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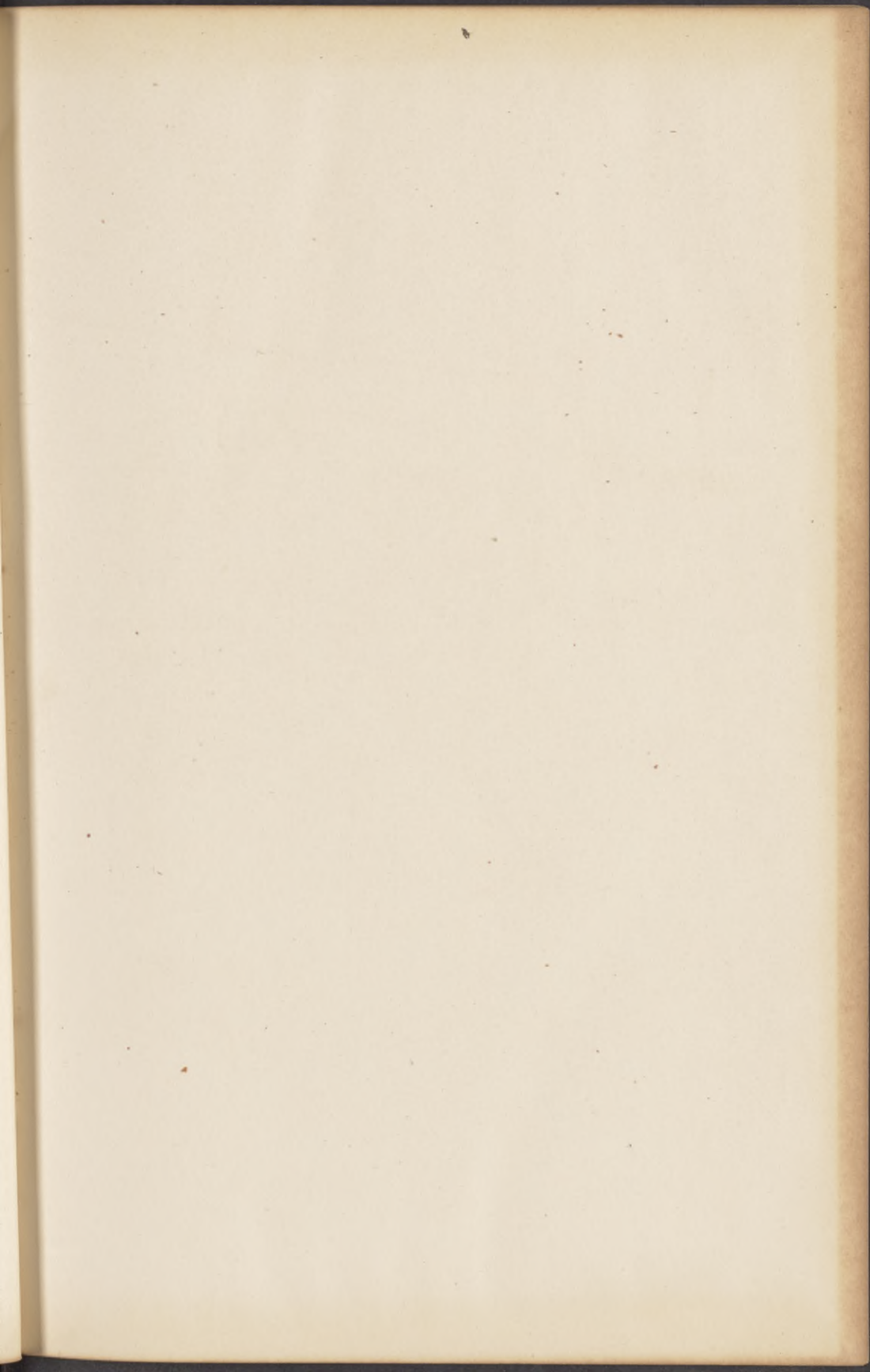
