde*, which is competent to impose such limitation.

But, with a view to construction, there will be found several considerations calculated to extend the power granted to cases wherein judgments have been obtained, rather than to restrain it to any pre-existing state of things. If the question be tested by the technical signification of the terms, in strictness, the power would be confined to cases in which judgment had been obtained, rather than to those of a contrary description. *Fines, *299] penalties and disabilities are not incurred, and do not accrue, in the technical sense of the terms, until judgment. With regard to disabilities particularly (and there is no discrimination made between the cases), I would notice that disqualification to hold any office under the United States, which is imposed upon a smuggler, for seven years. Who can question that it must be counted from the day of judgment, and not from the day of the offence or information? Or, who can suppose, that it could be made a plea to the authority of a public officer, at any time before conviction?

But with regard to fines and forfeitures also, there are various provisions of the United States laws, which look positively to a trial as necessary to determining whether such fines and forfeitures have been incurred. I would notice particularly the 29th section of the collection law of 1799, under which, incurring the penalty for the offence there stated, is made to depend upon the master's not being able to satisfy the court, by his own oath, or other sufficient testimony, of certain facts, which, in the given case, prevent his incurring the fine. So also of the 67th section of the same law, in which a forfeiture is made to accrue upon a state of facts which positively requires the intervention of a court of justice, and which, of consequence, cannot be said to have been incurred or accrued, until judgment.

But other considerations present themselves upon this law, which *300] lead to the same conclusion. *The words are, "shall prefer his peti-

tion to the judge of the district in which such fine, penalty, forfeiture or disability shall have accrued." That this word "accrued" meant something more than the term *incurred*, used in the previous part of the section, is obvious, from this consideration, that an offence might be committed in one district, and the offender prosecuted in another; but it never was imagined, that the suit for remission could be going on in the district where the penalty was incurred, in one sense of the term, and the prosecution in another. The term *accrued*, therefore, has been universally held to be here used with relation to the seizure, information or suit for the penalty; and so far from its being held to have any effect in confining the time of prosecuting this claim for remission to the interval between information and judgment, that, practically, we know, in some of the most commercial districts, the construction adopted was, that the penalty did not accrue, until conviction; and hence, suffering a decree or judgment to pass, was considered as essential to making up the case in which the suit for remission might be preferred. And there was some reason for this practice, since the necessary meaning of the term, as distinguished from the word *incurred*, shows, that there could hardly ever occur a case in which the suit for remission was not preceded by the suit for the penalty. But if the defendant was compelled to confess that he had violated the law, and so the act requires, what reason could exist why judgment should not forthwith *pass against him? And if, under [*301 such circumstances, the judgment was a bar to the remission, the boon held out to them was all a fallacy; nay, more, it was a lure to ensnare him; for the law imposes no obligation on the judge to stay proceedings; and whether he would or not, rested with him, or with the district-attorney, until the secretary should have time to act upon the application for remission.

The replication, however, exhibits the true ground on which the real plaintiff in this suit is compelled to rest his case: which is, that by virtue of the judgment, certain rights were vested in him, over which the remitting power of the secretary does not extend. In making up this replication, the party ought to have felt the real difficulties of his case. It is generally true, that the rules of pleading furnish the best test of a right of action. The effect, in this case, was to introduce a new personage into the cause; and if I were disposed to get rid of the question, on a technical ground, I should find no difficulty in coming to the conclusion, that there is a departure in this plea, and he has abated his writ. How, in fact, the name of the United States comes at all to be used in this cause, is to me a mystery. The very policy of the law, in this part of its revenue system, is avoided by it, and would be frustrated, if the practice could be countenanced. That the name of the United States should be used against its will, and an attorney for the United States nominated by a judge, to act where the attorney of the United *States refuses to act, and that without any authority by statute, [*302 I acknowledge has excited my surprise.

The principles asserted are, that an absolute interest is vested by law in the collector; that the United States are the trustees to their use; that the act of the trustee shall not defeat the interests of the *cestui que use*, and that he shall have the use of the trustee's name to vindicate his rights, that too in an action for damages. The whole of this thing appears to me to be wrong. If the right was an absolute, substantive, individual right, why

was not the suit brought in the name of the collector? If his interest is only an equitable interest, by what known rules of pleading can he avail himself of his mere equitable interest, in a suit at law? or rather, can he make his appearance as party in the suit instituted by his trustee? and that too, a suit for damages? It all results in a strong attempt to modify the operation of our laws, and to regulate the rights and powers of our officers, by some fancied analogy with the British laws of trade, and British revenue-officers.

Our system is a peculiar system; and nothing is clearer to my mind, than that, in many particulars, it is constructed with a view to avoid that very analogy which is here set up, and those consequences and embarrassments which might grow out of it. In the instance before us, relief was to be provided for a case of misfortune and of innocence, and nothing could have been more absurd, than to suffer the vested rights of informers *and seizing officers to embarrass the government in its benevolent and just views towards the objects of this law. Mercy and justice could only have been administered by halves, if collectors could have hurried causes to judgment, and then clung to the one-half of the forfeiture, in contempt of the cries of distress, or the mandates of the secretary. Hence, according to our system, all the suits to be instituted under the laws over which the secretary's power extends, are commenced in the name of the United States. No other party is permitted to sue; they are all made national prosecutions; all the legal actors are those who are bound in obedience to the government that prosecutes. Nothing is more untenable, than the idea, that at any one stage of the prosecution, the government assumes the character of a trustee; an idea so abhorrent to the principles of the common law, that to make the king a trustee, was to make him absolute proprietor. Nor is it until the character of prosecutor for offences against itself is put off, that the law raises a state of things, in which the relation of trustee and *cestui que use* actually can arise. This is, when the money is paid into the hands of the collector. To him the law directs that it shall be paid, in order that it may be distributed. What right, I would ask, would any one of the distributees here have to move the court, that the money be paid to him, and not to the collector? There are cases in which other persons than a collector may be entitled, in the capacity of informers, and it may then be necessary for the *court to decide on individual rights. But in no case, that I am aware of, arising under the collection law, can the court be called upon to pay the money in any other way than to the collector, to be by him distributed; and this distribution I consider as a mere boon from the government, which they may, justly, and do, practically, reserve a sovereign control over, until so paid under their laws. The gift is from them, of a thing perfected to them, and they may modify and withdraw that gift, *ad libitum*. When once paid away, according to legislative will, their control is at an end, and the right then, and not till then, becomes vested and absolute, as between them and their officers, whom, to the last, the law regards as absolute donees. That such is the view of the legislature, and that in the exercise of that discretion, they still meant to be reasonable and just, and not to exercise an *ex post facto* power in such case, is all conclusively proved in the third section of this act, as has been very justly insisted on in argument. During two years, this power of the secretary had remained suspended, and

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with regard to rights accruing during that time, the legislature declares, that as the modification imposed upon the grant to the informer, or seizing officer, by virtue of that dispensing power, did not then exist, their proportions should not afterwards be subjected to it, but the court may assess their proportions in a summary manner. There cannot be a more explicit declaration of legislative understanding than this clause presents, inasmuch as it makes no discrimination *between the cases of judgment and other cases, but considers the right accruing to them, the same before judgment, as it is after. [*305

There is one peculiarity in this case, which, in my opinion, precludes the possibility of recovery, independently of the general principle; which is, that this action is brought against the marshal, for not executing process issuing from another state. It certainly presents a dilemma from which I think it impossible for the party plantiff to escape. The right to issue such process originates in the 6th section of the "act more effectually to provide for the settlement of accounts between the United States and receivers of public money," by the words of which the power is explicitly confined to the executions on judgments obtained for the use of the United States. The real plaintiff here, then, is reduced to this alternative: Either the judgment was for his use, or it was not. If not for his use, then he cannot be damnified by the defendant, in refusing to execute it. But if for his use, it cannot be for the use of the United States, and then the execution issued wrongfully, and was rightfully disobeyed. If it be replied, that the judgment, in the first place, was obtained for the use of the United States, it only brings us back to what I before observed, that so entirely is this true, as to raise no vested right in any one, on the solitary ground of an eventual contingent interest.

Judgment affirmed.

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*The Dos Hermanos: Shields, Claimant. [*306

Prize.—Salvage.—Appeal.

Seizures made *jure belli* by non-commissioned captors, are made for the government, and no title of prize can be derived but from the prize acts.

A non-commissioned captor can only proceed in the prize court as for salvage, the amount of which is discretionary.

An appellate court will not interfere in the exercise of this discretion, as to the amount of salvage allowed, unless in a very clear case of mistake.

An appeal under the judiciary acts of 1789, § 22, and of 1803, prayed for and allowed, within five years, is valid, although the security was not given until after the lapse of five years.

The mode of taking the security, and the time perfecting it, are within the discretion of the court below, and this court will not interfere with the exercise of that discretion.

Appeal from the District Court of Louisiana. This was the same case reported 2 Wheat. 76, where the decree of the court below condemning the cargo as enemy's property, was affirmed by this court, reserving the question as to the distribution of the prize proceeds. The original capture was made by Mr. Shields, a purser of the navy, in the year 1814, in a barge armed and fitted out to cruise, but not regularly attached to the navy. The cause was remanded to the court below for further proceedings, and that court decreed the proceeds to be equally distributed between the United States and

the captors *without deducting the captors' expenses. From this decree, the captors appealed to this court.

March 5th. *C. J. Ingersoll*, for the appellants, stated, that it had been generally considered by the text-writers, and courts of prize, that the right to captures, *jure belli*, was in the government, and that no individual could derive any rights of prize but from the express grant of the government. 2 Wheat. app'x, note 1, p. 71. But, on principle, every individual is in a state of war with the enemies of his country; and the common law certainly considers the law of nations as authorizing any subject of the belligerent state to seize enemy's property within the realm, or the property of other subjects previously captured by the enemy, to the exclusion of the king, the admiral, and the owner, unless the latter came the same day they were taken, and claimed them *ante occasum solis*. 2 Reeves' Hist. Eng. Law, 171–2. To the same effect is the case in Year Book 7 Edw. IV. 14.

The principle is, that personal effects, seized in war, are acquired to the taker, by occupancy; and immovables, such as cities, lands, &c., to the public. Wood's Inst. Imp. Law, b. 2, c. 3, p. 154. But the crown, always rapacious, and seeking to extend its final prerogative, subsequently introduced the doctrine of public title to personal things taken in war. Thus, the statute
*308] *34 Edw. III., c. 1, declares, that the crown was always seised of the forfeitures of war; and hence came the doctrine of the *droits* of admiralty. 1 Ruff. 302; 2 Reeves 454. It does not appear, that this assumption has ever been expressly recognised by this court, as a part of the law of this country; and, unquestionably, a non-commissioned captor may seize enemy's property (2 Wheat. app'x, note 1, p. 7), and after a condemnation, as in this case, it must be adjudged to the captors. It is now too late for the government to interpose its claim. The act of the 23d April 1800, c. 189, § 5, and the prize act of 1812, c. 430, give the proceeds of vessels and goods, adjudged good prize, to the captors. But at all events, the captors are entitled to be repaid their expenses, and to a liberal salvage. *The San Bernardo*, 1 Rob. 178; *The Haase*, Ibid. 240.

The *Attorney-General*, contrà, argued, that it was established as an elementary principle in the law of prize, that all captures *jure belli*, inured to the public, and that the actual captors could only derive their title from the grant of the government. This was the case with commissioned captors, and still more emphatically as to non-commissioned captors; who, though they had a right to seize enemy's property, could claim no title to the proceeds upon adjudication, except what was derived from the bounty of the public. 2 Wheat. app'x, note 1, p. 7, 71. Whatever might have been the
*309] ancient *common-law doctrine, in England, it had been long since settled in that country, that all rights of prize were derived from the grant of the crown. Without entering into all the distinctions as to the capacity in which the crown took, whether in the king's office of admiral, or *jure coronæ*, it might be laid down as a general proposition, that non-commissioned captors, as a matter of strict right, were not entitled to any share of the prizes captured by them. Captures made by tenders or boats, sent out by officers of the navy, but not regularly attached by public authority to the navy, are condemned as *droits* of admiralty. *The Melomane*, 5 Rob. 41; *The Charlotte*, Ibid. 280, and note. But in these, and all other cases of seiz-

ures by non-commissioned captors, it was usual to reward the takers with a liberal share of the property, in the discretion of the court of admiralty. *The San Bernardo*, 1 Rob. 178; *The Haase*, Ibid. 286; *The Amor Parentum*, Ibid. 303. There was no reason why any different principle or mode of proceeding should be adopted in this country. It does not depend upon any peculiar municipal regulations, but grows out of a principle recognised by all the writers on public law: *Bello parta cedunt reipublicæ*. *The Elsebe*, 5 Rob. 173, 181. In the present case, a moiety of the proceeds had been allowed to the actual captors as salvage; but the provisions in the prize act for the distribution of prizes, were confined to commissioned public and private armed vessels.

*March 7th, 1825. MARSHALL, Ch. J., delivered the opinion of the court, that whatever might have been the ancient doctrine in [*310 England, in respect to captures in war, it is now clearly established in that kingdom, that all captures *jure belli*, are made for the government, and that no title of prize can be acquired but by the public acts of the government conferring rights on the captors. If the original law of England authorized an individual to acquire to his own use, the property of a belligerent, without any express authority from the public, that law was changed, long before the settlement of this country. It never was the law of this country. Before the revolution, all captures from the enemy accrued to the government, to be distributed according to law; and the revolution could not strip the government of this exclusive prerogative, and vest it in individuals. It is, then, the settled law of the United States, that all captures made by non-commissioned captors, are made for the government; and since the provisions in the prize acts, as to the distribution of prize proceeds, are confined to public and private armed vessels, cruising under a regular commission, the only claim which can be sustained by the captors, in cases like the present, must be in the nature of salvage for bringing in and preserving the property.

In the present case, the district court have awarded one-half of the prize proceeds, as salvage, to the captors. It was an exercise of sound discretion; and this court would, with extreme reluctance, interfere with that discretion, unless *in a very clear case of mistake. We perceive no such mis- [*311 take in this case, and are well satisfied with the amount of the salvage as decreed by the district court.

As to the question which has been made, whether the appeal was in due time, it appears, that the appeal was prayed for within five years, and was actually allowed by the court, within that period. It is true, that the security required by law was not given, until after the lapse of the five years; and under such circumstances, the court might have disallowed the appeal, and refused the security. But as the court accepted it, it must be considered as a sufficient compliance with the order of the court, and that it had relation back to the time of the allowance of the appeal. The mode of taking the security, and the time for perfecting it, are matters of discretion, to be regulated by the court granting the appeal; and when its order is complied with, the whole has relation back to the time when the appeal was prayed. We must presume, the security was given, in this case, according to the rule prescribed by the district court, and the appeal was, therefore, in time.

Decree affirmed, with costs.

*The Josefa Segunda : Roberts and others, Claimants.

Seizures.—Slave-trade.—Distribution of proceeds.

The district courts have jurisdiction, under the slave-trade acts, to determine who are the actual captors, under a state law made in pursuance of the 4th section of the slave-trade act of 1807, c. 77, and directing the proceeds of the sale of the negroes to be paid, "one moiety for the use of the commanding officer of the capturing vessel," &c.

In order to constitute a valid seizure, so as to entitled the party to the proceeds of a forfeiture, there must be an open, visible possession claimed, and authority exercised, under the seizure.

A seizure, once voluntarily abandoned, loses its validity.

A seizure, not followed by an actual prosecution, or by a claim in the district court, before a hearing on the merits, insisting on the benefit of the seizure, becomes a nullity.

Under the 7th section of the slave-trade act of 1807, c. 77, the entire proceeds of the vessel are forfeited to the use of the United States, unless the seizure be made by armed vessels of the navy, or by revenue-cutters; in which case, distribution is to be made in the same manner as prizes taken from the enemy.

Under the acts of the state of Louisiana of the 13th of March 1818, passed to carry into effect the 4th section of the slave-trade act of congress of 1807, c. 77, and directing the negroes imported contrary to the act to be sold, and the proceeds to be paid, "one moiety for the use of the commanding officers of the capturing vessel, and the other moiety to the treasurer of the Charity Hospital of New Orleans, for the use and benefit of the said hospital;" no other person is entitled to the first moiety, than the commanding officers of the armed vessels of the navy, or revenue-cutter, who may have made the seizure, under the 7th section of the act of congress.

*313] Appeal from the Circuit Court of Louisiana. *This is the same case which was reported in 5 Wheat. 338. It was a proceeding against the vessel, and the negroes taken on board of her, under the slave-trade act of the 3d of March 1807, c. 77, in which the vessel was condemned in the court below, and that decree was affirmed on appeal, by this court.

After the condemnation of the vessel in the district court, and before the appeal to this court, the negroes found on board of her were (under the 4th section of the act of congress, and under an act of the state of Louisiana, passed on the 13th of March 1818, in pursuance of the act of congress) delivered by the collector of the customs for the port of New Orleans, to the sheriff of the parish of New Orleans, for sale, according to law. A cross-libel was afterwards filed by the alleged original Spanish owners, claiming restitution of the negroes, which was dismissed, and, on appeal, the decree affirmed by this court. By consent of all the parties in interest, the negroes were sold by the sheriff, and the proceeds lodged in the Bank of the United States, subject to the order of the court below. After the cause had been remanded to the district court, a question arose in that court, respecting the manner in which these proceeds, as well as those of the vessel and effects, were to be distributed, and the parties respectively entitled to them. Mr. Roberts, an inspector of the revenue, claimed a moiety of the proceeds, as the original seizer or captor; Messrs. Gardner, Meade and Humphrey, *314] respectively, made similar claims, under subsequent *military seizures, alleged to be made by them; and Mr. Chew, the collector of the port of New Orleans, conjointly with the naval-officer and surveyor of the port, filed a like claim as the true and actual captors and seizers, who made the

last and only effectual seizure, and prosecuted the same to a final sentence of condemnation.(*a*)

(*a*) The act of congress of the 3d of March 1807, c. 77, § 4, after provided a personal penalty for taking on board, receiving or transporting any negro, &c., from Africa, or any other foreign country, for the purpose of selling them as slaves, in any part of the United States, enacts, that "every such ship or vessel, in which such negro, mulatto or person of color, shall have been taken an board, received or transported as aforesaid, her tackle, apparel and furniture, and the goods and effects which shall be found on board the same, shall be forfeited to the United States, and shall be liable to be seized, prosecuted and condemned, in any of the circuit courts or district courts, in the district where the said ship or vessel may be found of seized. And neither the importer, nor any person claiming from or under him, shall hold any right or title whatsoever to any negro, mulatto or person of color, nor to the service or labor thereof, who may be imported or brought within the United States, or territories thereof, in violation of this law, but the same shall remain subject to any regulations not contravening the provisions this act, which the legislatures of the several states or territories, at any time hereafter, may make, for disposing of any such negro, mulatto or person of color." § 7. "That if any ship or vessel shall be found, from and after the first day of January 1808, in any river, port, bay or harbor, or on the high seas, within the jurisdictional limits of the United States, or hovering on the coasts thereof, having on board any negro, mulatto or person of color, for the purpose of selling them as slaves, or with intent to land the same in any port or place within the jurisdiction of the United States, contrary to the prohibition of this act, every such ship or vessel, together with her tackle, apparel and furniture, and the goods or effects which shall be found on board the same, shall be forfeited to the use of the United States, and may be seized, prosecuted and condemned in any court of the United States, having jurisdiction thereof. And it shall be lawful for the president of the United States, and he is hereby authorized, should he deemed it expedient, to cause any of the armed vessels of the United States to be manned and employed to cruise on any part of the coast of the United States, or territories thereof, where he may judge attempts will be made to violate the provisions of this act, and to instruct and direct the commanders of armed vessels of the United States, to seize, take and bring into any port of the United States, such ships or vessels, and moreover to seize, take and bring into any port of the United States, all ships or vessels of the United States, wheresoever found on the high seas contravening the provisions of this act, to be proceeded against according to law," &c. "And the proceeds of all ships and vessels, their tackle, apparel and furniture, and the goods and effects on board of them, which shall be so seized, prosecuted and condemned, shall be divided equally between the United States and the officers and men who shall make such seizure, take or bring the same into port for condemnation, whether such seizure be made by an armed vessel of the United States, or revenue-cutters thereof; and the same shall be distributed in like manner as is provided by law for the distribution of prizes taken from an enemy: Provided, that the officers and men to be entitled to one-half of the proceeds aforesaid, shall safe keep every negro, mulatto or person of color, found on board of any ship or vessel so by them seized, taken or brought into court for condemnation, and shall deliver every such negro, mulatto or person or color, to such person or persons as shall be appointed by the respective states, to receive the same; and if no such person or persons shall be appointed by the respective states, they shall deliver every such negro, mulatto or person of color to the overseers of the poor of the port or place where such ship or vessel may be brought or found, and shall immediately transmit to the governor, or chief magistrate, of the state, an account of their proceedings, together with the number of such negroes, mulattoes or persons of color, and a descriptive list of the same, that he may give directions respecting such negroes, mulattoes or persons of color." The act of the legislature of the state of Louisiana,

*It appeared, by the evidence, that Roberts, being employed as an inspector in a revenue-boat, at the Balize, near the mouth of the Missis-
*316] sippi, *on the 18th of April 1818, boarded the vessel, and declared that he had seized her. He, soon afterwards, went on shore, and put a person on board to take charge of the vessel, which remained at anchor, opposite the block-house, until the 21st of April, when Lieutenant Meade, with six soldiers, in a boat, went from Fort St. Philip, in company with a custom-house boat, and Mr. Gardner, an officer of the customs, on board, took possession of the vessel, and brought her up under the guns of the fort. It appeared, that Roberts, afterwards, came on board the vessel, but did not remain on board, until her arrival at the city of New Orleans, he having left her, in order to board another vessel in the river. On the 21st of April, Mr. Chew, the collector at New Orleans, acting on independent information which he had received, sent an armed revenue-boat, with an inspector of the customs, down the river, with instructions to seize the
*317] vessel. On arriving at *Fort St. Philip, they found the vessel at anchor, opposite the fort, with a sergeant's guard on board, which had been placed there by Major Humphrey, the commanding officer at the fort. The inspector received from that officer the ship's papers, and took possession of the vessel and negroes, the guard having been withdrawn, and brought them up to the city of New Orleans. Proceedings were commenced against the property, at the instance of Mr. Chew, and the other officers of the customs, and though his name was not inserted in the libel, the prosecution was conducted by him, until its final determination, and the other parties claiming as captors, or seizers, did not intervene, until after the decree of this court on the appeal in the original cause.

The court below pronounced a decree, dismissing the claims of Messrs. Roberts, Humphrey, Meade and Gardner, and allowing that of the collector and other officers of the customs, and the cause was brought by appeal to this court.

March 15th. *Livingston*, for the appellant, Roberts, insisted, that he was entitled, as the first seizer, under the act of congress of the 3d of March 1807, c. 77, § 7, and the act of the legislature of Louisiana, passed on the 13th of March 1818, in pursuance of the act of congress, to a moiety of the proceeds of the vessel and negroes found on board. He exercised all the authority and control over the vessel he was capable of, with the force at his disposition. The persons on board submitted to the seizure; and, as in
*318] captures **jure belli*, it is not necessary that there should be a physical superiority of force on the part of the captors. *The Alexander*, 8 Cranch 179. He was afterwards compelled to abandon the possession;

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passed on the 13th of March 1818, after reciting the substance of the above 4th section of the act of congress, proceeds to declare, that the sheriff of the parish of New Orleans is authorized and required to receive any negro, &c., delivered to him in virtue of the act of congress, until the proper court pronounces a decree of condemnation; and after such condemnation, it authorizes him to sell such negro, &c., as a slave for life; and then declares, "that the proceeds of such sale shall, after deducting all charges, be paid over by the said sheriff, one moiety for the use of the commanding officer of the capturing vessel, and the other moiety to the treasurer of the Charity Hospital of New Orleans, for the use and benefit of the said hospital."

and such an abandonment, from the force and fear of another party, cannot invalidate the original seizure. *The Mary*, 2 Wheat. 123. By the act of congress (§ 7), the proceeds of the vessel and effects are to be divived equally between the United States and the officers and men who shall make the seizure ; and by the act of Louisiana, the proceeds of the negroes are to be divided equally between the commanding officer of the capturing vessel, and the charity hospital. The appellant, Roberts, is entitled in both capacities ; and the revenue-officers, who came in after the capture was complete, and dispossessed him who was the first seizer, can have no claim under either act.

Key, for the appellants, Gardner, Meade and Humphrey, argued upon the facts, to show that they were the real, meritorious captors.

The *Attorney-General*, for the respondents, insisted, that if any of the parties before the court were entitled, the collector and other officers of the customs were the only parties entitled by law to be considered as the captors or seizers, they having made the first effectual seizure, and prosecuted it to condemnation, whilst the other claimants avoided all the expense and *hazard of the prosecution, and did not intervene until its successful termination. The law does not mean to encourage that kind of seizure, where the captor lays his hand on the subject, and takes it off again. That person is the seizer who informs and prosecutes. If any other person claims a title, he is bound to intervene, before the first adjudication, and submit his claim to the decision of the court. Harg. Law Tracts, 226–7. It may be doubted, whether, under the 7th section of the act of congress, any person can be entitled, as a seizer, except the officers, &c., of the armed vessels and revenue-cutters of the United States. If it be a *casus omissus*, none of the captors now before the court are literally within the terms of the act, and the whole of the forfeiture must be to the United States. But if any are entitled, the collector is clearly to be preferred. [*319

March 18th, 1825. Story, Justice, delivered the opinion of the court.— The case of *The Josefa Segunda*, in which the present controversy had its origin, is reported in the 5th volume of Mr. Wheaton's reports. It is only necessary to mention, that after the condemnation of the vessel, in the district court of Louisiana, and before the intervention of the appeal to this court, the negroes seized on board of her, in pursuance of the act of congress, and the act of Louisiana, which will be hereafter commented on, were delivered by Mr. Chew (the *collector of the customs) to the sheriff of the parish of New Orleans, to be sold according to law ; and a few days afterwards, a new libel, claiming the property of the negroes, having been filed by the Spanish owners (which was afterwards dismissed, and on appeal, the dismissal confirmed by this court), by consent of all the parties in interest, the negroes were sold by the sheriff, and the proceeds lodged in the Bank of the United States, subject to the order of the district court. The question now in contestation respects the manner in which the proceeds of this sale, as well as of the sale of the vessel and effects, are to be distributed, and the parties who are entitled to them. Mr. Roberts, who is an inspector of the customs, claims title as the original seizer or captor ; [*320

Messrs. Gardner, Meade and Humphrey make a like claim, under a subsequent military seizure made by them; and Mr. Chew, and the surveyor and naval-officer of the port of New Orleans, a like claim, as the true and actual captors and seizers, who made the last and only effectual seizure, and prosecuted the same to a final decree of condemnation. Mr. Chew caused the original libel against the vessel to be brought, and though his name is accidentally omitted in it, as the officer through whose instrumentality the seizure was made, yet it is admitted, and indeed, could not be denied, that he was the sole responsible prosecutor of the suit, until the final condemnation
*321] of the vessel, and the final dismissal of the second libel, *brought by the original Spanish claimants. The claims of all the other parties now before the court, adverse to that of Mr. Chew, have intervened since the final judgment pronounced in the supreme court in the cause.

The Josefa Segunda was finally condemned, under the seventh section of the slave-trade act, of the 2d to March 1807, ch. 77. It will be necessary to refer to the terms of that section at large, because the question here respects as well the distribution of the proceeds of the vessel (which must be made according to the rules prescribed in that section), as of the proceeds of the sale of the negroes, who were unlawfully brought into the United States; and in the progress of the discussion, it will materially aid us in the decision of the latter, to ascertain who, by the construction of that section, are the captors entitled to the distribution of the former.

The fourth section of the act of 1807 provides, that "neither the importer, nor any person or persons claiming from or under him, shall hold any right or title whatsoever to any negro, &c., who may be imported or brought within the United States, or territories thereof, in violation of this law; but the same shall remain subject to any regulations, not contravening the provisions of this act, which the legislatures of the several states and territories, at any time hereafter, may make, for disposing of any such negro," &c. Accordingly, the legislature of Louisiana, on the 13th of March 1818, passed an act avowedly to meet the exigency of this section, which act, after
*322] *reciting the substance of the same section, proceeds to declare, that the sheriff of the parish of New Orleans is authorized and required to receive any negro, &c., delivered to him in virtue of the act of congress, until the proper court pronounces a decree of condemnation; and after such condemnation, it authorizes him to sell such negro, &c., as a slave for life; and then declares, that "the proceeds of such sale shall, after deducting all charges, be paid over by the said sheriff, one moiety for the use of the commanding officer of the capturing vessel, and the other moiety to the treasurer of the Charity Hospital of New Orleans, for the use and benefit of the said hospital." There is no doubt, that this act is not in contravention of the intention of the act of congress, for the sixth section contains a proviso, recognising the validity of such a sale, when made under the authority of a state law.

Some objection has been suggested as to the jurisdiction of the district court of Louisiana, to entertain the present proceedings, upon the ground that the distribution is to be made under this act by the sheriff of New Orleans. But upon a full consideration of the act of 1807, we are of opinion, that the objection cannot be maintained. By the judiciary act of 1789, as well as by the express provisions of the act of 1807, the district court has

jurisdiction over seizures made under the latter act. The principal proceedings are certainly to be against the vessel, and the goods and effects found on board. But *the negroes are also to be taken possession of, for [*323 the purpose of being delivered over to the state governments, according to the provision of the act; and it is obvious, that this delivery can only be, after a condemnation has occurred, since it is only in that event, that the state legislature can acquire any right to dispose of them. The proviso in the seventh section, that the officers to whom a moiety of the proceeds is given, on condemnation, shall be so entitled, only in case they safely keep and deliver over the negroes according to the laws of the states, operates by way of condition to the completion of their title; but does not import any requirement that the delivery shall be, until after the condemnation. On the contrary, as by a decree of restitution of the vessel and effects, the claimants would be entitled to a restitution of the negroes, the reasonable construction seems to be, that they remain subject to the order of the district court, as property in the custody of the law, though in the actual possession of the seizing officers. The possession of the latter is the possession of the court, as much in respect to the negroes, as the vessel and cargo; and it must remain, until the court, by pronouncing a final decree, directs in what manner it is to be surrendered.

In the present case, the negroes were sold, and the proceeds substituted for them, were in the custody of the court. It was, therefore, authorized to deliver them over to the parties who should be entitled, under the state law. In terms, the state law required the delivery to the *sheriff, [*324 to the use of the parties; but who the parties were, to whose use the sheriff must hold them, could not be ascertained by him, but must be awarded by the court, to whom, as an incident to the principal cause, it exclusively belonged. In what manner could any other court be authorized to ascertain who was the commanding officer of the capturing vessel? The decree of the court, in distributing the proceeds of the vessel and cargo, must necessarily involve this inquiry; and certainly, it cannot for a moment be maintained in argument, that any other person than the commander of of the capturing vessel, who would share the proceeds of the prize and her cargo, could be within the meaning of the law of Louisiana. The common form of drawing up decrees, in case of condemnation, is, that the proceeds be distributed according to law. But if any difficulty arises, upon petition, the court always proceeds to decide who are the parties entitled to distribution, and to make a supplementary decree. But it may do the same, in the first instance, and make the particulars of the distribution a part of the original decree. In the present case, if the original decree had been drawn out at large, it ought to have been, that the negroes so captured be delivered over to the sheriff of New Orleans for sale, according to the act of Louisiana in this behalf provided, and that the net proceeds of the sale be afterwards paid over, viz., one moiety to A. B., adjudged by the court to be the commanding officer of the capturing vessel, and the other moiety to the Charity Hospital *of New Orleans. This course of proceeding is very [*325 familiar in prize causes; where the court of admiralty always ascertains who are the captors entitled to the prize proceeds; and the courts of common law will never entertain any jurisdiction over the proceeds, until after such adjudication. Considering this cause, then, as a cause of ad-

miralty and maritime jurisdiction, belonging exclusively to the courts of the United States, we are not aware, how any other court could adjudge upon the question who were the captors or the seizers entitled to share the proceeds; and we think that the district court has jurisdiction over the present proceedings.

In respect to the claim of Mr. Roberts, we do not think that the evidence establishes that he ever made any valid seizure of the vessel. It is not sufficient, that he intended to make one, or that, on some occasions, he expressed to third persons that he had so done. There must be an open, visible possession claimed, and authority exercised, under a seizure. The parties must understand, that they are dispossessed, and that they are no longer at liberty to exercise any dominion on board of the ship. It is true, that a superior physical force is not necessary to be employed, if there is a voluntary acquiescence in the seizure and dispossession. If the party, upon notice, agrees to submit, and actually submits, to the command and control of the seizing officer, that is sufficient; for, in such cases, as in cases of captures *jure belli*, a voluntary surrender of authority, and an agreement to obey the
*326] captor, *supplies the place of actual force. But here, Mr. Roberts gave no notice of the seizure to the persons on board; he exercised no authority, and claimed no possession. He had no force adequate to compel submission; and his appearance in the vessel gave no other character to him than that of an inspector, rightfully on board, in performance of his ordinary duties. To construe such an equivocal act as a seizure, would be unsettling principles.

Messrs. Humphrey, Meade and Gardner, certainly, did make a seizure, by their open possession of the vessel, and bringing her under the guns of Fort St. Philip. But there is this objection to the seizure, both of Mr. Roberts (assuming that he made one) and of the other persons, that it was never followed up by any subsequent prosecution or proceedings. The seizure of Messrs. Humphrey, Meade and Gardner seems to have been voluntarily abandoned by them; and even that of Mr. Roberts, if he made one, does not seem to have been persisted in. Now, a seizure, or capture, call it which we may, if once abandoned, without the influence of superior force, loses all its validity, and becomes a complete nullity. Like the common case of a capture at sea, and a voluntary abandonment, it leaves the property open to the next occupant. But what is decisive in our view is, that neither of these gentlemen ever attempted any prosecution, or intervened in the original proceedings in the district court, claiming to be seizers, which was indispensable to consummate their legal right; and their claim
*327] *was, for the first time, made, after a final decree of condemnation in the supreme court. This was certainly a direct waiver of any right acquired by their original seizures. It is not permitted to parties to lie by, and allow other persons to incur all the hazards and responsibility of being held to damages, in case the seizure turns out to be wrongful, and then to come in, after the peril is over, and claim the whole reward. Such a proceeding would be utterly unjust and inadmissible. If the parties meant to have insisted on any right, as seizers, their duty was to have intervened in the district court, before the hearing on the merits, according to the course pointed out by Lord Hale, in the passage cited at the bar, where there are

several persons claiming to be seizers of forfeited property.(a) In the present case, Mr. Chew actually advanced a considerable sum of money for the maintenance of these negroes, during the pendency of the suit; and if it had been unsuccessful, he must have exclusively borne the loss. Upon the plain ground, then, that Mr. Roberts, and Messrs. Humphrey, Meade and Gardner, have not followed up their seizure by any prosecution, such as the act of 1807 requires, *we are of opinion, that there is no foundation, in point of law, for their claims. [*328

That Mr. Chew, on behalf of himself, and the surveyor and naval-officer of the port of New Orleans, did make the seizure on which the prosecution in this case was founded, is completely proved by the evidence; it is also admitted by the United States, in their answer to the libel of Messrs. Carricaburra, &c., the Spanish claimants, and is averred by Mr. Chew and his coadjutors, in their separate allegation and answer to the same libel. While the vessel lay at Fort St. Philip, armed boats, under revenue-officers, were sent down by him, with orders to seize her, and bring her up to New Orleans for prosecution, which was done accordingly.

The remaining question then is, whether Mr. Chew, for himself and his coadjutors in office, is to be considered as entitled to the proceeds of the vessel, under the act of congress, and to the proceeds of the negroes, as "the commanding officer of the capturing vessel," within the sense of the Louisiana law. If he is entitled to the proceeds of the vessel and cargo, under the 7th section of the act of 1807, then, we think, he must be fairly considered as within the spirit, if not the letter, of the act of Louisiana.

The 7th section is certainly not without difficulty in its construction. In the first clause, it declares, that vessels found "in any river, port, bay or harbor, or on the high seas, within the jurisdictional limits of the United States, or *hovering on the coast thereof, having on board any negro, &c., for the purpose of selling them as slaves, &c., contrary to the [*329 prohibition of this act, shall be forfeited to the use of the United States, and may be seized, prosecuted and condemned, in any court of the United States having jurisdiction thereof." Under this clause, standing alone, it cannot be doubted, that any person might lawfully seize such a vessel, at his peril, and if the United States should choose to adopt his act, and proceed to adjudication, he would, in the event of a condemnation, be completely justified. But it may be considered as peculiarly the duty of the officers of the customs, to watch over any maritime infractions of the laws of the United States; and by the collection act of 1799, ch. 128, § 70, it is made the duty of all custom-house officers, as well within their districts as without, to make seizures of all vessels violating the revenue laws.

The section, then, in the next clause, authorizes the president of the United States to employ any of the armed vessels of the United States to

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(a) Harg. Law Tracts (4to.) p. 227. "At common law, any person might seize unaccustomed goods, to the use of the king and himself, and thereupon, inform for a seizure. But yet, if A. seize goods, unaccustomed, and then B. seize them for the same cause, he that first seizeth ought to be preferred as the informer. And therefore, if B., that seized after, first inform, and A. also inform, A. may be admitted to interplead with B., upon the priority of the seizure, before the merchant shall be put to answer either."

cruise on any part of the coast, to prevent violations of the act, and to instruct and direct the commanders of such armed vessels, to seize all vessels contravening the act, "wheresoever found on the high seas," omitting the words, "in any river, port, bay or harbor," contained in the former clause. It then proceeds to declare, that the proceeds of all such vessels, when condemned, "shall be divided equally between the United States, and the
*330] officers and men, who shall make *such seizure, take or bring the same into port for condemnation, whether such service be made by an armed vessel of the United States, or revenue-cutters thereof, and the same shall be distributed, in like manner as is provided by law for the distribution of prizes taken from an enemy." In a strict sense, the present seizure was not made by an armed vessel of the United States, nor by a revenue-cutter, which, by the act of 1799, ch. 128, § 98, the president is at liberty to require to co-operate with the navy. But if we consider these cases as put only by way of example, or if we give an enlarged meaning to the words "revenue-cutter," so as to include revenue-boats, such as the collector is, by the act of 1799, ch. 128, § 101, authorized to employ, with the approbation of the treasury department, then the seizure of Mr. Chew may be brought within the general terms of the act. The United States do not appear to have resisted this construction, as to the proceeds of the sale of the Josefa Segunda. And on the other hand, if we consider, that the act meant to deal out the same rights to all parties who might seize the offending vessel, whether they were officers of armed vessels, or of revenue-cutters, or of merely private individuals, who may seize and prosecute to condemnation, then, under that construction, Mr. Chew may be properly deemed the seizing officer, entitled, with his crew, to the proceeds of the vessel. If such a construction is not admissible, within the equity of the act, then it
*331] is a *casus omissus*, *and the property yet remains undisposed of by law.

Upon the best consideration which we have been able to give the case, we are of opinion, that it is a *casus omissus*, or rather, that all the beneficial interest vests in the United States. The first clause of the seventh section declares, that all vessels offending against it, "shall be forfeited to the use of the United States," and may be seized, prosecuted and condemned accordingly. The seizure may be made by any person; but the forfeiture is still to be, by the terms of the act, for the use of the United States. If the act had stopped here, no difficulty in its construction could have occurred. As nothing is given by it to the seizing officer, nothing could be claimed by him, except from the bounty of the government. The subsequent clause looks exclusively to cases where the seizure is made by armed vessels of the navy, or by revenue-cutters, and directs, in such an event, a distribution to be made in the same manner as in cases of prizes taken from an enemy. Correctly speaking, these cases constitute exceptions from the preceding clause, and take them out of the general forfeiture "to the use of the United States." It might have been a wise policy, to have extended the benefit of these provisions much further, or to have given, as the act of the 20th of April 1818, ch. 85, has given, a moiety in all cases to the person who should prosecute the seizure to effect. But courts of law can deal with questions
*332] of this nature only so far as the legislature has clearly *expressed its will. Mr. Chew appears to be a very meritorious officer, and deserv-

ing of public respect for his good conduct on this occasion. But as the act has made no provision for his compensation, he must be left, in common with those who made the military seizure, to the liberality of the government.

The remarks which have been already made, dispose of the case, so far as respects the proceeds of the vessel, and we think they are decisive as to the claim to the proceeds of sale of the negroes. The case as to this matter is also a *casus omissus* in the act of Louisiana. That act had a direct reference to the act of congress, and "the commanding officer of the capturing vessel," in the sense of the former, must mean the commanding officer of such an armed vessel, or revenue-cutter, as is entitled to share in the distribution of the proceeds by the latter. It would be going very far, to give a larger construction to the words than in their strict form they import; and since they admit of a reasonable interpretation, by confining them to the cases provided for by congress, we are satisfied, that our duty is complied with, by assigning to them this unembarrassed limitation.

The decree of the district court, so far as it dismisses the claims of Messrs. Roberts, Humphrey, Meade and Gardner, is affirmed, and so far as it sustains the claim of Mr. Chew, and the naval-officer and surveyor of the port of New Orleans, is reversed.

Decree accordingly.

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*The President, Directors and Company of the Bank of the United States *v.* The President, Directors and Company of the Bank of the State of Georgia. [*333

Payment.

In general, a payment received in forged paper, or in any base coin, is not good; and if there be no negligence, in the party, he may recover back the consideration paid for them, or sue upon his original demand.[1]

But this principle does not apply to a payment made *bonâ fide* to a bank, in its own notes, which are received as cash, and afterwards discovered to be forged.

In case of such a payment upon general account, an action may be maintained by the party paying the notes, if there is a balance due him from the bank, upon their general account, either upon an *insimul computassent*, or as for money had and received.

Error to the Circuit Court of Georgia. This was an action of *assumpsit*, brought by the plaintiffs in error, the president, &c., of the Bank of the United States, against the defendants in error, the president, &c., of the Bank of the State of Georgia, in which the plaintiffs declared for the balance of an account stated, and for money had and received to their use.

At the trial, the plaintiffs offered evidence to prove, that mutual dealings existed between the parties, in the course of which, each being in the receipt of the bills of the other, they mutually paid in or deposited the bills of the other party, at intervals, as *each found the bills of the other party had accumulated to any considerable amount in their respective [*334 vaults; and upon each of such payments or deposits, the amount thereof was entered as so much "cash" in the customer's book of the party deposit-

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[1] Ramsdale *v.* Horton, 3 Penn. St. 330.

ing, by the proper officer of the bank receiving the same; from which said book of the plaintiffs, which was given in evidence, it appeared, that the sum of $6900 was the balance due from the defendants to the plaintiffs, at the time of instituting this action. The plaintiffs also offered evidence, that the transactions between the parties were almost exclusively in the deposits of their respective bills as aforesaid.

And the defendants, to maintain their said defence, offered evidence to prove, that in one of the said deposits so made by the plaintiffs, in the bank of the defendants, and so entered in the said book of the plaintiffs by the proper officer of the defendants, at the time the said deposit was made, to wit, on the 25th of February, in the year 1819, and which is one of the items comprised in the account upon which the balance was claimed by the plaintiffs, there were paid in 38 bills of the defendants' own issues or notes, of $5 each, which had been fraudulently altered by some person or persons unknown, from the denomination of $5 to that of $50; and 40 bills of the defendants' own issues or notes of $10 each, which had in like manner been fraudulently altered by some person or persons unknown, to that of hundreds, making together the sum of $5900, demanded by the plaintiffs *in this action; which said bills or notes had been subsequently tendered by the defendants to the plaintiffs, before the institution of this action, and by the plaintiffs refused. The plaintiffs then offered evidence to prove, that no notice or intimation of the said fraudulent alteration aforesaid was given by the defendants to the plaintiffs, until the 16th of March 1819, and that the tender to return the said altered notes to the plaintiffs, by the defendants, was not made until the 17th of March 1819, nineteen days after the receipt of the said notes by the defendants from the plaintiffs, and the entry of the same in the customer's book of the plaintiffs. The defendants further offered evidence to prove, that the said altered bills, so deposited by the plaintiffs and received by the defendants, had been received by the plaintiffs from the Planters' and Merchants' Bank of Huntsville, concerning which notes a correspondence had taken place between the plaintiffs and the said Planters' and Merchants' Bank of Huntsville, subsequently to the detection of the said fraudulent alteration, in the following words and figures, to wit:

*335]

Office Bank U. States, Savannah, 17th of March 1819.

Edward Rawlins, Esq., Cashier P. & Merchants' Bank of Huntsville.

Sir.—Upon a more minute investigation of the bills received last month from Mr. Hobson, of your bank, it turns out that 40 of the $100 notes of the state bank of this place, were altered *from $10, and 58 of the $50 notes of the same bank were altered from $5 notes, producing against us a difference in the $100 notes of $3600, and in the $50, $2610, making the whole difference $6210. By the person which we shall in a few days send to your place, as heretofore intimated, we will forward these altered bills for the purpose of getting you to exchange them for other money.

*336]

Eleazar Early, Cashier.

P. S.—Herein I inclose, for your future security, the official notice of the banks of Georgia, pointing out the difference between the genuine and altered bills. E. E., Cashier.

Office Bank U. States, Savannah, 25th March 1817.

Le Roy Pope, Esq., President, Bank Huntsville.

Sir.—Will you suffer me to introduce to your acquaintance and kindness, the bearer, Mr. Heinemann, our teller, whose objects have already been imparted to you in my letters of 23d February, and 13th inst. (copies in Mr. H.'s possession), and which, we doubt not, will receive every facility from your institution. Mr. Heinemann is also instructed to lay before you formal notice of a claim which we shall make on your bank for the spurious notes received from Mr. Hobson, in the event of our being cast in the suit about to be brought between the Bank of Georgia and ourselves *in the case. It has been deemed a better course than that proposed in [*337 our cashier's letter to Mr. Rawlins, your cashier, of the 17th inst. and will, no doubt, be more agreeable to you. Your obedient servant,

R. Richardson, President.

Planters and Merchants' Bank of Huntsville, 4th May 1819.

Sir.—Your favor, under date of the 25th, has been handed me by Mr. Heinemann, wherein you give me notice, that your bank holds this institution bound to make good the amount of the spurious notes which you say was received from Mr. Hobson, in the event of your being cast in a suit about to be brought between the Bank of Georgia and yourselves. I am directed by the board of directors to state to you, that they highly approve of the course your bank have adopted in regard to these spurious notes, and we shall cheerfully acquiesce with the decision of the court, let that be what it may. I am, respectfully, your obedient servant,

Le Roy Pope, President.

R. Richardson, Esq. President, Office Bank United States, Savannah.

And the plaintiffs further offered evidence to prove, that the officers of the defendants, at the time of receiving the said altered notes, had in their possession a certain book, called the bank-note *register of the said Bank of the State of Georgia, wherein were registered and recorded, [*338 the date, number, letter, amount and payee's name, of all the notes ever issued by the said bank, by means of which, and by reference whereto, the forgeries or alterations aforesaid could have been promptly and satisfactorily detected; and further, that so far as related to the said notes purporting to be the notes of $100, all the genuine notes of the defendants of that amount in circulation on the said 25th of February 1819, were marked with the letter A., whereas, twenty-three of the notes of $100 each, so received by the defendants as genuine notes, when in fact they were altered notes, bore the letters B., C. or D. And the defendants further offered evidence to prove, that the alteration in the said notes consisted in extracting the ink of certain printed figures and words which expressed the amount of said notes, and substituting therefor other printed figures and words; the signatures, and every other part of said notes, remaining unaltered. Whereupon, the parties having offered the above evidence, the plaintiffs prayed the court:—

1. To instruct the jury, that if they believed the said evidence, the said plaintiffs were entitled to recover of the said defendants the whole sum of $6900, being the balance so exhibited by their customer's book aforesaid, and as due from the said defendants to the said plaintiffs; which instruc-

tion the judges aforesaid, being divided *in opinion, refused to give; and the counsel for the plaintiffs excepted to the refusal.

2. The plaintiffs prayed the court to instruct the jury, that if they believed the evidence so given, the plaintiffs were entitled to recover of the defendants the sum of $690, being the original value of the altered notes; which instruction the said judges, being divided in opinion, did not give; to which refusal, the said counsel for the plaintiffs excepted.

3. The plaintiffs prayed the court to instruct the jury, that if they believed the evidence so given, the plaintiffs were entitled to recover of the defendants the whole sum of $6900, being the balance so exhibited by their customer's book aforesaid, as due from the defendants to the plaintiffs, with legal interest thereon from the day of instituting their action aforesaid; which instruction the judges aforesaid, being divided in opinion, refused to give; to which refusal, the counsel for the plaintiffs excepted.

Judgment being rendered upon this bill of exceptions, for the defendants in the court below, the cause was brought, by writ of error, to this court. It was insisted, on the part of the plaintiffs, that the judgment ought to be reversed, on the following grounds: 1. That what took place on the 25th of February 1819, between the parties, was not only equivalent to payment, but was payment itself; and the defendants are, in all respects, to be con-
*340] sidered *as if they were suing to recover back the money. 2. That if understood only as an acceptance, or agreement to pay, the principle would still be the same. 3. That in either case, the plaintiffs were entitled to recover.

March 14th, 1825. The cause was argued by *Sergeant*, for the plaintiffs ;(*a*) and by *Berrien*, for the defendants.(*b*)

March 18th. Story, Justice, delivered the opinion of the court.—This is a case of great importance in a practical view, and has been very fully argued
*341] upon its merits. The Bank of Georgia having originally *issued the bank-notes in question, they were, in the course of circulation, fraudulently altered, and having found their way into the Bank of the United States, the latter presented them to the former, who received them as genuine, and placed them to the general account of the Bank of the United States, as cash, by way of general deposit. The forgery was not discovered, until nineteen days afterwards, upon which, notice was duly given, and a tender of the notes was made to the Bank of the United States, and by them refused. Both parties are equally innocent of the fraud, and it is

(*a*) Citing Bolton *v.* Richards, 6 T. R. 139; Manhattan Company *v.* Lidig, 4 Johns. 377; Levy *v.* Bank of United States, 4 Dall. 234; s. c. 1 Binn. 27; Chitty on Bills 483; Smith *v.* Chester, 1 T. R. 655; Bass *v.* Clive, 4 M. & S. 15; Master *v.* Miller, 4 T. R. 320; Barber *v.* Gingell, 3 Esp. 60; Jordain *v.* Lashbrooke, 7 T. R. 604; Price *v.* Neal, 3 Burr. 1354; Jones *v.* Ryde, 5 Taunt. 488; Markle *v.* Hatfield, 2 Johns. 462; Gloucester Bank *v.* Salem Bank, 17 Mass. 33; Smith *v.* Mercer, 6 Taunt. 76; Meade *v.* Young, 4 T. R. 28; Jenys *v.* Fawler, 2 Str. 946.

(*b*) Citing Gates *v.* Winslow, 1 Mass. 66; Meade *v.* Young, 4 T. R. 28; Kyd on Bills 202–3; Lambert *v.* Oakes, 1 Ld. Raym. 443; Union Bank *v.* United States Bank, 3 Mass. 74; 1 Johns. Cas. 145; 5 Johns. 68; 2 T. R. 366; Buller *v.* Harrison, Cowp. 565; Miller *v.* Race, 1 Burr. 457; 2 Evans' Pothier 19, 495; Tobey *v.* Barber, 5 Johns. 72.

not disputed, that the Bank of the United States were holders, *bonâ fide* for a valuable consideration. Under these circumstances, the question arises, which of the parties is to bear the loss, or, in other words, whether the plaintiffs are entitled to recover, in this action, the amount of this deposit?

Some observations have been made as to the form of the action, the declaration embracing counts for the balance of an account stated, as well as for money had and received, &c. But if the plaintiffs are entitled to recover at all, we see no objection to a recovery upon either of these counts. The sum sued for is the balance due upon the general account of the parties, and it is money had and received to the use of the plaintiffs, if the transaction entitled the plaintiffs to consider the deposits as money. It is, clearly, not the case of a special deposit, where the identical thing was to be restored by the defendants; the notes were paid as money, upon general account, *and deposited as such; so that, according to the course of business, and the understanding of the parties, the identical notes were not to [*342 be restored, but an equal amount in cash. They passed, therefore, into the general funds of the Bank of Georgia, and became the property of the bank. The action has, therefore, assumed the proper shape, and if it is maintainable upon the merits, there is no difficulty in point of form.

We may lay out of the case, at once, all consideration of the point, how far the defendants would have been liable, if these notes had been the notes of any other bank, deposited by the plaintiff, in the Bank of Georgia, as cash. That might depend upon a variety of considerations, such as the usages of banks, and the implied contract resulting from their usual dealings with their customers, and upon the general principles of law applicable to cases of this nature. The modern authorities certainly do, in a strong manner, assert, that a payment received in forged paper, or in any base coin, is not good; and that if there be no negligence in the party, he may recover back the consideration paid for them, or sue upon his original demand. To this effect are the authorities cited at the bar, and particularly *Markle* v. *Hatfield*, 2 Johns. 455; *Young* v. *Adams*, 6 Mass. 182 and *Jones* v. *Ryde*, 5 Taunt. 488. But without entering upon any examination of this doctrine, it is sufficient to say, that the present is not such a case. The notes in question were not the notes of another bank, or the security of a third person, but *they were received and adopted by the bank, as its own genuine notes, in the absolute and unconditional manner. They were treated [*343 as cash, and carried to the credit of the plaintiff, in the same manner, and with the same general intent, as if they had been genuine notes or coin.

Many considerations of public convenience and policy would authorize a distinction between cases where a bank receives forged notes, purporting to be its own, and those where it receives the notes of other banks in payment, or upon general deposit. It has the benefit of circulating its own notes as currency, and commanding thereby the public confidence. It is bound to know its own paper, and provide for its payment, and must be presumed to use all reasonable means, by private marks and otherwise, to secure itself against forgeries and impositions. In point of fact, it is well known, that every bank is in the habit of using secret marks, and peculiar characters, for this purpose, and of keeping a regular register of all the notes it issues, so as to guide its own discretion as to its discounts and circulation, and to

enable it to detect frauds. Its own security, not less than that of the public, requires such precautions. Under such circumstances, the receipt by a bank of forged notes, purporting to be its own, must be deemed an adoption of them. It has the means of knowing if they are genuine; if these means are not employed, it is certainly evidence of a neglect of that duty, which the
*344] public have a right to require. And in respect to persons *equally innocent, where one is bound to know and act upon his knowledge, and the other has no means of knowledge, there seems to be no reason for burdening the latter with any loss, in exoneration of the former. There is nothing unconscientious, in retaining the sum received from the bank, in payment of such notes, which its own acts have deliberately assumed to be genuine. If this doctrine be applicable to ordinary cases, it must apply with greater strength to cases where the forgery has not been detected, until after a considerable lapse of time. The holder, under such circumstances, may not be able to ascertain from whom he received them, or the situation of the other parties may be essentially changed. Proof of actual damage may not always be within his reach; and therefore, to confine the remedy to cases of that sort, would fall far short of the actual grievance. The law will, therefore, presume a damage, actual or potential, sufficient to repel any claim against the holder. Even in relation to forged bills of third persons, received in payment of a debt, there has been a qualification engrafted on the general doctrine, that the notice and return must be within a reasonable time; and any neglect will absolve the payer from responsibility.

If, indeed, we were to apply the doctrine of negligence to the present case, there are circumstances strong to show a want of due diligence and circumspection on the part of the Bank of Georgia. It appears from the statement of facts, that all the genuine notes of that bank of the denomination
*345] *of $100, in circulation at this time, were marked with the letter A; whereas, twenty-three of the forged notes of $100 bore the marks of the letter B, C and D. These facts were known to the defendants, and unknown to the plaintiffs; so that, by ordinary circumspection, the fraud might have been detected.

The argument against this view of the subject, derived from the fact, that the defendants have received no consideration to raise a promise to pay this sum, since the notes were forgeries, is certainly not of itself sufficient. There are many cases in the law, where the party has received no legal consideration, and yet, in which, if he has paid the money, he cannot recover it back; and in which, if he has merely promised to pay, it may be recovered of him. The first class of cases often turns upon the point, whether, in good faith and conscience, the money can be justly retained; in the latter, whether there has been a credit thereby given to or by a third person, whose interest may be materially affected by the transaction. So that, to apply the doctrine of a want of consideration to any case, we must look to all the circumstances, and decide upon them all.

Passing from these general considerations, it is material to inquire, how, in analogous cases, the law has dealt with this matter. The present case does not, indeed, appear to have been in terms decided in any court; but if
*346] principles have been already established, which ought to *govern it, then it is the duty of the court to follow out those principles on this

occasion. The case has been argued in two aspects ; first, as a case of payment, and secondly, as a case of acceptance of the notes.

In respect to the first, upon the fullest examination of the facts, we are of opinion, that it is a case of actual payment. We treat it, in this respect, exactly as the parties have treated it, that is, as a case where the notes have been paid and credited as cash. The notes have not been credited as notes, or as a special deposit ; but the transaction is precisely the same, as if the money had been first paid to the plaintiffs, and instantaneously the same, money had been deposited by them. It can make no difference, that the same agent is employed by both parties, the one to receive, and the other to pay and credit. Upon what principle is it, then, that the court is called upon to construe the act different from the avowed intention of the parties? It is not a case where the law construes an act done with one intent, to be a different act, for the purpose of making it available in law ; to do that, *cy pres*, which would be defective in its direct form. Here, the parties were at liberty to treat it as they pleased, either as a payment of money, or as a credit of the notes. In either way, it was a legal proceeding, effectual and perfect ; and as no reason exists for a different construction, we think, that the parties, by treating it as a cash deposit, must be deemed to have considered it as paid in money, and then deposited ; since that is the only *way in which it could legally become, or be treated as cash. [*347

Nor is there any novelty in this view of the transaction. Bank-notes constitute a part of the common currency of the country, and ordinarily pass as money. When they are received as payment, the receipt is always given for them as money. They are a good tender as money, unless specially objected to ; and, as Lord MANSFIELD observed, in *Miller* v. *Race*, 1 Burr. 457, they are not, like bills of exchange, considered as mere securities or documents for debts. If this be true, in respect to bank-notes in general, it applies, *à fortiori*, to the notes of the bank which receives them ; for they are then treated as money received by the bank, being the representative of so much money admitted to be in its vaults for the use of the depositor. The same view was taken of this point in the case of *Levy* v. *Bank of the United States* (4 Dall. 234 ; s. c. 1 Binn. 27), where a forged check had been accepted by the bank, and carried to the credit of the plaintiff (a depositor) as cash, and upon a subsequent discovery of the fraud, the bank refused to pay the amount. The court there said, "it is our opinion, that when the check was credited to the plaintiff as cash, it was the same thing as if it had been paid ; it is for the interest of the bank that it should be so taken. In the latter case, the bank would have appeared as plaintiffs ; and every mistake which could have been corrected, in an action by them, may be corrected in this action, and none other." The case of *Bolton* v. *Richards*, *6 T. R. 138, is not, in all its circumstances, directly in point ; but there, the court manifestly considered the carrying of a check to the credit of a party, was equivalent to the transfer of so much money in the hands of the banker, to his account. [*348

Considering, then, the credit in this case as a payment of the notes, the question arises, whether, after a payment, the defendants would be permitted to recover the money back ; if they would not, then they have no right to retain the money, and the plaintiffs are entitled to a recovery in the present suit. In *Price* v. *Neale*, 3 Burr 1355, there were two bills of exchange,

which had been paid by the drawee, the drawer's handwriting being a forgery; one of these bills had been paid, when it become due, without acceptance; the other was duly accepted, and paid at maturity. Upon discovery of the fraud, the drawee brought an action against the holder, to recover back the money so paid, both parties being admitted to be equally innocent. Lord MANSFIELD, after adverting to the nature of the action, which was for money had and received, in which no recovery could be had, unless it be against conscience for the defendant to retain it, and that it could not be affirmed, that it was unconscientious for the defendant to retain it, he having paid a fair and valuable consideration for the bills, said, "Here was no fraud, no wrong; it was incumbent upon the plaintiff to be satisfied, that the bill drawn upon him was the drawer's hand, before he accepted or paid it; *but was not incumbent upon the defendant to inquire into it. There *349] was notice given by the defendant to the plaintiff, of a bill drawn upon him, and he sends his servant to pay it, and take it up; the other bill he actually accepts, after which, the defendant, innocently and *bonâ fide*, discounts it; the plaintiff lies by for a considerable time after he has paid these bills, and then found out that they were forged. He made no objection to them, at the time of paying them; whatever neglect there was, was on his side. The defendant had actual encouragement from the plaintiff for negotiating the second bill, from the plaintiff's having, without any scruple or hesitation, paid the first; and he paid the whole value *bonâ fide*. It is a misfortune which has happened without the defendant's fault or neglect. If there was no neglect in the plaintiff, yet there is no reason to throw off the loss from one innocent man, upon another innocent man. But in this case, if there was any fault or negligence in any one, it certainly was in the plaintiff, and not in the defendant." The whole reasoning of this case applies with full force to that now before the court. In regard to the first bill, there was no new credit given by any acceptance, and the holder was in possession of it, before the time it was paid or acknowledged. So that there is no pretence to allege, that there is any legal distinction between the case of a holder before or after the acceptance. Both were treated in this judgment as being in the same predicament, and entitled to the same equities. The case of *Price* v. *Neal* *has never since been departed from; and *350] in all the subsequent decisions in which it has been cited, it has had the uniform support of the court, and has been deemed a satisfactory authority.

The case of *Smith* v. *Mercer*, 6 Taunt. 76, was a stronger application of the principle. There, the acceptance was a forgery, and it purported to be payable at the plaintiff's, who was a banker, and paid it, at maturity, to the agent of the defendant, who paid it in account with the defendant. A week afterwards, the forgery was discovered, and due notice given to the defendant. But the court (Mr. Justice CHAMBRÉ dissenting) decided, that the plaintiff was not entitled to recover. Two of the judges proceeded upon the ground, that the banker was bound to know the handwriting of his customers; and that there was a want of caution and negligence on the part of the plaintiff. The chief justice, without dissenting from this ground, put it upon the narrower ground, that during the whole week, the bill must be considered as paid, and if the defendant were now compelled to pay the

money back, he could not recover against the prior indorsers; so that he would sustain the whole loss from the negligence of the plaintiff.

The very case occurred in the *Gloucester Bank* v. *Salem Bank*, 17 Mass. 33, where forged notes of the latter had been paid to the former, and upon a subsequent discovery, the amount was sought to be recovered back. The authorities were there elaborately reviewed, both by the counsel and the court, and the conclusion to *which the latter arrived was, that the plaintiffs were not entitled to recover, upon the ground, that by re- [*351 ceiving and paying the notes, the plaintiffs adopted them as their own, that they were bound to examine them, when offered of payment, and if they neglected to do it, within a reasonable time, they could not afterwards recover from the defendants, a loss occasioned by their own negligence. In that case, no notice was given of the doubtful character of the notes, until fifteen days after the receipt, and no actual averment of forgery, until about fifty days. The notes were in a bundle, when received, which had not been examined by the cashier, until after a considerable time had elapsed. Much of the language of the court as to negligence, is to be referred to this circumstance. The court said, "the true rule is, that the party receiving such notes must examine them as soon as he has opportunity, and return them immediately. If he does not, he is negligent, and negligence will defeat his right of action. This principle will apply in all cases where forged notes have been received, but certainly, with more strength, when the party receiving them is the one purporting to be bound to pay. For he knows better than any other, whether they are his notes or not; and if he pays them, or receives them in payment, and continues silent, after he has had sufficient opportunity to examine them, he should be considered as having adopted them as his own."

Against the pressure of these authorities, there is not a single opposing case; and we must, *therefore, conclude, that, both in England and [*352 America, the question has been supposed to be at rest. The case of *Jones* v. *Ryde*, 5 Taunt. 488, is clearly distinguishable, as it ranged itself within the class of cases, where forged securities of third persons had been received in payment. *Bruce* v. *Bruce*, 5 Taunt. 495, is very shortly and obscurely reported; but from what is there mentioned, as well as from the notice taken of it by Lord Chief Justice Gibbs, in *Smith* v. *Mercer*, 6 Ibid. 77, it must have turned on the same distinction as *Jones* v. *Ryde*, and was not governed by *Price* v. *Neal*.

But if the present case is to be considered, as the defendant's counsel is most solicitous to consider it, not as a case where the notes have been paid, but as a case of credit, as cash, upon the receipt of them, it will not help the argument. In that point of view, the notes must be deemed to have been accepted by the defendants, as genuine notes, and payment to have been promised accordingly. Credit was given for them, as cash, by the defendants, for nineteen days, and during all this period, no right could exist in the plaintiffs to recover the amount against any other person, from whom they were received. By such delay, according to the doctrine of Lord Chief Justice Gibbs, in *Smith* v. *Mercer*, 6 Taunt. 76, the prior holders would be discharged; and the case of the *Gloucester Bank* v. *Salem Bank*, 17 Mass. 33, adopts the same principle; so that there would be a loss produced by the negligence of the defendants. *But, waiving this narrower [*353 view, we think the case may be justly placed upon the broad ground,

that there was an acceptance of the notes as genuine, and that it falls directly within the authorities which govern the cases of acceptances of forged drafts. If there be any difference between them, the principle is stronger here than there; for there, the acceptor is presumed to know the drawer's signature. Here, *à fortiori*, the maker must be presumed, and is bound to know his own notes. He cannot be heard to aver his ignorance; and when he receives notes, purporting to be his own, without objection, it is an adoption of them as his own.

The general question, as to the effect of acceptances, has repeatedly come under the consideration of the courts of common law. In the early case of *Wilkinson* v. *Luteridge*, 1 Str. 648, the Lord Chief Justice considered, that the acceptance of the bill was, in an action against the acceptor, a sufficient proof of the handwriting of the drawer; but it was not conclusive. In the subsequent case of *Jenys* v. *Fawler*, 2 Str. 946, the Lord Chief Justice would not suffer the acceptor to give the evidence of witnesses, that they did not believe it the drawer's handwriting, from the danger to negotiable notes; and he strongly inclined to think, that actual forgery would be no defence, because the acceptance had given the bill a credit to the indorsee. Subsequent to this was the case of *Price* v. *Neal*, already commented on, in which it was thought that the acceptor ought to be con-
*354] clusively bound *by his acceptance. The correctness of this doctrine was recognised by Mr. Justice Buller, in *Smith* v. *Chester*, 1 T. R. 655; by Lord Kenyon, in *Barber* v. *Gingell*, 3 Esp. 60, where he extended it to an implied acceptance; and by Mr. Justice Dampier, in *Bass* v. *Cline*, 4 M. & Selw. 15; and it was acted upon, by necessary implication, by the court, in *Smith* v. *Mercer*, 6 Taunt. 76. In *Levy* v. *Bank of the United States*, 1 Binn. 27, already referred to, where a forged check, drawn upon the bank, had been accepted by the latter, and carried to the credit of the plaintiff, and on the refusal of the bank afterwards to pay the amount, the suit was brought, the court expressly held the plaintiff entitled to recover, upon the ground that the acceptance concluded the defendant. The case was very strong, for the fraud was discovered a few hours only after the receipt of the check, and immediate notice given. But this was not thought, in the slightest degree, to vary the legal result. "Some of the cases," said the court, "decide, that the acceptor is bound, because the acceptance gives a credit to the bill, &c. But the modern cases certainly notice another reason for his liability, which we think has much good sense in it, namely, that the acceptor is presumed to know the drawer's handwriting, and by his acceptance to take this knowledge upon himself." After some research, we have not been able to find a single case, in which the
*355] general doctrine, thus asserted, has been *shaken, or even doubted; and the diligence of the counsel for the defendants on the present occasion, has not been more successful than our own. Considering, then, as we do, that the doctrine is well established, that the acceptor is bound to know the handwriting of the drawer, and cannot defend himself from payment, by a subsequent discovery of the forgery, we are of opinion, that the present case falls directly within the same principle. We think the defendants were bound to know their own notes, and having once accepted the notes in question as their own, they are concluded by their act of adoption, and cannot be permitted to set up the defence of forgery against the plaintiffs.

It is not thought necessary to go into a consideration of other cases cited at the bar, to establish, that the acceptor may show that the accepted bill was void in its origin, as made in violation of the stamp act, &c.; for all these cases admit the genuineness of the notes, and turn upon questions of another nature—of public policy, and a violation of the laws of the land. Nor are the cases applicable, in which bills have been altered, after they were drawn, or of forged indorsements, for these are not facts which an acceptor is presumed to know. Nor is it deemed material to consider in what cases receipts and stated accounts may be opened for surcharge and falsification. They depend upon other principles of general application. It is sufficient for us to declare, that we place our judgment in the present case, upon the ground, that the defendants were bound to know their *own notes, and having received them, without objection, they cannot now recall their assent. We think this doctrine founded on [*356 public policy and convenience; and that actual loss is not necessary to be proved—for potential loss may exist, and the law will always presume a possible loss, in cases of this nature.

The remaining consideration is, whether there has been a legal waiver of the rights of the plaintiffs, derived under the cash deposit, or, in other words, whether they have consented to treat it as a nullity. There is nothing on which to rest such a defence, unless it is to be inferred from the letter of Mr. Early, the cashier of the Bank of the United States, under date of the 17th of March 1819, addressed to the cashier of the Bank of Huntsville. That letter contains information of the forgery of the notes, and then proceeds, "by the person which we shall in a few days send to your place, as heretofore intimated, we will forward these altered bills for the purpose of getting you to exchange them for other money." Now, there is no evidence that this letter was ever shown to the Bank of Georgia, or its contents ever brought to the cognisance of its officers. It states no agreement to take back the notes, or to transmit them, on account of the Bank of the United States, to Huntsville. For aught that appears, the intention may have been to transmit them on account of the Bank of Georgia, under the expectation that the latter might desire it. But what is almost conclusive on this point is, that on the same day, the Bank of Georgia *had made a tender of the notes to the plaintiffs, [*357 which had been refused. This is wholly inconsistent with the notion that they had agreed to take them back, or to treat the previous credit as a nullity. Assuming, therefore, that the cashier had a general or special authority for the purpose of extinguishing the rights of the plaintiffs, growing out of the prior transaction (which is not established in proof), it is sufficient to say, that it is not shown the he exercised such an authority. And the case of *Levy* v. *Bank of the United States* affords a very strong argument, that a waiver, without some new consideration, upon a sudden disclosure, and under a mistake of legal rights, ought not to be conclusive to the prejudice of the party, where, upon farther reflection, he refuses to acquiesce in it. The subsequent letter of the 25th of March, demonstrates, that the intention of waiving the rights of the bank, if ever entertained, had been at that time entirely abandoned.

The letter from the Huntsville Bank, of the 4th of May, cannot vary the legal result. What might be the rights of the plaintiffs against that bank,

in case of an unsuccessful issue of the present cause, it is unnecessary to determine. The contract, whatever it may be, is *res inter alios acta*, from which the defendants cannot, and ought not to derive any advantage.

It only remains to add, that if the plaintiffs are entitled to recover the principal, they are entitled to interest from the time of instituting the suit.

*358] *Upon the whole, it is the opinion of the court, that the circuit court erred in refusing the first and third instructions prayed for by the plaintiffs; and for these errors the judgment must be reversed, with directions to award a *venire facias de novo*. On the second instruction asked by the plaintiffs, it is unnecessary to express any opinion.

Judgment reversed, accordingly.

Keplinger *v.* De Young.

Patent.

A., having obtained a patent for a new and useful improvement, to wit, a machine for making watch-chains, brought an action, under the 3d section of the patent act of 1800, c. 179, for a violation of his patent-right against B.; and on the trial an agreement was proved, made by the defendant with C., to purchase of him all the watch-chains, not exceeding five gross a week, which he might be able to manufacture within six months, and an agreement on the part of C. to devote his whole time and attention to the manufacture of the watch-chains, and not to sell or dispose of any of them, so as to interfere with the exclusive privilege secured to the defendant of purchasing the whole quantity which it might be practicable for C. to make: And it was proved that the machine used by C. with the knowledge and consent of the defendant in the manufacture was the same with that invented by the plaintiff, and that all the watch-chains thus made by C. were delivered to the defendant according to the contract: *Held*, that if the contract were real and not colorable, and if the defendant had no other connection with C. than that which grew out of the contract, it did not amount to a breach of the plaintiff's patent-right.

*359] *Such a contract, connected with evidence from which the jury might legally infer, either that the machine which was to be employed in the manufacture of the patented article was owned wholly or in part by the defendant, or that it was hired to the defendant for six months, under color of a sale of the articles to be manufactured with it, and with intent to invade the plaintiff's patent-right, would amount to a breach of his right.

Error to the Circuit Court of Maryland.

March 15th, 1825. This cause was argued by *Webster* and *Sergeant*, for the plaintiff; and by the *Attorney-General*, for the defendant.

March 17th. Washington, Justice, delivered the opinion of the court.—This was a suit commenced by the plaintiff, Keplinger, in the fourth circuit, for the district of Maryland, against the defendant, for the violation of the plaintiff's patent-right, secured to him according to law, in a certain new and useful improvement, to wit, a machine for making watch-chains, &c. The third count in the declaration, upon which alone this cause has been argued, is in the usual form, charging the defendant with having unlawfully used the said improvement, without the consent of the plaintiff first had and obtained in writing. The defendant pleaded the general issue, and gave notice to the plaintiff that he should deny that the exclusive right of using the improvement mentioned in the declaration, was vested in the plaintiff, or that he was the original and first inventor of the said improvement, and and that he should give evidence to establish those facts.

*360] *At the trial, the plaintiff read in evidence the letters-patent,

duly granted, bearing date the 4th of May 1820, and proved, that he was the true and original inventor of the machine specified in the patent, and that the defendant, together with John Hatch and John C. Kirkner, did use the said machine in the making of watch-chains from steel, from the 4th of May till some time in the month of December 1820.

The defendant, in order to prove that any concern or connection which he had with the said Hatch and Kirkner, in the making of watch-chains, by means of the said machine, was merely as a purchaser of watch-chains from them, under the following contract, produced and gave the same in evidence. The agreement referred to, bearing date the 3d of May 1820, was between M. De Young, and J. Hatch and J. Kirkner, and witnessed, "that the said Hatch and Kirkner do hereby engage and obligate themselves to manufacture and deliver to M. De Young, or at his store, in said city, no less than three gross, but as many as five gross, of wire watch-chains, agreeably to a sample to be deposited with T. Barly (if practicable to manufacture so many), in each week, from the date hereof, for the terms of six months, one-half of which number to be with turned slides, and the other half, wire slides; the whole number to be four strands, if the said De Young so choose; but he is to have the privilege of directing the description to be furnished, that is to say, what number of four, five, six or eight strands; the prices of *which to be as follows: four strands, $2 per dozen; six strands, $2.66⅔ per dozen, and eight strands, at the rate of $3.33 per dozen; [*361 said Hatch and Kirkner to devote their whole time and attention to said manufactory, and neither to sell, barter nor dispose of, in any manner or way, or means whatever, of any goods of the description herein before described, or which may, in any manner or way whatsoever, interfere with the exclusive privilege herein before granted, but will faithfully manufacture for said De Young, and none other, as far as five gross of chains per week, if practicable, and not less than three gross per week, at the prices herein before stipulated, and payable as follows: one-half in cash at the end of every week, for the total number delivered within the week, and the other half in said De Young's promissory note, payable at sixty days from the date thereof. And the said De Young, on his part, does hereby promise to receive from the said Hatch & Kirkner, such quantity of watch-chains, answering the description of the sample, as it may be in their power to manufacture, not exceeding five gross per week, reserving to himself the privilege of directing what proportion thereof shall be four, six or eight strands, and pay for the same weekly in the following manner, viz., the one-half amount of week's delivery in cash, the other half in a note at sixty days, the same to be settled for weekly, in manner aforesaid, if required." The defendant also gave evidence to prove, *that all the connection [*362 he ever had with the said Hatch & Kirkner, relative to watch-chains made by them with the said machine or otherwise, was merely as a purchaser of such chains from them, under and in pursuance of the said contract.

The plaintiff then proved, that, at the time of making the said contract, the defendant was fully apprised of the existence of the machine described and specified in the patent, and of its prior and original invention by the plaintiff, and of the intention of the plaintiff to obtain the said patent; and that the said contract was made with a view to the employment by the said Hatch & Kirkner, in the manufacture of watch-chains, by a machine pre-

cisely similar to that invented by the plaintiff, after the plaintiff should have obtained his patent; and that a machine precisely similar to that invented by the plaintiff was employed by the said Hatch & Kirkner in the manufacture of watch-chains by them, under the said contract, and with the knowledge and consent of the defendant, during the whole period aforesaid, he and they having received notice, on the 5th of May 1820, of the plaintiff's patent; and that the watch-chains so manufactured by Hatch & Kirkner, during the whole of the said period, were delivered by them to the defendant, and by him received, under and in conformity with the said contract.

Upon this evidence, the court, at the request of the defendant's counsel, instructed the jury, that the plaintiff was not entitled to a verdict on the first and second counts in his declaration, *because the acts which they *363] charge, if true, constitute no offence against the plaintiff's patent. And that, if the jury should be of opinion, on the evidence, that the plaintiff is the sole and original inventor of the whole machine; and that the defendant had no other connection with Hatch & Kirkner, with regard to these chains, than that which arose from his said contract with them, under which he procured the chains to be made by Hatch & Kirkner, and sold them when so made; and that the said contract is a real contract; then these acts constituted no breach of the plaintiff's patent-right on the part of De Young, and that the verdict must be for the defendant; and that this legal aspect would not be changed, although the defendant may, on any occasion, have supplied, at the cost of Hatch & Kirkner, the wire from which the chains so manufactured were made. To this instruction the plaintiff's counsel took a bill of exceptions, and a verdict and judgment having been rendered for the defendant, the cause is brought into this court by a writ of error.

The only question which is presented by the bill of exceptions to the consideration of this court is, whether the court below erred in the instruction given to the jury; and this must depend upon the correct construction of the 3d section of the act of congress, of the 17th of April 1800, c. 179, which enacts, "that where any patent shall be granted, pursuant to *the act of the 21st February 1793, c. 156, and any person, without *364] the consent of the patentee, his executors, &c., first obtained in writing, shall make, devise, use or sell the thing whereof the exclusive right is secured to the said patentee, by such patent, such person, so offending, shall forfeit and pay to the said patentee, a sum equal to three times the actual damage sustained by such patentee," &c.

The contract, taken in connection with the whole of the evidence stated in the bill of exceptions, if the same were believed by the jury, formed, most certainly, a strong case against the defendant, sufficient to have warranted the jury in inferring, either that the machine which was to be employed in the manufacture of the watch-chains was owned in whole or in part by the defendant, or that it was hired to the defendant for six months, under color of a sale of the articles which might be manufactured with it, and with intent to invade the plaintiff's patent-right. Whether the contract, taken in connection with the whole of the evidence, does or does not amount to a hiring by the defendant of the machine, or the use of it for six months, as a point which is not to be considered as being decided either way by the court. The bill of exceptions does not call for an opinion upon it.

But the contract, taken by itself, amounted to no more than an agree-

ment by the defendant to purchase, at a fixed price, all the watch-chains, not exceeding five gross a week, which Hatch & Kirkner *might be able [*365
to manufacture in the course of six months, with any machine they might choose to employ; and an agreement on the part of Hatch & Kirkner, to devote their whole time and attention to the manufacture of the chains, and not to sell or dispose of any of them, so as to interfere with the exclusive privilege secured to the defendant, of purchasing the whole quantity which it might be practicable for them to make. If this contract was real, and not colorable, which is the obvious meaning of the instruction, and the defendant had no other connection with Hatch & Kirkner in regard to these claims, than what grew out of it, it would, in the opinion of the court, be an extravagant construction of the patent law, to pronounce that it amounted to a breach of the plaintiff's patent right, by fixing upon the defendant the charge of having used the plaintiff's machine. Such a construction would be highly inconvenient and unjust to the rest of the community, since it might subject any man who might innocently contract with a manufacturer, to purchase all the articles which he might be able to make within a limited period, to the heavy penalty inflicted by the act, although he might have been ignorant of the plaintiff's patent, or that a violation of it would be the necessary consequence of the contract. It might possibly extend further, and affect contracts, express or implied, though of a more limited character, but equally innocent, as to which, however, it is not the intention of the court to express *any opinion, as this case does not [*366
call for it.

This cause was argued by the plaintiff's counsel, as if the opinion of the court below had been given upon the whole of the evidence; but this was not the case. No instruction was asked for, but by the defendant's counsel, and that was confined to a single part of the case, the connection between the defendant and Hatch & Kirkner, in regard to the watch-chains which the latter bound themselves, by their contract, to manufacture and deliver to the former. If the jury had been of opinion, upon the whole of the evidence, that the contract was not a real one, or that that instrument did not constitute the sole connection between those parties, or that the transaction was merely colorable, with a view to evade the law, the jury were not precluded by the instruction from considering the plaintiff's patent-right as violated, and finding a verdict accordingly.

Had the plaintiff's counsel thought proper to call upon the court for an opinion and instruction to the jury, upon any points arising out of the whole, or any part of the evidence, it would have been their duty to give an opinion upon such points, leaving the conclusion of fact from the evidence to be drawn by the jury. But this course not having been pursued, this court can take no notice of the evidence, although spread upon the record, except so far as it is connected with the single point upon which the opinion, which is excepted to, was given. As to the residue of that opinion, that "the legal aspect of the *case would not be changed, although the defendant [*367
might, on any occasion, have supplied, at the cost of Hatch & Kirkner, the wire from which the chains so manufactured were made," it is quite as free from objection as the preceding part of it, since it stands upon precisely the same principle.

Judgment affirmed, with costs.

De Wolf *v.* J. Johnson, R. M. Johnson, W. T. Barry and J. Prentiss.

Lex loci contractus.— Usury.—Parties.

In a contract for the loan of money, the law of the place where the contract is made is to govern; and it is immaterial, that the loan was to be secured by a mortgage on lands in another state.[1]

In such a case, the statutes of usury of the state where the contract was made, and not those of the state where it is secured by mortgage, are to govern it, unless there be some other circumstance to show that the parties had in view the laws of the latter state.

Although a contract be usurious in its inception, a subsequent agreement to free it from the taint of usury, will render it valid.

The purchaser of an equity of redemption cannot set up usury, as a defence to a bill brought by the mortgagee for a foreclosure, especially, if the mortgagor has himself waived the defence.

Under a usury law which does not avoid the securities, but only forbids the taking a greater interest than six per centum per annum, a court of equity will not refuse its aid to recover the principal.[2]

A certificated bankrupt or insolvent, against whom no relief can be had, is not a necessary party to a suit in equity;[3] but if he be made a defendant, he cannot be examined as a witness in the cause, until an order has been obtained, upon motion, for that purpose.

*368] *Appeal from the Circuit Court of Kentucky. This was a bill filed by the appellant, De Wolf, in the court below, on the 4th of September 1818, for a foreclosure of a mortgage given by Prentiss, one of the respondents, on the 7th of July 1817, to secure the repayment of the sum of $62,000.