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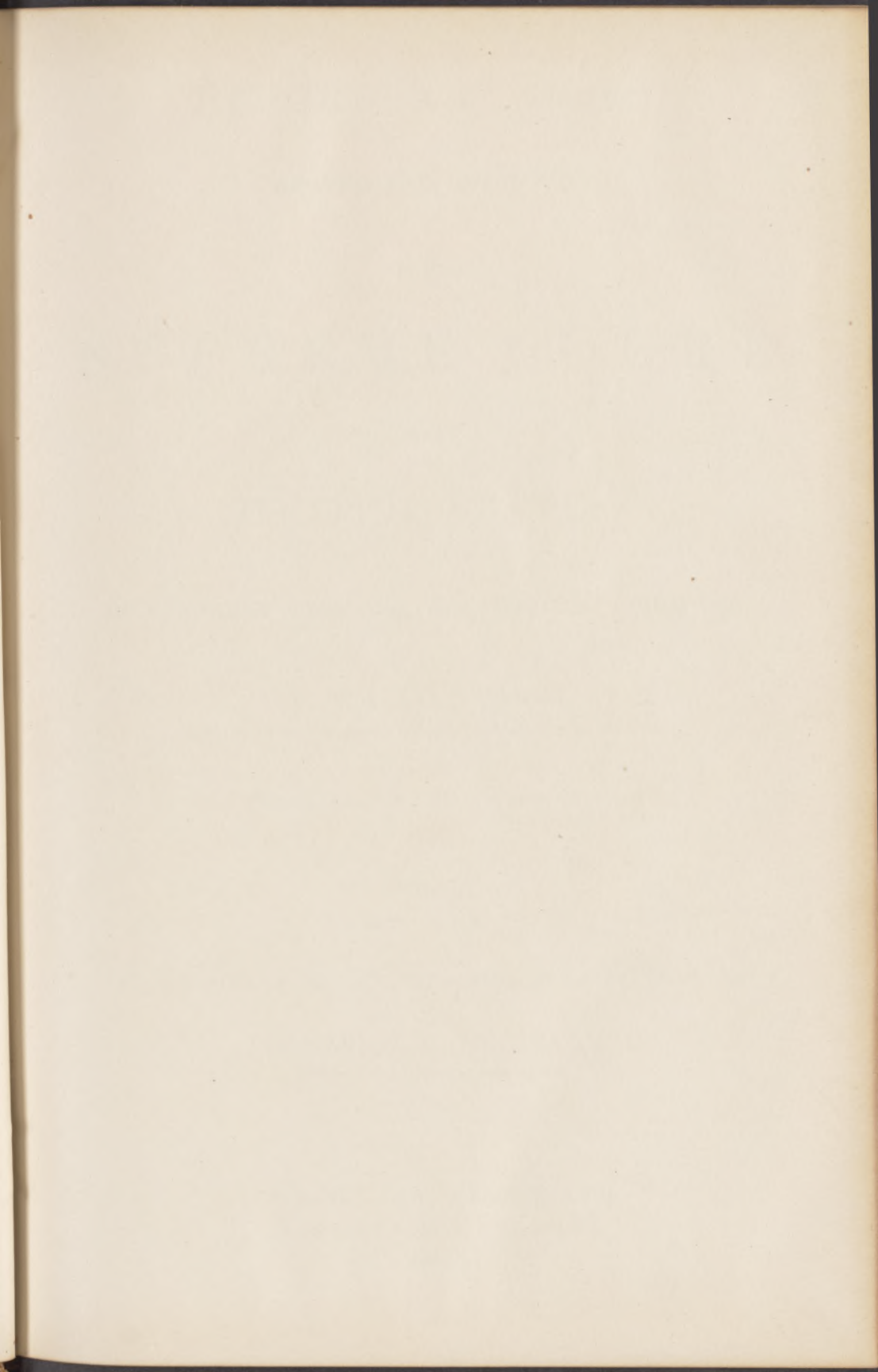


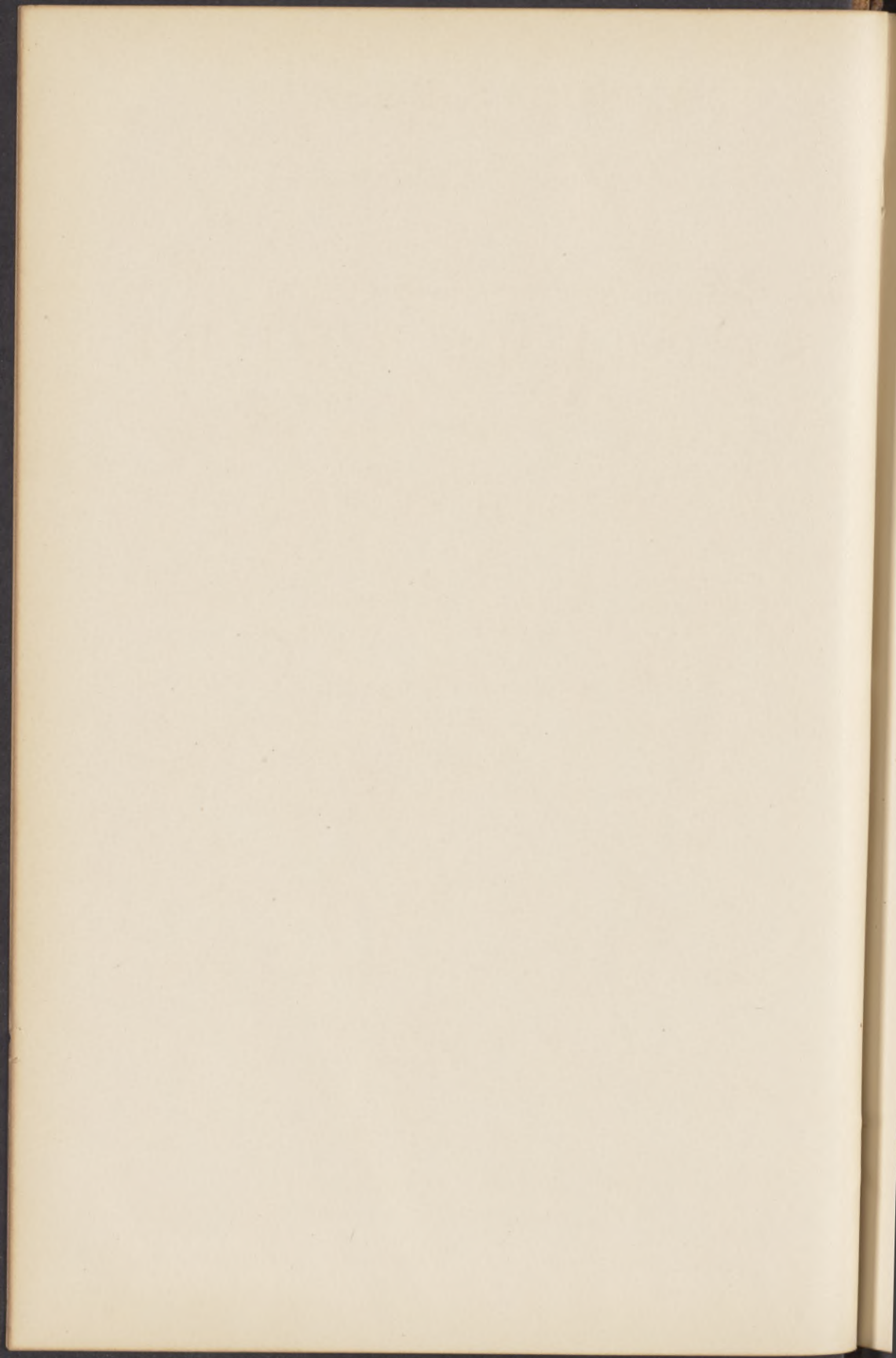














REPORTS OF CASES  
ARGUED AND ADJUDGED  
IN THE  
SUPREME COURT  
OF THE  
UNITED STATES,

IN FEBRUARY TERM 1804, AND FEBRUARY TERM 1805.

By WILLIAM CRANCH,  
CHIEF JUDGE OF THE CIRCUIT COURT OF THE DISTRICT OF COLUMBIA.

Potius ignoratio juris litigiosa est, quam scientia.  
CIC. DE LEGIBUS, DIAL. 1.

VOL. II.

THIRD EDITION.

*EDITED, WITH NOTES AND REFERENCES TO LATER DECISIONS,*

BY

FREDERICK C. BRIGHTLY,

AUTHOR OF THE "FEDERAL DIGEST," ETC.

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**JUDGES**  
OF THE  
**SUPREME COURT OF THE UNITED STATES,**  
DURING THE PERIOD OF THESE REPORTS.

---

Hon. JOHN MARSHALL,	Chief Justice.
“ WILLIAM CUSHING,	} Associate Justices.
“ WILLIAM PATERSON,	
“ SAMUEL CHASE,	
“ BUSHROD WASHINGTON,	
“ ALFRED MOORE,	
“ WILLIAM JOHNSON, in the place of	
“ ALFRED MOORE, resigned.	

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**THE ONLY JUDGES WHO ATTENDED AT FEBRUARY TERM**  
1804, WERE

Hon. JOHN MARSHALL,	Chief Justice.
“ WILLIAM CUSHING,	} Associate Justices.
“ SAMUEL CHASE,	
“ BUSHROD WASHINGTON,	

CHAPTER I

THE HISTORY OF THE UNITED STATES

FROM THE FIRST SETTLEMENTS TO THE PRESENT TIME

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## CASES DETERMINED

IN THE

## SUPREME COURT OF THE UNITED STATES.

FEBRUARY TERM, 1804.

WOOD *v.* WAGNON.

*Averments to confer jurisdiction.*

The courts of the United States have not jurisdiction in cases between citizens of the United States, unless the record expressly states them to be citizens of different states.

ERROR from the Circuit Court of the district of Georgia. The judgment was reversed, because it did not appear upon the record, that the circuit court had jurisdiction of the case.

The proceedings stated, that "the petition of John Peter Wagon, a citizen of the state of Pennsylvania, sheweth, that James Wood, of the state of Georgia," &c.