The bill alleged, that the mortgagor had conveyed his equity of redemption to W. T. Barry, by a deed of trust, dated the 16th of March 1818, describing the lands as "all those tracts or parcels of land described and contained in a deed of mortgage from the said J. Prentiss to the said J. De Wolf, dated the 7th of July 1817"—"it being the intention and meaning hereof, that after the satisfaction of the debts seth forth in said deeds, the remainder of the property described in said deeds"—"shall be hereby conveyed." According to the provisions of the deed, Barry exposed the premises for sale at public auction, on the 27th of May 1818, "subject to the incumbrances of any previous mortgage or deed of trust, particularly a mortgage deed to J. De Wolf, from J. Prentiss, dated the 7th of July 1817"—"recorded in the clerk's office of the Fayette county court, and to which all persons wishing to purchase are referred for more particular information." At this sale, the property was purchased by J. Johnson and R. M. Johnson.

Prentiss filed no answer to the bill, and it was taken *pro confesso* against him. J. Johnson answered, claiming as a *bonâ fide* purchaser, for a

*369] valuable consideration, and setting up the defence of *usury in the contract between Prentiss and the appellant, De Wolf, and also denying notice of the mortgage, except by vague report, which report was accompanied with the suggestion, that the mortgage was void, as being affected with usury. Barry also answered, admitting the conveyance to himself by Prentiss, in trust to sell, which sale he had effected publicly, and in good faith, before the bill filed; and in pursuance of the sale, had conveyed to the defendants, J. and R. M. Johnson; and alleged, that he was ignorant of the claim of the plaintiff, De Wolf, except so far as that claim

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[1] S. P. Davis *v.* Clemson, 6 McLean 622. See Fitch *v.* Renner, 1 Biss. 337.

[2] It is otherwise, where the local law avoids the contract *in toto*. Lloyd *v.* Scott, 4 Pet. 205.

[3] Van Riemsdyk *v.* Kane, 1 Gallis. 371.

was recognised in the deed of trust; and also set up the defence of usury between the mortgagor and mortgagee. The other defendant, R. M. Johnson, answered, recognising and adopting the answer of J. Johnson, and denying for himself all knowledge of the mortgage, at the date of the conveyance to Barry. He also averred, that he was a creditor of Prentiss to the amount of nearly $500,000, for which he had no other security than the assignment to Barry, through which he derived title to the mortgaged premises.

The cause went to hearing, on the pleadings and proofs, and Prentiss was admitted as a witness on the part of the other defendants, subject to legal exceptions; but it did not appear by the transcript of the record, whether the decree of the court below was grounded upon his testimony. It appeared by the other evidence in the cause, that the transaction originated in a loan made by De Wolf to Prentiss, in the state of Rhode Island, *in the year 1815, the repayment of which was secured by a mortgage upon the lands in Kentucky, which contract was afterwards [*370 waived by the parties, and a new contract entered into by them, in the state of Kentucky, in the year 1817. The principal question of fact was, whether either, or both, of those contracts, was void, under the usury laws of either of those states, and as this question is fully considered in the opinion of this court, it has not been thought necessary to extract from the voluminous mass of testimony in the court below, the general result of the evidence as bearing upon it.

On the part of the *appellants*, it was contended: 1. That the original contract of 1815, if usurious, was not void according to the laws by which it ought to be governed; the laws of Rhode Island not avoiding the contract, or the securities given for it, but only forfeiting one-third of the principal, and all the interest of the loan, as a penalty, to be recovered by information or action of debt. 2. That the contract of 1817 was free from the taint of usury. 3. That if either, or both those contracts, were usurious, the defendants, J. & R. M. Johnson, could not take advantage of the usury, not only because they were not parties to the contract, but because, by the very terms of the deed of trust to Barry, under which they claim, they *took the estate in controversy subject to the prior conveyance to [*371 the appellant.

On the part of the *respondents*, it was insisted: 1. That the loan of 1815 was usurious and void. 2. That the transaction of 1817 was a device to secure the repayment of money advanced on an usurious agreement. 3. That money advanced on an usurious agreement cannot be secured, and the payment enforced in a court of equity, at the instance of the lender, by force of any after-agreement of the lender, to relinquish the usury, and of the borrower, to repay the money lent.(*a*)

(*a*) The act of Rhode Island of 1798, after prohibiting (§ 1.) the contracting for more than six per centum per annum for the loan of money, wares, goods, &c., provides (§ 5.), "that a sum equal to one-third part of the principal, and all the interest of every bond, mortgage, specialty, agreement, contract, promise or assurance whatsoever, which shall be made after the passing of this act, for the payment of money, goods, wares or other commodities, to be lent on usury, wherein or whereby there shall be received, agreed for or taken, for the forbearance or giving day of payment,

*March 14th. *Jones* and *P. Hall*, for the appellant, argued, that contracts being to be governed by the laws of the country where they are made, as to their nature, construction and effect, the original contract of 1815 was not within the statute of Kentucky as to usury. Ord on Usury 32 *d*; *Blanchard* v. *Russell*, 13 Mass. 4; *Hicks* v. *Brown*, 12 Johns. 142; 5 Day 322; 2 Wash. 282; *Van Reimsdyk* v. *Kane*, 1 Gallis. 371; 4 Day 96. The rate of interest is governed by the law of the country where the debt was contracted, and not according to that where the action is brought. 2 Johns. Ch. 365. That if there be no express reference to any other place, the law will intend, that the contract was to be executed where it was made, and have a reference to the law of that state. Nor would taking a security upon lands in another country, vary the application of the rule. Thus, contracts made in England, secured by mortgage on estates in the West Indies, are construed by the English law. *De War* v. *Span*, 3 T. R. 425. So, where the debt was contracted *in Ireland, and the
*373] security given in England, it was held, that Irish interest should be allowed. *Lord Ranelaugh* v. *Champant*, 1 Eq. Cas. Abr. 289. If the contract be not void by the laws of the country where it was made, it can never become so, by being carried into another country to be enforced; if valid in the country where it was made, it will be valid everywhere, unless some reason of policy oppose its execution. 3 Dall. 370 n; Cowp. 341. Usury is only *malum prohibitum*, and independent of statutory regulation, the parties may contract for whatever rate of interest they please. 8 Wheat. 355. Unless the statute of usury which applies to the case, avoids the contract, the defendant cannot avail himself of this ground of defence. Penal laws are strictly local, and the statute of Rhode Island is merely a penal law. *Scoville* v. *Canfield*, 14 Johns. 339; 4 Burr. 2251; 2 Mod. 307; Ord on Usury 194. The respondents, seeking to avail themselves of usury in a contract made in that state, must show that it would be a good defence there. *Thompson* v. *Ketcham*, 8 Johns. 189; 3 Esp. 163. If the contract of 1815 were good under the law by which it ought to be governed, it would not be invalidated by the subsequent contract, even if that were void.

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above the rate of interest expressed in the first section of this act, shall be forfeited by the creditor, one-half of such forfeiture for the use of the state, and the other half for the use of him, her or them, who will prosecute for the same. That the said forfeiture shall and may be recovered, by information or action of debt, before any court proper to try the same; that in the trial of every such information or action, the borrower or hirer of the money, goods, wares or other commodities, on such usurious contract, shall be admitted a legal witness, if not interested in the event of such prosecution; provided, nevertheless, that all information and actions for the recovery of such forfeiture, shall be brought and commenced within one year after such forfeiture shall have accrued: Provided further, that nothing in this act shall extend to the letting of cattle, or other usages of the like nature, in practice amongst merchants, as bottomry, insurance or course of exchange, as hath been heretofore accustomed."

The act of Kentucky of 1798 prohibits the taking above the rate of six per centum per annum, as the interest for the loan of money, wares or merchandise, and declares, that "all bonds, contracts, covenants, conveyances or assurances, hereafter to be made for any money or goods so to be lent, on which a higher interest is reserved or taken than is hereby allowed, shall be utterly void."

Swartwout v. *Payne*, 19 Johns. 294. But the contract of 1817 was, in fact, free from usury, and would have the effect of purifying the previous contract *from all taint. Comyn on Usury 183–5. Where usurious [*374 securities have been destroyed by mutual consent, a promise by the borrower to repay the principal and legal interest is binding. Ord on Usury 103; 3 Day 350; 10 Mass. 121; *Barnes* v. *Headly*, 2 Taunt. 184; *Chadburn* v. *Watts*, 10 Mass. 123. As to the sale of stock, if it was fair and *bonâ fide*, and not with a view to evade the statute, it would not invalidate the contract. 3 T. R. 531; 8 East 307; Ord 76; 2 Dall. 92; Comyn on Usury 110; 1 Esp. 40, 176. As to the amount advanced in treasury-notes, they are to be put on a footing with bank-notes, and if received in payment, are to be considered as cash. 3 Burr. 1516; 1 Ibid. 452; 9 Johns. 120. A tender in bank-notes, if not objected to, is good. 3 T. R. 554; 7 Johns. 476; 19 Ibid. 508; 10 Mass. 284. The sum paid as rent is not usurious, unless paid in consequence of a previous corrupt agreement. Comyn on Usury 187; 7 Mod. 118; 8 Mass. 101, 258; 10 Ibid. 121; 4 Burr. 2253. A payment in the nature of a penalty is not usurious. Comyn 72. If there be any usury at all in the new contract of 1817, it has crept in by mistake and miscalculation, and that will not avoid it. Ord on Usury 37; 1 Camp. 149; 3 Wils. 390; 4 Burr. 2253; 9 Mass. 49; 1 Bos. & Pul. 149. The testimony of Prentiss to prove the alleged usury is inadmissible, because he is a party upon the record, is liable for costs, is directly interested in the event of the *suit, and is concluded by the decree. Phil. Ev. 57, 61, [*375 62; 5 Johns. Ch. 95; 14 East 565; 10 Johns. 95; 2 Wheat. 193, note; 20 Johns. 142; 5 Esp. 155; 6 Wheat. 109. And finally, even if usury exist, and be ever so clearly proved, the defendants, J. & R. M. Johnson, cannot take advantage of it, since they purchased, subject to De Wolf's mortgage, which, if usurious, is not to be taken as absolutely void. *Green* v. *Kemp*, 13 Mass. 515; 16 Ibid. 96; 5 Johns. Ch. 122, 555; 10 Johns. 202; 15 Ibid. 555; 1 Taunt. 414; 9 Mass. 48; Bac. Abr., tit. Usury, F; Bull. N. P. 224; 1 Johns. Ch. 158.

Webster and *Bibb*, contrà, admitted the general rule as to the *lex loci contractus*, but contended, that the present contract was made with a view to the laws of Kentucky, where the borrower was domiciled, where the security was given, and where the money was to be repaid. It was an exception to the rule, that where the contract was made in one country with a view to the laws of another, the statutes of the latter were to govern it. Huber. Prælect. tom. 2, l. 1, tit. 3; *Robinson* v. *Bland*, 2 Burr. 1077. This was founded upon the same reason with the rule itself, *i. e.*, the intention of the parties. Another exception is, where the parties go from one country into another, and there make a contract with a view to evade the laws of the former. So, if it be against the public policy of the country where performance of the contract is sought, to inforce it, the rule *does not apply. [*376 3 Dall. 374 n.; Hargr. Co. Litt. 79 *b*, 44 note; 3 Atk. 727; 1 Vern. 428. But it was insisted, that by the law of Rhode Island, where the original agreement was made, it was absolutely void; and as such, could not be enforced in any other state or country. But the statute of Kentucky, which was the law properly applicable to the case, not only prohibited the usurious contract, but absolutely avoided the securities. It was well set-

led, that any device, however specious, by which illegal interest is reserved, would render the contract void. Cowp. 114 ; 3 Bos. & Pul. 154 ; Cro. Eliz. 27. Even a beneficial purchase by the lender, or disadvantageous purchase by the borrower, will be considered within the statutes of usury, if connected with a loan or treaty, or communication for a loan. 1 Sch. & Lef. 115, 182, 119, note ; Chitty on Bills 94–5 ; Bac. Abr. Usury, C, 2 ; 1 Johns. Cas. 536 ; Cowp. 796, 770 ; Cro. Jac. 440. So, a sale of goods or stock, as a contrivance to evade the usury law, avoids the contract. 2 Doug. 735 ; Cowp. 793 ; 1 Atk. 351 ; Bac. Abr. Usury, C. 8, 9, 13 ; 2 Ves. 155 ; 7 Johns. 196 ; 3 T. R. 531 ; 1 Bro. C. C. 149, 151 ; Esp. N. P. 11 ; Ambl. 371 ; 1 Johns. Ch. 537. And if the lender, in part of his advance, give a bill or note, payable at a future day, and charges interest from the date of the contract, it is usurious. 13 Johns. 40 ; 2 Johns. Ch. 192 ; 4 Taunt. 810 ; 1 Bos. & Pul. 144. A contract, void upon the ground of usury, cannot be made good by a subsequent
*377] new agreement, *and if void in part, it is void *in toto*. 4 Camp. 157 ; 8 Johns. 253. If the lender of money, on an usurious contract, seeks to enforce his securities in a court of equity, the securities will be declared void, and ordered to be delivered up ; and in this respect, the rule is different, where the borrower himself applies to the court for relief, in which latter case, he must pay, or offer to pay, the principal and interest lawfully due, before he is entitled to relief. 5 Johns. Ch. 122. But it is sufficient, if a contract be prohibited by positive law, for a court of equity to refuse its aid in enforcing it, whether the securities given be expressly declared void or not. The other defendants, claiming to stand in the place of Prentiss, as his assignees and creditors, have a clear legal and equitable right to take advantage of the illegality of the contract made with him, and which was attempted to be secured by a mortgage upon his property.

March 18th, 1825. JOHNSON, Justice, delivered the opinion of the court.—This cause has been discussed very much at large, and with a degree of talent, candor and research, very satisfactory to the court. In proceeding to consider it, however, we think it advisable to deviate from the order in which the points were examined at the bar, and to pursue them as they arise in the progress of the suit.

*378] In the year 1818, the complainant filed his bill in *the circuit court of the United States for Kentucky, to obtain a foreclosure of a mortgage given to secure the sum of $62,000, and bearing date July 7th, 1817. The debt secured was payable by instalments, only one of which was due when the bill was filed, but in the progress of the cause, all the instalments falling due, they were all, by consent, admitted into the pleadings, as if introduced by supplemental bill.

The bill first sets out the mortgage and the breach, and then proceeds to allege, that Prentiss, the mortgagor, had conveyed his equity of redemption to W. J. Barry, who had sold to James Johnson and R. M. Johnson, the two latter of whom were then in possession. Prentiss files no answer, and in due course, the bill, as to him, is ordered to be taken *pro confesso*. James Johnson files an answer, claiming as *bonâ fide* purchaser, for a valuable consideration, and setting up the defence of usury in the contract between Prentiss and the complainant, and putting the complainant generally upon his proof. He also denies notice of De Wolf's mortgage, otherwise than by

vague report, which report, he alleges, was accompanied with the suggestion, that the mortgage to De Wolf was affected with usury, and void. At a subsequent day, Barry also answers, admitting the conveyance to himself by Prentiss, in trust to sell, which sale, he alleges, he had affected publicly, and in good faith, before the bill was filed; and in pursuance of such sale, had conveyed *to the Johnsons. He further alleges, that at the time [*379
of the execution of the deed of trust to him, "he was ignorant of the complainant's claim, except so far as that claim is recognised in the deed of trust," and also sets up the usury between the mortgagor and mortgagee, in avoidance of the mortgage. R. M. Johnson also files an answer, in which he recognises and adopts the answer of James Johnson, and further denies, altogether, knowledge of the mortgage to De Wolf, at the date of the transfer to Barry. He then sets out, that he is a creditor of Prentiss to the amount of near $500,000, for which he has no other security than the assignment to Barry, through which he derives title to the mortgaged premises.

Upon this state of the pleadings, with a few formal and immaterial additions, the parties went into their proofs. And as the complainant exhibited his mortgage in legal form, and with all the evidence of authenticity required by law, it followed, that the defendants were put upon their proof to maintain the grounds on which they sought to avoid it.

It was not contended, that in the immediate contract on which the bill was founded, there was any usurious taint belonging to that transaction itself. The ground taken was usury in a transaction, anterior by two years, out of which the mortgage in question drew its origin, and from which the usurious taint was supposed to be transmitted, either directly or incidentally. The case proposed to be established in proof *was, that in the year [*380
1815, there was a negotiation for a loan between these parties, the scene of which was in Bristol, Rhode Island. That the sum to be loaned was $83,000, but which sum in fact was reduced below $80,000, by means which they contended were resorted to for the purpose of disguising the usurious interest, to be retained by way of premium, or *bonus*, or imposition. That the interest actually stipulated for was twelve per cent., of which six per cent. was reserved in a bond executed at the time, for $111,000, comprising compound interest, there being no annual interest reserved. The other six per cent. was secured under the aspect of a rent payable out of lands in Kentucky, for which Prentiss executed absolute conveyances, and De Wolf stipulated to reconvey on the payment of the amount for which Prentiss gave his bond, and a sum annually, by way of rent, equal to six per cent. upon the $83,000, that is, the sum of $4980. This rent, it seems, was paid the first year, together with an additional sum of $498, added as interest and damages. And a bill for the sum of $4980 was drawn, the second year, by De Wolf upon Prentiss, payable in Philadelphia, but this was returned under protest, and subsequently taken up by a bill for $5154, indorsed by J. T. Meder, jun.

The evasion of the statute against usury, supposed to have been practised upon Prentiss, in making up the sum of $83,000, had relation to three items. The first a sum of about *$32,000, admitted into the computation, [*381
as the price set upon fifteen shares of the Lexington Manufacturing Establishment, transferred by De Wolf to Prentiss. The second, treasury-notes to the amount of $20,211.94, received at par; and the third,

$30,802.73 bills drawn upon Philadelphia, also taken at par. Upon these three items, there was an estimated loss sustained of about $3400.

The contract of 1815 was unquestionably entered into in the state of Rhode Island, and was there reduced to writing; but had a view to Kentucky for its consummation. As it entered into the contract, that Prentiss should secure De Wolf by a conveyance of Kentucky land to a large amount, two agents were employed and intrusted by De Wolf, with the securities to be passed to Prentiss, and a power to draw upon him for the money, to be paid in Philadelphia; which Prentiss was to have the benefit of, upon complying with the articles of his contract, purporting an absolute conveyance of the land. The place where the contract of repayment of the principal on the part of Prentiss was to be fulfilled, appears no further than this, that the bond is given to pay, generally, without regard to place, and the money to be paid by way of rent, appears by the subsequent acts of the parties respecting the bills drawn for the rent, to have been payable in Philadelphia.

The contract of 1817, in which this mortgage originated, was executed in Kentucky; and had its inception in an intimation from Prentiss of a
*382] design to avail himself of the plea of usury. Upon this, De Wolf repaired to Kentucky, and their instituted a new negotiation with Prentiss personally, having for its object to clear the contract from all usurious incidents, and to take security for the sum loaned, at the legal interest of Kentucky, which, as well as that of Rhode Island, is six per cent. Accordingly, all the instruments of writing which appertained to the old contract were surrendered mutually, and a new mortgage given to secure the balance now sued for; the original sum having been reduced, by large actual payments, to the sum for which this mortgage was given, and which includes the same premises conveyed under the prior contract.

The defence set up rests upon the assumption that the new contract was not purged of the usury; or, rather, that the whole contract of 1815 was void, and could, therefore, form no basis or consideration for the contract of 1817. Or, if not wholly void, it comprised several items of an usurious character, which ought to be included in the new contract. And here two preliminary questions arose, the first of which was, whether the *lex loci* of the contract of 1815 was Rhode Island or Kentucky? By the usury laws of the latter, the contract, and all the securities given for it, are void, both for principal and interest. By the laws of the former, although it is prohibited to take more than six per. cent interest, and a penalty imposed for the offence, the act does not render the contract void, certainly not for the prin-
*383] cipal sum. By the laws of Kentucky, *it is supposed, that the principal debt being abolished, there could be no consideration to sustain the new contract: by the laws of Rhode Island, that the reverse would be the effect, unless, as was contended in argument, that the simple prohibition of such a contract, which is express in the Rhode Island act, would affect it with the character of an illegal contract, and as such, one which a court of equity would not lend its aid to carry into effect.

With regard to the locality of the contract of 1815, we have no doubt, that it must be governed by the law of Rhode Island. The proof is positive, that it was entered into there, and there is nothing that can raise a question but the circumstance of its making a part of the contract, that it should be secured by conveyances of Kentucky land. But the point is estab-

lished, that the mere taking of foreign security does not alter the locality of the contract with regard to the legal interest. Taking foreign security does not necessarily draw after it the consequence, that the contract is to be fulfilled were the security is taken. The legal fulfilment of a contract of loan, on the part of the borrower, is repayment of the money, and the security given it but the means of securing what he has contracted for, which, in the eye of the law, is to pay, where he borrows, unless another place of payment be expressly designated by the contract. No tender would have been effectual to dicharge the mortgagee, unless made in Rhode Island. On a bill to redeem, a court of equity would not have listened to the idea of *calling the mortgagee to Kentucky in order to receive a tender. [*384

In the effort to sustain his defence, under the laws of Rhode Island, the defendants have introduced into the cause the examination of their co-defendant, Prentiss, taken at the instance of themselves, and received in the court below subject to legal exceptions. We are not informed, whether the court below actually recognised it as competent evidence, since the grounds on which that court dismissed the bill, are not spread upon the record. It is enough, that it does not appear to be rejected; we are now called upon to pass an opinion upon it.

The only grounds upon which an argument has been made in support of the admissibility of Prentiss's deposition, have been, that the complainant avers him to be insolvent, which fact the testimony in the cause goes also far to establish; and that his deposition was taken, before he was in reality made a party in the service of a *subpœna*. But, on no principle, can his evidence be adjudged competent. It is true, that cases occur in which certificated bankrupts are struck out of a record and made witnesses; but if this was a case in which a motion to strike out could have been sustained, the motion should have been made, and the party's name expunged from the record. On no principle could he be made a witness, while he was himself a party. He may have had little or no interest in the event of the suit, except as to the costs; but still, while a party to the record, he could not be examined. We *know of no exception to this rule, whatever be the court in which the question occurs, except it be in the administration of certain branches of the admiralty jurisdiction. From the views that we take of the case, however, we do not find it necessary to inquire, whether there is sufficient evidence in the cause, after rejecting the evidence of Prentiss, to sustain the facts on which the defence rests. If, with the aid of that testimony, the defence cannot be sustained; *à fortiori*, it cannot be, without it. And here it may be proper to premise, as was very correctly remarked in the argument, that there has not been, in fact, any contrariety of opinion expressed by the counsel on the law of usury. Usury is a moral taint, wherever it exists, and no subterfuge shall be permitted to conceal it from the eye of the law; this is the substance of all the cases, and they only vary as they follow the detours through which they have had to pursue the money-lender. But one difficulty presents itself here, of no ordinary kind. It is not very easy to discover how the taint of Rhode Island usury can infuse itself into the veins of a Kentucky contract. The defence would not admit of a moment's reflection, if it rested on the direct effects which laws against usury have upon contracts. Whatever sums may have been derived [*385

through the usurious contract of 1815, to the contract of 1817, they would not affect the latter with usury, unless introduced in violation or evasion of the laws of Kentucky, for the two contracts are governed by laws that have no connection. But it makes very little difference *in this case, since, *386] if the contract of 1817 is, either in whole or in part, unconscionable, this court would not lend its aid to execute it, so far as it was unconscionable, and the argument was to show, that it partakes of that character, because, admitting that the law of Rhode Island did not render the contract of 1815 null and void, for the principal sum loaned, yet the sum exhibited in that contract, as principal, and so transmitted to the latter contract, contained sundry items, which it is contended, were passed upon Prentiss at a great loss, and under circumstances calculated to serve as a disguise to usury.

And first, as to the shares in the Lexington Manufacturing Company; these were fifteen in number, and appear to have been taken by Prentiss on account of the $83,000, at about $2000 a share. The whole of which, there is reason to think, was sunk in his hands, in the general wreck of the adventure. It cannot be denied, that this is a suspicious item; it does not, in general, comport with a negotiation for a loan of money, that anything should enter into the views of the parties but money, or those substitutes which, from their approximation to money, circulate with corresponding, if not equal, facility. Still, however, like every other case, it is open to explanation, and the question always is, whether it was or was not a subterfuge to evade the laws against usury. And here it is to be observed, that it is not every sale which, in a negotiation for a loan, will taint the transaction with usury; for it may *comport perfectly with the general views of *387] the borrower to make such a purchase, or to take the article even in preference to money. I would illustrate this by the case of a merchant who proposes to borrow a capital to adventure in trade, and who, instead of money, receives an assortment, at a fair price, adapted to that trade. There would be no ground for attributing to such a transaction a design to evade the statute. But in what does the present case vary from that? Prentiss had embarked in a manufactory, of the prospects of which he entertained the highest hopes. He either believed, or endeavored to persuade others, that it would yield fifty per cent. The De Wolfs had embarked, on his representations, $30,000 in the enterprise. No experiments had been yet made, from which any doubts could be excited, nor is there any proof that the stock was falling. Under these circumstances, he proposes to take back the shares, if he could procure money to complete the establishment. The connection between the actual loan, and taking the shares as part of the loan, was easy and natural, and the interest of twelve per cent., with other incidental advantages held out for the loan, may well be estimated as the actual inducement, without supposing that De Wolf was conscious of passing this item upon Prentiss at an inflated price. Prentiss had himself put a value upon these shares, but a short time before, in the sale to De Wolf, at nearly the same price, and De Wolf was either his dupe, or the shares were resold at their value. Prentiss's continuing *confidence in their *388] value is postively deduced from the efforts he made to complete, at every hazard and sacrifice, the establishment to which those shares appertained. He still thought it a profitable investment, and so had De Wolf

thought it, or he would not have made so large an investment, without an atom of security but what was to be found in his anticipations from the establishment itself. It is conclusive, that this was no heterogeneous disconnected article, forced into the negotiation, but intimately connected with, if not the primary object of, the loan; that the price, however inflated, was that which both parties had, by previous unequivocal acts, set upon it; and if it could be said to have a market value, there is no evidence, that is was above its market value; and finally, that it was an actual transfer of interest, with a view to acquire the article, and not merely to throw it upon the market in order to raise money. It was a real transaction, and not a subterfuge.

On the subject of the treasury-notes and bills drawn on Philadelphia, we can perceive nothing usurious, or even unconscionable, in this part of the transaction. As to treasury-notes, they were thrown into circulation as money, and it is an historical fact, that they were worth all they purported to be worth, notwithstanding the causal depreciation which the embarrassments of the country, and the scarcity of gold and silver, may have produced; and as to the bills on Philadelphia, we are induced to believe, that payment in that form was a benefit conferred on the borrower. *From the well-known course of trade between Kentucky and Philadelphia, [*389 it would scarcely have been possible, at that time, or perhaps, at any time, to have suited them better in making a payment of money intended to be transported to, and used in, Kentucky. With regard to the bills, it is in evidence, that there was no loss incurred; and on the treasury-notes, not as much as the transportation of gold and silver would have cost, calculating all the incidents to actual transportation. But what if these payments had been made in Rhode Island bank-bills? Would there have been a pretext of lurking usury in such a payment? Yet who can doubt, that the payment would have been less convenient than that actually made? In all probability, with reference to gold and silver, and the exchange or depreciation in Kentucky, the paper of Rhode Island would have been equally, if not more disadvantageous. It is not on such vague and equivocal grounds, that courts infer the presence of usury. But there is one consideration with reference to this part of the cause, which is conclusive. There is no evidence in the record that these payments were in any way forced upon Prentiss. On the contrary, for anything that appears in the evidence, it may have been, in both instances, the payment of his own choice. In a letter, not long before the loan, he actually quotes bills on Philadelphia from four to six per cent. advance. Nothing of that chaffering appears in the cause, which distinguishes all the cases in which attempts are made to evade usury laws, *at the moment of extorting extravagant profits on the advance of money. [*390

With regard to the two payments made by way of rent, we have to remark, that there never was any payment of interest for two years on the $83,000, besides what was made in that form; and had the payments been direct and absolute, and confined to the sum of $4890 each, there could no question have been raised respecting those payments. They would have amounted only to the legal compensation for the use of the money. With regard to the second year, it is obvious, that as yet nothing has been actually paid; but as it may be said to be secured or acknowledged by another bill,

we will consider both sums as paid. And then, the only exceptionable parts of the payment will be, the sum of $498 added to that actually paid for the first year, and $174.30 added to the bill drawn for the rent of the second year. As to the cash, it is a simple allowance of interest upon a bill drawn for the $4980, upon its being returned and taken up by another, and cannot be excepted to. And as to the first, we perceive in the transaction about the second payment, a sufficient explanation of the origin of the addition made in that instance. As Prentiss acquiesced in having a bill drawn for the second year, payable in Philadelphia, we may reasonably conclude, that the agreement was to pay the rent or interest, whichever it may be called, by drawing such a bill. If, then, such a bill was drawn, and
*391] returned for non-payment, it may *afford an easy solution of the question upon what principle that addition was made.

But why, for so inconsiderable a sum, should we perplex ourselves with difficulties in so large a transaction? It could, at most, in common with all the items we have been examining, have furnished only a ground for a deduction, certainly not for dismissing the bill. Nor should we have proceeded to examine these items in detail, were it not that the court below will have to make a decree upon which it will be necessary to allow or disallow these items. Nor, when it is considered, under what circumstances this second contract was entered into, would this court, upon slight grounds, be induced to open it. The parties had previously entered into a contract, avowedly usurious with relation to the interest reserved. The defendant intimates his intention to avail himself of the defence of usury, and the parties sit down together for the sole and express purpose of purging it of all usurious taint, and to arrange a new contract respecting the same loan which should be legally obligatory. Is it then, probable, that any deduction would have been withheld, which, by being retained, could affect the new contract with usury, or with any of the incidents of usury? Would De Wolf have trusted himself again in the hands of Prentiss, by mixing up anything with this contract, on which a legal exception could be sustained? We think not.

But one of the counsel for the appellees has placed the objection to the
*392] complainant's right to *relief, on a more general ground, than the receipt of usury, or the avoidance of the contract under statute. He insists, that it is enough for this court to refuse its aid, that the contract of 1815 was prohibited by law, although not avoided by law. That a court of equity will not lend its aid to an illegal or unconscionable bargain is true. But the argument carries this principle rather too far as applied to this case. The law of Rhode Island certainly forbids the contract of loan for a greater interest than six per cent., and so far no court would lend its aid to recover such interest. But the law goes no further; it does not forbid the contract of loan, nor preclude the recovery of the principal, under any circumstances. The sanctions of that law are the loss of the interest, and a penalty to the amount of the whole interest, and one-third of the principal, if sued for within a year. On what principle could this court add another to the penalties declared by the law itself?

But the case does not rest here. The subsequent legal contract of 1817, rescued the case from the frowns of the law. Courts of justice will not shut the door in the face of the penitent; and hence it has been decided, in

a case very analogous to the present, that although a contract be in its inception usurious, a subsequent agreement to free it from the illegal incident shall make it good. (1 Camp. 165, note ; 2 Taunt. 184.) According to the views, then, which we have *exhibited of the case, the principal sum of the loan of 1815 was subsisting debt at the date of the contract of [*393 1817, and unaffected by any of the deductions contended for in the several items which we have considered. There was, then, a good consideration for the contract of 1817, and it is legally valid to the amount which it purports on its face.

But if it were otherwise, there are two views of this subject, upon which the court below ought to have sustained the bill. It is very clear, that the Kentucky contract must be considered as a new and substantive contract. It is governed by a distinct code of laws from the Rhode Island contract, and cannot be affected by the taint of usury which might have been transmitted to it, under some circumstances, had it taken place in Rhode Island. It was, then, equivalent to a payment and re-loan ; and no one can doubt, that money paid on an usurious contract, is not recoverable back, beyond the amount of the usury paid.

Again, it is perfectly established, that the plea of usury, at least so far as to landed security, is personal and peculiar ; and however a third person, having an interest in the land, may be affected incidentally by a usurious contract, he cannot take advantage of the usury. Some exceptions may exist to this rule under bankrupt systems, but they are statutory and peculiar. Here, then, the case presents a third person, the assignee of an equity ot redemption, setting up a defence, which, in one aspect, Prentiss himself *cannot set up ; and which, in another aspect, he has not set up ; but, on the contrary, under the state of the pleadings, must be supposed [*394 to have refused to set up, or have abandoned. These views are independent of the effect of notice, or of the peculiar circumstances of the notice in this case.

It is true, the Johnsons deny the notice prior to the deed of trust. But previous notice is immaterial, since the notice with which the law affects them, is that which the deed to Barry, under which they claim, communicates to him as assignee. In the actual case, the notice is peculiarly strong and pointed, since the only description of the lands in question, in the deed to Barry, is contained in a reference for description to the mortgage to De Wolf, and the purpose is explicitly declared to give priority to that mortgage. Technically and morally, therefore, they required no more than what should remain, after satisfying De Wolf. But had they purchased from Prentiss, in the most absolute and general manner, and altogether without notice, actual or constructive, they still could have acquired no more than the equity of redemption, and that would not have transferred to them the right of availing themselves of the plea of usury. We have examined the cases quoted to this point, and are satisfied with their applicetion and correctness. It would, indeed, be astonishing, were it otherwise, for the contrary rule would hold out no relief to the borrower ; it would be only transferring his money from the pocket of the *lender to the pocket of the holder of the equity of redemption. [*395

Upon the whole, we are of opinion, that the decree must be reversed,

and the cause sent back to have a decree of foreclosure entered, and carried into effect, according to the exigencies of the case.

Decree reversed.

Brent and others *v.* Davis.

Lottery.

The scheme of a lottery contained a stationary prize for the first drawn number, on each of twelve days, during which the drawing was to continue, and the first drawn number on the tenth day was to be entitled to $30,000, payable in part by three hundred tickets, from Nos. 501 to 800, inclusive; No. 623, one of the 300 tickets to be given in part payment of the said prize, was drawn first on that day, and decided to be entitled to the prize of $30,000; after the drawing for the day was concluded, the managers reversed this decision, and awarded the prize to No. 4760, which was drawn next to No. 623, and had drawn a prize of $25, which they decreed to No. 623.

In drawing the same lottery, it was discovered on the last day, that the wheel of blanks and prizes contained one blank less than ought to have been put into it; and to remedy this mistake, an additional blank was thrown in.

In an action brought by the managers against a person who had purchased the whole lottery, for the purchase-money, it was held, that these irregularities did not vitiate the drawing of the lottery, the conduct of the managers having been *bonâ fide*, and the affirmance of their acts not furnishing any inducement to the repetition of the same mistake, or any motive for misconduct of any description.

Quære? Whether the ticket No. 623, or No. 4760, was entitled to the prize of $30,000?

*396] *Error to the Circuit Court for the District of Columbia.

March 14th, 1825. This cause was argued by *Key*, for the plaintiffs; and by *Swann* and *Jones*, for the defendant.

March 17th. Marshall, Ch. J., delivered the opinion of the court.—The defendant was the purchaser of the first class of a lottery to be drawn in the city of Washington, conformable to a scheme agreed on between the plaintiffs, who had been appointed managers, and himself; and the declaration is on the penalty of the bond given for the sum of $10,000, conditioned for the performance of articles entered into between them, one of which was, that he should pay the said sum of $10,000 to the plaintiffs, within sixty days after the lottery should be completed. The defendant prayed *oyer* of the bond, and of the condition; after which the following entry is made: "*Non damnificatus* pleaded, and issue, with leave to give the special matter in evidence on both sides." A jury was impannelled, who found a special verdict, which states at large the by-law of the corporation, authorizing the lottery, the appointment of the managers, their sale of the first class to Davis, the scheme of the lottery, and the agreement entered into by him with them. The verdict then states, that the managers, and the said *397] Davis, proceeded to draw the said *lottery, in the course of which, certain irregularities took place, which are detailed at large; and the whole progress of the lottery to its conclusion is stated.

The scheme contains a stationary prize for the first drawn number, on each of twelve days, during which the drawing was to continue; which were not put into the numerical wheel. The first drawn number on the 10th day was to be entitled to $30,000, payable in part by 300 tickets, from numbers 501 to 800 inclusive. No. 623, one of the 300 tickets to be given in part payment of the said prize, was drawn first on that day, which was immedi-

ately proclaimed by the managers, and the prize awarded to it, by making the usual entry in a book kept for that purpose. After the drawing for that day was concluded, the managers reconsidered their judgment, awarding the prize of $30,000 to No. 623, and reversed it. They then awarded the prize to No. 4760, which was drawn next to 623, and had drawn a prize of $25, which prize they decreed to No. 623; and the original entries made in the book for the registration of prizes, were transposed so as to conform to this last determination. On the last day, it was discovered, that the wheel of blanks and prizes contained one blank less than ought to have been put into it; and to remedy this mistake, the managers, and the said Davis, agreed to throw in an additional blank.

*The verdict appears to have been intended not only for this cause, but for another suit also, which was brought for the benefit of [*398 the proprietors of a ticket which had drawn a prize of $10,000, by the Corporation of Washington against one of the managers, on a bond given for the performance of his duty. It concludes with the following findings: "If, upon the whole matter, the law be for the plaintiffs, so as to entitle the plaintiffs to demand and have of the defendant in this action, the sum of $10,000, in and by the agreement recited in the condition of the bond given by the said Gideon Davis to the said managers aforesaid, sixty days after the drawing of the said lottery is completed, then we find for the plaintiffs the debt in the declaration mentioned, and one cent damages, to be discharged by the payment of $10,000. And if the proprietors of the said prize-tickets, or the said proprietors of the said ticket No. 1037, be entitled to demand and have the amount of the several prizes drawn against their respective tickets, in the course of the drawings as aforesaid, after making the deduction of fifteen per cent. according to the said scheme, and if the proprietors of the said ticket No. 1037, be entitled to demand and receive payment of the said prize of $10,000, with such deduction as aforesaid, against the defendant in this action, then we find for the plaintiffs the further sum of $8500, to the use of the said purchasers and proprietors of the said ticket No. 1037, in equal shares and proportions aforesaid. And if, *upon the whole matter, the law be for the defendant, we find for the [*399 defendant." The judgment of the court was in favor of the defendant; and that judgment is now before this court on a writ of error.

If, through the confusion which is introduced into this record by the extreme irregularity of the proceedings, the court can perceive that the plaintiffs have a real cause of action, which may be barred by this judgment, the justice of the case requires, that it should be reversed, although the great fault in pleading has been committed by the plaintiffs, in failing to assign any breach of the condition of the bond on which the suit was instituted.

The suit is supposed to be brought for the recovery of the $10,000 which the defendant engaged to pay sixty days after the lottery should be drawn. This claim is resisted, on the plea that the lottery, in point of law, is not yet drawn; that the irregularities stated in the verdict have vitiated the whole transaction; that the lottery must be redrawn; and that no right of action can accrue to the plaintiffs until sixty days after such redrawing shall be concluded. The right of the plaintiffs, then, to maintain this action, depends on the legality of the drawing as found in the special verdict.

The defendant insists that two errors have been committed in drawing

the lottery, which vitiate the whole transaction. The first is the proceeding respecting the first drawn ticket on the 10th day; and the last, the circum-
*400] stance in *relation to the deficient ticket in the wheel of blanks and prizes.

If the ticket which was first drawn in fact, ought to be considered as entitled to the prize, as was first decided by the managers, then no irregularity whatever took place in their proceedings with regard to this ticket, and this objection is clearly at an end. If the last decision of the managers was right, still there was no irregularity in the drawing, unless the ticket No. 623 ought to have been restored to the wheel, and have taken its chance for a blank or a prize. We are not satisfied, that the managers ought to have taken this course. The ticket was properly put in the wheel, and was, consequently, liable to be drawn out of it at any time. The scheme did not say, that if any of those tickets which were to be paid in part discharge of the stationary prizes should itself draw the prize, it should be returned to the wheel and redrawn; and great objections would, without doubt, have been made to such a proceeding. It would have diminished the chance of every remaining ticket for the undrawn prizes, and would have constituted a much more valid objection than can be made to what was actually done. Had No. 623 been replaced in the wheel, and been fortunate enough again to draw a large prize, it would have been very difficult to sustain its title to that prize. This first objection to the conduct of the managers is not, we think, supported.

More difficulty is presented by the last. The mistake in the number of
*401] tickets placed in the *wheel is undoubtedly an irregularity; but the effect it ought to have on the lottery is not so obvious. The ticket not put in the wheel was a blank; and, consequently, the omission did not diminish the chances of the adventurers. The last drawn number would find no corresponding ticket in the other wheel; but the chance of each to be the last drawn was precisely the same as the chance of each would have been to draw the blank, which ought to have been in the wheel. Had the lottery been completed, without attempting to correct the error by throwing in another blank, the owner of the last drawn ticket would have been in the same situaiton as if the blank had remained in the wheel; and if he could be considered as having any just cause of complaint, it would seem more reasonable, that the proprietors of the lottery should restore him the price of his ticket, than that the whole proceeding should declared a nullity. The general quiet is more consulted by considering his particular contract as void for want of consideration, than by annulling all the rights acquired in the course of the drawing.

We do not think the case materially varied, by placing the blank in the wheel, in the course of the last day. The tickets previously drawn could not be affected by this act; the rights to prizes which had been previously vested, could not be divested by this act. It could affect nothing which had been done, and was of importance to those tickets only which remained in
*402] the wheel; it did not in the slightest degree vary their *chance. There were the same number of prizes and the same number of blanks, with this only difference—had the blank not been put in the wheel, the last ticket would have drawn nothing; whereas, by putting it in the wheel, it did not necessarily fall to the lot of the last ticket. But the aggregate of

chances remained precisely the same. It appears to have been one of those unimportant incidents, which, having been found to be accidental, ought not to have so essential and so disquieting an effect as unsettling all that had been done would have.