The objection taken was, that it did not appear that the plaintiff and defendant were citizens of different states, and on that ground, the judgment was reversed, upon the authority of *Bingham v. Cabot et al.*, 3 Dall. 382.

WILLIAMS and HODGES *v.* LYLES.

*Forthcoming bond. — Variance.*

In Virginia, a forthcoming bond which, in reciting the execution, states the costs to be \$20, instead of \$12, is not thereby vitiated, if the aggregate of debts and costs be truly stated, but will support a judgment, on motion.

THIS was a writ of error to a judgment of the Circuit Court of the district of Columbia, sitting at Alexandria, upon a forthcoming bond, taken under the laws of Virginia.

The execution, upon which the bond was taken, was for "\$143.67, also \$12.33, \*and 355 pounds of tobacco at the rate of 13 shillings and [\*10 four pence per cwt." The recital of the execution in the bond stated it to be for "\$143.67, also \$20.33, and 355 pounds of tobacco, at the

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rate of 13 shillings and four pence per hundred weight; and marshal's fees and commissions, and all costs attending the execution of the said writ, \$8.11, making in the whole the sum of \$171.99." This aggregate sum was correct, according to the execution, and not according to the recital, there having been a mistake in writing the word twenty for twelve. The court below, considering the recital as correct in substance, rendered judgment for the plaintiff. The defendants took a bill of exceptions, and brought their writ of error.

*Youngs*, for the defendant in error, cited *Scott v. Hornsby*, 1 Call 42; *Bell v. Marr*, Ibid. 47; *Worsham v. Egleston*, Ibid. 48; and *Wilkinson v. McLochlin*, Ibid. 49.

Judgment affirmed, with ten per cent. damages and costs.

### FAW v. MARSTELLER. (a)

#### *Depreciation.*

In a deed, made in the year 1779, of land, rendering an annual rent of 26℥ current money of Virginia for ever, the rents are not to be reduced by the scale of depreciation, but the actual annual value of the land, at the date of the contract, in specie, or in other money equivalent thereto, is to be ascertained by a jury.<sup>1</sup>

*Marsteller v. Faw*, 1 Cr. C. C. 117, reversed.

THIS was an appeal by Faw, the original defendant, from a decree of the Circuit Court of the district of Columbia, sitting as a court of chancery, at Alexandria, in July 1803 (Reported below, 1 Cr. C. C. 117). The case, as stated by Marshall, Ch. J., in delivering the opinion of the court, was as follows:

\*[11] "In the month of May 1779, the executors of John Alexander, in pursuance of a power contained in the will of their testator, set up to the highest bidder, on a ground-rent for ever, certain lots of land lying in the town of Alexandria. One of these lots, containing half an acre, was struck off to a certain Peter Wise, at the rent of 26℥ per annum, current money of Virginia. Wise bid for Jacob Sly, a citizen of Maryland, who transferred the lot to Abraham Faw, to whom the same was conveyed in fee-simple, by a deed bearing date the 5th of August 1779, in which the said ground-rent of 26℥ per annum, current money of Virginia, was reserved.

In the year 1784, Abraham Faw divided the said half acre of ground into eight smaller lots, five of which he had sold, reserving a ground-rent

(a) The counsel in this cause had not furnished the court with a statement of the points of the case, according to the rule of the court, ante, vol. 1, p. xvi. Being called upon by the court for such a statement, Swann observed, that there was but a single point in the case, and therefore, they had not supposed it necessary to reduce it to writing.

MARSHALL, Ch. J.—The court will proceed to hear this cause, without having been furnished with a statement of the points; but they wish it to be understood, that they always expect such a statement. If there is only one point, it is the easier to state it.

<sup>1</sup> The obligation of a contract to pay money, *v. Lee*, 12 Wall. 548, *STRONG, J.* See *Thorington v. Smith*, 8 Id. 1; *Bigler v. Waller*, 14 Id. 297.



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for ever, amounting to 84*l.* 12*s.* per annum. One of these lots was conveyed by Faw to Jacob Hess, in the year 1784, at the ground-rent of 25*l.* 16*s.* per annum, which lot had been since purchased by Philip Marsteller, the appellee, who had also purchased from the devisee of John Alexander, all his rights in, or issuing from, the half-acre lot of ground conveyed to Abraham Faw. Thus, Abraham Faw became liable to Philip Marsteller, for the rent accruing under the deed of August 1779, who was himself liable to the said Faw for the rent accruing on part of the same lot, under the deed executed by Faw to Hess, in November 1784.

In November 1781, the legislature of Virginia passed an act calling paper money out of circulation; and also another act directing the mode for adjusting and settling contracts made in that currency. The second section of this latter act, after stating, by way of preamble, that "the good people of the state would labor under many inconveniences for want of some rule, whereby to settle and adjust the payment of debts and contracts entered into, or made, between the first day of January 1777, and the first day of January 1782, unless some rule should be by law established for liquidating and adjusting the same, so \*as to do justice as well to the debtor as the creditor," [\*12 enacted, that from and after the passing of the act, "all debts and contracts entered into or made in the current money of this state, or the United States, excepting, at all times, contracts entered into for gold and silver coin, tobacco or any other specific property, within the period aforesaid, now remaining due and unfulfilled, or which may become due, at any future day or days, for the payment of any sum or sums of money, shall be liquidated, settled and adjusted agreeably to a scale of depreciation hereinafter mentioned and contained; that is to say, by reducing the amount of all such debts and contracts to the true value in specie, at the days or times the same were incurred or entered into, and upon payment of said value so found, in specie, or other money equivalent thereto, the debtors or contractors shall be for ever discharged of and from the said debts or contracts, any law, custom or usage to the contrary, in any wise notwithstanding."

The fourth section established the scale of depreciation which should constitute the rule by which the value of the debts, contracts and demands in the act mentioned, should be ascertained; and the fifth section enacted, "that where a suit shall be brought for the recovery of a debt, and it shall appear, that the value thereof hath been tendered and refused; or where it shall appear, that the non-payment thereof hath been owing to the creditor; or where other circumstances arise, which, in the opinion of the court, before whom the cause is brought to issue, would render a determination agreeable to the above table unjust; in either case, it shall and may be lawful for the court to award such judgment as to them shall appear just and equitable."

The act then empowered the court to direct at what depreciation any judgment should be discharged, on a verdict given for damages, between the first day of January 1777, and the first day of January 1782, having "regard to the original injury or contract on which the damages are founded, and any other proper circumstances that the nature of the case will admit."

\*It was proved in the cause, that the contracts made by the ex- [\*13 ecutors of John Alexander excited at the time very great attention, and were the subject of general conversation. The prevailing opinion among the bidders was, that the rents would be paid in paper money, so long as

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paper should be the circulating medium, after which, they would be paid in specie. Such, too, was the opinion of Peter Wise, the purchaser of the particular lot which occasioned the existing controversy, and there was reason to suppose, it was also the opinion of those who were disposing of the property; it was also thought, the rent reserved was low, when considered as payable in paper, but high, if to be paid in specie.

It was further proved, that a lot, not more valuable than that which occasioned the present contest, was sold in 1774, on a ground-rent of 13*l.* 5*s.* per annum, for ever, and that a lot, less valuable, was sold in the year 1784, on a ground-rent of 35*l.* per annum. But it appeared from other parts of the testimony, that the lots which were sold in the year 1784, in Alexandria, on ground-rent, were contracted for so much above the value they afterwards bore, that the lessors, in very many instances, were under the necessity of reducing the rents one-half below the sum originally stipulated, and in some instances, the reduction was still greater.

The circuit court decreed that the rents which accrued during the existence of paper money, should be reduced according to the scale, for the time when they became payable, but that the subsequent rents should be paid in specie. From this decree, Faw appealed, and the case was now argued by *Swann* and *Mason*, for the appellant; and by *E. J. Lee*, *Jones* and *Key*, for the appellee.

For the *appellant*, it was contended, that this was a contract within the letter and spirit of the 2d section of the act of assembly of Virginia before mentioned, passed in November 1781, c. 22 (Chancery Revision of the Laws, p. 147), and entitled "An act directing the mode of adjusting and settling  
\*14] the payment of certain debts and contracts, and for other purposes;" and therefore, \*it was not within the the 5th section of that act.

1. This is a contract made in current money of the state, within the period contemplated by the act, payable at a future day or days, for the payment of money, and is, therefore, within the very words of the 2d section of the act. This point was decided by the court of appeals in Virginia, in the case of *Watson and Hartshorne v. Alexander*, 1 Wash. 340. The object of that section was to provide for contracts in which the fact of depreciation had increased the ideal value of the consideration of the contract. It is proved, in the present case, that the rent was high, if payable in specie. It is, therefore, a case within the spirit as well as within the words of the section; for it is reasonable to presume, that the high rent was agreed to be given, in consequence of the depreciated state of the paper currency.

2. The 5th section could not mean to provide for cases which were within the spirit of the 2d; because that would be to render the latter section a mere nullity. There would be no use in fixing a scale, if the court were to make a rule according to the circumstances of each particular case. But the 5th section was intended for the benefit of debtors only. Every case of equity in favor of creditors was provided for by the exception in the 2d. The only two cases particularly specified in the 5th section to authorize the equitable interposition of the court, are, where the money has been tendered and refused, or where the non-payment is owing to the creditor. In both these cases, the equity is in favor of the debtor. The act then proceeds, "or where other circumstances arise, which in the opinion of the court would render a determination according to the above table unjust; in either case,



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it shall be lawful for the court, to award such judgment as to them shall appear just and equitable." The two cases are only put by way of example, to show the nature of those other circumstances which will justify the court in departing from the general rule.