The establishment of the lottery thus drawn can be attended with no pernicious consequence. The transaction was, throughout, perfectly fair; and if the managers have committed an error, it was unintentional and unimportant. The affirmance of their acts can furnish no inducement to the repetition of the same mistakes, nor any motive for misconduct of any description. But let it be settled, that the absence of a blank, at the conclusion of a lottery, shall vitiate the whole transaction, and it is not difficult to perceive, how frequently motives may exist for producing that state of things. However questionable may be the policy of tolerating lotteries, there can be no question respecting the policy of removing, as far as possible, from those who are concerned in them, all temptation to fraud.

The case of *Madison and others* v. *Vaughan* (5 Call 562), decided in the court of appeals of Virginia, is supposed by the defendants to be an authority for declaring that this lottery ought to be redrawn. *In that case, a [*403 number corresponding to the number of one of the tickets was not put into the wheel, and two blanks more than the proper number were put into it. Chancellor WYTHE considered the lottery as well drawn; but his decree was reversed in the court of appeals. Supposing the decree of reversal to be correct, there is some difference between the cases. One ticket not being in the wheel, the proprietor of it did not partake of the chance to which every adventurer had an equal right; and there being two more blanks in the wheel than were allowed by the scheme, the chances of every ticket were diminished. If, when all the numbers for the tickets which had been put in the wheel were drawn, two blanks had remained undrawn, it would be difficult to show that any injury had been done to a ticket-holder by the two additional blanks; but if one or two prizes had remained undrawn, it would be obvious, that some ticket had drawn a blank which ought to have drawn a prize, and this circumstance would have afforded stronger reason for the decree that the whole proceeding must be considered as a nullity.

The case of *Neilson* v. *Mott*, 2 Binn. 301 was a suit brought by the proprietor of a lottery against a purchaser of 500 lottery-tickets, on a note given by him for the purchase-money, which was payable one day after the conclusion of the drawing of the lottery. In the wheel containing the numbers of the tickets, the numbers of thirty-nine tickets were omitted, and in the same wheel, there were duplicates of thirty-nine numbers. *The pro- [*404 prietors had satisfied all the holders of the duplicate numbers, except four or five, and had offered to indemnify all by public advertisement. A day or two before the last day's drawing, the managers opened the wheel, and discovered that there was one number omitted and another put in twice, which they altered. The defendant resisted the payment of his note, because the lottery was not legally drawn, the whole being vitiated by this mistake. Judgment was given for the plaintiff, on the ground, that the drawing was not vitiated by these irregularities. Two of the judges were of opinion, that as the defendant had sustained no injury by them, he could not avail himself of them; and the third (the court consisting of three) thought he had

waived his right, by not returning his ticket, and by receiving the prize he had drawn.

The case of *Schinotti* v. *Bumstead and others*, 6 T. R. 646, was an action brought by the holder of a ticket, claiming a prize alotted in the scheme to that which should be last drawn in the lottery. The number of one ticket had not been put into the wheel; and the demand made by the owner of the ticket which was last actually drawn, was resisted, on the ground that the ticket not yet drawn, for which a correspondent blank remained in the wheel, must be the last. Lord KENYON said, that as the plaintiff's ticket was the last
*405] drawn, he is entitled to the prize; the *only competitor with him was the owner of a ticket which never was drawn, and that person has no claim to it whatever. So far as respects the omission to put the number of one ticket into the wheel, this case bears an exact resemblance to *Madison et al.* v. *Vaughan*, and is, perhaps, stronger than the case under consideration. The omission of a ticket is, at least, as irregular and as important, as the omission of a blank, and yet, in *Schinotti* v. *Bumstead and others*, no suggestion was made against the validity of the drawing

Upon these authorities, and upon the reason and substantial justice of the case, this court is of opinion, that the lottery in the special verdict mentioned, has been legally drawn, and that the defendant became liable to the plaintiffs, sixty days after it was concluded, for the sum of $10,000. The judgment, therefore, in favor of the defendant, must be reversed. But the pleadings are too defective to sustain a judgment on this verdict for the plaintiffs. The verdict, therefore, and the pleadings, up to the declaration, must be set aside, and the cause remanded to the circuit court, that further proceedings may be had therein according to law.

Judgment reversed, and a *venire facias de novo* awarded.[1]

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*406] *CORPORATION OF WASHINGTON, for the use of McCUE and others, *v.* MOSES YOUNG.

Lottery.

Where the manager of a lottery, drawn in pursuance of an ordinance of the corporation of the city of Washington, gave a bond to the corporation, conditioned "truly and impartially to execute the duty and authority vested in him by the ordinance;" *held*, that the person entitled to a prize-ticket had no right to bring a suit for the prize against the manager, upon his bond, in the name of the corporation, without their consent.

ERROR to the Circuit Court for the District of Columbia.

This cause was argued by the same counsel with the preceding.

March 18th, 1825. MARSHALL, Ch. J., delivered the opinion of the court.—The defendant was the manager of a lottery, drawn in pursuance of an ordinance of the corporation of Washington, and gave his bond to the corporation in the penalty of $10,000, conditioned "truly and impartially to execute the duty and authority vested in him by the ordinance." The declaration was on the penalty of the bond; after *oyer* of which, and of the

[1] See 2 Cr. C. C. 632.

condition, the defendant pleaded *non damnificatus*, upon which there was issue, with leave to give the special matter in evidence on both sides. A jury was impannelled, who found the special verdict stated in the preceding case of *Brent et al.* v. *Davis*, *with this additional circumstance, which, having no connection with that case, was not stated in it. The [*407 ticket No. 1037, drew a prize of $10,000. It had been sold in quarter shares to several persons, but had remained in possession of the said Gideon Davis, who gave to each purchaser a certificate specifying the interest he held in the ticket. After the drawing was completed, but before the institution of this suit, Gideon Davis delivered the said ticket, No. 1037, to the managers, towards securing and paying of the moneys stipulated to be paid by him under his contract for the purchase of the lottery. This suit is instituted for the benefit of the purchasers of the ticket No. 1037, without the consent of the corporation. The judgment of the court was in favor of the defendant, and the plaintiffs have sued out a writ of error to bring the cause into this court.

The first inquiry is, into the right of the proprietors of the ticket No. 1037, to sue in the name of the corporation, without its consent. Their counsel insists, that the bond was taken for the benefit of the fortunate adventurers in the lottery, and that each has a right to use it. In support of this proposition, he has cited the case of *McMechen* v. *Mayor and City Council of Baltimore* (3 Har. & Johns. 534), decided in the court of appeals of Maryland, in the year 1806. That was a writ of error to a judgment confessed in the general court, in an action brought by the corporation on a bond given by Thomas Yates and Archibald *Campbell, with their [*408 sureties, conditioned for the performance of their duty as auctioneers. The court determined, that the suit was to be considered as brought by authority of the corporation, although no warrant of attorney was shown; and that the confession was an admission of the right to recover the penalty of the bond; whether in their own right, or for the use of another, was immaterial. The opinion was also expressed, as stated by the reporters in a note, that every person whose money was withheld by the auctioneers, had a right to apply to the city council, to direct a suit to be instituted on the bond; and the corporation could not, consistently with their duty under the ordinance, refuse such application, and might be enjoined by suit in chancery to allow the person to use their name to prosecute his claim. Had this been the direct judgment of the court, it could not have sustained the pretensions of the proprietors of this ticket, to maintain this suit, under the circumstances which attend it. They have undoubtedly "a right to apply to the corporation to direct the suit, and the corporation could not, consistently with their duty, have refused such application," if the purpose of the bond was to secure the fortunate adventurers in the lottery, not to protect the corporation itself. But the propriety of bringing such suit was a subject on which the obligees had themselves a right to judge. If the proprietors of one prize-ticket had an interest in this bond, the proprietors of every other prize-ticket had the same interest; *and it could not be in the power [*409 of the first bold adventurer who should seize and sue upon it, to appropriate it to his own use, and to force the obligees to appear in court as plaintiffs, against their own will. No person who is not the proprietor of an obligation, can have a legal right to put it in suit, unless such right be given

by the legislature; and no person can be authorized to use the name of another, without his assent given in fact, or by legal intendment. The declaration of the judge in the case cited from Harris & Johnson, that a court of chancery might enjoin the obligees to allow the injured person to use their names in that particular case, is evidence of the opinion, that he could not sue at his own will. We think, then, that this case is no authority for the power claimed by the proprietors of ticket No. 1037; and we think, upon general principles, they had no right to institute this suit without the consent of the corporation.

But, we think also, that the corporation itself must be considered as the real plaintiff, and that its right to prosecute the suit cannot be affected by the allegation that it is brought for the benefit of others. It has been determined in this court, that the warrant of attorney need not be spread on the record, to enable counsel to appear for a corporation; and if the dismissal of the suit be not ordered, the consent of the corporation will be
*410] presumed, after verdict.(*a*) If, in its progress, the *court shall perceive that it is brought without authority, the proper course would seem to be, to dismiss it; not to render judgment for the defendant, which might, where no special breach is assigned, bar any other action.

The proprietors of the ticket No. 1037 have shown no right to sue on this bond. Their remedy is certainly directly against Gideon Davis; and in the event of his insolvency, it may be against the managers. But if they have, without authority, put this bond in suit, the proper course is to turn them out of court, not to render a judgment, which may bar any future suit brought by the plaintiffs, whose names have been improperly used. The judgment of the circuit court, therefore, must be reversed; but as the pleadings are so incomplete as not to show what judgment ought to be entered, the proceedings are set aside up to the declaration, and the cause remanded to the circuit court, to be further proceeded in according to law.

Judgment reversed accordingly.

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*411] *JANNEY *v.* COLUMBIAN INSURANCE COMPANY.

Marine insurance.—Seaworthiness.

Under a policy containing the following clause: "It is declared and understood, that if the above-mentioned brig, after a regular survey, should be condemned for being unsound or rotten, the insurers shall not be bound to pay the sum hereby insured, nor any part thereof," a survey by the master and wardens of the port of New Orleans, which was obtained at the instance of the master, who was also a part-owner, and was transmitted by him to the other part-owner, and by the latter laid before the underwriters, as proof of the loss, stated that the wardens, "ordered one streak of plank, fore and aft, to be taken out, about three feet below the bends on the starboard side; and found the timber and bottom plank so much decayed, that we were unanimously of opinion, her repairs would cost more than she would be worth afterwards, and that it would be for the interest of all concerned she should be condemned as unworthy of repair, on that ground: we did, therefore, condemn her as not seaworthy, and as unworthy of repair; and therefore, according to the powers vested by law in the master and wardens of this port, we do hereby order and direct the aforesaid damaged brig to be sold at public auction,

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(*a*) See Osborn *v.* United States Bank, 9 Wheat. 738, 829.

Janney v. Columbian Ins. Co.

for the account of the insurers thereof or whomsoever the same may concern:" It was *held*, that the survey was conclusive evidence, under the clause, to discharge the insurers from their liability for the loss.

Quære? How far the state legislatures may authorize the condemnation of vessels as unseaworthy, by tribunals or boards constituted under state authority, in the absence of any general regulation made by congress, under its power of regulating commerce, or as a branch of the admiralty jurisdiction?

However this may be, the above condemnation not being specially authorized by any law of the state of Louisiana, it would not have been considered as conclusive evidence, within the clause, had not the condemnation been obtained by the master, as the agent of the owners, and afterwards adopted by them, as proof of the facts stated therein.

*Error to the Circuit Court for the District of Columbia. This [*412 was an action brought in the court below by the plaintiff in error, Janney, against the defendants in error, the Columbian Insurance Company, on a policy of insurance on the brig Hunter, Grinnolds, lost or not lost, from Alexandria to Norfolk and New Orleans; in which policy there was the following clause: "It is declared and understood, that if the above-mentioned brig, after a regular survey, should be condemned for being unsound or rotten, the insurers shall not be bound to pay the sum hereby insured, nor any part thereof." On the first trial of the cause, the jury, not agreeing on a verdict, was discharged; and, on the second trial, a verdict was found for the defendants, under an instruction from the court to the following effect, as stated in the bill of exceptions:

And the plaintiff offered to prove, by parol evidence, that at the time that the said brig Hunter sailed from the port of Alexandria, upon her voyage aforesaid, and at the time she was surveyed and condemned at New Orleans as herein after mentioned, she was sound, and that the repairs of vessels, and materials of ship-building, at that place, were very high; and that the prices there would have amounted to two or three times as much as the prices would have amounted to, in the port of Alexandria; and that the repairs of the said vessel, arising from the injuries which she *had [*413 sustained in her voyage to New Orleans, would not have amounted to less, in that place, than $2000, independent of the detention of the vessel, and the other necessary expenses of the voyage. But the defendants produced, and read in evidence to the jury, a regular survey, called upon the state and condition of the vessel, on her arrival at New Orleans, by the said Capt. Grinnolds, master and part-owner; and by him transmitted to the plaintiff, to be laid before the insurance office, as evidence of loss; and actually laid before such office by the plaintiff accordingly; and at the former trial, read on the part of the plaintiff, in evidence to the jury, in the words following:

"Port-Wardens' Office, New Orleans, 13th January 1819.

"We, the subscribers, the wardens of this port, having been thereto required by Capt. Grinnolds, did repair on board the brig Hunter, commanded by him, and lately arrived from Norfolk, and, assisted by A. Seguin, carpenter, surveyed her condition. Found twenty-five feet of quarter-rail, and seventy-five feet of waist boards, and the boat's davit, carried away; the oakum of the break of the quarter-deck started, and also the strings and drifts; the cambouse-stove, and its house, carried away; the vessel was reported to have leaked much at sea. All which, therefore,

according to the powers vested by law in the *master and wardens of this port, we do hereby certify.

(Signed) James Rinker,
E. Marchand,
J. M. Cartande.

"A true copy of the records in this office,
George Pollock, Warden and Secretary."

"Port-Wardens' Office, New Orleans, 24th February 1819.

"We, the subscribers, wardens of this port, having been thereunto required by Captain Grinnolds to inspect the condition of the brig Hunter, commanded by said Captain Grinnolds, from Norfolk, did repair to the ship-yards, and assisted by Andrew Seguin and Robert Fell, ship-carpenters, and for the greater satisfaction of said master, by Captain Wayne of the ship Ariadne, and Captain Williams of the brig Maryland, surveyed her condition. We ordered one streak of the plank, fore and aft, to be taken out, about three feet below the bends, on the starboard side, and found the timbers and bottom plank so much decayed, that we were unanimously of opinion, her repairs would cost more than she would be worth afterwards; and that it would be for the interest of all concerned, she should be condemned as unworthy of repair, on that ground. We did, therefore, condemn her as not seaworthy, and as unworthy of repair; and therefore, according to the powers vested by law in the master and wardens of this port, we do hereby
*415] order and direct the aforesaid damaged brig to be sold at *public auction, for account of the insurers thereof, or whomsoever the same may concern.

(Signed) James Rinker,
E. Marchand,
J. M. Cartande."

"Port-Wardens' Office, New Orleans, 22d March 1819.

"We, the subscribers, wardens of this port, do hereby certify, to whom it may concern, that the goods mentioned in the annexed account of sales, were sold at public auction, by our order, in our presence, by Dutillet & Sagony, commissioned auctioneers, after having been advertised in due form of law; and that the said account of sales is, in all respects, just and true. In testimony whereof, we have countersigned the said account, and now grant this certificate as the law directs.

(Signed) Em. Marchand,
J. M. Cartande.

"A true copy of the records in this office,
George Pollock, Warden and Secretary."

Whereupon, the defendants prayed the opinion of the court, and their instruction to the jury, that the said survey is conclusive evidence that the said vessel was condemned for being unsound or rotten; and that it is not competent for the plaintiff to produce evidence inconsistent with said survey, to prove that the said vessel was, in fact, sound, at the time of such
*416] survey; and that, upon such evidence, the plaintiff is not entitled *to recover under the policy given in evidence in this case; and the

court so accordingly instructed the jury, and refused to suffer the said evidence to be given to the jury.

A verdict and judgment thereon having been rendered for the defendants, the cause was brought by writ of error to this court; and was argued (February 25th) by *Swann* for the plaintiff, and by *Jones*, for the defendants.

March 15th, 1825. JOHNSON, Justice, delivered the opinion of the court. —This case varies somewhat in form, but nothing in principle, from the case of *Dorr* v. *Pacific Insurance Co.*, 7 Wheat. 582. The material point of distinction is this; in that case, the discharge of the underwriters was made to depend on a regular survey alone; the stipulation was, "that if the vessel, upon a regular survey, should be thereby declared unseaworthy, by reason of her being unsound or rotten," the policy should be discharged. And hence, although a condemnation in the vice-admiralty court of the Bahamas was produced in evidence in that cause, the court makes no other use of it, than as the means of authenticating the survey upon which the decree was made.

The terms of the present stipulation are these: "If the above-mentioned brig, after a regular survey should be condemned for being unsound or rotten," the insurers are to be discharged. From which, it is obvious, that both a regular survey and a condemnation are in contemplation *of the parties. And the question is, whether the bill of exceptions makes [*417 out the *casus fœderis*. This gives rise to the questions: Was the survey regular? was the condemnation conformable to the contract? and does the one or the other bring the case within the terms of the stipulation?

With regard to the survey, the case is a very clear one. The laws of Louisiana contain ample and judicious provisions on this subject. The master and wardens of the port of Orleans are vested with various powers, and required to keep an office, and a book of record open to all the world; they possess, in fact, some of the attributes of a municipal court. With regard to damaged vessels, and vessels deemed unfit to proceed to sea, they, or any two of them, with one or more skilful carpenters, are constituted surveyors; and the laws enjoin, "that they shall, upon every such survey, certify under their hands, how the vessels so surveyed appeared to them, and shall cause entries to be made in a book to be kept for that purpose in their office." A survey, therefore, made by them, pursuant to this law, and at the call of the captain of this vessel, was emphatically a regular survey.

The difficulty in the cause arises upon the next member of the clause under consideration, to wit, that which requires a condemnation. The certificate of the survey purports, that there was, in fact, a condemnation of the vessel; but there is nothing in the laws of Louisiana which vests the power expressly in the master and wardens of the port to condemn a vessel as unfit for sea or *unworthy of repair. As to damaged merchandise, [*418 the power is expressly given; but as to ships, it appears to be exercised as incidental to the surveying power. In other parts of the world, it is very generally exercised as an incident to the admiralty power; and the admiralty jurisdiction under our system, can only be exercised under the laws of the United States. These considerations are only thrown out to

preclude the supposition that the court has not had them in mind whilst considering this subject. We do not mean to intimate, that the power is one which cannot be exercised under municipal regulations. On the contrary, there are many reasons for maintaining that it may be so exercised, until congress may think proper to establish some general rule upon the subject, either as one appertaining to trade and commerce, or within the admiralty jurisdiction. If, therefore, there had been express provision on the subject in the laws of Louisiana, or it had been shown to be recognised as a power known and habitually exercised in that court, as an incident to the surveying power, we should have felt no difficulty on this point. As it is, we must place our opinion on another ground, one, however, which is also noticed in *Dorr's Case.* It is this, that the condemnation, such as it is, was obtained through the instrumentality of the master, who, as such, represented his employers, and who was, in fact, in this instance, also a part-owner. In this condemnation he acquiesced, broke up the voyage, and sold the vessel ; and
*419] the certificates now before *this court were transmitted to the underwriters, and actually, in a former trial between the same parties, made evidence, to prove the fact which they ascertain. It is then too late for the plaintiffs to dispute the validity or verity of the act of condemnation. They have recognised the jurisdiction of the tribunal they appealed to, to obtain the survey, as sufficient also to make the condemnation, and must be held to abide by it as such. All further and other investigation in a more competent tribunal, if there was such, was rendered impossible by their act.

It only remains, then, to determine, whether the facts ascertained by the survey are such as bring the case within the terms of the stipulation. We are of opinion, they are. It would be difficult to find a shade of difference in this respect, between the present case and that of *Dorr.* The terms of this certificate are, "we found the timbers and bottom plank so much decayed, that we are unanimously of opinion, her repairs would cost more than she would be worth afterwards ; and that it would be for the interest of all concerned, she should be condemned as unworthy of repairs, on that ground. We did, therefore, condemn her as not seaworthy, and as unworthy of repairs." Now, it cannot be questioned, that the ground of condemnation here stated does not stand single and unconnected with the estimated cost of repairs. But does this vary the case? We are of opinion, it does not, since the condemnation of a vessel, on account of decay, can
*420] *never, in its nature, stand single and unconnected with the expense of repairs. It is the common place to which the question of condemnation must always have reference. It is hardly possible to conceive a case, where a survey would be called, in which a vessel might not be repaired or renovated, and still leave enough of the hull to maintain her identity. A state of hopeless and absolute decay, therefore, is never in the contemplation of the contract. And whether expressed or not, the consideration, whether the value, when repaired, would exceed the expense, invariably enters into the decision of surveyors, upon a question of seaworthiness. As, then, her being decayed, so as to be unworthy of repairs, is equivalent to, and in fact the technical meaning of unseaworthiness, we are of opinion, that the certificate brings the case within the words of the stipulation. It

follows, that the court were correct in refusing the evidence offered by the plaintiff.

Judgment affirmed.

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*Sixty Pipes of Brandy : Kennedy & Maitland, Claimants. [*421

Forfeiture.

Under the duty act of 1799, c. 126, § 43, it is no cause of forfeiture, that the casks, which are marked and accompanied with the certificates required by the act, contain distilled spirits, which have not been imported into the United States, or a mixture of domestic with foreign spirits ; the object of the act being the security of the revenue, without interfering with those mercantile devices which look only to individual profit, without defrauding the government.

Appeal from the Circuit Court of Massachusetts.

March 14th, 1825. This cause was argued by *Emmet*, for the appellants and claimants ; and by *Webster*, for the respondents.

March 18th. Johnson, Justice, delivered the opinion of the court.— The libel in this case contains two allegations, and the amended or supplemental libel contains a third. The first is, that these sixty pipes of brandy were imported from abroad, and landed in the port of Boston, without a permit. The second, that they were not accompanied with the marks and certificates required by law. And the third, *that they were imported from abroad, and landed in the port of New York, without a permit. [*422 To the first and third of these allegations, the record furnishes no evidence, nor, in fact, is it contended, that the article seized is to be visited by the penalties inflicted for those offences, otherwise than as an incident to the cause of forfeiture contained in the second allegation.

The passage of the law on which the libellants claim the forfeiture, is in these words : " and if any casks, &c., containing distilled spirits, &c., which, by the foregoing provisions, ought to be marked and accompanied with certificates, shall be found in possession of any person, unaccompanied with such marks and certificates, it shall be presumptive evidence, that the same are liable to forfeiture, and it shall be lawful for any officer of the customs, or of inspection, to seize them as forfeited ; and if, upon the trial, in consequence of such seizure, the owner or claimant of the spirits, &c., seized, shall not prove that they were imported into the United States according to law, and the duties thereupon paid or secured, they shall be adjudged to be forfeited."

The fact that these casks were accompanied with certificates, is not questioned, nor that the certificates accompanying them were those which issued from the custom-house upon those identical casks. But it is contended, that the identity of the spirits is destroyed by a large admixture of other spirits; and that, by the true construction of the law, such a change falsifies the certificate, and the casks are no longer, in the sense of *the law, " accompanied by certificates." And further, that such a change [*423 justified the seizure, and wherever the seizure is just, the *onus probandi* is thrown upon the claimant, and he is held to comply strictly with the words of the law, and prove the spirits which they contain to have been " imported according to law, and the duties thereon paid, or secured to be paid."

That such a construction of the law is carrying its penal effects beyond

the literal meaning of its terms, we understand no one to deny. The words are, "if any casks, containing distilled spirits, which ought to be marked and accompanied with certificates," &c. That these words must necessarily be confined to the cask, and cannot extend to its contents, results, we think, from requiring the article to be marked, as well as accompanied with the certificate; a requisition, absurd in terms, if applied to the distilled spirits contained in the casks. And although the term, "the same," used in the member of the sentence which imposes the forfeiture, might, with grammatical correctness, be applied exclusively to the cask, and thereby produce a greater absurdity, yet it may, with as much propriety, be applied to both the cask and spirits, as its antecedent; and this application is sustained by the subsequent words of the same period; which speak expressly and exclusively of the "claimant of the spirits," and leave the cask to be claimed only as an incident to the property in the spirits.

The constitutents of the offence here intended to be visited on the
*424] claimant, obviously are, *1. That the cask should contain distilled spirits. 2. That it should be one which the law requires should be marked and accompanied with a certificate, that is, one that has been used for foreign spirits. 3. That it should be found in the possession of some persons, unaccompanied with the legal mark and certificates. When these three facts concur, the property is presumed subject to forfeiture; and it follows, that unless all the constituents unite in the given case, it must be a case of innocence. But the whole argument of the libellant goes to impose a fourth circumstance as essential to the imputation of innocence, and the absence of which, of consequence, must exist in order to repel the imputation of crime; which is, that the distilled spirits in the cask should be the indentical spirits imported in the cask; and this, not from any necessary construction of the language of the act, but as a deduction from the supposed policy of the act.

We are induced to adopt the opinion, that even if it were consistent with the rules of construction to give a latitude to the meaning of language used in a statute so highly penal, the language of this act is so far from sanctioning the construction here contended for, that it actually repels it; for, it is observable, that when the act goes on to declare what it shall be incumbent on the defendant to establish, in order to escape the penalty of the law, the identity of the spirits found in the cask, with that originally imported, is not required to be proved. It is only required, that
*425] he should prove the spirits seized to have *been legally imported, and the duties paid, and whether in those casks, or any other cask, is altogether immaterial to his defence. Gin and brandy may interchange receptacles, and travel together in perfect security, provided they have been respectively, legally imported, and the original certificates attend the casks to which they were originally attached.

From this, we think it conclusively results, that the government had nothing in view but the security of its own revenue, without interfering with those devices of the mercantile world which look only to individual profit, without defrauding the government; and hence, that the spirit and policy of the 43d section would carry us no further than its express letter.

But there are other views of this subject which raise other questions in adjudicating on this cause. And first, it is very obvious, that if the change

of contents of the cask could invalidate the immunities of the certificate in other cases, it could not, in the case where domestic spirits have been substituted for that imported. If the evidence establishes any adulteration in this case, it proves it to have been made by the addition of American spirits to the imported brandy. But when the act imposes upon the claimant the necessity of proving "that the spirits found in the casks were imported into the United States according to law, and the duties thereon paid or secured," it could not have intended to impose an actual impossibility, by requiring such proof as to spirits, which *ex vi termini*, *were not imported. [*426 Much less could it have intended to leave open a chance of defence, where the substitution was of foreign liquors, upon which it might, by possibility, have been defrauded, and preclude all defence as to domestic spirits, a trade in which, coastwise or in any wise, was perfectly harmless, and could not have produced a fraud upon the revenue.

But although the libellant may have failed on his second count, he is entitled to all the benefit which the law allows him under his first and third. And here, the case rests upon the general provisions of the 50th, 70th, 71st and some other sections of the revenue law, under which the collector was certainly justifiable in making any seizure, where he had reasonable ground to subject that a fraud upon the revenue, or a violation of the revenue laws, was meditated. And upon showing probable cause for such seizure, the *onus probandi* is thrown upon the claimant. Whatever was the fact, the certificates of the numerous individuals who examined this brandy, and testified to its equivocal nature, were sufficient to attract the collector's attention, and justify his instituting an inquiry, to determine whether this brandy, notwithstanding the certificates, had actually paid the duty. The brandy which had paid the duty, might, by possibility, have been drawn off, and other brandy substituted that had evaded the duty. It would be too much, also, to hold him to a correct construction of laws, which have excited doubts and elicited contrary opinions in courts of justice. The claimant, therefore, *upon the general provisions of the collection law, was properly called upon the furnish an explanation of circumstances calculated to excite reasonable suspicion. [*427 After comparing the mass of testimony which the case affords, we are led to the conclusion, that the claimant has successfully repelled the charge of illicit importation. If, as before observed, the brandy was not the identical brandy imported in these casks in which it was seized, still, all the evidence goes to prove that it was in part the same, and in part consisted of neutral spirits, which spirits two of the witnesses call American. Illegal importation, therefore, is out of the case. And the views which we have taken of the subject render it unnecessary to examine the question, whether the evidence establishes the fact of adulteration or not.

Decree of condemnation reversed, with a certificate of probable cause.

*The Steamboat Thomas Jefferson: Johnson and others, Claimants.

Admiralty jurisdiction.

The district court has not jurisdiction of a suit for wages earned on a voyage in a steam-vessel, from Shippingport, in the state of Kentucky, upon the river Missouri, and back again to the port of departure, as a court of admiralty and maritime jurisdiction.

The admiralty has no jurisdiction over contracts for the hire of seamen, except in cases where the service is substantially performed upon the sea, or upon waters within the ebb and flow of the tide.

But the jurisdiction exists, although the commencement or termination of the voyage is at some place beyond the reach of the tide; it is sufficient, if the service be essentially a maritime service ?[1]

Quære ? Whether, under the power to regulate commerce among the several states, congress may not extend the remedy, by the summary process of the admiralty, to the case of voyages on the western waters ?[2]

However this may be, the act of 1790, c. 29, for the government and regulation of seamen in the merchant service, confines the remedies in the district courts to such cases as ordinarily belong to the admiralty jurisdiction.

Appeal from the Circuit Court of Kentucky.

March 18th, 1825. Story, Justice, delivered the opinion of the court.—This is a suit brought in the district court of Kentucky for subtraction of wages. The libel claims wages earned on a voyage from Shippingport, in that state, up the river Missouri, and back again to the port of departure; and the question is, whether this case, as stated in the *libel, is of admiralty and maritime jurisdiction, or otherwise within the jurisdiction of the district court? The court below dismissed the libel for want of jurisdiction, and the libellants have appealed from that decree to this court.

*429]

In the great struggles between the courts of common law and the admiralty, the latter never attempted to assert any jurisdiction, except over maritime contracts. In respect to contracts for the hire of seamen, the admiralty never pretended to claim, nor could it rightfully exercise any jurisdiction, except in cases where the service was substantially performed, or to be performed, upon the sea, or upon waters within the ebb and flow of the tide. This is the prescribed limit, which it was not at liberty to transcend. We say, the service was to be substantially performed on the sea, or on tide-water, because there is no doubt that the jurisdiction exists, although the commencement or termination of the voyage may happen to be at some place beyond the reach of the tide. The material consideration is, whether the service is essentially a maritime service. In the present case, the voyage, not only in its commencement and termination, but in all its intermediate progress, was several hundreds of miles above the ebb and flow of the tide; and in no just sense, can the wages be considered as earned in a maritime employment.

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[1] The Robert Morris, 1 Wall. Jr. C. C. 33; The Salisbury, Olcott 71; The Sarah June, 1 Low. 203. See McCormick *v.* Ives, 1 Abb. U. S. 529.

[2] It is now settled, that the admiralty jurisdiction extends to the lakes and navigable waters of the United States, without regard to the ebb and flow of the tide. The Genesee Chief, 12 How. 443; The Magnolia, 20 Id. 296; The Hine, 4 Wall. 555; The Belfast, 7 Id. 624; The Eagle, 8 Id. 15; Insurance Co. *v.* Dunham, 11 Id. 1; Schoonmaker *v.* Gilmore, 102 U. S. 118.

Some reliance has been placed in argument upon that clause of the judiciary act of 1789, ch. 20, § 9, which includes all seizures made on waters navigable from the sea by vessels of ten *or more tons burden (of which description the waters in this case are) within the admiralty [*430 jurisdiction. But this is a statutable provision, and limited to the cases there stated. To make the argument available, it should be shown, that some act of congress had extended the right to sue in courts having admiralty jurisdiction, to cases of voyages of this nature. We have, for this purpose, examined the act of congress for the government and regulation of seamen in the merchant service (Act of 1790, ch. 29), and though its language is somewhat general, we think that its strict interpretation confines the remedy in the admiralty to such cases as ordinarily belong to its cognisance, as maritime contracts for wages. It merely recognises the existing, and does not intend to confer any new, jurisdiction. Whether, under the power to regulate commerce between the states, congress may not extend the remedy, by the summary process of the admiralty, to the case of voyages on the western waters, it is unnecessary for us to consider. If the public inconvenience, from the want of a process of an analogous nature, shall be extensively felt, the attention of the legislature will doubtless be drawn to the subject. But we have now only to declare, that the present suit is not maintainable as a cause of admiralty and maritime jurisdiction, upon acknowledged principles of law.

The decree of the circuit court, dismissing the libel for want of jurisdiction, is, therefore, affirmed.

Decree accordingly.

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*The Santa Maria : The Spanish Consul, Libellant. [*431

Prize.—Second appeal.

Upon an appeal from a mandate to carry into effect a former decree of the court, nothing is before the court but the proceedings subsequent to the mandate.[1]

But the original proceedings are always before the court, so far as is necessary to determine any new points in controversy between the parties, which are not terminated by the original decree.

After a general decree of restitution, in this court, the captors, or purchasers under them, cannot set up in the court below new claims for equitable deductions, meliorations and charges, even if such claims might have been allowed, had they been asserted before the original decree.

Nor can the claimants, or original owners, in such a case, set up a claim for interest, upon the stipulation, taken in the usual form, for the appraised value of the goods, interest not being mentioned in the stipulation itself.

Nor can interest be decreed against the captors personally, by way of damages for the detention and delay, no such claim having been set up, upon the original hearing in the court below, or upon the original appeal to this court.

The case of Rose *v.* Himely, 5 Cranch 313, reviewed, explained and confirmed.

Upon a mandate to the circuit court, to carry into effect a general decree of restitution by this court, where the property has been delivered upon a stipulation for the appraised value, and the duties paid upon it by the party to whom it is delivered, the amount of the duties is to be deducted from the appraised value.

Appeal from the Circuit Court of Maryland. This cause was formerly

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[1] Roberts *v.* Cooper, 20 How. 467.

before the court, and the decision then pronounced will be found reported,
*432] *in 7 Wheat. 490.

The claim of Mr. Burke, as a *bonâ fide* purchaser, was then rejected, upon the ground of the illegality of the original capture, it having been made in violation of the neutrality of the United States; and a general decree of restitution was awarded in favor of the libellant, suing in his official character as the consul of Spain, for the benefit of the original owners. A mandate issued from this court to the court below, to carry that decree into effect. Pending the original proceedings in the court below, and before the appeal, the property, upon the application of Mr. Burke, was delivered to him, upon a stipulation given, with sureties, in the usual manner, for the payment of the appraised value, according to the future decree of the court. The appraisers estimated the property at $7473.43, being, as they declare, "the long price, including custom-house duties," and for this sum, the stipulation was given. Under the application to the court below, to enforce the mandate of this court, Mr. Burke filed a petition, asserting that he had incurred costs and expenses, and paid certain liens upon the property. The specifications now insisted on, were the following: 1. Insurance on the property from Galveston to Baltimore, $751.25. 2. Duties paid on the same at Baltimore, $1945.14. A petition was also filed on behalf of Mr. Burke and a Mr. Forbes (who now, for the first time, appeared in the cause), as joint-owners of the schooner Harriet, in which the property in question
*433] *was brought from Galveston to Baltimore, praying for the allowance of freight for the voyage, amounting to $1500. The libellant also made an application for interest upon the amount of the stipulation to be decreed in his favor, either from the time of capture, from the date of the stipulation, or from the decree of this court.

The respective claims of all the parties for these allowances were rejected by the circuit court, and from the decree dismissing them, an appeal was taken to this court.

February 10th. The *Attorney-General*, for the appellant, Burke, stated, that the allegation demanding restitution in the original case, was filed by the Spanish consul against the goods, and the appellant claimed the cargo as having been remitted to him in return for an outward cargo shipped to his agent at Matagorda. It is now alleged, that he was part-owner of the capturing vessel, and therefore, as a wrongdoer, not entitled to the equitable deductions he claims. He insists, that he is a *bonâ fide* purchaser, without notice of the illegal capture, and therefore, entitled to be allowed for duties and other charges. In the admiralty, the libellant and claimant are both actors. *Jennings* v. *Carson*, 4 Cranch 23. If, therefore, it had been the wish of the libellant to put in issue the fact of Burke's knowledge of, or connection with, the illegal capture, he should have answered the
*434] averment which is *contained in the claim, that he (Burke) was entirely ignorant of, and unconnected with, that transaction; or he should have filed an amended libel, and charged the guilt of Burke. The libellant did neither; and thus the fact of Burke's guilt or innocence was not in issue in that case. It was not involved in the decision of the court, which turned on the facts of the illegal armament of the Patriota, in the ports of the United States, the capture of the Santa Maria, by that vessel,

and the identity of the goods, as part of the cargo of the Santa Maria. These facts being established, it was immaterial, who the owners of the capturing vessel were, or how the goods came into the possession of Burke. Restitution was decreed to the original owners and it was in the execution of this decree, under the mandate from this court, that the proceeding now in question took place. Upon the present appeal, nothing is before the court but what is subsequent to the mandate. *Himely* v. *Rose*, 5 Cranch 313. The respondents cannot, therefore, enter into the question of the guilt or innocence of Burke, upon the evidence in the original cause. He is now to be considered as an innocent purchaser, and entitled as such to all equitable deductions, meliorations and charges.

Besides the other claims which are now insisted on, there was a minor claim in the court below, for the difference between the valuation and the actual sales, which was withdrawn, upon the authority *of the case of *The Betsey*, and other cases cited in a note to that case. 5 Rob. 295. [*435

To the claims for duties, insurance and freight, it was objected in the circuit court, that the court had no authority to consider them, because the original decree of this court had closed the door against all inquiry into the subject, upon the principle settled in *Himely* v. *Rose*. But this was a misapplication of the principle determined in that case. The question on the first appeal was merely as to the proprietary interest of the cargo. But after the principal question in the cause has been finally decided, and the cause *quoad hoc* perpetually disposed of, any question of charge upon the original fund may still be taken up as a new question, so long as the fund remains within the power of the court. Such is understood to be the practice, both in England and in this country. *The Fortuna*, 4 Rob. 228; *The Vrow Anna Catharina*, 6 Ibid. 269; *The Nereide*, 1 Wheat. 171; *The St. Lawrence*, 2 Gallis. 20. Considering Burke as an innocent purchaser of the goods, who had brought them to the United States, where they were claimed by the original owners, and restored to them, because of the defect of title in those from whom Burke had purchased, this case cannot be distinguished in principle from that of *Rose* v. *Himely*, in which freight, insurance, duties and other expenses were allowed, under the same circumstances. 4 Cranch 281; 5 Ibid. 316. The charges and expenses, in the present *case, having been actually borne by the innocent purchaser, in bringing the goods safely into the country, seem to enter into the value of the articles themselves; and in withdrawing them from the possession of the purchaser, a reimbursement of his actual expenses is required by natural equity, and may be considered as a species of mitigated salvage. The claim for the amount of the duties rests upon higher grounds. Wherever goods are sold by order of court, or consent of parties, the duties attach as upon an ordinary importation; and upon restitution of the proceeds, the amount of the duties is to be deducted. *The Concord*, 9 Cranch 387. The party gets more than the value of the goods, if he gets the amount of the duties; and the purchaser pays the duties twice over, to the government, as duties, and again to the original owner, as part of the long price value of his goods. [*436

As to the claim by the other party for interest upon the appraised value, so far as it is claimed from the time of capture, the question is not before

this court, because it was not made in the court below. Nor can it be allowed from the date of the stipulation, because the stipulation is a mere substitute for the specific goods, which would not have carried interest. The principle of *Rose* v. *Himely* applies to this demand, since it is in the nature of a claim for damages for the illegal detention and delay, which were
*437] prayed in the original libel, but which were not allowed by *the court below, nor by this court, upon the first appeal. Interest might doubtless, have been expressly reserved in the stipulation, if the court below had deemed the party entitled to it. But these questions are definitively closed by the original decree, and cannot arise upon the mandate to carry that decree into effect.

D. Hoffman, contrà, insisted, that the original proceedings in the cause showed that Burke was a participator in the illegal seizure of this property, and, consequently, could not claim any equitable deductions from the full value, on account of charges incurred by him in its preservation. He was a *malâ fide* possessor, who was not entitled to be allowed for his expenses actually laid out upon the property, still less for the fictitious charges of freight, insurance and duties. As to the duties, they have been incurred solely by his electing to import the goods for consumption. Had they been delivered to the original owners, and carried away by them, or had they never been brought in, they would not have been subject to duties. There was a manifest inconsistency in the opposite argument, which would not admit the stipulation to carry interest, whilst it sought to diminish the principal sum specified in the stipulation, by claims which might have been made upon the original hearing. But there is no principle, authority or established practice, which requires, that where the goods have been delivered on bail, the court should, contemporaneously, decree restitution of the
*438] specific *thing, and the performance of the stipulation. The court may decree restitution generally, and in executing the decree, it is to be applied to the stipulation, so as to include not only what is substantially comprehended in the decree, but every equitable demand consistent with it, although not expressly included in its terms. The allowance of interest by the court below, after the original decree in this court, does not so much depend upon the circumstance of its being expressly reserved upon the face of the stipulation, as upon the notorious fact, that the court would be subsequently called on to act definitively upon the stipulation, when it came to execute the final decree of the court. In thus executing it, by allowing interest, the court below would not modify or add to the original decree of this court, since this allowance opens nothing which had been adjudicated by this court, and is to be regarded as nothing more than an incident to the execution of the decree of restitution. That restitution would have been incomplete without it, as, if the property had not been delivered to the capturing claimant upon bail, it might have been delivered in the same manner to the original owner, or sold by order of court, and the proceeds invested in stocks bearing an interest.