\*In the present case, there are no such other circumstances as come within the intention of the legislature; nothing like the examples [\*15 which they have stated.

The act of assembly is founded upon the idea that every contract for the payment of current money, made within the period described, is to be considered, *prima facie*, a contract for the payment of paper money. This idea is founded in reason, because, during that period, it was almost the only circulating medium: gold and silver were scarcely known.

But if the 5th section was intended for the benefit of creditors, as well as debtors, still it authorizes the court to interfere only in cases attended with extraordinary circumstances. No such circumstances appear in the present case: it was an ordinary and a common contract, not differing from the great mass of cases which the legislature intended to subject to the operation of the scale. At the time when this contract was made, May 1779, the parties could have had no idea of a scale of depreciation. It was even in a manner criminal, to doubt the faith of the money. It might have appreciated, until it gained the par of gold and silver. It was, therefore, natural, that they should have had an expectation that the rents would at some future time be payable in specie. Such must also have been the expectation of all those who made contracts for the payment of current money, at distant future periods, and therefore, that circumstance cannot vary this case from all others, where the money was to be paid in future. The injury arising from that expectation was the very evil which the legislature intended to guard against.

Argument for the *appellee*.—1. This case is not within the letter or the spirit of the 2d section of the act: 2. It is within the 5th section.

1. It is not within the spirit or letter of the 2d section. \*The object of the legislature was, to prevent injury arising from the depreciation of paper money, in cases where the contract was not made with a view to that currency, and where the parties had not guarded themselves from the effect of its depreciation. The act was not expected to do abstract justice in each case, but to fix a rule which should produce a general good effect. It was predicated upon the idea, that an equivalent ought to be paid for the consideration received. The consideration was presumed to pass, at the time when the obligation was given, or the contract entered into; and if entered into between certain periods, the value of the consideration was supposed to have been measured by the paper medium. But where anything on the face of the contract, showed that paper money was not in contemplation, then the rule was not to apply, as where the contract was made for gold and silver, tobacco or other specific thing. A contract, therefore, in which the parties did not estimate the value of the consideration by the paper medium, was not a contract within the spirit of the 2d section of this act of assembly. So, if the parties themselves had provided for the event of the depreciation and total failure of paper money, and had regulated the price accordingly, the case would be out of the spirit of the law; for the parties themselves



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had taken care to do the thing which the law supposed them to have neglected, and only for that reason provided a remedy.

Hence, in the construction of this act, courts have always traced the contract up to the time when the consideration first moved from the plaintiff to the defendant, as in the case of *Pleasants v. Bibb*, 1 Wash. 8, where the bond was dated 1st of February 1780, with condition to pay 105*l.* on or before December 17th, 1781, with interest thereon from the 16th of February 1779, and it was decided, that the debt arose in February 1779, and was to be reduced by the scale for that month. By the same reason, if the debt had been stated to have accrued before January 1777, it would not have been reduced at all, yet it would, by the tender law, have been payable in paper money, during its existence, but if not actually paid or tendered \*17] \*in paper, during that time, it would not come within the act of assembly of 1781.

Suppose, a contract made in 1779, when the depreciation was twenty for one, and a bond given to pay 20*l.* current money, on delivery of a horse worth 20*l.* current money, in 1785. This is another case not within the spirit of the act. Again, suppose, a contract made in 1777, when the market price of wheat was 20*s.* a bushel, payable in paper money, by which A. should bind himself and his heirs, to deliver to B. and his heirs, 1000 bushels of wheat per annum, for 1000 years, for which B. agrees for himself and his heirs, to pay ten shillings current money of Virginia per bushel, on delivery. Would this contract be within the spirit of the act?

In the present case, the lease creates no debt; it is only inducement. The debt arises only from the enjoyment of the property; and *nil debet* is a good plea, which it would not be, if the debt was due by specialty. The consideration of the rent due at the end of any one year was the enjoyment for that year; and if the tenant should be evicted by a paramount title, the rent would not be recoverable. The consideration for all the rents since 1781, has accrued since the passage of the law.

If the debt in 1800 arises from the enjoyment of the preceding year, is it possible to measure the value of that enjoyment, by the depreciated paper of 1779? No consideration passed at the date of the deed, and no debt was then created. It is impossible to conceive, that an interminable contract, when a new debt is always rising from a new enjoyment, should be measured by the paper money and the enjoyment of 1779.