As to the case of *Himely* v. *Rose*, it will be found, that the court there assumes, that the question of interest was before it on the original appeal, and
*439] asserts, that if the claim had there been made, it would have been rejected, because *the court did not consider the appellants as infected

by the marine trespass committed by the captors. "The circumstances of the case were such as to restrain the court from inserting in its decree anything which might increase its severity. The loss was heavy, and it fell unavoidably on one of two innocent parties. The court was not inclined to add to its weight, by giving interest in the nature of damages. The allowance of interest, therefore, in the court below, is overruled." 5 Cranch 317. Besides, in that case, the court had all the questions of equitable deductions and allowances before them, on the original appeal, and gave a very special decree and mandate, which, *ex industria*, omitted interest. But here, the question is not between two equally innocent parties. Here, none of the questions of freight, insurance, duties and interest were raised in the original cause. They were all reserved as incidental to the stipulation, which was not then brought before this court.

The doctrine laid down in *Himely* v. *Rose*, that after a decree in this court, and the cause sent by mandate to the court below, and the further proceedings upon the mandate are appealed from, nothing is before this court on the appeal but what is subsequent to the mandate, is unquestionably a sound and salutary rule. But is it anything more than what the general principles of law would establish? Is it anything more than an application of the familiar maxim as to *res *adjudicata?* "Nothing is before this court," says the chief justice, "but what is subsequent [*440 to the mandate." This is unquestionably true, but with this indispensable qualification, that the matter in question prior to the mandate was, or ought necessarily to have been, before the court originally. The rule was applied to the claims of freight and insurance which the original decree of this court had expressly allowed, but which the commissioner appointed by the circuit court, under the mandate, had disallowed. But no case can be found, which requires the court below to pass any decree, in the first instance, upon the stipulation, or to allow interest before the appeal, or which requires the question of interest, or any similar incidental claim, to be brought before this court upon the original appeal. The rule in regard to matters prior or subsequent to the mandate, appears to be understood precisely in this manner by the learned judge who delivered the opinion of the court in *Martin* v. *Hunter*. "A final judgment of this court is conclusive upon the rights which it decides, and no statute has provided any process by which this court can revise its own judgment." 1 Wheat. 304, 354.

The claim for interest is an incident to the execution of the mandate for restitution. Interest is impliedly due, wherever a liquidated sum of money is wrongfully withheld. "If a man has my money by way of loan, he ought to answer interest; but if he detains my money wrongfully, *he [*441 ought, *à fortiori*, to answer interest; and it is still stronger, when one by wrong takes from me my money or goods, which I am trading with, in order to turn them into money." 1 P. Wms. 396.(*a*) Were not this the case, a strong temptation would be presented to debtors to violate their duty. In the language of Lord MANSFIELD, "they would be encouraged to make use of all the unjust dilatoriness of chicane, and the more the plaintiff is injured, the less he will be relieved." This is emphatically applicable to the present case, where the capturing claimant has superadded to the ori-

(*a*) See also 1 Binn. 494; 9 Johns. 71; 11 Mass. 594; 1 N. H. 180.

ginal wrong done to the owners of these goods, all the unjust dilatoriness of chicane. *The Diana*, 3 Wheat. 58; 3 Dall. 333, 336; 2 Burr. 1088. See also 1 H. Bl. 305; 3 Wils. 205; 7 T. R. 124; 2 Bos. & Pul. 219; 1 Johns. Cas. 27; 1 Johns. 343; 4 Mass. 171.

February 26th, 1825. STORY, Justice, delivered the opinion of the court, and after stating the case, proceeded as follows:—Several preliminary questions have been argued, which must be disposed of, before the court can entertain any question upon the merits of these claims; and if disposed of one way, they put an end to the controversy.

In the first place, it is asserted, that Mr. Burke is a *malâ fide* claimant,
*442] entitled to no favor whatever; and by reference to the original proceedings, will be found a party to the wrongful capture and detention of the property. And the first question, therefore, that arises, is, whether, upon this appeal, the court can look into those proceedings, for the purpose of ascertaining the guilt or innocence of the claimant? The principle laid down in the case of *Himely* v. *Rose*, 5 Cranch 313, that upon an appeal from a mandate, nothing is before the court but the proceedings subsequent to the mandate, is undoubtedly correct, in the sense in which that expression was used, with reference to the doctrine of that case. Whatever had been formerly before the court, and was disposed of by its decree, was considered as finally disposed of; and the question of interest raised upon the execution of the mandate in that case, was in that predicament. But upon all proceedings to carry into effect the decree of the court, the original proceedings are always before the court, so far as they are necessary to determine any new points or rights in controversy between the parties, which were not terminated by the original decree. The court may, therefore, inspect the original proceedings, to ascertain the merits or demerits of the parties, so far as they bear on the new claims, and must decide, upon the whole examination, what its duty requires. In the present case, it is impossible to separate the stipulation from the other proceedings. It is unintelligible, without reference to them. The court must inspect them, to guide it in its future acts, and to enable it to carry into effect the decree of the supreme
*443] court. That *decree restores the property, generally, as claimed by the libellant; but what that property is, in what predicament it is, and what are the means by which it is to be restored, must be ascertained, before the court can institute any further proceedings.

Another preliminary question is, whether the subject-matter of these claims is, in this stage of the cause, open for discussion. All the claims of Mr. Burke might certainly have been brought forward and insisted upon in the original proceedings. If his right to the property was not established, still, he might be entitled to equitable deductions for meliorations or charges; and if these claims were favored by the court, the decree of restitution would have been subject to these deductions. They would then have constituted a lien upon the property, and the circuit court must have enforced it. But no such claims were insisted upon in the written allegations, or even *vivâ voce* at the hearing; the omission was voluntary, and the decree of restitution passed in the most absolute and unconditional form. The consequences of now admitting them to be brought before this court by appeal, would be most inconvient and mischievous in practice. It would encourage

the grossest *laches* and delays. The party might lie by, through the whole progress of the original cause, until a final decree, holding the real owner out of his property, and securely enjoying, as in this case, the profits, and then start new claims for future investigation, which would protract the final decision to an indefinite period. Such a *course would have a [*444
tendency justly to bring into discrepute the administration of justice, and inflict upon the innocent all the evils of expensive litigation. We think, therefore, that upon principle, every existing claim, which the party has omitted to make at the hearing upon the merits, and before the final decree, is to be considered as waived by him, and is not to be entertained in any future proceedings ; and when a decree has been made, which is in its own terms absolute, it is to be carried into effect according to those terms, and excludes all inquiry between the litigating parties as to liens or claims, which might have been attached to it by the court, if they had been previously brought to its notice. These remarks apply as well to the claim for freight, as to other items. Mr. Burke, as the importer of the goods, would, if the carrier ship had belonged to a mere stranger, have been directly responsible for the freight, and would have been entitled to bring it forward in the original suit as an equitable charge. It can make no difference, in his favor, that he was, as he now asserts himself in his petition to be, a joint-owner of the vessel with Mr. Forbes. Whether as between himself and his co-proprietor, he would be liable to pay any freight, does not appear, for the petition is naked of any proofs, and he may have occupied only his own portion of the vessel. Nor is there any evidence adduced, that Mr. Forbes was really a joint-owner ; and in his original claim, Mr. Burke expressly asserts the vessel to be his own, in terms which imply a sole proprietary interest. *But without relying on these circumstances, it is [*445
sufficient to say, that it is too late for Mr. Burke in any way to assert the claim for freight, and if payable at all, he must now bear the burden occasioned by his own *laches*.

This view of the subject, makes it wholly unnecessary to enter upon the inquiry, how far Mr. Burke is an innocent possessor of the property in controversy, and, as such, entitled to equitable deductions and charges. The claim, whether a lien, or a mere equity, has been totally displaced by the unconditional decree of restitution.

The same doctrine applies to the claim of interest made by the libellant. The question was involved in the original proceedings, and the libel itself contains an express prayer for damages, as well as for restitution of the property. Damages are often given by way of interest, for the illegal seizure and detention of property ; and, indeed, in cases of tort, if given at all, interest partakes of the very nature of damages. The ground now assumed is, that interest ought to be given, since the date of the stipulation. or, at all events, since the decree of restitution, because the claimant has had the use of the property during this period, and it is but a just compensation to the libellant for the delay and loss he has sustained by the dispossession. It might have been just and proper for the court below to have refused the delivery of the property upon stipulation, unless upon the express condition, that the same should carry interest, if so decreed by the court. And in cases of this nature, it appears *to us highly proper, that such a clause [*446
should be inserted in the stipulation. But the present stipulation

contains no such clause, and therefore, so far as respects the principal and sureties, to decree it upon that, would be to include a liability not justified by its terms. It is true, that interest might be decreed against Mr. Burke, personally, not as the stipulator, but as the claimant in the cause; but then it would be by way of damages for the detention or delay. In this view, it was a matter open for discussion upon the original appeal; and no interest having been then asked for or granted, the claim is finally at rest. What was matter formerly before the court cannot again be drawn into controversy.

We have considered these questions thus far upon principle. But they have been already decided by this court. The case of *Himely* v. *Rose*, 5 Cranch 313, is directly in point. The authority of that case has not been in the slightest degree impugned, and, without overthrowing it, this court could not now entertain the present claims. We are not disposed to doubt the entire correctness of that adjudication.

The question in regard to the duties, admits of a very different consideration. The decree of restitution awards to the libellant the whole property in controversy, and nothing more. Upon the face of the proceedings, it appears, that the stipulation was taken for the appraised value of the property, including the duties paid to the United States by the claimant. The *447] amount of *those duties never constituted any part of the property of the libellant, or those for whom he acts. Neither he nor they have ever incurred the charge, nor made the advance. And if it is now given to the libellant, it is a sum beyond the value of the property, which has been paid upon the importation, without his aid, and without any injury to him or his principal. It is true, that in the hands of the claimant, the property may be assumed to be worth the whole appraised value; but that value includes not only the value of the property *per se*, but the amount of the duties already paid by the claimant. In receiving it, the claimant has received no more of the libellant's property than the sum, deducting the duties already paid. It has been said, that the property was wrongfully brought to the United States by the claimant, and therefore, he is not entitled to favor. This might be a satisfactory answer to any attempt of the claimant to charge the libellant with the duties as an equitable charge. But no such claim has been asserted; and if the court were now to decree to the libellant the whole sum in the stipulation, the decree in effect would require the claimant to pay the duties to the libellant, as well as to the government. The original decree purports no such thing. It is confined to simple restitution of the property; and the proceeds substituted for that, are the net sum, deducting the duties, the market price or appraised value, being compounded of the original value and the duties. These observations are confined to a case, *448] where the error in the *stipulation is apparent upon the face of the proceedings; and it would be dangerous, as well as improper, to entertain the question, where the evidence must be sought from extrinsic sources.

Upon the whole, the decree of the circuit court is affirmed as to all things, except the disallowance of the claim for the deduction of duties, and as to that, it is reversed; and it is ordered, that the libellant have restitution of the net appraised value, deducting the duties; and that as to so much thereof as has not been already paid to him, interest be allowed to him at the rate

of six per cent. per annum, from the time of the allowance of the present appeal, unto the final execution of this decree, and that the stipulation stand security therefor.

DECREE.—This cause came on, &c.: On consideration whereof, it is ordered, adjudged and decreed, that the decree of the circuit court in the premises be and hereby is affirmed, except in disallowing the item stated in the petition of the claimants, paid for duties, and except so far as is otherwise directed by this decree: And this court, proceeding to pass such decree as the circuit court ought to have given, do hereby further order, adjudge and decree, that the said items of duties, amounting to the sum of $1945.14, be deducted from the appraised value of the property, as ascertained in the stipulation; and that the libellant have restitution of the residue of the appraised value; and that upon so much of the *said residue as has not already been paid to the libellant, interest at the rate of six per centum per annum be allowed to the libellant, from the time of the present appeal, until this present decree shall be executed upon mandate by the circuit court, together with all the costs of suit on the present as on the original appeal; and that the said stipulation do stand as security therefor; and that the circuit court do award execution upon the said stipulation, for the amount of principal and interest so ordered, adjudged and decreed. [*449

DAY and others *v.* CHISM.

Pleading in covenant.

In a declaration upon a covenant of warranty, it is necessary to allege substantially an eviction by title paramount;[1] but no formal terms are prescribed in which the averment is to be made.

Where it was averred in such a declaration, "that the said O. had not a good and sufficient title to the said tract of land, and by reason thereof, the said plaintiffs were ousted and dispossessed of the said premises, by due course of law," it was held sufficient, as a substantial averment of an eviction by title paramount.[2]

Where the plaintiffs declared in covenant, both as heirs and devisees, without showing in particular how they were heirs, and without setting out the will, it was held not to be fatal, on general demurrer.

Such a defect may be amended, under the 32d section of the judiciary act of 1789, c. 20.

ERROR to the Circuit Court of Tennessee.

*February 11th, 1825. This cause was argued by *Bibb*, for the plaintiff in error; and by *Eaton*, for the defendant in error. [*450

February 23d. MARSHALL, Ch. J., delivered the opinion of the court.—This is an action of covenant brought by the heirs and devisees of Nathaniel Day, in the court for the seventh circuit, for the district of Tennessee, on a covenant contained in a deed from the defendant to the said Nathaniel Day, purporting to convey a tract of land therein mentioned.

The declaration, which contains six counts, states the covenant in the fourth in the following words: That the said Obadiah Chism, the defendant,

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[1] Rickert *v.* Snyder, 9 Wend. 415.

[2] See Townsend *v.* Morris, 6 Cow. 122.

"then and there, by the said indenture, covenanted and agreed with the said Nathaniel Day, his heirs and assigns, to warrant and defend the title to the said premises against the claim of all and every other person whatsoever, as his own proper right in fee-simple." In the fifth count, the covenant alleged is, "to warrant and defend the land against all and every person whatever." In some of the counts, the only breach assigned is want of title in the defendant. The fourth and fifth counts charge, that "the said Obadiah, the defendant, hath not kept and performed his covenant so made with the said Nathaniel aforesaid, with the said Nathaniel in his lifetime, nor with the plaintiffs since his death, but hath broken it, in this, that he hath not warranted and defended the title to said premises, described in said covenant,
*451] *against all and every person whatsoever, to said Nathaniel Day, his heirs and assigns; and also in this, that the said Obadiah had no title to said tract of land, but it was vested in the state of Tennessee; and the said plaintiffs aver, that by reason of said want of title in said Obadiah, the said Nathaniel, in his lifetime, and the plaintiffs since his death, were unable to obtain possession thereof, or to derive any benefit therefrom; and also in this, that the said Obadiah had not a good and sufficient title to the said tract of land, and by reason thereof, the said plaintiffs were ousted and dispossessed of the said premises by due course of law; and also in this, that the said Obadiah had no title to the said premises, but the same was in the state of North Carolina, by reason whereof the said Nathaniel, in his lifetime, and the plaintiffs since his death, were and are unable to obtain possession of the said premises.

The defendant demurred to the declaration, and assigned for cause of demurrer, that, 1st. "It does not appear in and by the said declaration, any averment or allegation therein, that the said plaintiffs have been evicted by a title paramount to the title of the defendant; and 2d. The said declaration is, in other respects, defective, uncertain and informal."

The covenant stated in the declaration is, we think, a covenant of warranty, and not a covenant of seisin, or that the vendor has title. In an action on such a covenant, it is undoubtedly necessary to allege, substantially, an eviction by title paramount, but we do not think that any
*452] *formal words are prescribed, in which this allegation is to be made. It is not necessary to say, in terms, that the plaintiff has been evicted by a title paramount to that of the defendants. In this case, we think such an eviction is averred substantially. The plaintiffs aver, "that the said Obadiah had not a good and sufficient title to the said tract of land; and by reason thereof, the said plaintiffs were ousted and dispossessed of the said premises, by due course of law." This averment, we think, contains all the facts which constitute an eviction by title paramount. The person who, from want of title, is dispossessed and ousted, by due course of law, must, we think, be evicted by title paramount. We think, then, that the special cause assigned for the demurrer will not sustain it.

There are other defects in the declaration, which are supposed by the counsel for the defendants in error to be sufficient to support the judgment. The plaintiffs claim both as heirs and devisees, and do not show in particular how they are heirs, nor do they set out the will, It is undoubtedly true, that their title cannot be in both characters, and that the will, if it passes the estate differently from what it would pass at law, defeats their title as

heirs. But a man may devise lands to his heirs, as well as his devisees, though not a strictly artificial mode of declaring, is an error of form and not of substance. Of the same character is, we think, the omission to state how the plaintiffs are heirs, or to set out the will. *Although in the [*453
case of *Denham* v. *Stephenson* (1 Salk. 355, 6 Mod. 241), the court says, "that where H. sues an heir, he must show his pedigree, and *coment heres*, for it lies in his proper knowledge," the court does not say, that the omission to do this would be fatal on a general demurrer, or that it is an error in substance. The plaintiff must show how he is heir on the trial; and the 32d section of the judiciary act of 1789, c. 20, applies, we think, to omissions of this description. The judgment may be given, "according to the right of the cause, and matter in law," although the declaration may not show whether the plaintiff is the son or brother of his ancestor, or may not set out the will at large. An averment that he is the heir or the devisee, avers substantially a valid title, which it is incumbent on him to prove at the trial.

The declaration presents another objection, respecting which the court has felt considerable difficulty. In the same count breaches are assigned which are directly repugnant to each other. The plaintiffs allege, that from the defect of title in the vendor, they have not been able to obtain possession of the premises; and also that they have been dispossessed of those premises by due course of law. These averments are in opposition to each other. But the allegation that possession has never been obtained is immaterial, because not a breach of the covenant, and the majority of the court is disposed to think, may be disregarded on a general demurrer.

*It is the opinion of the court, that the fourth and fifth counts, [*454
however informal, have substance enough in them to be maintained against a general demurrer, and that the judgment must be reversed, and the cause remanded for further proceedings. It will be in the power of the circuit court to allow the parties to amend their pleadings.

Judgment reversed accordingly.

McDowell *v.* Peyton and others.

Land law of Kentucky.

The following entry, "I. T. enters 10,000 acres of land, on part of a treasury-warrant, No. 9739, to be laid off in one or more surveys, lying between Stoner's fork and Hingston's fork, about six or seven miles nearly north-east of Harrod's lick, at two white-ash saplings from one root, with the letter K marked on each of them, standing at the forks of a west branch of Hington's fork, on the east side of the branch, then running a line from said ash saplings, south 45° east, 1600 poles, thence extending from each end of this line north, 45° east, down the branch, until a line nearly parallel to the beginning line shall include the quantity of vacant land, exclusive of prior claims," is not a valid entry, there being no proof that the "two white-ash saplings from one root, with the letter K marked on each of them, standing at the forks of a west branch of Hingston's fork," had acquired sufficient notoriety to constitute a valid call for the beginning of an entry, without further aid than is afforded by the information that the land lies between those forks.

Appeal from the Circuit Court of Kentucky.

February 21st, 1825. This cause was argued by *Wickliffe*, for *the [*455
appellant; and by *Talbot*, for the respondents.

March 3d. MARSHALL, Ch. J., delivered the opinion of the court.—This is an appeal from a decree pronounced in the court of the United States for the seventh circuit and district of Kentucky, dismissing a bill brought by the plaintiff, to obtain a conveyance for a tract of land in possession of the defendant, under an elder grant, to which the plaintiff claims to have the superior equitable title. The defendant rests on his patent ; and as the entry under which the plaintiff claims was made before that patent issued, the cause depends essentially on the validity of the entry. It is in these words :

Dec. 24th, 1782. "John Tabb enters 10,000 acres of land, on part of a treasury-warrant, No. 9739, to be laid off in one or more surveys, lying between Stoner's fork and Hingston's fork, beginning about six or seven miles nearly north-east of Harrod's lick, at two white-ash saplings from one root, with the letter K marked on each of them, standing at the forks of a west branch of Hington's fork, on the east side of the branch, then running a line from said ash saplings, south 45 degrees east, 1600 poles, thence extending from each end of this line north 45 east, down the branch, until a line nearly parallel to the beginning line shall include the quantity of vacant land, exclusive of prior claims."

*456] The counsel for the defendant insists, that this *entry is invalid, because it does not describe the land with that certainty which is required by the land law of Kentucky. They contend, that the description given to find the beginning is false, and calculated to mislead a subsequent locator.

Harrod's lick, Stoner's fork and Hingston's fork, are proved to have been objects well known by those names, at the date of the entry, and serve as a general description of the country in which the land lies ; but it is not shown, that the two white-ash saplings from one root, with the letter K marked on each of them, standing at the forks of a west branch of Hingston's fork, had acquired sufficient notoriety to constitute a valid call for the beginning of an entry, without further aid than is afforded by the information that the land lies between these forks. Its identity is proved, but the decisions on the act of 1779 require notoriety as well as identity. The plaintiffs' counsel maintain, that there are descriptive words in the entry, sufficient to bring a person, using reasonable diligence, and searching for this beginning, near enough to it, to find the two white-ash saplings. Those descriptive words are, "beginning about six or seven miles nearly north-east of Harrod's lick, at two white-ash saplings, &c., standing at the forks of a west branch of Hingston's fork, on the east side of the branch." The information which is to guide a subsequent locator to the white-ash saplings, is the course and distance from Harrod's lick, and the forks of a west branch of Hingston's fork.

*457] A survey was made by the order of the court, *and the plat shows that the saplings mentioned in the entry are three miles and 145 poles from Harrod's lick, and that the course which leads to them is north 53° east. The real distance, then, is about one-half the distance called for in the entry, and the course varies eight degrees. To obviate the objection founded on this variance, the plaintiff alleges the distinction between the descriptive and locative calls of an entry. The purpose of the first is to bring the subsequent locator into the neighborhood of the land he means to

avoid, and that of the second is to find the land already appropriated, so as to enable him to appropriate the adjacent residuum. The precision, therefore, which is necessary in a locative call, has never been required in that which is descriptive.

The correctness of this principle is not controverted. Still, it is necessary that the descriptive calls should designate the place so nearly, as to give information which would enable a subsequent locator of ordinary intelligence to find the land previously entered, by making a reasonable search. It will not be pretended, that in such a case as this, exactness in distance or in course, would be indispensable to the validity of the entry; but distance and course are both intended to lead to the ash saplings, and, if unaided by other description, could alone be regarded by the person who should search for them. He would pursue a north-east course at least six miles from Harrod's lick; and not finding a western branch *of Hingston, would search for such a stream in every direction, from [*458 the place to which he was conducted by his conrse and distance. In an unexplored country, covered with cane and other wood, it would be extremely difficult to find an object, far from being conspicuous, at a distance of two or three miles, and would require more time and labor than ought to be imposed on a person desirous of appropriating the adjacent residuum. The counsel for the plaintiffs would not attempt to support such an entry; but they contend, that the error in both course and distance is corrected by other parts of the entry, and by the situation of objects to which the attention is directed.

The land is required to lie between Stoner and Hingston; and the person who should pursue a north-east direction from Harrod's lick, in search of it, would strike Hingston at the distance of five and one-eighth miles. He would, consequently, know that he had passed the ash saplings, and would return in search of them. His search would be directed to a western branch of Hingston, at the forks of which the two white-ash saplings would be found. It is contended, that this description would lead the inquirer to the mouth of Clear creek, proceeding up which, he would find, at one of its forks, the white-ash saplings, at which Tabb's entry begins. If this statement was strictly accurate, there would certainly be great force in the argument founded on it. With certain information that Clear creek was called for in the entry, and that *its beginning was at a place so well described as to be known when seen, it might not, perhaps, be too much [*459 to require the person desirous of acquiring adjacent land to trace that creek to the forks at which the saplings stand. But the inquirer is not directed to Clear creek. He is directed to a western branch of Hingston, and two branches empty into that stream, the one above, and the other below the point, at which a north-east course from Harrod's lick would strike it, and about equidistant from that point. There is no expression in the entry which would, in the first instance, direct the inquirer to Clear creek, on which the saplings stand, in preference to Brush creek, on which they do not stand. His attention would be rather directed to Brush creek, by a circumstance which is undoubtedly entitled to consideration, and has always received it in Kentucky. It is this: Clear creek had, at the time this entry was made, an appropriate name, which distinguished it from the other western branches of Hingston; and a locator, intending to place his beginning

on that creek, might be reasonably expected to call it by its appropriate name, and not to refer to it by a general description which it possessed in common with many other streams. The inquirer, therefore, would proceed, in the first instance, to Brush creek, because that creek would be designated, when Tabb's entry was made, only as a western branch of Hingston. The plaintiff contends, that this error would soon be corrected, because the entry calls for a north-east course, to run down the branch, and Brush
*460] *creek bends so much at a small distance from its mouth, as to satisfy the inquirer that this could not be the stream intended by the entry. With the plat before us, we can readily make this discovery. But a person unacquainted with the course of Brush creek, would not make it, until he had proceeded up it a considerable distance. He could not know, till he had done so, that the creek would not again change its course, and pursue a south-western direction. If, after making this discovery, he should go to Clear creek, he would find its first course from Hingston a very discouraging one; nor would its course be adapted to the call of the entry, until he came within a very short distance of the fork at which the saplings stand. Add to this, Clear creek appears to fork several times before reaching the saplings; and at each of these forks, an accurate search must be made, before the inquirer would proceed farther up the creek.

The course and distance from Harrod's lick, mentioned in the entry, are calculated to mislead a person desirous of knowing the land it designates; and although these errors might unquestionably be corrected by other parts of the description, which would conduct us with reasonable certainty to the beginning, it may well be doubted, whether the whole of this entry, taking all of its parts together, and combining them, contains such reasonable certainty. Had it been now, for the first time, brought before a court for adjudication, it is liable to such great and serious objections, that it would
*461] most probably be *pronounced invalid. But the highest court of Kentucky has already given this decision; and the court has always conformed to that construction of the legislative acts of a state, which has been given by its own courts. This general principle is entitled to peculiar consideration, when it applies to an act which regulates titles to land.

The case of *Couchman* v. *Thomas*, reported in Hardin 261, depended on the validity of this entry, and in that case, the court decided against its validity. The authority of this decision has been questioned on several grounds. 1st. It was made by only two judges, when the court consisted of four, the others being interested. Had a contrary opinion been avowed by both or either of the other judges, or by any judge since this decision was made, its authority would undoubtedly be much impaired, if not entirely annulled. But no such contrary opinion has been expressed, although the decree in *Couchman* v. *Thomas* was pronounced in the spring term of 1808. Since, then, it was made by a tribunal, which was, at the time, legally constituted, and has remained unquestioned for sixteen years, this court must admit its authority in like manner as if it had received the formal approbation of a majority of the judges.

2d. A second objection is, that it is a single decision; and the courts of Kentucky do not consider themselves as bound by a single decision, if its
*462] principles are believed, on more mature *deliberation, to be unsound. Those courts, we are informed, have often given different decisions

on the same entry, when brought before them in a different case, prepared with more care. That different decisions will be often made on the same entry, can excite no surprise, when it is recollected, that the validity of an entry does not depend entirely on its own terms, but on the application of those terms to external objects, and the general notoriety of those objects, as proved by the testimony in each case. If, in one case, the party claiming under an entry had neglected to prove the notoriety of some material call, by the notoriety of which its certainty was to be established, in consequence of which defect, the entry was declared to be invalid, this could constitute no reason for pronouncing the same decision, in another case, between different parties, who had been careful to bring before the court ample testimony of the fact on which the cause must depend. This difference of decision would constitute no difference of principle.

But the court can perceive no new testimony in the case under consideration, which can vary it, to the advantage of the plaintiff, from the case of *Couchman* v. *Thomas*. It may be very true, that a single decision cannot be permitted to shake settled principles, and that this court ought not to consider one judgment as overturning well-established doctrines, and introducing a new course of opinion. But, certainly, a decision on the very point, which has remained for many years unquestioned, has the *first impression in its favor, and must be proved to overturn established principles, before this court can disregard it. [*463

The land-law of Kentucky requires that the holder of a land-warrant, shall locate it "so specially and precisely, that others may be enabled with certainty to locate other warrants on the adjacent residuum." In construing this provision of the law, courts have always inclined to support entries, where this inclination could be indulged consistently with the provision itself; but they have always supposed a reasonable degree of precision and certainty to be indispensable to the validity of every entry. They have laid down great general principles, in the application of which to particular cases, the shades of difference are as numerous and as nice as in the application of the principle, that the intention of the testator shall govern, to the words of a will.

The description of the land to be acquired, which every entry must contain, may be divided into general and special. The general description must be such as to bring the holder of a warrant to be located into the neighborhood of the land already appropriated, and such as to enable him to find that land with reasonable diligence; the special description, or, in the technical language of the country, the locative calls of the entry, must be such, as to ascertain and identify the land. All the cases recognise these principles, and claim to come within them.

*The counsel for the plaintiff has cited many cases, in which entries have been sustained, although the whole description they contain has not been precisely accurate. The court has examined these cases, and is of opinion, that in all of them, although the description may be in part defective and uncertain, such defect and uncertainty have been cured by other calls, which afford all the information that could be reasonably required. An example of this is furnished by the case of *Taylor* v. *Kincaid*, Hardin 82. The entry was made "on the head of Willis Lee's branch, four miles from Leesburg," and was sustained, although the head of the branch [*464

was, in truth, eleven miles from Leesburg. In this case, however, the mistake in the distance was corrected by the notoriety of the object itself. Willis Lee's branch, at the time, and before the location was made, was so notorious, that the inquirer could not be misled by the mistake in the distance. That a part of the description which is erroneous, may be discarded, if the object called for is itself so notorious that it requires no aid from description, and cannot be mistaken; and that such part will not vitiate the entry, may be admitted, without impugning the judgment in the case of *Couchman* v. *Thomas*.

Tabb's entry contains no descriptive call, which would conduct the inquirer to the white-ash saplings he is in search of, and the saplings themselves were not objects of sufficient notoriety to cure the defects in the general description.

Decree affirmed.

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*465] *Darby's Lessee *v.* Mayer and another.

Conflict of laws.

Quære? How far a will of lands, duly proved and recorded in one state, so as to be evidence in the courts of that state, is thereby rendered evidence in the courts of another state (provided the record on its fact shows that it possesses all the solemnities required by the laws of the state where the land lies), under the 4th art. § 1, of the constitution of the United States.

The local law of Maryland, as to the effect of evidence of the probate of a will of lands, in an action of ejectment, is the same with the common law.

A duly certified copy of a will of lands, and the probate thereof, in the orphans' court of Maryland, is not evidence, in an action of ejectment, of a devise of lands in Tennessee.

Error to the Circuit Court of West Tennessee.

March 1st, 1825. This cause was argued by *Bibb* and *Isaacs*, for the plaintiff in error; and by *White* and *D. Hoffman*, for the defendants in error. But as the judgment turned only on a single point, and does not finally dispose of the cause, it has not been thought necessary to report the argument.

March 17th. Johnson, Justice, delivered the opinion of the court.—This was an action of ejectment, in which the present plaintiff was plaintiff in the court below. His title is derived through a patent to one John Rice,
*466] and successive conveyances down to himself, *which it is immaterial to recapitulate, since no question arises upon this part of the evidence. The defence set up was the statute of limitations, and in order to bring himself within its provisions, the defendant received the patent under which the plaintiff claims, as the patent for his own land, and undertakes to connect himself with it. This gave rise to a variety of exceptions taken by the plaintiff to the evidence offered by the defendant for this purpose, to which the defendant replies, that should he have failed in establishing a connection by a chain of title, he has complied with the statute notwithstanding, by proving his possession within the patent issued to Rice, which, he contends, is all the connection with a patent which the law requires.

One of the grounds of exception made by the plaintiff is, that the evidence of the defendant proves his possession to be upon a tract of land essentially different from that which the patent covers. And not a little

difficulty has existed on this part of the case, to understand the counsel, when discussing the question of identity. All this has arisen from omitting to have the *locus in quo* established by a survey; an omission to which the court takes this opportunity to express its disapprobation. It is true, that the case upon this bill of exceptions can be disposed of, without such a survey, but great facility would have been afforded by a survey, in understanding the discussion, which, without it, was scarcely intelligible. It is very obvious, when we refer to the patent to Rice, under which the plaintiff claims, *and the entry of Ramsay, through which the defendant deduces title, both of which are made parts of the bill of exceptions, [*467 that they do not describe the same land. On the contrary, that to Rice, calling for the entry of Ramsay as its eastern boundary, must necessarily lie without it.

However, we are of opinion, that we are not now at liberty to notice this inconsistency. The bill of exceptions states, that the plaintiff proved the defendant in possession of the land granted to Rice, and the defendant proved himself in possession of the land entered by Ramsay, both concurring in the fact, that the land in the defendant's possession was the land in controversy; from which it certainly results that Rice held a patent for Ramsay's entry. But the defendant having no patent, the other has, of course, the legal estate in him, which may be barred by the defendant's possession, if he brings himself within the provisions of the statute.

In order to connect himself with the patent, the defendant proved a sale of the inchoate interest of John Rice to one Solomon Kitts, and the next link in his title depended upon the will of Solomon Kitts. To prove that Kitts devised the land to the trustees through whom defendant made title, a copy and probate of the will of Kitts was produced in evidence, duly certified from the orphans' court of Baltimore county, Maryland, in which, it seems, the will had been recently proved and recorded. This evidence was excepted to, but the court overruled the exception, and it went to the jury. *The question is, whether the evidence thus offered was legal evi- [*468 dence of a devise of land?

The common-law doctrine on this subject no one contests; the ordinary's probate was no evidence of the execution of the will, in ejectment. Where the will itself was in existence, and could be produced, it was necessary to produce it; when the will was lost, or could not be procured to be produced in evidence, secondary evidence was necessarily resorted to, according to the nature of the case. But whatever proof was made, was required to be made before the court that tried the cause; the proof before the ordinary being *ex parte*, and the heir-at-law having had no opportunity to cross-examine the witnesses; neither were the same solemnities required to admit the will to probate, as were indispensable to give it validity as a devise of real estate. At first, it was a question of controversy between the common-law and ecclesiastical courts, whether a will, containing a devise of lands, should not be precluded from probate, although containing a bequest of personality also. And the question was one of serious import, since the common-law courts required the production of the original, whereas, the consequence of probate was, that the original should be consigned to the archives of the court that proved it. This was at length compromised, and the prac-

tice introduced of delivering out the will, when necessary, upon security to return it.

Upon general principles, there is no question, that lands in Tennessee
*469] must, in all respects, be *subject to the land laws of Tennessee. Their laws affecting devises, and the rules of their courts respecting evidence in ejectment, must be the law of this case, so far as the constitution of the United States does not control the one or the other. With regard to the modification under which the right of devising may be exercised, there is no question that the power of the state is unlimited; and wills of realty, wherever executed, must conform to the laws of Tennessee. The right of determining whether its laws have been complied with in this respect, is a necessary result from the power of passing those laws. But in this respect, it has been supposed, that the right of the states is in some measures controlled by that article of the constitution, which declares "that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state." And hence, that a will of lands duly recorded in one state, so as to be evidence in the courts of that state, is rendered evidence thereby in the court of every other state, provided the record, on the face of it, shows that it possessed the solemnities required by the laws of the state where the land lies.

As this is a question of some delicacy as it relates to devises of lands, the court passes it over at present, being induced to adopt the opinion, that the rule could not be applied to this case, since the laws of Maryland do not make the probate here offered evidence in a land-cause in the courts of that state.

*470] *That the law of Maryland, with regard to the evidence of a devise in ejectment, is the common law of England, is clearly recognised in the case of *Smith's Lessee* v. *Steele*, 1 Harris & McHenry 419. In that case, as in this, a copy of the will and probate were offered in evidence, and was supported by proof of the loss of the original will from the office of probates. Yet the whole argument turns, not on the admission of the copy and probate *per se*, but whether admissible at all, to prove the existence and contents of the original will. And the court declare, in permitting it to be read in evidence to the jury, that they are at liberty to find for or against the original will, not holding them bound from the production of the probate, to find for the plaintiffs. It is observable also in that case, that it is yielded in argument throughout, that the admission of the probate could only be sustained on the idea, that the acts of 1704 and 1715, now no more in force, permitted the ordinary to take probate of wills of land.

But it has been supposed, that the Maryland law of probates of 1798, has, by express enactment, made such probates evidence in their own courts. And had it been shown, that such had been the established construction of that law, and the practice of the state courts under it, this court would not have hesitated to relinquish their own views on the correct construction to be given to the clause. As it is, we must pursue the suggestions of our own
*471] minds with regard to the legal construction of the act. *The clause alluded to is the 4th section, ch. 2, art. 3, of the act in question, and is in these words: "An attested copy, under the seal of office, of any will, testament or codicil, recorded in any office authorized to record the same, shall be admitted in evidence in any court of law or equity, provided, that

the execution of the original will or codicil be subject to be contested until a probate hath been had according to this act."

It is true, that the generality of the terms in the first lines of this clause is such as would, if unrestricted by the context, embrace wills of lands. It is also true, that the previous chapter in the same article prescribes the formalities necessary to give validity to devises of real estate; it is further true, that the previous sections of the second chapter indicate the means, and impose the duty of delivering up wills of all discriptions to the register of the court of probates, for safe-keeping, after the death of the testator, and until they shall be demanded by some person authorized to demand them for the purpose of proving them. But it is equally true, that the act does not authorize the registering of any will, without probate. Nor does it, in any one of its provisions, relate to the probate of any wills, except wills of goods and chattels.

The clause recited makes evidence of such wills only as are recorded in the offices of courts authorized to record them. But when the power of taking probates is expressly limited to the probate of wills of goods and chattels, we see not *with what propriety the meaning of the clause in question can be extended to wills of any other description. The orphans' [*472
court may take probates of wills, though they affect lands, provided they also affect goods and chattels; but the will, nevertheless, is conclusively established only as to the personalty. Unless the words be explicit and imperative to the contrary, the construction must necessarily conform to the existing laws of the state on the subject of wills of real estate. And when the power of taking probates is confined to wills of personalty, we think the construction of the clause recited must be limited by the context.

We are, therefore, of opinion, that there was nothing in the law of Maryland which could, under the constitution, make the document offered to prove this will *per se* evidence in a land cause. Nor does there appear to exist any rule of law in Tennessee, which could make such a document good evidence under the laws of that state. Since, therefore, the charge of the court was general in favor of the defendants, and the effect of each particular piece of evidence upon the minds of the jury cannot be discriminated, this opinion disposes of the whole cause.

The case presents several other, and very important questions, but the court will at present decline remarking on them.

Judgment reversed, and a *venire facias de novo* awarded.

*J. Manro and others *v.* Joseph Almeida and the goods, chattels and credits of the said Almeida.

Process of attachment in the admiralty.

The courts of the United States, proceeding as courts of admiralty and maritime jurisdiction, have jurisdiction in cases of maritime torts, *in personam* as well as *in rem.*[1]

The courts of the United States, proceeding as courts of admiralty and maritime jurisdiction may issue the process of attachment to compel appearance, both in cases of maritime torts and contracts.[2]

Under the process act of 1792, c. 137, § 2, the proceedings in cases of admiralty and maritime jurisdiction, in the courts of the United States, are to be according to the modified admiralty practice in our own country, engrafted upon the British practice; and it is not asufficient reason for rejecting a particular process, which has been constantly used in the admiralty courts of this country, that it has fallen into desuetude in England.

The process by attachment may issue, wherever the defendant has concealed himself or absconded from the country, and the goods to be attached are within the jurisdiction of the admiralty.

It may issue against his goods and chattels, and against his credits and effects in the hands of third persons.

The remedy by attachment, in the admiralty, in maritime cases, applies even where the same goods are liable to the process of foreign attachment, issuing from the courts of commom law.

It applies to the case of a piratical capture, and the civil remedy is not merged in the criminal offence.

In case of default, the property attached may be condemned to answer the demand of the libellant.

It is not necessary, that the property to be attached should be specified in the libel.

It seems, that an attachment cannot issue, without an express order of the judge, but it may be issued simultaneously with the monition; and where the attachment issued in this manner, and in pursuance of the prayer of the libel, this court will presume that it was regularly issued.

*474] *Appeal from the Circuit Court of Maryland. This was a libel filed in the district court by the appellants, resident merchants of Baltimore, against the respondent, Almeida, charging him with having forcibly and piratically taken from on board a certain vessel, off the Capes of the Chesapeake, and within the territorial limits of the United States, the sum of $5000, in specie, belonging to the appellants, and converted the same to his own use, without bringing it into any port or place for adjudication. The libel further stated, that the said Almeida had absconded from the United States, and fled beyond the jurisdiction of the court, and that no means of redress remained for the libellants, unless by process of attachment against the goods, chattels and credits of the said Almeida, which were also about to be removed, by his orders, to foreign parts. The libel also prayed a personal monition, and likewise *viis et modis*, and that the respondent might answer the premises on oath, and be compelled to pay the appellants the said sum of $5000, and damages; and in default therefore, that his goods, chattels and credits, when attached, be condemned to answer the premises, &c.

The marshal returned, that he had attached certain goods and chattels

[1] The Invincible, 2 Gallis. 29; De Lovio *v.* Boit, Id. 398; Banks *v.* Trevitt, 1 Mason 96; Martins *v.* Ballard, Bee 51; The Condalow, Id. 64; The Martha Anne, Olcott 18.

[2] The Invincible, 2 Gallis. 29; Bouysen *v.* Miller, Bee 156; Reed *v.* Hussey, 1 Bl. & H. 525; Atkins *v.* Disintegrating Co., 18 Wall. 272; New England Mutual Ins. Co. *v.* Detroit and Cleveland Steam Nav. Co., Id. 307; Casey *v.* Leary, 2 Ben. 530; Cushing *v.* Laird, 4 Id. 70; Manchester *v.* Hotchkiss, 19 Am. L. Reg. 379.

of the said Almeida; that the said Almeida was not to be found within the district, and that he had left a copy of the monition at the late dwelling-house of Almeida, and had affixed it at the public exchange, *and on the mast of the vessel containing the goods and chattels attached by him. [*475 But although the transcript of the record contained a petition for the sale of the attached goods, and an order of the court denying the prayer of the petition; yet it did not appear by the record, by what authority the attachment issued. But it appeared by the admission of counsel, at the hearing, that the attachment had been issued by the clerk of the district court, as a process of course, without any particular order of the judge. The respondent appeared by a proctor of the court, and demurred to the libel. On the argument of the demurrer, the district court dismissed the libel, and ordered that the goods, chattels and credits attached, should be restored, with costs. This decree being affirmed, *pro formâ*, by the circuit court, the cause was brought by appeal to this court.

February 26th. *Hoffman* and *Mayer*, for the appellants, argued: 1. That on principle, the process of attachment must be considered as peculiarly applicable in admiralty proceedings. As the court acts habitually *in rem*, the proceeding by attachment very naturally became a part of its practice. Hence it was often resorted to, in early times, in England; but the courts of common law, influenced by an illiberal and jealous spirit, have gradually encroached upon the admiralty judicature; and we may readily believe, as we are told, that it has fallen into desuetude *in that country. [*476 2 Bro. Civ. & Adm. Law 333. But this does not prove that its legal existence is extinguished. It is still in use on the European continent, whence the local customs of London and Exeter were also derived; the principle being, that persons are to be reached by justice through the medium of their property, as well as by direct proceedings *in personam;* and though there are some exceptions to the application of this principle, yet it is universally applied to the case of absconding debtors. Van Leeuwen's Rom. Dutch Law 542–3, 546, 548. Contrary to the opinion of Huberus, the proceeding by attachment was known to the civil law, and is expressly provided for by the Digest, in the case of an absconding defendant.

2. It has been said, that if the proceeding by attachment, in the admiralty, be applicable to cases of contract, it cannot properly be applied to a tort such as the present. But there is no authority to sustain such a distinction. In Clerke's Praxis, no distinction is laid down between tort and debt; but the course of proceeding is intimated in that book as applicable to both; and the language in 2 Bro. 434, includes all grievances and claims whether of contract or tort. Hall's Adm. Pr. 60–1, 63, 70, 78, 82, 89. In this country, however, it has been expressly adjudged to extend to tort as well as debt. Bee 60, 64, 141, 186; 2 Gallis. 41; *Del Col* v. *Arnold*, 3 Dall. 333; *The Cassius*, Ibid. 123; 2 Sir L. Jenkins' Works, 714, 754. It may be admitted, that where the tort *is of so indefinite a character, that it can be reduced to no certain estimate, attachment will not lie. But [*477 here, there is an obvious standard for determining the amount of the wrong, and liquidating the damages. The property taken consisted of specie dollars. Where a tort can be thus defined, attachments have been allowed, even from the courts of common law. Sergeant's Law of Attach. 44; 2 Bro.

(Pa.) app'x, 28 ; 5 Serg. & Rawle 450 ; 3 T. R. 338. *Res non per se invicem sed per pecuniam estimantur, et non pecunia per res.* Even before the statute of Marlbridge, for remedy in excessive distresses, where money was taken in such cases, trespass would lie ; because money is the measure of its own value, and of every wrong concerning it. 2 Bac. Abr. tit. Distress ; 1 Burr. 590 ; 2 Str. 281. There is, then, here, as much certainty in the demand, from the nature of the wrong, as is required in debt. The appellants do not sue as for a tort, by that name ; but they state their complaint, and leave it to the court to give it the benefit of such technical forms as are appropriate to the case. Even at common law, they might have divested their claim of all the formal characteristics of tort, and given it the qualities of contract and the certainty of debt. The wrong concerning money exclusively, they might have brought *indebitatus assumpsit* for money had and received, instead of trespass for money taken and carried away. A court of admi-
*478] ralty, with its characteristic liberality, will regard their *claim as having assumed this technical form, if it be necessary for the purposes of justice.

3. Even if the process issued irregularly, in this case, for want of a previous special application to the judge, it is now too late to object to the irregularity, since the appearance of the defendant cures all formal defects in the process. 3 Cranch 496 ; 4 Ibid. 421. But the equitable maxim, that what ought to be done will be considered as done, is applicable in a court of admiralty ; and if the claim be so verified as that the process of attachment ought to have issued, the court will consider it as having duly issued. *Quod fieri non debit factum valet,* is a maxim applicable to the omission of acts merely directory and formal in their nature. It may be, that the course of the English high court of admiralty requires a previous application to the judge, to authorize the issuing an attachment, but such is not the practice in the United States. The irregularity might have been taken advantage of by an exception, in the nature of a plea in abatement, or by a motion to set aside the process, but not upon demurrer, as here attempted.

4. This is a complaint cognisable on the instance side of the court, and not of prize jurisdiction. The libel alleges a capture within the territorial jurisdiction of this country, and therefore, a violation of it neutrality. It is then not a case of ordinary belligerent capture, involving the rights of war,
*479] and requiring the cognisance *of the prize court. A mere maritime tort is out of the sphere of the prize jurisdiction, which is confined to captures *jure belli.* The libel here charges a piratical taking, and not a capture *jure belli.* The act of 1794, c. 50, § 6, authorizes the district courts to take cognisance of all cases of capture within our waters. It brings them within the civil or instance jurisdiction of the admiralty, and does not consider such cases as subjects of prize jurisdiction, which had already been vested in the district courts.

5. The civil remedy in this case is not merged in the piracy charged as the wrong of which the appellants complain. Co. Litt. 111–12; 5 T. R. 175; 4 Bl. Com. 70, 268, 362 ; 14 Johns. 268 ; 2 Bro. Civ. & Adm. Law 110. That doctrine only applies to cases of felony and treason; and takes its rise from the policy of the ancient common law, to compel the despoiled party to prosecute his appeal for robbery, and to prevent the compounding of felonies. Piracy is not felony at common law, nor has it all the common-

law incidents of felony, although in some cases it is expressly declared by statute to be felony. Although the stat. 28 Hen. VIII., c. 15, makes piracy triable according to the course of the common law, yet it has not been interpreted to place it on the footing, and give it the technical qualities, of felony. A pardon of felonies, since this statute, does not, *ex vi termini*, include piracy. Bac. Abr. tit. Piracy, Pardon. The act of congress goes no further, in identifying *piracy with felony, than the statute of Henry does. An attachment against a pirate's goods, for a robbery committed by him, was known to the earlier periods of the law, and there was a writ from chancery to authorize it. F. N. B. 114; 2 Gallis. 408–9. But it is clear, that the doctrine of merger cannot be applied to the case of a pirate absconding from justice, and where the individual sufferer cannot prosecute him criminally. Such is understood to be the recently adjudged law in England, even in respect to a felony at common law. [*480

6. It was unnecessary, that the attachment should specify the goods to be attached. No rule of practice prescribes it, and no principle of convenience requires it. In the analogous case of *distringas* on mesne process, at common law, no such specification is made. The party whose goods are attached may release them, by appearing and giving security; and if he suffers them to be condemned and sold, by default, no more of the proceeds will be decreed to the libellant, than is sufficient to satisfy his demand.

7. Nor is the locality of the territory or jurisdiction within which the property is attached material to the validity of the attachment, it being seized in the exercise of the admiralty judicature, upon a subject within its established jurisdiction, and the property taken, or the right to it, not being the immediate object of the suit, but only incidental to its prosecution. Clerke's Praxis (pt. 2, tit. 28) does, indeed, speak of *goods within the ebb and flow of the tide, or on the sea, being subject to the attachment; but it evidently alludes to these instances, only by way of exemplification, not of restriction. This is also evident from tit. 32, which authorizes the attachment of the defendant's goods and credits in the hands of a third person, without restriction as to locality. [*481

Taney, contrà, argued: 1. That a civil suit could not be maintained for the injury complained of in the libel. The remedy is here sought *in personam*, by a suit in the instance court; the attachment is a mere ancillary process to compel appearance. The property is out of the jurisdiction of the court, and this is a proceeding against other property to compel an appearance. The wrong charged in the libel is a piracy. Can this be treated as a private wrong? There is no case in the records of the English admiralty, to authorize such a proceeding, and both principle and analogy are against it. The absence of all authority in adjudged cases, is a strong argument that it is not law. It is said, that piracy is not treason nor felony. In England, it was treason, and is felony. It has been such since the stat. 25 Edw. III., c. 2. 4 Bl. Com. 71. The goods of pirates, not belonging to others, are forfeited to the crown, as in felony. 2 Bro. Civ. & Adm. Law 462. How, then, can these *goods be made liable to satisfy the damages sustained by a private party? [*482

But it is said, that the injured party may waive the tort, and treat it as a contract. The only case where this may be done is, where, on a conversion

of the plaintiff's goods, and a subsequent sale and receipt of the goods, the plaintiff may ratify what is done, and consider the goods as having been received by his authority. But that is in the case of a private tort, which may be waived: a wrong to the public cannot be waived. The authority of Dr. Brown is express, that in such a case, the remedy is either criminally, as for a public crime, or in the prize court, as for a wrongful taking as prize. 2 Bro. Civ. & Adm. Law 113.

2. If the appellants can maintain a civil suit in such a case, can they do it in this form of proceeding? Will an attachment from the admiralty lie, against the goods of an absent or absconding debtor? The power of proceeding in this manner once existed, and was analogous to the proceeding by foreign attachment according to the custom of London; but has long since been disused in England (2 Bro. Civ. & Adm. Law 434), and, like many other usages in the admiralty, has become obsolete. Hall's Adm. Pr. 62. But the foreign attachment, according to the custom of London, only applied to cases of contract; and Sir L. Jenkins claims the admiralty jurisdiction to be exercised in this manner only *in cases of contract. 3 Hall's L. J. 171; Bro. Civ. & Adm. Law 435. The practice, as it is laid down by Clerke, is plainly confined to contracts. The caption of tit. 28, part 1, is "of the warrant to be impetrated *in rem*, where the debtor absconds," &c. And tit. 32 states, that "sometimes the person, who, by loan, or other maritime contract, is indebted to another," &c., and then authorizes an attachment of the credits or goods of the debtor, in the hands of a third person, upon the principle laid down in the code, that *debitor creditoris est debitor creditori creditoris;* all which evidently implies, that the whole proceeding is confined to matters of debt and contract. Hall's Adm. Pr. 60, 70.

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Although the proceeding by attachment has been occasionally resorted to in this country, yet it cannot be said to have gained a legal footing; and it would be an extremely inconvenient practice, in our divided jurisdiction, where there may be as many different attachments issued at the same time as there are districts in the Union. But to prevent the abuses to which it is liable, it is indispensably necessary, that this process should only issue by an express order of the court. There is no precedent for its issuing of course, and as it cannot issue, without an affidavit, the sufficiency of the matter contained in the affidavit, and the libel, are fit subjects for the determination of the judge, and ought not to be confided to the discretion of a mere ministerial *officer, such as the clerk. So also, the property to be attached should be specifically stated in the warrant. This is required by Clerke, in the passages already cited; tit. 28 authorizes "a warrant to be impetrated to this effect, viz., to attach such goods or such ship of D., the defendant, in whose hands soever they may be; and to cite the said D. specially as the owner, and all others who claim any right or title to them," &c. These errors were not cured by the defendant's appearance, because, if we resort to the analogy of common-law proceedings, his appearance dissolved the attachment; and in the present case, he appeared under protest, for the purpose of contesting the regularity of the proceedings.

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March 8th, 1825. JOHNSON, Justice, delivered the opinion of the court.—The record in this cause sets out the libel, the demurrer, and the decision of

the court upon the demurrer. So far the case is consistent and intelligible; but the record contains also a petition for the sale of certain attached goods, a survey of the goods, and a decision against the petition, but no exhibition of the process or mode by which these goods came into the custody of the marshal. As the decision of the court sustains the demurrer, we are left at a loss, upon the record, to discover how process of attachment came to be issued. To obtain such process is the very prayer of the libel, and the decision of the court is against that prayer.

All the solution that the case presents, is to be *found in the argument of counsel, and their mutual admissions. The clerk, it seems, [*435 issued the attachment as process of course, and the respondent, instead of moving to quash it for irregularity, appeared to the libel, filed his demurrer, and was content to let the regularity of the attachment abide the decision of the court upon the general questions raised upon the libel. The court appears to have treated the subject under the same views, since the decree of the district court, after dismissing the libel, contains an order, "that the goods, chattels and credits attached, be restored with costs;" which decree was affirmed *pro formâ* in the circuit court.

Upon this state of the case, the cause has been argued, as one bringing up to this court a question on the regularity of the process issued by the clerk; and if the process so issued, and the return of the marshal upon it, and a motion to quash the writ, had been set out on the record, there is no question, that the appeal would have brought up the whole subject. But as the record is deficient in these particulars, we do not perceive how we can take notice of that part of the judge's decision which orders the restoration of the goods attached. We must, therefore, confine ourselves to the questions raised on the libel and demurrer.

The immediate question presented is, whether the court below erred in refusing to the libellant the process of attachment on the case made out in his libel. *And this resolves itself into two questions; the first aris- [*486 ing on the right, the second on the remedy of the case. It must be here noticed, that the legality of the seizure made by Almeida is not now in question; that the question may be undergoing adjudication, for aught we know, in a court of competent jurisdiction, and we are not to be understood, as prejudging the influence which the decision of a foreign tribunal may have upon the final adjudication between these parties. The defendant has demurred, under protest, and the only question now is, whether the libellant has made out, *primâ facie*, a good cause for relief in the admiralty.

The ground of complaint is a maritime tort, the violent seizure on the ocean of a sum of money, the property of the libellants. That the libellant would have been entitled to admiralty process against the property, had it been brought within the reach of our process, no one has questioned. The only doubt on this part of the subject is, whether the remedy *in personam*, for which this is a substitute (or, more properly, the form of instituting it), can be pursued in the admiralty. On this point, we consider it now too late to express a doubt. This court has entertained such suits too often, without hesitation, to permit the right now to be questioned. Such was the case of *Maley* v. *Shattuck*, 3 Cranch 458. Such is the principle recognised in *Murray* v. *The Charming Betsey*, 2 Ibid, 483 where the court decrees damages against the libellant. *Such also was the principle [*487

in the case of *The Apollon*, 9 Wheat. 362, in which the libel was directly *in personam*, and damages decreed. We consider that question, therefore, as not to be stirred.

The remedy by attachment also, to compel appearance, has very respectable support in precedent. In the district court of South Carolina, during the administration of a very able admiralty judge, it was restored to habitually, both in cases of tort and contract. Bee 141. The case of *Del Col* v. *Arnold*, 3 Dall. 333, is the only one we know of, in which any view of this question appears to have been presented to this court. And there, undoubtedly, the exception taken was not to the issuing of the attachment in the abstract, but to the issuing of it against a prize made from a friendly power, before the property had been divested by condemnation. The response of the court on this point would seem to imply something more, since their decision is reported to have been, "that whatever might originally have been the irregularity in attaching the Industry and cargo, it is completely obviated, since the captors had a power to sell the prize, and by their own agreement, they have consented that the proceeds of the sale should abide the present suit."

Still there is nothing to be deduced from this case, which can affect the question now under consideration. The point, as stated to have been presented to the court in argument, was certainly one of which a captor could
*488] not avail himself *and the original owner of the prize was not in court. And although the court would appear to have had the present question in view, when disposing of that point, yet it is only noticed *arguendo*, as they pass on to take a ground which precluded the necessity of considering the point made in argument. We, therefore, consider this altogether a new question before this court.

The jurisdiction of the admiralty rests upon the grant in the constitution, and the terms in which that grant is extended to the respective courts of the United States. The forms and modes of proceeding in causes of admiralty and maritime jurisdiction, are prescribed to the courts by the second section of the process act of 1792. In the process act of 1789, the language made use of in prescribing those forms implied a general reference to the practice of the civil law; but in the act of 1792, the terms employed are, "according to the principles, rules and usages, which belong to courts of admiralty, as contradistinguished from courts of common law."

By the laws of Maryland, the right of attachment may be asserted in the courts of common law, and the court below appears to have considered the libel in this instance as an attempt by the libellant to avail himself in the admiralty of the common-law remedy by attachment. The forms of the libel must determine this question, and their we find the prayer expressed in these
*489] woods: "To the end, therefore, that your libellants *may obtain speedy relief in the premises, they pray process of attachment against the said goods, and chattels and credits of the said J. A., which may be found within the jurisdiction of this honorable court, and the process thereof, according to the just course of the admiralty, and that monition *viis et modis* be made accordingly," &c., "to compel an answer," &c.; and "finally, that the said goods and chattels and credits, when duly attached, may, by a decree of this honorable court, be condemned to answer the premises." There can be little doubt, as well from the objects embraced in this

prayer, as from the argument, that the identity of the remedy in the common-law and admiralty courts, appears to have been in the mind of the party libellant. Yet this was no ground for the total refusal of the relief prayed for; the writ should have been granted, and the question as to ulterior proceedings under it retained, to be disposed of afterwards. The prayer of the libel contemplates two purposes; first, to compel appearances; secondly, to condemn for satisfaction. Now, although the latter may be only incidental, and not the primary object of the attachment; yet, if it be legal for the purpose of compelling appearance, the demand for the one purpose was no ground for refusing it for the other.

In giving a construction to the act of 1792, it is unavoidable, that we should consider the admiralty practice there alluded to, as the admiralty practice of our own country, as engrafted upon the *British practice; it is known to have had some peculiarities which have been incorporated into the jurisprudence of the United States. We had then been sixteen years an independent people, and had administered the admiralty jurisdiction as well in admiralty courts of the states, as in those of the general government; and if, in fact, a change had taken place in the practice of the two countries, that of our own certainly must claim precedence. On the subject particularly under consideration, it appears from an English writer, that the practice of issuing attachments had been discontinued in the English courts of admiralty, while in some of our own courts it was still in use, perhaps not so generally as to sanction our sustaining it altogether on authority, were we not of opinion, that it has the highest sanction also, as well in principle as convenience. [*490

It is a mistake, to consider the use of this process in the admiralty as borrowed from, or in imitation of, the foreign attachment under the custom of London. Its origin is to be found in the remotest history, as well of the civil as the common law. In the simplicity of the remote ages of the civil law, the plaintiff himself arrested the defendant, and brought him before the Prætor. But as the sanctuary of his own habitation was not to be violated, if he came not abroad, a summons was attached to his door-posts citing him to appear and answer. Hence, our monition *viis et modis.* If he still proved recusant, after three *times repeating this solemn notice, a decree issued to attach his goods; and thus, this process of the admiralty had a common origin with the common-law mode of instituting a suit by summons and distress infinite. If the defendant obeyed, he could only appear upon giving bail; and thus again, the analogy was kept up with the appearance at common law, which was synonymous with filing special bail. [*491

Thus, this process has the clearest sanction in the practice of the civil law, and during the three years that the admiralty courts of these states were referred to the practice of the civil law for their "forms and modes of proceeding," there could have been no question that this process was legalized. Nor is there anything in the different phraseology adopted in the act of 1792, that could preclude its use. That it is agreeable to the "principles, rules and usages, which belong to courts of admiralty," is established, not only by its being resorted to in one at least of the courts of the United States, but by the explicit declaration of a book of respectable authority, and remote origin, in which it is laid down thus: "If the defendant has

concealed himself, er has absconded from the kingdom, so that he cannot be arrested, if he have any goods, merchandise, ship or vessel, on the sea, or within the ebb or flow of the sea, and within the jurisdiction of the Lord High Admiral, a warrant is to be impetrated to this effect, viz., to attach such goods or ship of D., the defendant, in whose hands soever they may be; *492] and to cite the said *D. specially as the owner, and all others who claim any right or title to them, to be and appear on a certain day to answer unto P., in a civil and maritime cause." (Clerke's Praxis, by Hall, part 2, tit. 28.)

I have cited the passage at length, in order to facilitate a reference which must be made to it on several other points in this opinion. And, 1. It appears from this authority, that where a defendant has concealed himself, or absconded from the kingdom, this process may issue. In this particular, the averments in the libel conform literally to the authority. 2. It is required, that the goods and effects to be attached should be within the jurisdiction of the admiralty. To this the libel conforms also, for the prayer is for process against "the said goods, and chattels, and credits, of the said J. A. which may be found within the jurisdiction of the court, and the process thereof, according to the just course of the admiralty." 3. It is required, that the attachment issue against any goods, merchandise, ship or vessel, on the sea, &c. The only deviation in this particular is, that the process prayed for is against the credits, as well as the goods and chattels, &c., within the jurisdiction of the court. On this part of the prayer, the question is raised, as to what goods and chattels the attachment may issue, where situated, and whether against credits and effects in the hands of third persons, but not tangible or accessi- *493] ble to the marshal. *This question arises from a comparison of the tit. 32, p. 70, Clerke's Praxis, by Hall, with the 28th before cited. The language of the 28th would seem to confine the operation of the attachment to goods and chattels "on the sea, or within the ebb and flow of the sea." But by reference to the 32d, it appears, that it is consistent with the practice of the admiralty also, in cases where there is no property which the officer can attach by manucaption,, to proceed to attach goods or credits in the hands of third persons, by means of the simple service of a notice. To all the questions which may be supposed to arise on this part of the case, we give one general answer, viz., that as goods and credits in the hands of a third person, wherever situated, may be attached by notice, there cannot be a reason assigned why the goods themselves, if accessible, should not be actually attached ; and although it is very clear, that the process of attaching by notice, seems given as the alternative, where the officer cannot have access to the goods themselves, yet all this may be confided to the discretion of the judge who orders the process ; and if the party libellant was entitled to the process at all, the court was not justified in refusing it altogether. 4. The libel prays, that the articles attached may be condemned to answer the demand of the libellant. On this subject it is very clear, that the *494] primary object of the attachment is to obtain an appearance. *But it is equally clear, that upon the third default in personal actions, the goods arrested were estreated, and, after a year, finally abandoned to the plaintiff. But as this proceeding was too dilatory for the movements of the admiralty, the condemnation and sale, after proof of the cause of action,

was substituted for it. There was, therefore, nothing incorrect in uniting the prayer for condemnation with the acknowledged end of forcing an appearance; and if there had been, it was no ground for refusing relief so far as the claim was sustainable in the admiralty.

It may be remarked here, that the case is somewhat embarrassed by the state of the pleadings, inasmuch as, after appearance, it is hardly conceivable, on what ground the attachment could be granted. It would seem, that the defendant, for some cause, had been permitted by the court to appear and plead, without giving bail to the action. There are such causes known to the practice of the civil law, and we are compelled to take the case as we find it.

It has been further argued, that as the libel alleges the trespass complained of to have been piratically done, the civil remedy merges in the crime. But this we think, clearly, cannot be maintained. Whatever may have been the barbarous doctrines of antiquity about converting goods piratically taken into *droits* of the admiralty, the day has long gone by, since it gave way to a more rational rule, and the party dispossessed was sustained in his remedy to reclaim the *property as not divested by piratical capture. It is [*495
hardly necessary to quote authority for this doctrine, but it will be found to have been the rule of justice, as early as the reports of Croke and Ventris. If the party may recover his property, why not recover the value of it from any goods of the offender, within reach of the admiralty? We think the doctrine of merger altogether inapplicable to the case. Even at common law, it was confined to felonies, and piracy was no felony at common law.

On the question, whether the property to be attached should have been specified in the libel or process, we have before remarked, that as neither the process nor return is before us, we can express no opinion respecting its form. The libel contains no specification of the articles to be attached, and if this were fatal, the demurrer might have been sustained. But, pursuing the analogy with the civil law process to compel appearance, we can see no reason for requiring such a specification. There is no reason to conclude, that the decree for attachment issued against the recusant at the civil law, was otherwise than general. And although the other course may be pursued, and might be most convenient and satisfactory, yet we know of no imperative rule upon the subject. The authority on which the libel was filed sanctions the general language in which it is couched.

The last point made in argument was, whether the process of attachment could issue without an *order of the judge. But here, again, we have [*496
to remark, that we can take no notice of the circumstances under which the writ actually did issue. And looking to the libel, it appears to have been its express object to obtain such an order from the court. That the process of attachment at the civil law did not issue of course, is very well known. It was obtained for contumacy, after monition; and analogy, as well as public convenience, would seem to render the judge's order necessary. Yet, we see no objection to pursuing the prayer of the libel, and issuing it simultaneously with the monition; the purpose of justice would seem to require that course.

Upon the whole, we are of opinion, that for a maritime trespass, even though it savors of piracy, the person injured may have his action *in per-*

sonam, and compel appearance by the process of attachment on the goods of the trespasser, according to the forms of the civil law, as engrafted upon the admiralty practice. And we think it indispensable to the purposes of justice, and the due exercise of the admiralty jurisdiction, that the remedy should be applied, even in cases where the same goods may have been attachable under the process of foreign attachment issuing from the common-law courts. For it will necessarily follow, in all such cases, that a question peculiarly of admiralty cognisance, will be brought to be examined before a tribunal not competent to exercise original admiralty jurisdiction; and that, as a primary,
*497] not an incidental question; since the whole proceeding will have *for its object to determine whether a maritime trespass has been committed, and then to apply the remedy.

Judgment reversed, and the cause remanded for further proceedings.

The Gran Para: The Consul-General of Portugal, Libellant.

Admiralty process.

Where the court of admiralty has parted with the possession of the property, upon bail or stipulation, and it is necessary, for the purposes of justice, to retake the property into the custody of the court, the proper process against any person not a party to the stipulation, but who is alleged to have the actual or constructive possession is a monition, and not an execution, in the first instance.

Appeal from the Circuit Court of Maryland. This is the same case which was reported in 7 Wheat. 471, and was an appeal from proceedings had in the court below, under the mandate of this court in the original cause.

February 24th, 1825. The cause was argued by *D. Hoffman*, for the appellant; and by the *Attorney-General* and *Taney*, for the respondent. But as the present determination of the court was confined to the single point of practice, without affecting the other questions involved in the
*498] cause, it has *not been thought necessary to report the arguments of counsel.

March 1st. Story, Justice, delivered the opinion of the court.—This is an appeal from the circuit court for the district of Maryland, from proceedings had in that court under the mandate of this court in the original cause, which is reported in 7 Wheat. 471.

The material facts are these: The original libel was against sundry quantities of gold and silver coin, and bullion, deposited by Daniels in the Marine Bank of Baltimore. A claim was interposed by one Nicholas Stansbury, asserting himself to be "agent and attorney in fact," of Daniels, on behalf of the latter, and claiming restitution of the property, as lawfully captured in war by Daniels. Pending the proceedings in the court below, Stansbury made application for the delivery of the property, upon stipulation, and thereupon, the court ordered, that J. D. Daniels be permitted to draw for, and the president and directors of the Marine Bank be suffered to pay to Daniels, the money in controversy, provided, that Daniels should enter into stipulation in $23,000, with such surety or sureties as might be

approved of by the libellant's proctors, to abide such further order or decree, either interlocutory or final, as might be made by the court in the premises. The libellant's proctors approved of Stansbury, and one Thomas Sheppard, and one Henry Didier, jun., as sureties, *and they, accordingly, gave [*499 a stipulation for the amount for "J. D. Daniels, claimant." But Daniels himself was not a party to the stipulation. By a subsequent order of the court, the money was delivered by the Marine Bank to Stansbury, who signed a receipt for the same, as attorney for Daniels, upon a certificate of the deposit originally given by the cashier of the bank to Daniels, and by him delivered over to Stansbury.

A decree of restitution having passed in the supreme court, after the mandate was brought into the circuit court, the libellant prayed that execution might issue against Daniels, to enforce the performance of the decree, and that a monition, or other proper process, might issue against the sureties to the stipulation. To this course the proctor for the claimant objected, and the court finally ordered admiralty process to issue against the stipulators, but refused to make any further order under the motion of the libellant. The case is now before us by appeal from that decision.

Several points have been urged in the argument, upon which, in the present stage of the cause, it is not thought necessary to express any opinion. Assuming Daniels to be a party to the cause, in virtue of the claim made in his behalf by Stansbury, it still remains to show, that the process of execution is, in the first instance, to be issued against him. He is not a party to the stipulation, and so far as any remedy is to be sought upon that, it lies exclusively against the *sureties, since he, as principal, has not, personally, or through the instrumentality of any agent, become bound [*500 by it. The remedy against him for the property, or its proceeds, must be sought solely upon the ground, that he has the actual or constructive possession of them, in virtue of the delivery to his agent, under the order of the court below. If the property had remained in the custody of the court, there is no pretence to say, that he would be liable for the restitution. It is the delivery to them, or to his authorized agent, which can alone give rise to any liability on his part, whether he be a party to the suit, or only a custodian of the property of its proceeds. In such cases, the usual proceeding in the admiralty is, not to award execution against the party, for that would preclude him from showing, in his defence, that he never had any actual or constructive possession, or that he was discharged from all liability. The proper course is, to issue a monition to Daniels, in the usual manner, upon the return of which he may appear and justify himself, and interpose such allegations on the merits as may bring all the matters fully before the court for judgment. This is the constant practice of the admiralty ; and the subsequent proceedings are to be according to the common usage, upon which it is unnecessary to comment.

It is, therefore, the opinion of this court, that the circuit court was right in refusing to grant an execution against Daniels, under the circumstances, and that its decretal order ought to be *affirmed ; but inasmuch as it [*501 appears, that the principal question between the parties has been, whether any process whatsoever could be awarded against Daniels, it is directed that the affirmation of the order be without prejudice to the award of a monition against Daniels, in the common form of the admiralty.

DECREE.—This cause came on, &c.: On consideration whereof, it is ordered, adjudged and decreed, that the decree of the circuit court, refusing to issue an execution against John D. Daniels, as prayed for by the libellant in his petition, be and the same hereby is affirmed, with costs; without prejudice to the libellant, to apply to the said circuit court for a monition against the said John D. Daniels, in the premises, according to the usage of the admiralty, that being a process to which the libellant is entitled by law.

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*502] *The PALMYRA: DEPAU, Claimant.

Appeal.

No appeal lies from a decree of restitution, with costs and damages, in the circuit court; the report of the commissioners appointed to ascertain the damages not having been acted on by the court when the appeal was taken: such a decree is not a final decree.

APPEAL from the Circuit Court of South Carolina. This was the case of an armed vessel, called the Palmyra, taken under Spanish colors, by the United States schooner Grampus (commanded by Lieutenant Gregory, and cruising, with instructions fron the president, against pirates), and brought into the port of Charleston, South Carolina, for adjudication. A libel was filed by the captors, and a claim interposed by Mr. Depau, as agent of the alleged owners of the Palmyra, Spanish merchants, domiciled at Porto Rico, and of the captain, officers and crew. In the district court, the libel was dismissed, without costs and damages against the captors. The decree of restitution was affirmed in the circuit court, with costs and damages, and the cause was brought by appeal to this court.

February 19th. It was suggested by the *Attorney-General* (with whom was *Hayne*), for the appellants, that after the decree of restitution, and for *503] damages, in the circuit court, there had been a *reference to commissioners to ascertain the amount of damages, and before the report of the commissioners had been acted upon by that court, the appeal was taken. The question was, whether the appeal was not taken too early, the judiciary act of March 3d, 1803, c. 353, having confined the right of appeal to "final decrees." *Ray* v. *Law*, 3 Cranch 179.

Tazewell, contrà, stated, that in the district court there was a decree of restitution and a denial of damages. Both parties appealed from that decree the libellants being dissatisfied with the decree of restitution, and the claimants with the denial of damages. These were, then, cross-appeals, and consequently, there might be an appeal from the decision of the circuit court decreeing restitution, and affirming, in this respect, the decree of the district court, although the decree of the circuit court, reversing that of the district court as to damages, and awarding the latter to the claimants, was as yet undetermined.

February 20th, 1825. MARSHALL, Ch. J., delivered the opinion of the court.—The court has had the question submitted in this cause under consideration, and is of opinion, that the appeal is not well taken. The decree of the circuit court was not *final*, in the sense of the act of congress. The

damages remain undisposed of, and an appeal may still lie *upon that part of the decree awarding damages. The whole cause is not, therefore, finally determined in the circuit court; and we are of opinion, that the cause cannot be divided, so as to bring up successively distinct parts of it.

The case in 3 Cranch 179, is essentially different. In that case, which was an appeal in an equity cause, there was a decree of foreclosure and sale of the mortgaged property. The sale could only be ordered, after an account taken, or the sum due on the mortgage ascertained in some other way; and the usual decree is, that unless the defendant shall pay that sum in a given time, the estate shall be sold. The decree of sale, therefore, is, in such a case, final upon the rights of the parties in controversy, and leaves ministerial duties only to be performed.

Appeal dismissed.(a)

(a) See Young v. Grundy, 6 Cranch 51; Gibbons v. Ogden, 6 Wheat. 448.

APPENDIX.

NOTE I.

Documents relating to the Slave-trade, referred to in the case of The Antelope.

Report of the Committee to whom was referred so much of the President's Message, of the 7th of December last, as relates to the suppression of the Slave-trade.

February 16, 1825. Read, and committed to the committee of the whole House on the state of the Union.

The commitee on the suppression of the slave-trade, to whom was referred so much of the president's message, of the 7th December last, as relates to that subject, have according to order, had the same under consideration, and respectfully report: That pursuant to the almost unanimous request of the house of representatives, expressed by their resolution of 28th February 1823, the president of the United States concluded a convention with Great Britain, on the 13th of March, in the following year, by which the African slave-trade was denounced to be piracy, under the laws of both countries; the United States having so declared it, by their antecedent act of the 15th of May 1820, and it being understood between* the contracting parties, as a preliminary to the ratification of the convention by the United States, that Great [*4
Britain should, by an act of her parliament, concur in a similar declaration. With great promptitude, and in accordance with this agreement, such an act was passed, declaring the African slave-trade to be piracy, and annexing to it the penalty denounced against this crime by the common law of nations. A copy of this act was transmitted, by the British government, to the executive of the United States, and the convention submitted, by the president, to the senate, for their advice and consent. The convention was approved by the senate, with certain qualifications, to all of which, except one, Great Britian, *sub modo*, acceded: her government having instructed its minister in Washington to tender to the acceptance of the United States, a treaty, agreeing, in every particular except one, with the terms approved by the senate. This exception, the message of the president to the house of representatives presumes "not to be of sufficient magnitude to defeat an object so near to the heart of both nations," as the abolition of the African slave-trade, "and so desirable to the friends of humanity throughout the world." But the president further adds, "that as objections to the principle recommended by the house of representatives, or at least, to the consequences inseparable from it, and which are understood to apply to the law, have been raised, which may deserve a reconsideration of the whole subject, he has thought proper to suspend the conclusion of a new convention, until the definitive sentiments of congress can be ascertained." Your committee are, therefore, required to review the grounds of the law of 1820, and the resolution of 1823, to which the rejected, or, as they rather

hope, the suspended convention, referred. The former was the joint act of both branches of congress, approved by the president; the latter, although adopted with extraordinary unanimity, was the single act of the house of representatives.

Upon the principle or intention of the act of congress of 1820, making the slave-trade punishable as piracy, the history of the act may reflect some light. A bill from the senate, entitled "an act to continue in force the act to protect the commerce of the United States, and punish the crime of piracy, and also to make further provision to punish the crime of piracy," came to the house of representatives on the 27th of April 1820, and was, on the same day, referred to a committee of the whole, to which had been referred a bill of similar purport and title, that had originated in the house of representatives. Upon the 8th of May following, the committee on the sup-
*5] pression of the slave-trade reported an amendment of two additional sections to the senate's bill; also, a bill to incorporate the American Society for colonizing the free people of color of the United States, and three joint resolutions, two of which related to the objects of that society; but the first of which, in behalf of both houses of congress, requested the president "to consult and negotiate with all the governments where ministers of the United States are, or shall be, accredited, on the means of effecting an entire and immediate abolition of the African slave-trade." The amendatory sections denounced the guilt and penalty of piracy against any citizen of the United States, of the crew or company of any foreign vessel, and any person, whatever of the crew or company of any American vessel, who should be engaged in this traffic. The amendments, bill and resolutions, along with the explanatory report which accompanied them, were referred to the committee of the whole above mentioned; and on the 11th of the same month, the house proceeded to consider them. After a discussion in the committee, the piracy bill and its amendments having been adopted, were reported, and both were concurred in by the house. The following day, the bill, as amended, being then on its passage, a motion was debated and negatived, to recommit the bill to a select committee, with on instruction to strike out the last section of the amendment. The bill then passed, and was ordered to be returned, as amended, to the senate.

On the same day, a motion prevailed to discharged the committee of the whole from the further consideration of the bill, and the resolutions which accompanied the report; and the particular resolution, already recited, being under consideration, to try the sense of the house on its merits, it was moved to lay it on the table. The yeas and nays having been ordered on this motion, it was rejected by a majority of 78 to 35 members. It having been again proposed to postpone the resolution, till the ensuing or second sessions of the same congress, and this proposal being also determined in the negative, the resolution was engrossed, read the third time, passed, and ordered to be transmitted to the senate on the same day with the piracy bill. The amendments of this bill underwent like scrutiny and debate in the senate, and were finally concurred in, the day after they were received from the house of representatives, without any division apparent on the journal of that house.

The resolution which had been received by the senate, at a different hour of the same day, was read a second time, on the 15th of May, was *further taken up
*6] and considered, as in committee of the whole, reported to the house without amendment, and ordered, after debate, to pass to a third reading. But this being the last day of the session of congress, and a single member objecting "that it was against one of the rules of the senate, to read it the third time, on the same day, without unanimous consent," it remained on the table of that body, on its final adjournment, after an ineffectual effort to suspend one of their rules, against which many of the friends of the resolution felt themselves compelled, by their invariable usage, to vote in union with its enemies.

One of the objections to the resolution in the senate, was founded upon the peculiar relation of that branch of the national legislature to the executive, in the ratification of treaties; which seemed, in the opinion of those who urged this argument, to interdict their concurrence in a request of the president to institute any negotiation whatever.

A contemporary exposition of the object of the amendments of the piracy bill, and

the resolution which the house of representatives adopted, by so large a majority, will be found in the report, which accompanied them, from the committee on the suppression of the slave-trade, and which is hereto annexed. (A.) Those objects, it will be seen, were in perfect accordance with each other. They were designed to introduce, by treaty, into the code of international law, a principle, deemed by the committee essential to the abolition of the African slave-trade, that it should be denounced and treated as piracy by the civilized world.

The resolution being joint, and having failed in the senate, for the reason already stated, the subject of it was revived in the house of representatives, at a very early period of the succeeding session of congress, by a call for information from the executive, which, being received, was referred to a committee of the same title with the last. Their report, after reviewing all the antecedent measures of the United States for the suppression of the slave-trade, urgently recommended the co-operation of the American and British navy against this traffic, under the guarded provisions of a common treaty, authorizing the practice of a qualified and reciprocal right of search. This report, which is also annexed, closed with a resolution, requesting "the president of the United States to enter into such arrangements as he might deem suitable and proper, with one or more of the maritime powers of Europe, for the effectual abolition of the African slave-trade." (B.)

The United States had, by the treaty of Ghent, entered into a formal stipulation with Great Britain, "that both the contracting parties *shall use their best [*7
endeavors to accomplish the entire abolition of this traffic." The failure of the only joint attempt which had been made by England and America, at the date of this report, to give effect to this provision, being ascribable, in part, to a jealousy of the views of the former, corroborated by the language and conduct of one of the principal maritime powers of Europe, in relation to the same topic, the committee referred to the decision of Sir William Scott, in the case of the French ship *Le Louis*, to demonstrate that Great Britain claimed no right of search, in peace, but such as the consent of other nations should accord to her by treaty; and sought it, by a fair exchange, in this tranquil mode, for the beneficent purpose of an enlarged humanity.

Certain facts, disclosed by the diplomatic correspondence of France and England, during the pendency of that case in the British court of admiralty, were calculated to guard the sympathies of America from being misguided by the language of the former power. The painful truth was elicited, that France had evaded the execution of her promise at Vienna, to Europe and mankind. That she had, long after the date of that promise, tolerated, if she had not cherished, several branches of a traffic, which she had concurred in denouncing to be the opprobrium of Christendom, and which she had subsequently bound herself, by the higher obligations of a solemn treaty, to abolish, as inconsistent with the laws of God and nature. Succeeding events in the councils of the French nation, have not impaired the force of this testimony. What authority can be accorded to the moral influence of a government which insults the humanity of a generous and gallant people, by pleading, in apology for the breach of its plighted faith, that its subjects required the indulgence of this guilty traffic! The Emperor Napoleon, who re-established this commerce on the ruins of the French republic, also abolished it again, when he sought to conciliate the people of France, during that transient reign, which immediately preceded his final overthrow.

Congress adjourned without acting on this report. By an instruction to the committee on the suppression of the slave-trade, of the 15th of January 1822, the same subject was a third time brought directly before the house of representatives. The instruction called the attention of the committee to the present condition of the African slave-trade; to the defects of any of the existing laws for its suppression, and to their appropriate remedies. In the report, made in obedience *to this instruction, on [*8
the 12th of April 1822, the committee state, after having consulted all the evidence within their reach, they are brought to the mournful conclusion, that the traffic prevailed to a greater extent than ever, and with increased malignity; that its total suppression, or even sensible diminution, cannot be expected from the separate

and disunited efforts of one or more states, so long as a single flag remains to cover it from detection and punishment. They renew, therefore, as the only practicable and efficient remedy, the concurrence of the United States with the maritime powers of Europe, in a modified and reciprocal exercise of the right of search. In closing their report, the committee add, in effect, that they "cannot doubt that the people of America have the intelligence to distinguish between the right of searching a neutral on the high seas, in time of war, claimed by some belligerents, and that mutual, restricted and peaceful concession, by treaty, suggested by the committee, and which is demanded in the name of suffering humanity." The committee had before intimated, that the remedy which they recommended to the house of representatives, pre-supposed the exercise of the authority of another department of the government; and that objections to the exercise of this authority, in the mode which they had presumed to suggest, had hitherto existed in that department. Their report, also annexed, closed with a resolution differing in no other respect from that of the preceding session, than that it did not require the concurrence of the senate, for the reason already suggested. (C.) The report and resolution were referred to a committee of the whole, and never further considered.