The act must have meant temporary, and not interminable contracts. It could not have been the understanding of the parties, at the date of the deed, \*18] that the rent was for ever \*to be paid in the currency of 1779; which is the construction contended for by the appellant, in his answer to the bill. No person had an expectation that paper money would last for ever: it was not in the nature of things, that it should. Nor is such a construction warranted by the expressions of the deed. The words are, "to have and to hold the said lot unto the said Abraham Faw, his heirs and assigns for ever, yielding and paying for the same, on the fifth day of August next ensuing, and yearly and every year for ever, on the same day, unto the said William Thornton Alexander, his heirs and assigns, the sum of twenty-six pounds, current money of Virginia." And the covenant of Faw is, that he will "yearly and every year for ever, well and truly pay the aforesaid sum of twenty-six pounds, Virginia currency." This can only mean money current

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at the times the rents shall become payable. It cannot be contended, that he could satisfy the terms of the lease by paying the rents since 1782, in paper money.

As this case is not within the spirit, so neither is it within the letter, of the second section of the act. The words are, "all debts and contracts entered into or made in the current money of this state, or of the United States," "within the period aforesaid, now remaining due and unfulfilled, or which may become due at any future day or days, for the payment of any sum or sums of money," &c. At the date of the deed, this was neither a debt nor a contract, in the sense in which those terms are used in the act.

The whole clause must be taken together. The subsequent words explain the kind of debts and contracts intended. The word debts means *debita in presenti, solvenda in futuro*; such as debts due by instalments. But in the present case, there was no debt at the date of the deed. If Faw had become bankrupt, the rents not accrued \*at the time of the bankruptcy, could not be proved under the commission; and the certificate [\*19 would be no bar to the recovery of the future rents. The reason is, because there is no debt, until after enjoyment. Each gale of rent is as a new and separate contract, and constitutes a new and separate debt.

The words "debts" and "contracts" are not used synonymously, but in contradistinction to each other; and the subsequent epithets are to be applied distributively, *reddenda singula singulis*. Thus, the words "now remaining due, or which may become due, at any future day or days," are to be referred only to the word "debts;" and the expressions "unfulfilled," and "for the payment of any sum or sums of money," are only applicable to the word "contracts." The meaning, therefore, is, "debts now remaining due, or which may become due, at any future day or days," and "contracts for the payment of any sum or sums of money, now remaining unfulfilled."

It is clear, then, that this was not a debt within the meaning of the act. The word contract evidently means such a contract as might be fulfilled. This is implied by the words "now remaining unfulfilled." It must not only be a contract which might be fulfilled, but it must be then remaining unfulfilled. Now, this is not a contract which can ever be fulfilled, strictly speaking; and if the rents had been paid up to the time of passing the act, it would have been fulfilled so far as it was possible ever to fulfil it. If the rents should be paid for a thousand years, it would still be as far from being fulfilled, as it was the day of its date. But as the rents were not paid up to the time of passing the act, there was something for the act to operate upon, if it is to be considered as affecting the case at all. The rents then accrued constituted a debt "remaining due," and therefore, perhaps, they were properly subject to the scale. But the future rents constituted no debt; and the contract was constantly renovating, and never could be discharged.

\*The case, then, is not within the statute. But if it is, it is within the fifth section. It has been urged, that this section is for the benefit of debtors only. But surely, the legislature of Virginia would not so violate the principles of justice, as to provide for the equity of debtors, without also providing for special cases in favor of creditors. The case of *Watson and Hartshorne v. Alexander*, 1 Wash. 340, is full in our favor upon this point. The judgment in that case was not reversed on the merits, but upon a supposed impropriety in the manner of bringing the special cir- [\*20



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cumstances of the case before the court below. But here, it is not contended, that the facts did not come properly before the court.

It appears, that the rent was high at that time, if payable in specie; but low, if payable in paper money. The deposition of Wise, who purchased the lot for Sly, states, that he understood, at the time, that the rents would be payable in specie, when paper should cease to circulate. What was the appellant's own opinion, appears by his having received from Saunders, 400*l.* in specie, for a breach of Saunders's covenant to extinguish the rent. If the rent is to be reduced to the sum of 1*l.* 3*s.* 7*d.*, according to the appellant's idea, he will have received more than three hundred years' purchase.

But the parties in this case made their contract, with a full knowledge of the depreciation of paper money. It had already greatly depreciated, and was continuing rapidly to depreciate. They knew they were forming a contract which would extend far beyond the possible existence of paper money. That temporary medium, therefore, could not have had much influence upon either of them. The chance of paying his rent, for some time, in a depreciated currency might have been some small temptation to the appellant, to give a little higher rent, but it does not appear to have been a very high rent, even if payable in specie, provided specie had been as plenty as it was \*21] before the existence of paper money. The small increase of the rent which the existence of paper money occasioned, was compensated to the appellant, by his right to pay it in a depreciated currency, during the existence of that currency; while the same increase of rent, was a compensation to Alexander, for his loss by the depreciation.