After a delay till the 20th of the succeeding February, a resolution was submitted to the house, which was evidently a part of the same system of measures for the suppression of the slave-trade, which had been begun by the act of the 3d of March 1819, and followed up by the connected series of reports and resolutions, which the committee have reviewed, and which breathe the same spirit. This resolution, in proposing to make the slave-trade piracy, by the consent of mankind, sought to supplant, by a measure of greater rigor, the qualified international exchange of the right of search for the apprehension of the African slave-dealer, and the British system of mixed tribunals, created for his trial and punishment : a system of which experience, and the recent extension of the traffic that it sought to limit, had disclosed the entire inefficacy. The
*9] United States had already established the true denomination and *grade of this offence, by a municipal law. The resolution contemplated, as did the report which accompanied and expounded that law, the extension of its principle, by negotiation, to the code of all nations. It denounced the authors of this stupendous iniquity, as the enemies of the human race, and armed all men with authority to detect, pursue, arrest and punish them. Such a measure, to succeed to its fullest extent, must have a beginning somewhere. Commencing with the consent of any two states, to regard it as binding on themselves only, it would, by the gradual accession of others, enlarge the sphere of its operation, until it embraced, as the resolution contemplated, all the maritime powers of the civilized world. While it involved, of necessity, the visit and search of piratical vessels, as belligerent rights against the common enemies of man, it avoided all complexity, difficulty and delay, in the seizure, condemnation and punishment of the pirate himself. It made no distinction in favor of those pirates who prey upon the property, against those who seize, torture and kill, or consign to interminable and hereditary slavery, the persons of their enemies. Your committee are at a loss for the foundation of any such discrimination. It is believed, that the most ancient piracies consisted in converting innocent captives into slaves; and those were not attended with the destruction of one-third of their victims, by loathsome confinement and mortal disease.

While the modern, therefore, accords with the ancient denomination of this crime, its punishment is not disproportionate to its guilt. It has robbery and murder for its mere accessories, and moisten one continent with blood and tears, in order to curse another, by slow consuming ruin, physical and moral. One high consolation attends upon the new remedy for this frightful and prolific evil. If once successful, it will for ever remain so, until, being unexerted, its very application will be found in history alone. Can it be doubted, that if ever legitimate commerce shall supplant the source of this evil in Africa, and a reliance on other supplies of labor, its use elsewhere, a revival of slave-trade will be as impracticable as a reversion to barbarism ?—that, after the lapse of a century from its extinction, except where the consequences of

the crime shall survive, the stories of the African slave-trade will become as improbable among the unlearned, as the expeditions of the heroes of Homer? The principle of the law of 1820, making the slave-trade a statutory piracy, and of the resolution of the house of representatives, of May *1823, which sought to render this denunciation of that offence universal, cannot, therefore, be misunderstood. It [*10 was not misconceived by the house of representatives, when ratified with almost unprecedented unanimity.

An unfounded suggestion has been heard, that the abortive attempt to amend the resolution, indicated that it was not considered as involving the right of search. The opposite conclusion is the more rational, if not, indeed, irresistible; that having, by the denomination of the crime, provided for the detection, trial and punishment of the criminal, an amendment designing to add what was already included in the main proposition, would be superfluous, if not absurd. But no such amendment *was* rejected. The house of representatives, very near the close of the session of 1823, desirous of economizing time, threatened to be consumed by a protracted debate, entertained the previous question, while an amendment, the only one offered to the resolution, was depending. The effect of the previous question was, to bring on an immediate decision upon the resolution itself, which was adopted by a vote of 131 members to 9. It is alike untrue, that the resolution was regarded with indifference. The house had been prepared to pass it without debate, by a series of measures, having their origin in 1819, and steadily advancing to maturity. Before the resolution did pass, two motions had been submitted, to lay it on the table, and to postpone it to a future day. The former was resisted by an ascertained majority of 105 to 25; the latter, without a division. Is the house now ready to retrace its steps? The committee believe not. Neither the people of America, nor their representatives, will sully the glory they have earned by their early labor, and steady perseverance, in sustaining, by their federal and state governments, the cause of humanity at home and abroad.

The calamity inflicted upon them by the introduction of slavery, in a form, and to an extent forbidding its hasty alleviation by intemperate zeal, is imputable to a foreign cause, for which the past is responsible to the present age. They will not deny to themselves, and to mankind, a generous co-operation in the only efficient measure of retributive justice, to an insulted and afflicted continent, and to an injured and degraded race. In the independence of Spanish and Portuguese America, the committee *behold a speedy termination of the few remainining obstacles to the extension of the policy of the resolution of May 1823. Brazil cannot in- [*11 tend to resist the voice of the residue of the continent of America; and Portugal, deprived of her great market for slaves, will no longer have a motive to resist the common feelings of Europe. And yet, while from the Rio del la Plata to the Amazon, and through the American archipelago, the importation of slaves covertly continues, if it be not openly countenanced, the impolicy is obvious, of denying to the American shore the protective vigilance of the only adequate check upon this traffic.

Your committee forbear to enter upon an investigation of the particular provisions of a depending negotiation, nor do they consider the message referred to them as inviting any such inquiry. They will not regard a negotiation to be dissolved, which has approached so near consummation, nor a convention as absolutely void, which has been executed by one party, and which the United States, having first tendered, should be the last to reject.

Slave Trade.

(A.)

Report of the committee to whom was referred, at the commencement of the present session of congress, so much of the President's Message as relates to the slave-trade, accompanied with a bill to incorporate the American Society for colonizing the free people of color of the United States.

May 8, 1820. Read twice, and, with the bill, committed to the Committee of the whole house on the bill from the senate, to continue in force an act to protect the commerce of the United States, and punish the crime of piracy, &c.

The committee on the slave-trade, to whom was referred the memorial of the president and board of managers of the American Society for colonizing the free people of color of the United States, have, according to order, had under consideration the several subjects therein embraced, and report:—That the American Society was instituted in the city of Washington, on the 28th of December 1816, for the benevolent purpose of affording to the free people of color of the United States the *12] means of establishing one or more independent colonies on the western coast of Africa. After ascertaining, by a mission to that continent, and other preliminary inquiries, that their object is practicable, the society requests of the congress of the United States a charter of incorporation, and such other legislative aid as their enterprise may be thought to merit and require. The memorialists anticipate from its success consequences the most beneficial to the free people of color themselves, to the several states in which they at present reside, and to that continent which is to be the seat of their future establishment. Passing by the foundation of these anticipations, which will be seen in the annual reports of the society and their former memorials, the attention of the committee has been particularly drawn to the connection which the memorialists have traced between their purpose and the policy of the more effectual abolition of the African slave-trade.

Experience has demonstrated, that this detestable traffic can be nowhere so successfully assailed, as on the coast upon which it originates. Not only does the collection and embarkation of its unnatural cargoes consume more time than their subsequent distribution and sale in the market for which they are destined, but the African coast, frequented by the slave-ships, is indented with so few commodious or accessible harbors, that, notwithstanding its great extent, it could be guarded by the vigilance of a few active cruisers. If to these be added, colonies of civilized blacks, planted in commanding situations along that coast, no slave-ship could possibly escape detection; aud thus the security, as well as the enhanced profit which now cherishes this illicit trade, would be effectually counteracted. Such colonies, by diffusing a taste for legitimate commerce among the native tribes of that fruitful continent, would gradually destroy among them also the only incentive of a traffic which has hitherto rendered all African labor insecure, and spread desolation over one of the most beautiful regions of the globe. The colonies, and the armed vessels employed in watching the African coast, while they co-operated alike in the cause of humanity, would afford to each other mutual succor.

There is a single consideration, however, added to the preceding view of this subject, which appears to your committee, of itself, conclusive of the tendency of the views of the memorialists to further the operation of the act of the 3d of March 1819. That act not only revokes the authority antecedently given to the several state and territorial* governments, to dispose, as they pleased, of those African captives, *13] who might be liberated by the tribunals of the United States, but authorizes and requires the president to restore them to their native country. The unavoidable consequence of this just and humane provision, is, to require some preparation to be made for their temporary succor, on being re-landed upon the African shore. And no preparation can prove so congenial to its own object, or so economical, as regards

the government charged with this charitable duty, as that which would be found in a colony of the free people of color of the United States. Sustained by the recommendations of numerous societies in every part of the United States, and the approving voice of the legislative assemblies of several states, without inquiring into any other tendency of the object of the memorialists, your committee do not hesitate to pronounce it deserving of the countenance and support of the general government. The extent to which these shall be carried, is a question not so easily determined. The memorialists do not ask the government to assume the jurisdiction of the territory, or to become, in any degree whatever, responsible for the future safety or tranquillity of the contemplated colony. They have prudently thought, that its external peace and security would be most effectually guarded, by an appeal in its behalf to philanthropy of the civilized world; and to that sentiment of retributive justice, with which all Christendom is at present animated towards a much injured continent. Of the constitutional power of the general government to grant the limited aid contemplated by the accompanying bill and resolutions, your committee presume, there can exist no shadow of doubt; and they leave it to a period of greater national prosperity to determine how far the authority of congress, the resources of national government, and the welfare and happiness of the United States, will want or require its extension.

Your committee are solemnly enjoined by the peculiar object of their trust, and invited by the suggestion of the memorialists, to inquire into the defects of the existing laws against the African slave-trade. So long as it is in the power of the United States to provide additional restraints upon this odious traffic, they cannot be withheld, consistently with justice and the honor of the nation. Congress have heretofore marked, with decided reprobation, the authors and abettors of his inquitous commerce, in every form which it assumes; from the inception of its unrighteous purpose in America, *through all the subsequent stages of its progress, to its final consummation; the outward voyage; the cruel seizure and forcible abduction of the unfortunate African from his native home, and the fraudulent transfer of the property thus acquired. It may, however, be questioned, if a proper discrimination of their relative guilt has entered into the measure of punishment annexed to these criminal acts. Your committee cannot perceive wherein the offence of kidnapping an unoffending inhabitant of a foreign country; of chaining him down for a series of days, weeks and months, amidst the dying and the dead, to the pestilential hold of a slave-ship; of consigning him, if he chance to live out the voyage, to perpetual slavery in a remote and unknown land, differs in malignity from piracy, or why a milder punishment should follow the one, than the other crime. On the other hand, the purchase of the unfortunate African, after his enlargement from the floating dungeon which wafts him to the foreign market, however criminal in itself, and yet more in tendency to encourage this abominable traffic, yields in atrocity to the violent seizure of his person, his sudden and unprepared separation from his family, his kindred, his friends and his country, followed by all the horrors of the middle passage. Are there not united in this offence all that is most iniquitous in theft, most daring in robbery, and cruel in murder? Its consequences to the victim, if he survives; to the country which receives him, and to that from which he is torn, are alike disastrous. If the internal wars of Africa, and their desolating effect, may be imputed to the slave-trade, and that the greater part of them must now, cannot be questioned, this crime, considered in its remote, as well as its proximate consequences, is the very darkest in the whole catalogue of human iniquities; and its authors should be regarded as *hostes humani generis.* [*14

In proposing to the house of representatives to make such part of this offence as occurs upon the ocean, piracy, your committee are animated, not by the desire of manifesting to the world the horror with which it is viewed by the American people; but by the confident expectation of promoting, by this example, its more certain punishment by all nations, and its absolute and final extinction. May it not be believed, that when the whole civilized world shall have denounced the slave-trade

as piracy, it will become as unfrequent as any other species of that offence against the law of nations? Is it unreasonable to suppose, that negotiation will, with greater facility, introduce into that law such a provision as is here proposed, when it shall have been already incorporated into the separate code of each state?

*15] *The maritime powers of the Christian world have, at length, concurred in pronouncing sentence of condemnation against this traffic. The United States, having led the way in forming this decree, owe it to themselves, not to follow the rest of mankind in promoting its vigorous execution. If it should be objected, that the legislation of congress would be partial, and its benefit, for a time at least, local, it may be replied, that the constitutional power of the government has already been exercised in defining the crime of piracy, in accordance with similar analogies, to that which the committee have sought to trace between this general offence against the peace of nations and the slave-trade. In some of the foreign treaties, as well as in the laws of the United States, examples are to be found of piracies, which are not cognisable, as such, by the tribunals of all nations. Such is the unavoidable consequence of any exercise of the authority of congress, to define and punish this crime. The definition and the punishment can bind the United States alone.

A bill from the senate, making further provision for the exercise of this constitutional power, being now before the house of representatives, your committee beg leave to offer such an amendment of its provisions, as shall attain the last object which they have presumed to recommend.

(B.)

Report of the Committee to which was referred so much of the President's Message as relates to the Slave-Trade.

February 9, 1821. Read, and ordered to lie upon the table.

The committee to which is referred so much of the president's message as relates to the slave-trade, and to which are referred the two messages of the president, transmitting, in pursuance of the resolution of the house of representatives, of the 4th of December, a report of the secretary of state, and inclosed documents, relating to the negotiation for the suppression of the slave-trade, report:—That the committee have

*16] deemed it advisable, previous to entering *into a consideration of the proposed co-operation to exterminate the slave-trade, to take a summary review of the constitution and laws of the United States relating to this subject. It will disclose the earnestness and zeal with which this nation has been actuated, and the laudable ambition that has animated her councils to take a lead in the reformation of a disgraceful practice, and one which is productive of so much human misery; it will, by displaying the constant anxiety of this nation to suppress the African slave-trade, afford ample testimony that she will be the last to persevere in measures wisely digested, to effectuate this great and most desirable object, whenever such measures can be adopted in consistency with the leading principles of her local institutions.

In consequence of the existence of slavery in many of the states, when British colonies, the habits and means of carrying on industry, could not be suddenly changed; and the constitution of the United States yielded to the provision, that the migration or importation of such persons, as any of the states now existing shall think proper to admit, shall not be prohibited by the congress, prior to the year 1808. But long antecedent to this period, congress legislated on the subject wherever its power extended, and endeavored, by a system of rigorous penalties, to suppress this unnatural trade.

The act of congress of the 22d of March 1794, contains provisions that no citizen or citizens of the United States, or foreigner, or any other person coming into, or residing within the same, shall, for himself, or any other person whatsoever, either as master, factor or owner, build, fit, equip, load, or otherwise prepare, any ship or vessel, within any port or place of the United States, nor shall cause any ship or vessel to sail from any port or place within the same, for the purpose of carrying on any trade

or traffic in slaves to any foreign country ; or for the purpose of procuring from any foreign kingdom, place or country, the inhabitants of such kingdom, place or country, to be transported to any foreign country, port or place whatever, to be sold or disposed of as slaves, under the penalty of the forfeiture of any such vessel, and of the payment of large sums of money by the persons offending against the directions of the act. By an act of the 3d of April 1798, in relation to the Mississippi territory, to which the constitutional provision did not extend, the introduction of slaves, under severe penalties, was forbidden, and every slave imported contrary to the act, was to be entitled to freedom.

By an act of the 10th of May 1800, the citizens or residents of this country were prohibited from holding any right or property in vessels *employed in transporting slaves from one foreign country to another, on pain of forfeiting their [*17 right of property, and also double the value of that right in money, and double the value of their interest in the slaves; nor were they allowed to serve on board of vessels of the United States, employed in the transportation of slaves from one country to another, under the punishment of fine and imprisonment ; nor were they permitted to serve on board foreign ships employed in the slave-trade. By this act also, the commissioned vessels of the United States were authorized to seize vessels and crews employed contrary to the act. By an act of the 28th of February 1803, masters of vessels were not allowed to bring into any port (where the laws of the state prohibited the importation), any negro, mulatto or other person of color, not being a native, a citizen, or registered seaman of the United States. under severe penalties; and no vessel, having on board persons of the above description, was to be admitted to an entry ; and if any such person should be landed from on board of any vessel, the same was to be forfeited.

By an act of the 2d of March 1807, the importation of slaves into any port of the United States was to be prohibited, after the first of January 1808, the time prescribed by the constitutional provision. This act contains many severe provisions against any interference or participation in the slave-trade, such as heavy fines, long imprisonments, and the forfeiture of vessels. The president was also authorized to employ armed vessels to cruise on any part of the coast where he might judge attempts would be made to violate the act, and to instruct the commanders of armed vessels to seize and bring in vessels found on the high seas, contravening the provisions of the law. By an act of the 20th of April 1818, the laws, in prohibition of the slave-trade, were further improved ; this act is characterized with a peculiarity of legislative precaution, especially, in the eighth section, which throws the labor of proof upon the defendant, that the colored persons brought into the United States by him had not been brought in contrary to the laws. By an act of the 3d of March 1819, the power is continued in the president, to employ the armed ships of the United States to seize and bring into port any vessel engaged in the slave-trade by citizens or residents of the United States ; and such vessels, together with the goods and effects on board, are to be forfeited and sold, and the proceeds to be distributed, in like manner as is provided by law for the distribution of prizes taken from an enemy ; and the officers and crew are to undergo *the punishments inflicted by previous acts. The president, [*18 by this act, is authorized to make such regulations and arrangements as he may deem expedient, for the safe-keeping, support and removal beyond the limits of the United States, of all such negroes, mulattoes or persons of color, as may have been brought within its jurisdiction, and to appoint a proper person or persons, residing on the coast of Africa, as agent or agents for receiving the negroes, mulattoes or persons of color, delivered from on board of vessels seized in the prosecution of the slave-trade.

And in addition to all the aforesaid laws, the present congress, on the 15th of May 1820, believing that the then existing provisions would not be sufficiently available, enacted, that if any citizen of the United States, being of the crew or ship's company of any foreign ship or vessel engaged in the slave-trade, or any person whatever, being of the crew or ship's company or any ship or vessel, owned in the whole or in part, or navigated for, or in behalf of, any citizen or citizens of the United States, shall land

from any such ship or vessel, and on foreign shore, seize any negro or mulatto, nor held to service or labor, by the laws of either of the states or territories of the United States, with intent to make such negro or mulatto a slave, or shall decoy, or forcibly bring or carry, or shall receive such negro or mulatto on board any such ship or vessel, with intent as aforesaid, such citizen or person shall be adjudged a pirate, and on conviction shall suffer death.

The immoral and the pernicious practice of slave-trade has attracted much public attention in Europe, within the last few years, and in a congress at Vienna, on the 8th of February 1815, five of the principal powers made a solemn engagement, in the face of mankind, that this traffic should be made to cease; in pursuance of which, these powers have enacted municipal laws to suppress the trade. Spain, although not a party to the original engagement, did, soon after, in her treaty with England, stipulate for the immediate abolition of the Spanish slave-trade, to the north of the equator, and for its final and universal abolition, on the 30th of May 1820. Portugal, likewise, in her treaty in 1817, stipulated that the Portuguese slave-trade on the coast of Africa should entirely cease to the northward of the equator, and engaged that it should be unlawful for her subjects to purchase or trade in slaves, except to the southward of the line; the precise period at which the entire abolition is to take place in Portugal does not appear to be finally fixed; but the Portuguese ambassador, in the presence of the congress at Vienna, declared,

*19] that Portugal, faithful to *her principles, would not refuse to adopt the term of eight years, which term will expire in the year 1823.

At this time, among the European states, there is not a flag which can legally cover this inhuman traffic to the north of the line: nevertheless, experience has proved the inefficacy of the various and rigorous laws which have been made in Europe and in this country; it being a lamentable fact, that the disgraceful practice is even now carried on to a surprising extent. During the last year, Captain Trenchard, the commander of the United States sloop of war, the Cyane, found that part of the coast of Africa which he visited, lined with vessels, engaged, as it is presumed, in this forbidden traffic; of these, he examined many: and five, which appeared to be fitted out on American account, he sent into the jurisdiction of the United States for adjudication; each of them, it is believed, has been condemned, and the commanders of two of them have been sentenced to the punishment prescribed by the laws of the United States. The testimony recently published, with the opinion of the presiding judge of the United States court of the southern district in the state of New York, in the case of schooner Plattsburg, lays open a scene of the grossest fraud that could be practised to deceive the officers of government, and conceal the unlawful transaction.

The extension of the trade for the last 25 or 30 years must, in a degree, be conjectured; but the best information that can be obtained on the subject, furnishes good foundation to believe, that, during that period, the number of slaves withdrawn from western Africa amounts upwards of 1,500,000; the annual average would be a mean somewhere between 50,000 and 80,000. The trade appears to be lucrative in proportion to its heinousness, and, as it is generally inhibited, the unfeeling slave-dealers, in order to elude the laws, increase its horrors; the innocent Africans, who are mercilessly forced from their native homes in irons, are crowded in vessels and situations, which are not adapted for the transportation of human beings; and this cruelty is frequently succeeded, during the voyage to their destination, with dreadful mortality. Further information on this subject will appear in a letter from the secretary of the navy, inclosing two other letters, marked 1 and 2, and also by the extract of a letter from an officer of the Cyane, dated April 10th 1820, which are annexed to this report. While the slave-trade exists, there can be no prospect of civilization in Africa.

However well-disposed the European powers may be to effect a practical

*20] *abolition of the trade, it seems generally acknowledge, that, for the attainment of this object, it is necessary to agree upon some concerted plan of co-operation;

but, unhappily, no arrangement has as yet obtained universal consent. England had recently engaged in treaties with Spain, Portugal and the Netherlands, in which the mutual right of visitation and search is exchanged. This right is of a special and limited character, as well in relation to the number and description of vessels, as to space; and to avoid possible inconveniences, no suspicious circumstances are to warrant the detention of a vessel; this right is restricted to the simple fact of slaves being on board. These treaties contemplate the establishment of mixed courts, formed of an equal number of individuals of the two contracting nations, the one to reside in a possession belonging to his Britannic Majesty; the other within the territory of the other respective power. When a vessel is visited and detained, it is to be taken to the nearest court, and if condemned, the vessel is to be declared a lawful prize as well as the cargo, and are to be sold for the profit of the two nations; the slaves are to receive a certificate of emancipation, and to be delivered over to the government on whose territory the court is which passes sentence, to be employed as servants or free laborers. Each of the governments binds itself to guaranty the liberty of such portion of these individuals as may be respectively assigned to it. Particular provisions are made for remuneration, in case vessels are not condemned after trial, and special instructions are stipulated to be furnished to commanders of vessels possessing the qualified right of visitation and search. These powers entertain the opinion, that nothing short of the concession of a qualified right of visitation and search can practically suppress the slave-trade. An association of armed ships is contemplated, to form a species of naval police, to be stationed principally in the African seas, where the commanders of the ships will be enabled to co-operate in harmony and concert.

The United States have been earnestly invited, by the principal secretary of state for foreign affairs of the British government, to join in the same or similar arrangements; and this invitation has been sanctioned and enforced, by a unanimous vote of the house of lords and commons, in a manner that precludes all doubts as to the sincerity and benevolence of their design. In answer to this invitation, the president of the United States has expressed his regret, that the stipulations in the treaties communicated, *are of a character to which the peculiar situations and institutions of the United States do not permit them to accede. The objections [*21
made are contained in an extract of a letter from the secretary of state, under date of the 2d November 1818; in which it is observed, that, "in examining the provisions of the treaties communicated by Lord Castlereagh, all the essential articles appear to be of a character not adaptable to the institutions, or to the circumstances of the United States. The powers agreed to be reciprocally given to the officers of the ship of war of either party, to enter, search, capture and carry into port for adjudication, the merchant vessels, of the other, however qualfied and restricted, is most essentially connected with the institution, by each treaty, of two mixed courts, one of which is to reside in the external or colonial possession of each of the two parties respectively. This part of the system is indispensable to give it that character of reciprocity, without which the right granted to the armed ships of one nation, to search the merchant vessels of another, would be rather a mark of vassalage than of independence. But to this part of the system, the United States, having no colonies either on the coast of Africa, or in the West Indies, cannot give effect. That by the constitution of the United States, it is provided that the judicial power of the United States shall be vested in a supreme court, and in such inferior courts as the congress may, from time to time, ordain and establish. It provides, that judges of these courts shall hold their offices during good behavior; and that they shall be removable by impeachment, or conviction of crimes and misdemeanors. There may be doubts, whether the power of the government of the United States is competent to institute a court for carrying into execution their penal statutes beyond the territories of the United States—a court consisting partly of foreign judges, not amenable to impeachment for corruption, and deciding upon statutes of the United States, without appeal

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"That the disposal of the negroes found on board of the slave-trading vessels, which might be condemned by the sentence of these mixed courts, cannot be carried into effect by the United States; for, if the slaves of vessels condemned by the mixed courts should be delivered over to the government of the United States as freemen, they could not, but by their own consent, be employed as servants or free laborers. The condition of the blacks being, in this Union, regulated by municipal laws of the separate states, the government of the United States can neither guaranty their liberty in the states where they could only be received as slaves, nor control them in
*22] the states where they would *be recognised as free. That the admission of a right in the officers of foreign ships of war, to enter and search the vessels of the United States, in time of peace, under any circumstances whatever, would meet with universal repugnance in the public opinion of this country; and that there would be no prospect of a ratification, by advice and consent of the senate, to any stipulation of that nature. That the search by foreign officers, even in time of war, is so obnoxious to the feelings and recollections of this country, that nothing could reconcile them to the extension of it, however qualified or restricted, to a time of peace; and that it would be viewed in a still more aggravated light, if, as in the treaty with the Netherlands, connected with a formal admission, that even vessels under convoy of ships of war of their own nation, should be liable to search by the ships of war of another."

The committee will observe, in the first instance, that a mutual right of search appears to be indispensable to the great object of abolition; for while flags remain as a cover for this traffic, against the right of search by any vessels except of the same nation, the chance of detection will be much less that it would be, if the right of search was extended to vessels of other powers; and as soon as any one nation should cease to be vigilant in the discovery of infractions practised on its own code, the slave-dealers would avail themselves of a system of obtaining fraudulent papers, and concealing the real ownership under the cover of such flags, which would be carried on with such address, as to render it easy for the citizens or subjects of one state to evade their own municipal laws; but if a concerted system existed, and a qualified right or mutual search was granted, the apprehension of these piratical offenders would be reduced to a much greater certainty; and the very knowledge of the existence of an active and vigorous system of co-operation, would divert many from this practice, as the unlawful trade would become too hazardous for profitable speculation. In relation to any inconveniences that might result from such an arrangement, the commerce of the United States is so limited on the African coast, that it could not be much affected by it; and as it regards economy, the expense of stationing a few vessels on that coast would not be much greater than to maintain them at any other place.

The committee have briefly noticed the practical results of a reciprocal right of search, as it bears on the slave-trade; but the objection as to the propriety of ceding this right remains. It is with deference, that the committee undertake to make any remarks upon it. They bear in recollection the opinions entertained in this country
*23] on the practice of searching *neutral vessels in time of war; but they cannot perceive that the right under discussion is in principle, allied, in any degree, to the general question of search; it can involve no commitment, nor is it susceptible of any unfavorable inference on that subject; and even if there were any affinity between the cases, the necessity of a special agreement would be inconsistent with the idea of existing rights: the proposal itself, in the manner made, is a total abandonment, on the part of England, of any claim to visit and search vessels in time of peace, and this question has been unequivocally decided in the negative in her admiralty courts. Although it is not among the objections; that the desired arrangement would give any color to a claim or right of search in time of peace, yet, lest the case in this respect may be prejudiced in the minds of any, the committee will observe, that the right of search, in time of peace, is one that is not claimed by any power, as a part of the law of nations; no nation pretends that it can exercise the right of

visitation and search, upon the common and unappropriated parts of the sea, except upon the belligerent claim. A recent decision in the British admiralty court, in the case of the French slave-ship Le Louis, is clear and decisive on this point. The case is annexed to this report. In regard, then, to the reciprocal right wished to be ceded, it is reduced to the simply inquiry, whether, in practice, it will be beneficial to the two contracting nations. Its exercise, so far as it relates to the detention of vessels, as it is confined to the fact of slaves being actually on board, precludes almost the possibility of accident or much inconvenience.

In relation also to the disposal of the vessels and slaves detained, an arrangement, perhaps, could be effected, so as to deliver them up to the vessels of the nation to which the detained vessel should belong. Under such an understanding, the vessels and slaves delivered to the jurisdiction of the United States, might be disposed of, in conformity with the provisions of our own act of the 3d of March 1819; and an arrangement of this kind would be free from any of the other objections.

An exchange of the right of search, limited in duration, or to continue at pleasure, for the sake of experiment, might, it is anxiously hoped, be so restricted to vessels and seas, and with such civil and harmonious stipulations, as not to be unacceptable. The feelings of this country on the general question of search, have often been roused to a degree of excitement that evince their unchangeable character ; but the American people will readily see the distinction between the cases; the one, in its exercise to the extent claimed, will *ever produce irritation, and excite a patriotic spirit of resistance; the other is amicable and charitable; the justness and [*24 nobleness of the undertaking, are worthy of the combined concern of Christian nations.

The detestable crime of kidnapping the unoffending inhabitants of one country, and chaining them to slavery in another, is marked with all the atrociousness of piracy ; and as such it is stigmatized and punishable by our own laws.

To efface this reproachful stain from the character of civilized mankind, would be the proudest triumph that could be achieved in the cause of humanity. On this subject, the United States, having led the way, owe it to themselves to give their influence and cordial co-operation to any measure that will accomplish the great and good purpose; but this happy result, experience has demonstrated cannot be realized by any system, except a concession by the maritime powers to each other's ships of war, of a qualified right of search; if this object was generally attained, it is confidently believed, that the active exertions of even a few nations would be sufficient entirely to suppress the slave-trade. The slave-dealers could be successfully assailed on the coast upon which the trade originates, as they must necessarily consume more time in the collection and embarkation of their cargoes, than in the subsequent distribution in the markets for which they are destined; this renders that coast the most advantageous position for their apprehension ; and besides, the African coast, frequented by the slave-ships, is indented with so few commodious or accessible harbors, that, notwithstanding its greater extent, it could be guarded by the vigilance of a small number of cruisers. But if the slave-ships are permitted to escape from the African coast, and to be dispersed to different parts of the world, their capture would be rendered uncertain and hopeless. The committee, after much reflection, offer the following resolution:

Resolved, by the senate and house of representatives of the United States of America, in congress assembled, that the president of the United States be requested to enter into such arrangements as he may deem suitable and proper, with one or more of the maritime powers of Europe, for the effectual abolition of the African slave-trade.

Slave Trade.

*Case of the French slave ship *Le Louis*, extracted from the 12th annual report of the African Institution, printed in 1818.

This vessel sailed from Martinique, on the 30th of January 1816, on a slave-trading voyage to the coast of Africa, and was captured, near Cape Mesurado, by the Sierra Leone colonial vessel of war, the Queen Charlotte, after a severe engagement, which followed an attempt to escape, in which eight men were killed and twelve wounded of the British; and proceedings having been instituted against *Le Louis* in the vice-admiralty court of Sierra Leone, as belonging to French subjects, and as fitted out manned and navigated, for the purpose or carrying on the slave-trade, after the trade had been abolished both by the internal laws of France, and by the treaty between that country and Great Britain, the ship and cargo were condemned as forfeited to his majesty. From this sentence an appeal having been made to the high court of admiralty, the cause came on for hearing, when the court reversed the judgment of the inferior court, and ordered the restitution of the property to the claimants.

This judgment of Sir WILLIAM SCOTT was given at great length. The directors will advert to such points of it as are immediately connected with their present subject. "No doubt," he said, "could exist that this was a French ship, intentionally engaged in the slave-trade." But as these were facts which were ascertained in consequence of its seizure, before the seizer could avail himself of this discovery, it was necessary to inquire, whether he possessed any right of visitation and search; because, if the discovery was unlawfully produced, he could not be allowed to take advantage of the consequences of his own wrong. The learned judge then discussed, at considerable length, the question, whether the right of search exists in time of peace. And he decided it, without hesitation, in the negative. "I can find," he says, "no authority that gives the right of interruption to the navigation of states in amity, upon the high seas, excepting that which the rights of war give to both belligerents against neutrals. No nation can exercise a right of visitation and search upon the common and unappropriated parts of the sea, save only on the belligerent claim." He admits, indeed, and with just concern, that if this right be not conceded in time of peace, it will be extremely difficult to suppress thetraffic in slaves. "The great object, therefore, ought to be, to obtain the concurrence of other nations, by application, by remonstrance, by example, by every peaceable instrument which men can employ to attract the consent of *men. But a nation is not justified in assuming rights that do not belong to her, merely because she means to apply them to a laudable purpose." "If this right," he adds, "is imported into a state of peace, it must be done by convention; and it will then be for the prudence of states to regulate, by such convention, the exercise of the right, with all the softenings of which it is susceptible."

*26]

The judgment of Sir WILLIAM SCOTT would have been equally conclusive against the legality of this seizure, even if it could have been established in evidence, that France had previously prohibited the slave-trade by her municipal laws. For the sake of argument, however, he assumes that the view he has taken of the subject might, in such a case, be controverted. He proceeds, therefore, to inquire how far the French law had actually abolished the slave-trade, at the time of this adventure. The actual state of the matter, as collected from the documents before the court, he observes, is this:

"On the 27th of July 1815, the British minister at Paris writes a note to Prince Talleyrand, then minister to the King of France, expressing a desire on the part of his court to be informed, whether, under the law of France as it then stood, it was prohibited to French subjects to carry on the slave-trade. The French minister informs him, in answer, on the 30th of July, that the law of the usurper on that subject was null and void (as were all his decrees), but that his Most Christian Majesty had issued directions, that, on the part of France, 'the traffic should cease, from the present time, everywhere, and for ever.' In what form these directions were issued, or to whom addressed, does not appear; but, upon such authority, it must be presumed that they were actually issued. It is, however, no violation of the respect due

to that authority, to inquire, what was the result or effect of those directions so given; what followed in obedience to them, in any public and binding form. And I fear, I am compelled to say, that nothing of the kind followed, and that the directions must have slept in the portfolio of the office to which they were addressed; for it is, I think, impossible, that if any public and authoritative ordinance had followed, it could have escaped the sleepless attention of many persons in our own country, to all public foreign proceedings upon this interesting subject. Still less would it have escaped the notice of the British resident minister, who, at the distance of a year and a half, is compelled, on the part of his own court, to express a curiosity to know what laws, ordinances, instructions and other public and ostensible acts, had passed, for the abolition of the slave-trade.

*"On the 30th of November, in the same year (1815), the additional article of the definitive treaty, a very solemn instrument, most undoubtedly, is formally and publicly executed, and it is in these terms: 'The high contracting parties, sincerely desiring to give effect to the measures on which they deliberated at the congress of Vienna, for the complete and universal abolition of the slave-trade; and having each, in their respective dominions, prohibited, without restriction, their colonies and subjects from taking any part whatever in this traffic, engage to renew, conjointly, their efforts, with a view to insure final success to the principle which they proclaimed in the declaration of the 8th of February 1815, and to concert, without loss of time, by their ministers at the court of London, the most effectual measures for the entire and definitive abolition of the traffic, so odious and so highly reproved by the laws of religion and nature.' Now, what are the effects of this treaty? According to the view I take of it, they are two, and two only; one declaratory of a fact, the other promissory of future measures. It is to be observed, that the treaty itself does not abolish the slave-trade; it does not inform the subjects that that trade is hereby abolished, and that, by virtue of the prohibitions therein contained, its subjects shall not, in future, carry on the trade; but the contracting parties mutually inform each other of the fact, that they have, in their respective dominions, abolished the slave-trade, without stating at all the mode in which that abolition had taken place. [*27

"It next engages to take future measures for the universal abolition. That, with respect to both the declaratory and promissory parts, Great Britain has acted with the *optima fides*, is known to the whole world, which has witnessed its domestic laws, as well as its foreign negotiations. I am very far from intimating that the government of this country did not act with perfect propriety, in accepting the assurance that the French government had actually abolished the slave-trade, as a sufficient proof of the fact; but the fact is now denied, by a person who has a right to deny it; for, though a French subject, he is not bound to acknowledge the existence of any law which has not publicly appeared; and the other party having taken upon himself the burden of proving it, in the course of a legal inquiry, the court is compelled to demand and expect the ordinary evidence of such a disputed fact. It was not till the 15th of January, in the present year (1817), that the British resident minister applies for the communication I have described, of all laws, instructions, ordinances and so on; he receives in return what is delivered *by the French minister as the ordinance, bearing date only one week before the requested communication, namely, the 8th of January. It has been asserted, in argument, that no such ordinance has yet, up to this very hour, even appeared in any printed or public form, however much it might import both French subjects, and the subjects of foreign states, so to receive it. [*28

"How the fact may be, I cannot say; but I observe, it appears before me in a manuscript form; and by inquiry at the secretary of state's office, I find it exists there in no other plight or condition. In transmitting this to the British government, the British minister observes, it is not the document he had reason to expect; and certainly, with much propriety; for how does the document answer his requisition? His requisition is for all laws, ordinances, instructions, and so forth. How does this, a simple ordinance, professing to have passed only a week before, realize the assurance given on the 30th of July 1815, that the traffic 'should cease, from the present time,

every where, and for ever ?' or how does this realize the promise made in November, that measures should be taken, without loss of time, to prohibit not only French colonists, but French subjects likewise, from taking any part whatever in this traffic ? What is this regulation, in substance ? Why, it is a mere prospective colonial regulation, prohibiting the importation of slaves into the French colonies from the 8th of January 1817. Consistently with this declaration, even if it does exist, in the form and with the force of a law, French subjects may be yet the common carriers of slaves to any foreign settlement that will admit them, and may devote their capital and their industry, unmolested by law, to the supply of any such markets.

"Supposing, however, the regulations to contain the fullest and most entire fulfilment of the engagement of France, both in time and in substance, what possible application can a prospective regulation of January 1817 have to a transaction of March 1816 ? Nobody is now to be told, that a modern edict which does not appear cannot be presumed; and that no penal law of any state can bind the conduct of its subjects, unless it is conveyed to their attention, in a way which excludes the possibility of honest ignorance. The very production of a law professing to be enacted in the beginning of 1817, is a satisfactory proof that no such law existed in 1816, the year of this transaction. In short, the seizer has entirely failed in the task he has undertaken, in proving the existence of a prohibitory law, enacted by the legal government of France, which can be applied to the present transaction."

*29] *(C.)

Report of the Committee on the suppression of the Slave-trade; made in the House of Representatives, April 12, 1822.

The Committee on the suppression of the Slave-trade, to whom was referred a resolution of the House of Representatives, of the 15th of January last, instructing them to inquire whether the laws of the United States prohibiting that traffic have been duly executed ; also, into the general operation thereof ; and, if any defects exist in those laws, to suggest adequate remedies therefor ; and, to whom many memorials have been referred touching the same subject ; have, according to order, had the said resolution and memorials under consideration, and beg leave to report:—That, under the just and liberal construction put by the executive on the act of congress of March 3d, 1819, and that of the 15th of May 1820, inflicting the punishment of piracy on the African slave-trade, a foundation has been laid for the most systematic and vigorous application of the power of the United States, to the suppression of that iniquitous traffic. Its unhappy subjects, when captured, are restored to their country, agents are there appointed to receive them, and a colony, the offspring of private charity, is rising on its shores, in which such as cannot reach their native tribes, will find the means of alleviating the calamities they may have endured before their liberation. When these humane provision are contrasted with the system which they supersede, there can be but one sentiment in favor of a steady adherence to their support. The document accompanying this report, and marked (A), states the number of Africans seized or taken within or without the limits of the United States, and brought there, and their present condition.

It does not appear to your committee, that such part of the naval force of the country as has been hitherto employed in the execution of the laws against this traffic, could have been more effectually used for the interest and honor of the nation. The document marked (B), is a statement of the names of the vessels, and their commanders, ordered upon this service, with the dates of their departure, &c. The first vessel destined for this service, arrived upon the coast of Africa in March 1820, *and
30*] in the few weeks she remained there, sent in for adjudication four American vessels, all of which were condemned. The four which have been since employed in this service, have made five visits, (the Alligator having made two cruises in the

past summer), the whole of which have amonnted to a service of about ten months by a single vessel, within a period of two years; and since the middle of last November, the commencement of the healthy season on that coast, no vessel has been, nor, as your committee is informed, is under orders for that service. The committee are thus particular on this branch of their inquiry, because unfounded rumors have been in circulation, that other branches of the public service have suffered from the destination given to the inconsiderable force above stated, which, small as it has been, has, in every instance, been directed, both in its outward and homeward voyage, to cruise in the West India seas.

Before they quit this part of their inquiry, your committee feel it their duty to state, that the loss of several of the prizes made in this service, is imputable to the size of the ships engaged in it. The efficacy of this force, as well as the health and discipline of the officers and crews, conspire to recommend the employment of no smaller vessel than a corvette or a sloop of war, to which it would be expedient to allow the largest possible complement of men; and, if possible, she should be accompanied by a tender, or vessel drawing less water. The vessels engaged in this service should be frequently relieved, but the coast should at no time be left without a vessel to watch and protect its shores.

Your committee find it impossible to measure with precision the effect produced upon the American branch of the slave-trade, by the laws above mentioned, and the seizures under them. They are unable to state, whether those American merchants, the American capital and seamen, which heretofore aided in this traffic, have abandoned it altogether, or have sought shelter under the flags of other nations. It is ascertained, however, that the American flag, which heretofore covered so large a portion of the slave-trade, has wholly disappeared from the coasts of Africa. The trade, notwithstanding, increases annually, under the flags of other nations. France has incurred the reproach of being the greatest adventurer in this traffic, prohibited by her laws; but it is to be presumed, that this results not so much from the avidity of her subjects for this iniquitous gain, as from the safety which, in the absence of all hazard of capture, her flag affords to the greedy and unprincipled adventurers of all nations. It is neither candid nor just, to impute to a gallant and high-minded people, the exclusive commission of crimes, which the abandoned *of all [*31
nations are alike capable of perpetrating, with the additional wrong to France herself, of using her flag to cover and protect them. If the vigor of the American navy has saved its banner from like reproach, it has done much to preserve, unsullied, its high reputation, and amply repaid the expense charged upon the public revenue by a system of laws to which it has given such honorable effect.

But the conclusion to which your committee has arrived, after consulting all the evidence within their reach, is, that the African slave-trade now prevails to a great extent, and that its total suppression can never be effected by the separate and disunited efforts of one or more state; and as the resolution to which this report refers, requires the suggestion of some remedy for the defects, if any exist, in the system of laws for the suppression of this traffic, your committee beg leave to call the attention of the house to the report and accompanying documents submitted to the last congress, by the committee on the slave-trade, and to make the same a part of this report. That report proposes, as a remedy for the existing evils of the system, the concurrence of the United States with one or all the maritime powers of Europe, in a modified and reciprocal right of search, on the African coast, with a view to the total suppression of the slave-trade. It is with great delicacy that the committee have approached this subject; because they are aware that the remedy which they have presumed to recommend to the consideration of the house, requires the exercise of the power of another department of this government, and that objections to the exercise of this power, in the mode here proposed, have hitherto existed in that department.

Your committee are confident, however, that these objections apply rather to a particular proposition for the exchange of the right of search, than to that modification

of it which presents itself to your committee. They contemplate the trial and condemnation of such American citizens as may be found engaged in this forbidden trade, not by mixed tribunals, sitting in a foreign country, but by existing courts of competent jurisdiction, in the United States. They propose the same disposition of the captured Africans, now authorized by law ; and, least of all, their detention in America. They contemplate an exchange of this right, which shall be in all respects reciprocal ; an exchange which, deriving its sole authority from treaty, would exclude the pretension, which no nation, however, has presumed to set up, that this right can be derived from the law of nations ; and further, they have limited it, in their conception of its application, *not only to certain latitudes, and to a certain distance from *32] the coast of Africa, but to a small number of vessels to be employed by each power, and to be previously designated. The visit and search, thus restricted, it is believed, would insure the co-operation of one great maritime power, in the proposed exchange, and guard it from the danger of abuse.

Your committee cannot doubt that the people of America have the intelligence to distinguish between the right of searching a neutral on the high seas, in time of war, claimed by some belligerents, and that mutual, restricted, and peaceful concession by treaty, suggested by your committee, and which is demanded in the name of suffering humanity. In closing this report, they recommend to the House the adoption of the following resolution, viz :

Resolved, That the president of the United States be requested to enter into such arrangements as he may deem suitable and proper, with one or more of the maritime powers of Europe, for the effectual abolition of the slave-trade.

The following resolution was submitted to the House of Representatives, on the 10th of February 1823, and adopted the 28th of the same month :

Resolved, That the president of the United States be requested to enter upon, and to prosecute, from time to time, such negotiations with the several maritime powers of Europe and America, as he may deem expedient, for the effectual abolition of the African slave-trade, and its ultimate denunciation, as piracy, under the law of nations, by the consent of the civilized world.

Spanish Decree.

"The introduction of negro slaves into America was one of the first measures which my predecessors dictated for the support and prosperity of those vast regions, soon after their discovery. The impossibility of inducing the Indians to engage in dif- *33] ferent useful though painful labors, *arising from their complete ignorance of the conveniences of life, and the very small progress they had made in the arts of social existence, required that the working of the mines, and the cultivation of the soil, should be committed to hands more robust and active than theirs. This measure, which did not create slavery, but only took advantage of that which existed through the barbarity of the Africans, by saving from death their prisoners, and alleviating their sad condition, far from being prejudicial to the negroes transported to America, conferred upon them not only the incomparable blessing of being instructed in the knowledge of the true God, and of the only religion in which the Supreme Being desires to be adored by his creatures, but likewise all the advantages which accompany civilization, without subjecting them, in their state of servitude, to a harder condition than that which they endured in freedom, when free in their native country. Nevertheless, the novelty of this system demanded prudence in its execution; and thus it happened, that the introduction of negro slaves into America depended always on particular licenses, which my predecessors granted according to circumstances of places and times, till the era when untrained slaves were generally permitted to be imported, both in national and foreign vessels, by the royal proclamations of the 28th of September 1789, the 12th of April 1798, and the 22d of April 1804; in each of which the different places for their introduction were determined. All this clearly

evinced, that the Christian wisdom of my predecessors considered always these provisions as exceptions to the law, and dependent on variable conditions. Although the license granted the 22d of April 1804, had not expired, when Divine Providence restored me to the throne to which it had destined me, and of which an unjust usurper had perfidiously attempted to deprive me, the disturbances and dissensions excited in my American dominions, during my absence, immediately fixed my sovereign attention ; and meditating incessantly on the most appropriate means of re-establishing good order in these remote possessions, and giving them all the encouragement of which they are capable, I was not slow in perceiving, that the circumstances which had induced my predecessors to permit the traffic in slaves on the coast of Africa, and their introduction into both Americas, had entirely changed. In these provinces, the number of indigenous negroes has increased prodigiously, and even that of free negroes, under the fostering care of a mild government, and the Christian humanity of the Spanish proprietors; the number of the white inhabitants has likewise been much augmented, and the climate is not now so prejudicial to the latter, as it was before the *soil was cleared of wood, and subjected of cultivation. The advantage, likewise, which resulted to the inhabitants of Africa from their transportation to a [*34 civilized country, is not now so urgent or exclusive, since an enlightened nation has undertaken the glorious task of civilizing them in their own land. At the same time, the general progress of improvement in Europe, and the spirit of humanity which directed its late transactions, in restoring the political edifice, which the wickedness of a usurped government had shaken to its foundation, have excited among European sovereigns a desire to see this traffic abolished ; and at the congress of Vienna, agreeing on the necessity of the abolition, they occupied themselves in facilitating its execution, by the most amicable negotiations with those powers which had colonies, meeting in me that disposition which became so laudable an undertaking. Those considerations moved my royal mind to inform itself from enlightened persons, zealous for the prosperity of my states, as to the effects which the abolition of the traffic would produce on them. Having seen their reports, and being desirous to attain certainty in a matter of so grave importance, I transmitted them to my Council of the Indies, with my royal order, of the 14th of June 1815, that it might communicate to me its opinion and advice. Having collected all these copious materials, and having examined the proposition which the same supreme tribunal laid before me in its deliberation of the 15th of February 1816 ; answering to the confidence which I repose in it, and coinciding with its opinion respecting the abolition of the traffic in slaves ; and co-operating with the King of Great Britain by a solemn treaty, embracing all the points of reciprocal interest involved in this important transaction ; and determining that the time for the abolition was arrived, the interest of my American states being duly reconciled with the sentiments of my royal mind, and the wishes of all the sovereigns, my friends and allies; I have decreed as follows :

"Art. I. From this day forward, I prohibit all my subjects, both in the Peninsula and in America, from going to buy negroes on the coasts of Africa, north of the line. The negroes who may be bought on the said coasts shall be declared free in the first port of my dominions at which the ship in which they are transported shall arrive. The ship itself, together with the remainder of its cargo, shall be confiscated to the royal treasury, and the purchaser, the captain, the master and pilot, shall be irrevocably condemned to ten years' transportation to the Philippines.

"Art. II. The above punishment does not attach to the trader, the *captain, the master and pilot of the vessels which sail from any port of my dominions, [*35 for the coasts of Africa, north of the line, before the 22d of November of the present year ; to which period I grant, besides, an extension of six months, counting from the above date, to complete their voyages.

"Art. III. From the 30th of May 1820, I equally prohibit all my subjects, as well in the Peninsula as in America, from going to purchase negroes along those parts of the coast of Africa which are to the south of the line, under the same penalties imposed in the first article of this decree; allowing, likewise, the space of

five months from the above date, to complete the voyages that may be undertaken before the above mentioned 39th of May, in which the traffic in slaves shall cease in all my dominions, as well in Spain as in America.

"Art. IV. Those who, using the permission which I grant till the 30th of May 1820, shall purchase slaves on that part of the coast of Africa which lies south of the line, shall not be allowed to carry more slaves than five to two tons of tonnage of their vessel; and any persons contravening this enactment shall be subjected to the penalty of losing all the slaves on board, who shall be declared free at the port of my dominions in which the ship arrives.

"Art. V. This computation is made without a reference to those who may be born during the voyage, or to those why may be serving on board as sailors or servants.

"Art. VI. Foreign vessels, which may import negroes into any port of my dominions, shall be subjected to the regulations prescribed in this decree; and in case of contravening them, shall be subjected to the penalties contrined in it.

"And my royal pleasure being that the above decree should circulate in my dominions of America and Asia, for its punctual observance, I communicated it to my Supreme Council of the Indies, signed with my own hand, under date of the 22d of September last past; and on its being published in that tribunal, the 1st instant, a resolution passed, that steps should be taken to enforce it, and that the said tribunal should, for such purpose, circulate this my royal *cedula*, by which I direct all my viceroys, presidents, courts of judicature, commandants-general, governors and intendants of the Indies, of the adjacent, and of the Phil'ppine islands, to keep, fulfil and execute, and cause to be kept, fulfilled and executed, all that has been enjoined in this my sovereign determination, without transgressing or contravening, or permitting to be transgressed or contravened, its contents in any way; causing, it

*36] for that *purpose, to be published as an order, not only in the capital cities but also in the chief towns of jurisdiction of their respective districts, and communicating it likewise, each in his territory, to the tribunals, justices, authorities and persons who in any way may be bound to observe it. And this my royal *cedula* shall be attended to by the accountants' general offices of my said council. Dated, Madrid, the — December 1817.

"Your majesty prohibits for ever all your subjects of the Peninsula, as well as of America, from purchasing negroes on the coasts of Africa, enacting, that voyages for that purpose may not be undertaken to the coasts north of the equator, after the 22d of November, nor to those south of the equator, after the 30th of May 1820, under the penalties specified."

Portuguese Edict.

"I, the King, make known to those to whom the present Alvará, having the force and effect of a law, shall come, that as the abolition of the slave-trade in the ports of the coast of Africa, north of the equator, established by the ratification of the treaty, dated the 22d of January 1815, and of the additional convention, dated the 28th of July 1817, requires the adoption of fresh measures, which, fixing just and adequate penalties that shall attach to offenders, may afford to judges, and other persons charged with the execution of those measures, a standard for deciding upon such cases as shall occur relative to this object, think proper to ordain as follows:

"Art. I. All persons, of whatsoever quality or condition, who shall proceed to fit out or prepare vessels for the traffic in slaves, in any part of the coast of Africa lying north of the equator, shall incur the penalty of the loss of the slaves, who shall be declared free, with a destination herein afterwards mentioned. The vessels engaged in the traffic shall be confiscated, with all their tackle and appurtenances, together with the cargo, of what ever it may consist, which shall be on board on

account, *of the owners or freighters of such vessel, and of the owners of such slaves. The officers of such vessels to wit, the captain or master, the pilot, and supercargo shall be banished for five years to Mosambique, and each shall pay a fine equivalent to the pay or other profits which he was to gain by the adventure. Policies of insurance cannot be made on such vessels or their cargoes; and if they are made, the assurers who shall knowingly make them shall be condemned in triple the amount of the stipulated premium.

"Art. II. All persons, of whatever rank or condition, who shall import slaves into Brazil, in foreign vessels, shall incur the same penalty of the loss of the slaves, who who shall become freedmen, and be provided for as hereinafter directed.

"Art. III. Information shall be received relative to all the above cases. And if the vessel and her cargo have been confiscated, half of the whole proceeds of the property, sold at public auction, as well as half of the fines, shall be given to the informer, and the other half shall be paid into my royal treasury, to which the whole produce shall belong, if there be no informer. In case, however, of a vessel having been captured by a ship of war, such vessel and her cargo shall be subject to the provisions specified in the seventh article of the regulations concerning the mixed commission, annexed, uuder number 3, to the above convention of July the 28th, 1817. But in case the ship should be captured or confiscated, it shall not be lawful to commence an action for the recovery of such ship and cargo, except within a term not exceeding three years, to reckon from the date of the ship's entrance into the port where she has unloaded; after the expiration of which period, the said action shall be inadmissible and void.

"Art. IV. Informations, and all proceedings inclusive of the final sentence and its execution, shall be brought before the judges appointed to try causes respecting contraband goods and embezzlement, in any place or district, whither the slaves have been carried, or before any other magistrate or judge competent to decide on those matters, to whom I deem proper to commit this jurisdiction, as well as the authority requisite for carrying into execution the sentences passed by the mixed commission, in cases cognisable by the latter, and for trying and determining other cases that may occur, as also those accruing from them, allowing the party to bring an appeal conformably to the ordinance. It shall, however, be lawful for either of the parties to apply to the mixed commission, for them to determine whether or not the case have reference to the abolition; in which event, the proceedings upon it shall be delivered *up to the commission in the state in which they are; and whatever the commission may decide, shall be carried into effect. [*38

"Art. V. The slaves made over to my royal treasury in the manner specified in the above seventh article of the regulations concerning the mixed commissions, and those declared free by the above article (as it would be unjust to abandon them without support), shall be delivered into the office of the judge of the district, or, where there is none, into that of the judge charged to watch over the rights of the Indians, whose powers I enlarge with that jurisdiction, to serve as freedman for fourteen years, in any public service of the navy, the fortresses, agriculture or manual trades, as may be thought most convenient, being for that purpose enrolled in the respective stations; or shall be hired out to individuals of known property and probity, who shall be bound to support, clothe and instruct them, teaching them some handicraft or labor, that may be agreed upon, during stipulated period; the terms and the conditions of which shall be renewed as often as necessary, till the fourteen years are expired; the time of servitude may be shortened by two or more years, according as the good conduct of these persons may entitle them to the enjoyment of full freedom. In case these freedmen are destined for the public service, the officer who shall have authority in the respective stations to which they are assigned, shall nominate a proper person to fix the period as above mentioned, who shall be responsible for their education and treatment. They shall have as curator a person of known probity, who shall be nominated every three years by the judge, and approved by the judicial council or governor, and captain-general of the

province. To him it shall belong, to provide everything which may contribute to their well-being, to testify abuses that may affect them, to procure them release after their proper term of service, and enforce generally, for their benefit, the observance of the laws prescribed for the protection of orphans, in as far as those laws are applicable to them, to the end that whatever is ordered concerning them may be strictly executed.

"Art. VI. In the ports to the south of the equator, where the traffic in slaves is still permitted, the regulations passed in the law of the 24th of November 1813, shall be observed, with the following modifications: The distinction between vessels which shall exceed or shall not exceed 201 tons shall be abolished, and the number of slaves shall be regulated according to the tonnage of the vessel, in the proportion of five to every two tons, according to the ancient measure. The prohibition respecting marks made with iron on the body of the slaves, shall not extend
*39] to *marks imprinted with silver *carimbos*, which, being excepted, shall be permitted. It shall be allowed to the persons who own or freight slave vessels, to use, indiscriminately, iron or copper kettles, provided the latter, every voyage, be tinned anew, which shall be ascertained by proper officers visiting those vessels. If surgeons do not sail on board such vessels, on account of the impossibility of procuring them, or for some other reason equally conclusive, the owners shall be obliged to carry with them black *sangradores*, experienced in the treatment of the diseases with which the slaves are commonly afflicted, and in the remedies proper for curing them; because, in regard to all these objects, experience has evinced the necessity of specifying the provisions set forth in this *alvará*, which, under the above modifications, shall be observed in all its details.

"Art VII. Whereas, the alteration effected in the slave-trade by the restrictions contained in the above treaty and additional convention, requires considerable modifications in the provisions of the former laws enacted on this subject, independent of the last change, which will tend to render many of them void, I think proper to order that it shall be permitted to import into the ports of Brazil, slaves from any ports where this traffic is not prohibited, and that the freight shall continue to be settled by the parties.

"The present injunctions shall be strictly complied with; wherefore, I direct the tribunal of the Privy Council, of Conscience and of Orders; the president of my Royal Exchequer; the council of my Royal Treasury; the chief justice of the supreme court of appeal in Brazil; the president of the tribunal of Bahia; the Governors and Captains-General; and the other Governors of Brazil, and of my dominions beyond sea; also all the ministers of justice, and other persons whom the preset *alvara* may concern, to comply with and observe the same, notwithstanding any decision that may be at variance with it, and which I rescind for this end only; and it shall have the force and effect of a letter issued by the chancellery, though it be not actually issued by the same, and though its validity extend beyond a year, notwithstanding the law to the contrary. Given at the palace of Rio de Janeiro, the 26th of January 1818."

*Cases referred to in the argument of The Antelope.

The Amedie, 1 Acton 240.

This was an American vessel, captured by a British cruiser, in the latter part of the year 1807, on her way from Bonny, on the coast of Africa, to Matanzas, in the island of Cuba, with 105 slaves on board. She was libelled in the vice-admiralty court of Tortola, and condemned as engaged in an illegal trade. From this sentence an appeal was prosecuted to the high court of appeals. The first reason assigned by the captors for the condemnation of this vessel was, that "this ship was proceeding from Africa, with a cargo there laden, to Matanzas, in the island of Cuba, being a part of a colony then belonging to his majesty's enemies, contrary to the prohibitions of the order of his majesty in council, of the 11th day of November 1807." The second reason assigned was, that "the voyage was contrary to the prohibitory laws

of the United States of America, made for abolishing the slave-trade, which had been officially notified to the Lords of Appeal by the act of the American government in the case of the *The Chance*, Brown, master; and although such laws of a foreign state may not amount to a direct or substantive ground of condemnation in a court of prize, yet they may and ought to exclude an American claimant from the benefit of those relaxations of the law of war which, in favor of neutral states, have been introduced by his majesty's instructions, in regard to their commerce with the colonies of his majesty's enemies; a privilege which can only be understood to be granted to neutral governments as a branch of their national commerce, and not as an invitation to lawless individuals to engage in a trade which the neutral state itself has prohibited, and desires to discourage." The third ground of condemnation assigned by the captors was, "that Scott, the supercargo and lader of the slaves, is admitted to have an interest therein, which is liable to confiscation, he being a British subject, by the statute of 46 Geo. III., cap. 52."

JUDGMENT. Sir William Grant.—In the case of *The Amedie*, it must be considered, on the evidence produced to the court, and from the situation *of this vessel at the time of capture, that she was employed in carrying slaves from the coast of [*41 Africa to a Spanish colony. We are of opinion, this appears to have been the original design and purpose of the voyage, notwithstanding the pretence set up to veil the real intention of the proprietor. The American claimant, however, complains of the injury and interruption he has sustained in carrying on his usual and lawful trade, that of importing slaves for the purpose of sale, and calls upon the prize court to redress the grievance, and repair the damage he has sustained by the capture and unjust detention of this vessel.

On the different occasions when cases of this description formerly came before the court, the slave-trade was liable to considerations very different from those which now belong to it. So far as respected the transportation of slaves to the colonies of foreign nations, this trade had been prohibited by the laws of America only ; this country had taken no notice of that prohibition ; our law sanctioned the trade, which it was the policy of the American law first to restrict, and finally to abolish. It appeared to us, therefore, difficult to consider the prohibitory law of America in any other light than as one of those municipal regulations of a foreign state, of which this court could not take any cognisance, and of course, could not be called upon to enforce ; nor could it possibly bar a party in a court of prize. But by the alteration which has since taken place in our law, the question stands now upon very different grounds. We do now, and did, at the time of this capture, take an interest in preventing that traffic in which this ship was engaged. The slave-trade has since been totally abolished in this country, and our legislature has declared the African slave-trade is contrary to the principles of justice and humanity. Whatever opinions, as private individuals, we before might have entertained upon the nature of this trade, no court of justice could with propriety have assumed such a position as the basis of any of its decisions, whilst it was permitted by our own laws ; but we do now lay down as a principle, that this is a trade which cannot, abstractedly speaking, be said to have a legitimate existence; I say, abstractedly speaking, because we cannot legislate for other countries ; nor has this country a right to control any foreign legislature that may think proper to dissent from this doctrine, and give permission to its subjects to prosecute this trade. We cannot, certainly, compel the subjects of other nations to observe any other than the first and generally-received principles of universal law. But thus far we are now entitled to act, according to our law, and to hold that, *primâ facie*, the trade is altogether illegal, and thus to throw on a claimant the whole burden of proof, *in order to show, that by the particular law of his own country he is entitled [*42 to carry on this traffic. As the case now stands, we think that no claimant can be heard in an application to a court of prize, for the restoration of the human beings he carried unjustly to another country, for the purpose of disposing of them as slaves. The consequence of making such proof is not now necessary to determine ; but where it cannot

be made, the party must be considered to have failed in establishing his asserted right. We are of opinion, upon the whole, that persons engaged in such a trade cannot, upon principles of universal law, have a right to be heard upon a claim of this nature in any court. In the present case, the claimant does not bring himself within the protection of the law of his own country; he appears to have been acting in direct violation of that law, which admits of no right of property such as he claims; ours is express and satisfactory upon the subject.

Where, therefore, there is no right established to carry on this trade, no claim to restitution of this property can be admitted. We are hence of opinion, the sentence of the court below was valid, and ought to be affirmed.

The Fortuna, 1 Dodson 81.

This was the case of a vessel bearing the Portuguese flag, captured by a British cruiser, in October 1810, and sent into Plymouth as prize. It appeared in evidence, that she sailed from New York, under American colors, in the month of July 1810; and ostensibly owned by an American citizen; that she went to Madeira, landed a part of her cargo, and about a week before her departure from thence, a bill of sale of the ship was executed to a native of Madeira, a Portuguese subject; and in consequence of this sale, Portuguese papers obtained, and the Portuguese flag assumed. It appeared, from an inspection of the vessel, and other evidence in the case, that the object of the voyage was to procure a cargo of slaves on the coast of Africa.

Judgment. Sir William Scott.—"An American ship, *qua* American, is entitled, upon proof, to immediate restitution; but she may forfeit, as other neutral ships may, that title, by various acts of misconduct, by violation of belligerent rights most clearly and universally. But though this prize law looks primarily to violations of belligerent rights, as grounds of confiscation, in vessels not actually belonging to the enemy, it has extended itself a good deal beyond consideration of that description
*43] *only. It has been established, by recent decisions of the supreme court, that the court of prize, though properly a court purely of the law of nations, has a right to notice the municipal law of this country, in the case of a British vessel, which in the course of a prize proceeding, appears to have been trading in violation of that law, and to reject a claim for her on that account. That principle has been incorporated into the prize law of this country, within the last twenty years, and seems now fully incorporated. A late decision, in the case of *The Amedie*, seems to have gone the length of establishing a principle, that any trade contrary to the general law of nations, although not tending to, or accompanied with, any infraction of the belligerent rights of that country, whose tribunals are called upon to consider it, may subject the vessel employed in that trade to confiscation. *The Amedie* was an American ship, employed in carrying on the slave-trade; a trade which this country, since its own abandonment of it, has deemed repugnant to the law of nations, to justice and humanity, though without presuming so, to consider and treat it where it occurs in the practice of the subjects of a state which continues to tolerate and protect it by its own municipal regulations; but it puts upon the parties who are found in the occupation of that trade, the burden of showing that it was so tolerated and protected; and on failure of producing such proof, proceeds to condemnation, as it did in the case of that vessel. How far that judgment has been universally concurred in and approved, is not for me to inquire. If there be those who disapprove it, I am certainly not at liberty to include myself in that number, because the decisions of that court bind authoritatively the judicial conscience of this; its decisions must be conformed to, and its principles practically adopted, The principle laid down in that case appears to be, that the slave-trade, carried on by a vessel belonging to a subject of the United States, is a trade which, being unprotected by the domestic regulations of their legislature and government, subjects the vessel engaged in it to a sentence of condemnation. If the ship should, therefore, turn out to be an American, actually so employed; and it matters not, in my opinion, in what stage of the employment

whether in the inception or the consummation of it; the case of *The Amedie* will bind the conscience of this court to the effect of compelling it to pronounce a sentence of confiscation. I can have no rational doubt of her (The Fortuna's) real character; and under the authority of the case of *The Amedie*, I condemn her and her cargo."

*The Donna Marianna, 1 Dodson 91. [*44

This was the case of a vessel seized as she was proceeding to Cape Coast for a cargo of slaves, under the Portuguese flag. It appeared in evidence, that she was originally an American vessel, had been *bonâ fide* sold to a British subject, and was now claimed as Portuguese property, on the ground that she had been since conveyed to a Portuguese merchant. The court condemned the ship, as being a British vessel engaged in the slave-trade.

Sir William Scott.—"It would be a monstrous thing, where a ship, admitted to have been at one time British property, is found engaging in this traffic, to say, that, however imperfect the documentary evidence of the asserted transfer may be and however startling the other circumstances of the case, no inquiry shall be made into the real ownership. Here are on board this vessel only papers of mere form, and which are in contradiction with each other, leaving the whole transaction of the transfer in great doubt and obscurity; and if the court were to be prohibited, under such circumstances, from inquiry into the reality of the Portuguese title, one sees how easily the provisions of the legislature would be defeated. I can have no doubt that this court is bound judicially to consider this as a British vessel, and that this Portuguese disguise has been assumed for the mere purpose of protecting the property of British merchants in a traffic which it was not lawful for them to engage in."

The Diana, 1 Dodson 95.

This was the case of a vessel, under Swedish colors, seized at Cape Mount, on the coast of Africa, on the 10th of September 1810, by a British cruiser, and carried to Sierra Leone, where proceedings were instituted against the vessel and cargo. At the time of the seizure, she had exchanged her outward cargo for 120 slaves, part of which she had received on board. An information was filed on the part of the captors, and a claim made for the ship and cargo, as the property of a subject of the King of Sweden. The vessel and cargo were condemned in the vice-admiralty court at Sierra Leone, from which an appeal was prosecuted to the high court of admiralty.

The condemnation also took place on a principle which this court cannot in any manner recognise, inasmuch as the sentence affirms, *"that the slave-trade, [*45
from motives of humanity, hath been abolished by most civilized nations, and is not at the present time legally authorized by any." This appears to me to be an assertion by no means sustainable. This court is disposed to go as far in discountenancing this odious traffic, as the law of nations, and the principles recognised by English tribunals, will warrant it in doing, but beyond these principles, it does not feel itself at liberty to travel. It cannot proceed, on a sweeping anathema of this kind against property belonging to the subjects of foreign independant states. The position laid down in the sentence of the court below, that the slave-trade is not authorized by any civilized state, is, unfortunately, by no means correct, the contrary being notoriously the fact, that it is tolerated by some of them. This trade was at one time, we know, universally allowed by the different nations of Europe, and carried on by them to a greater or less extent, according to their respective necessities. Sweden, having but small colonial possessions, did not engage very deeply in the traffic, but she entered into it so far as her convenience required for the supply of her own colonies. The trade, which was generally allowed, has been since abol-

ished by some particular countries; but I am yet to learn that Sweden(*a*) has prohibited its subjects from engaging in the traffic, or that she has abstained from it either in act or declaration. Our own country, it is true, has taken a more correct view of the subject, and has decreed the abolition of the slave-trade, so far as British subjects are concerned; but it claims no right of enforcing its prohibition against the subjects of those states which have not adopted the same opinion with respect to the injustice and immorality of the trade.

The principle which has been extracted by the judge of the court below, from the case of *The Amedie*, is the reverse of the real principle there laid down by the superior court, which was, that where the municipal laws of the country to which the parties belong have prohibited the trade, the tribunals of this country will hold it to be illegal, upon the general *principles of justice and humanity, and refuse restitution of the property; but on the other hand, though they consider the trade to be generally contrary to the principles of justice and humanity, where not tolerated by the laws of the country, they will respect the property of persons engaged in it, under the sanction of the laws of their own country. The lords of appeal did not mean to set themselves up as legislators for the whole world, or presume in any manner to interfere with the commercial regulations of other states, or to lay down general principles that were to overthrow their legislative provisions with respect to the conduct of their own subjects. It is highly fit, that the judge of the court below should be corrected in the view which he has taken of this matter, since the doctrine laid down by him in this sentence is inconsistent with the peace of this country and the rights of other states.

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The proceedings in this court, as of appeal, have been commenced and carried on by both parties in the manner in which instance causes are usually conducted. A libel has been brought on the one side, to which a negative issue has been given on the other. Objections, however have been taken to the jurisdiction, upon two grounds. In the first place, it has been said, that the sentence of the court below, condemning the property to the crown, was a prize sentence, and, consequently, that the appeal ought to have been made to the privy council, and not to the instance court of admiralty, which is a mere municipal tribunal. It has likewise been said, that, supposing this court to be possessed of an appellate jurisdiction, still it has no jurisdiction over the question itself, which depends altogether upon the *jus gentium*. But I think the proceedings of the parties have sufficiently founded the jurisdiction in the cause; and I am by no means clear, that a court of civil jurisdiction might not otherwise have adjudicated on a question of this kind, and have excluded a claim asserted to be founded on principles contrary to general justice. The general injustice of a claim may be the subject of cognisance in a municipal court; a claim founded on piracy, or any other act which, in the general estimation of mankind, is held to be illegal and immoral, might, I presume, be rejected in any court, upon that ground alone. I am of opinion, therefore, that neither of the objections which have been taken are founded. After issue has been given here by the captors, as in an instance court, they cannot object to the competency of the court to entertain the question; and I am by no means willing to put the parties to the expense and inconvenience of commencing proceedings *de novo* before another tribunal.

(*a*) The treaty of concert and subsidy between his majesty and the King of Sweden, which was signed at Stockholm on the 3d of March 1813, has been made public since the date of this judgment. By an article of this treaty, the King of Sweden engages " to forbid and prohibit, at the period of the cession of Guadaloupe, the introduction of slaves from Africa into the said island, and the other possessions in the West Indies of his Swedish majesty, and not to permit Swedish subjects to engage in the slave-trade; an engagement which, (it is said) his Swedish majesty is the more willing to contract, as this traffic has never been authorized by him," though it had never been prohibited, and therefore, had been tolerated in practice, upon the principles then generally received.

On the part of the appellants it is, I think, sufficiently established in *evidence, that the ship and cargo are Swedish property; whilst, on the other side, there is nothing but a general suggestion that they may belong to American citizens. It may, perhaps, be true, that persons of that country have dishonestly engaged themselves in this traffic, under color of the Swedish flag, and the island of St. Bartholomew may be a convenient resort for such an illegal purpose; but there is nothing in this particular case which can lead to a grave suspicion, much less to legal conclusion, that this ship is not *bonâ fide* the property of Swedish subjects.

The question, then, is whether the slave-trade is permitted by the law of Sweden? I have before stated, that this trade was, till of late years, generally allowed by the states of Europe, when, from motives of humanity, some of them were induced to abolish it, so far as their own subjects were concerned. It does not appear, that anything has been done by Sweden, in the way of abjuring it, much less that she has issued any positive declaration to that effect. The court is certainly inclined to hold that it lies on the individual making the claim to show that the law of this country countenances the trade; but in this particular instance, that demand appears to be satisfied sufficiently, at least, to throw on the other party the *onus* of proving that it is not allowed. The indorsement upon the pass, signed by the Swedish governor, that the vessel was "bound to the coast of Guinea, for slaves," raises a presumption of the legality of the trade, and shifts the burden of proof from the claimant to the captor. It is not necessary that there should be an immediate act of the Swedish government itself on board, declaring what the precise state of the law may be; the court is bound to accept the declaration and authority of the governor, as it appears upon the pass, if not contradicted. I do not find that the authenticity of this pass at all denied by the judge of the court below: he goes on the broad and sweeping ground, that all dealing in slaves is unlawful, because the trade is not authorized by any civilized state, which is certainly an incorrect erroneous statement. If the captors had it in their power to prove that Sweden had abolished this trade, they should now have produced that proof; for they must have been aware, that the sentence of the judge could never be supported on the principles stated by him in his judgment. The sanction of the colonial governor has been produced by the claimants; and I am clearly of opinion, under this authority standing before me, and standing uncontradicted, that Sweden has not abolished the slave-trade.

*The King's Advocate.—From private information, I understand that Sweden never, at any time, engaged in this trade. [*48

Court.—Have you any documents to produce by which that fact can be made to appear? Can I presume, that the Swedish governor, who granted this pass, was acting contrary to the laws of his own country? It is impossible, for me, upon mere private information, to say that such was the fact. If anything can be produced in the way of evidence, it must be offered to the court before which this case may be carried on appeal. With every disposition to sustain the disinclination which has of late been justly shown to the slave-trade, I feel myself under a necessity of reversing this sentence, which appears to be founded on a false and dangerous principle, inconsistent with the rights of independent states, and, consequently, with the peace and safety of this country.

The only remaining point is, respecting these few Portuguese slaves which were found on board the ship. It appears, that they belong to the master of a Portuguese schooner, which had been lying at Cape Mount, but was driven to sea by stress of weather, whilst he was on shore, and that himself and his slaves had been taken on board this ship out of charity. In the absence of all proof, I shall not presume that he had been acting in opposition to the laws of his own country, and the treaty relative to the slave-trade between Great Britain and Portugal.

Sentence reversed.

MADRAZO *v.* WILLES, 5 Barn. & Ald. 353.

A foreigner, who is not prohibited from carrying on the slave-trade, by the laws of his own country, may, in a British court of justice, recover damages sustained by him in respect of the wrongful seizure, by a British subject, of a cargo of slaves on board of a ship then employed by him in carrying on the African slave-trade.

The declaration stated, that the plaintiff was a subject of the King of Spain, and that on the 12th of July 1817, at Havana, in the island of Cuba, he was lawfully possessed of a certain brig, called, &c., and continued so possessed, until the committing of the trespasses after mentioned, to wit, at, &c.; and that the said brig was, to wit, on, &c., lawfully cleared out for a certain voyage in the slave-trade, to wit, from Havana to the coast of Africa and back; and that, on the 16th of January 1818, on the high seas, to wit, off Cape St. Paul's, on the coast of Africa, defendant, with force and arms, seized the said brig, together with her stores, &c., and 300 slaves, and also divers goods, &c., on board of the said brig, and kept and detained them for a long time, *and converted and disposed of the slaves, goods, &c., to his own use; by means whereof, the said brig was prevented from further prosecuting the said voyage, and the plaintiff deprived of great gains, which would have accrued from the slaves and goods, and from taking on board other slaves and other goods, and from carrying them to the island of Cuba: plea not guilty. At the trial, at the last London sittings after Michaelmas term, it appeared, that the defendant, who was a captain in the royal navy, had, on the 16th of January 1818, off Cape St. Paul's, unlawfully taken possession of the ship of the plaintiff, a Spanish merchant, which was engaged in the slave-trade on the coast of Africa. The only question which arose, was as to the amount of damages. It occurred to the Lord Chief Justice at the trial, that the plaintiff was not entitled to recover the value of the slaves in an English court of justice; and accordingly, he desired the jury to find their verdict separately for each part of the damage, giving to the defendant liberty to move to reduce the verdict to the smaller sum, in case the court should agree with him on the point. The jury found a verdict for the plaintiff, damages 21,180*l.*; being for the deterioration of the ship's stores and goods, 3000*l.*, and for the supposed profit of the cargo of slaves, 18,180*l.* And now—

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Jervis moved for a rule *nisi* to reduce the damages to 3000 pounds. By the 47 Geo. III., c. 36, the slave-trade, and all dealings connected with it, were declared unlawful. It follows, therefore, as a consequence, that no one can be allowed to recover damages in respect of a cargo of slaves. And the 51 Geo. III., c. 23, goes still further; for it declares that trade to be contrary to the principles of justice, humanity and sound policy. Now, it being the duty of English courts of justice to be guided by those principles, no one, whether he be a foreigner or an Englishman, can be permitted there to claim any compensation in respect of such a traffic. The 58 Geo. III., c. 36, is, indeed, relied on by the other side; but that act, which was passed with a view of carrying into effect a treaty with Spain on this subject, ought not to affect the present question. Indeed, the fourth article of the treaty is strongly in favor of the defendant; for it provides, that the British government shall make compensation, out of a sum provided by parliament to Spanish merchants, for the seizure of their ships, which would seem to prove that, independently of that, such merchants had no other remedy.

ABBOTT, C. J.—On further consideration, it appears to me that there is no sufficient ground for reducing this verdict to the smallest sum found by the jury. Considering the very extensive language used in the two *acts of parliament to which we have been referred, I had at first thought that it was not competent, even for a foreigner, to come into an English court of justice, and there to recover damages for a loss sustained by him in the prosecution of a trade declared by the British legislature, in such strong language, to be unlawful. It was with that view that I directed the jury to separate the damages in this case; for it occurred to me,

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that though the plaintiff might not be entitled to recover for the slaves, still, inasmuch as, at all events, the defendant ought to have taken away the slaves promptly, if at all, the subsequent detention of the ship was an injury, for which the plaintiff was entitled to compensation. But I am now satisfied, that the words used by the legislature, although large and extensive, can only be taken to be applicable to British subjects. By the 58 Geo. III., c. 36, it appears, that a treaty had been made with Spain, for the prohibition of an important branch of the trade ; and that, with regard to the remainder, special provisions had been made, and a special court constituted, for the purpose of settling the disputes which might occur. Now, that shows most strongly, that but for such a treaty, the trade would have been perfectly legal in a Spaniard ; and the 10th section of that act, by which a certain sum is provided, as a full compensation for all losses sustained in consequence of the seizure of vessels, previously to the ratification of that treaty, seems to me to corroborate most strongly this view of the subject ; for it enables the parties sued to plead that clause in bar of the action, which would obviously have been unnecessary, if, under the previous acts, no action could have been maintained at all. This clause, therefore, seems to me to be a legislative recognition of a foreigner's right of suit. And by the 11th and 12th sections it is provided, that all suits commenced in the courts of admiralty shall proceed, if commenced ; and that the damages, &c., when recovered, shall be paid to the government of this country. All these clauses, taken together, appear to me to show, that what occurred to me at *nisi prius*, was not a sound exposition of the law. I am, therefore, of opinion, that the verdict for the larger sum found by the jury is right, and that we ought to refuse this rule.

Bayley, J.—I do not think that there is sufficient doubt in this case, to induce us to grant a rule. A British court of justice is always open to the subjects of all countries in amity with us, and they are entitled to compensation for any wrongful act done by a British subject to them. It is no answer to the present action to say, that it would not be maintainable by a British subject ; for the only questions are, whether the act of the defendant be wrongful, and what injury the plaintiff has sustained *from it ? Although the language used by the legislature in the statute referred to, is undoubtedly very strong, yet it can only apply to British subjects, and can only render the slave-trade unlawful, if carried on by them ; it cannot apply, in any way, to a foreigner. It is true, that if this were a trade contrary to the law of nations, a foreigner could not maintain this action. But it is not ; and as a Spaniard cannot be considered as bound by the acts of the British legislature prohibiting this trade, it would be unjust to deprive him of a remedy for the wrong which he has sustained. He had a legal property in the slaves, of which he has, by the defendant's act, been deprived. The 58 Geo. III., c. 36, proceeds on this principle ; and the provisions referred to by my Lord Chief Justice, seem to me to be conclusive on the subject. I think, therefore, that we ought not to disturb this verdict. [*51

Holroyd, J.—However much I may regret that any damages can be recoverable for such a subject as this, yet I think we are bound to say, that this plaintiff is entitled to them. I agree with the construction which has been put on the 58 Geo. III., c. 36 ; and I think, that even independently of that act, the action would have been maintainable for the loss of the slaves.

Best, J.—The statutes which have been referred to, speak in just terms of indignation of the horrible traffic in human beings ; but they speak only in the name of the British nation. The declaration of the British legislature, that the slave-trade is contrary to justice and humanity, cannot affect the subjects of other countries, or prevent them from carrying on this trade, out of the limits of the British dominions. The assertion of a right to control the subjects of other states in this respect, would be inconsistent with that independence which we acknowledge that every foreign government possesses. If a ship be acting contrary to the general law of nations, she is thereby

subject to confiscation; but it is impossible to say, that the slave-trade is contrary to what may be called the common law of nations. It was, until lately, carried on by all the nations of all Europe. A practice so sanctioned can only be rendered illegal, by the consent of all the powers. Most of the states of Christendom have now consented to the abolition of the slave-trade, and concurred with us in declaring it to be unjust and inhuman. The subjects of any of these states could not, I think, maintain an action in the courts of this country for any injury happening to them in the prose-

*52] cution of this trade; but Spain has reserved to herself the right of carrying *it on in that part of the world where this transaction occurred. Her subjects could not legally be interrupted in buying slaves in that part of the globe, and have a right to appeal to the justice of this country for any injury sustained by them from such an interruption. These principles are confirmed by the decisions of the court of Admiralty, and also by a judgment of Sir William Grant, pronounced at the Cockpit. The cases to which I allnde, are, The Fortuna, The Donna Marianna, and The Diana, in the admiralty court; and The Amedie, before the privy council. (1 Dodson 81, 91, 95.) These cases establish this rule, that ships which belong to countries that have prohibited the slave-trade, are liable to capture and condemnation, if found employed in such trade; but that the subjects of countries which permit the prosecution of this trade, cannot be interrupted, while carrying it on. It is clear, from these authorities, that the slave-trade is not condemned by the general law of nations. The subjects of Spain have only to look to the municipal laws of their own country, and cannot be affected by any laws made by our government. The rule for reducing the damages, in this case, must, therefore, be refused.

Rule refused.

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