It was, therefore, a fair and equitable bargain, in which the subject of depreciation was completely and fairly settled by the parties themselves. This court, therefore, as a court of equity, has nothing more to do than to carry into effect the contract, as it was understood by the parties at the time, by reducing to the scale the rents which accrued during the existence of paper money, and by compelling a payment of the residue in specie. The intention of the parties constitutes the contract; especially, in equity. If it was their intention (as seems to have been fully proved) that the rent should be paid in paper money, during its existence, and afterward, in specie, then it was a contract to pay the rent in gold and silver, after a certain period; which period has, by subsequent events, been proved to be the 1st of January 1782. As to all the rents, therefore, which have since accrued, it was a contract for gold and silver, and therefore, expressly within the exception of the 2d section of the act.

Upon these principles, the decree of the court below is founded, and if the court is now to form an equitable adjustment of the contract, it cannot be formed on surer ground than the intentions of the parties themselves, deliberately entered into, with a full knowledge of all the circumstances, and without even an allegation of fraud, mistake or accident.

In *reply*, it was observed, that the nature of the consideration makes no difference. The case is not varied, whether the consideration be a horse or land; or the use of a horse, or the use of land; or whether an annuity for ever be granted in consideration of 1000*l.* paid in hand, or whether it be a perpetual rent.



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\*If the deed did not create a debt, yet it created a contract. It contains a covenant on the part of Faw to pay, every year, 26*l*. Virginia currency. This is a contract obligatory upon him, without enjoyment.

The intention of the parties has been resorted to. That intention can be learned only from the instrument itself. But if we do resort to extraneous evidence, it appears, that current money was intended, and that paper money was most naturally within the contemplation of the parties, because there was little specie in circulation. The law was intended to carry into effect the intention of the parties.

It has been said, that the consideration must be a past, and not an accruing consideration. But here the consideration was past. The grantor had parted with his whole right and estate. In an action of debt, for rent, upon a demise by deed, it is not necessary to aver occupation and enjoyment. The deed itself is the consideration.

February 14th, 1804. MARSHALL, Ch. J., after stating the facts of the case, delivered the opinion of the court.

This suit was instituted to recover the rent in arrear, under the deed, executed in August 1779, a part of which rent had accrued during the circulation of paper money. The circuit court decreed that the rents which became payable in the years 1780 and 1781 should be adjusted by the scale of depreciation, when they respectively became due, and that the rents accruing afterwards should be discharged in specie. From this decree, Faw appealed to this court, and it is alleged, that the decree of the court below is erroneous, because, 1st. The contract of August 1777, is within the 2d section of the act of the Virginia assembly, which has been cited. [\*23 And, if so, \*2d. That it is not within the 5th section of that act.

The descriptive words of the act of assembly are, "all debts and contracts entered into, or made, in the current money of this state, or of the United States," "now remaining due and unfulfilled, or which may become due, at any future day or days, for the payment of any sum or sums of money." These words, it is urged, comprehend in express terms the very contract now before the court. That contract is an engagement entered into within the time specified by the act, to pay several sums of current money in future. To make the case still stronger, contracts for gold and silver coin, tobacco or any other specific property, are expressly excepted out of the operation of the law. When those who introduced these exceptions were so very cautious, as expressly to take a contract for tobacco, or other specific property, out of the operations of a law made solely for money contracts, there are additional inducements to believe, that every possible contract, not included within the exceptions, was designed to be comprehended in the general rule.

It is admitted in argument, by the counsel for the appellee, that the terms used in the first part of the section are such, that if they stood alone, they would include, in their letter, the case at bar: but it is contended, that there are subsequent words which limit those just quoted, so as to restrain their operation to contracts capable of being extinguished. These words are, that upon payment of what was the value of the debt or contract, at the time it was entered into, "the debtors or contractors shall be for ever discharged of and from the said debts or contracts." These words, it is

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said, can only apply to temporary contracts, such as may be completely fulfilled, and from which the debtors or contractors may, in the language of the law, "be for ever discharged."

It will not be denied, that there is much weight in this argument; but it does not appear to the court, to be strictly correct. In searching for the literal construction of an act, it would seem to be generally true, that positive and explicit provisions, comprehending in terms \*a whole class  
\*24] of cases, are not to be restrained, by applying to those cases an implication drawn from subsequent words, unless that implication be very clear, necessary and irresistible. In the present case, the implication does not appear to the court to be of that description. A contract for the payment of distinct sums of money, at different periods, is very much in the nature of distinct contracts. An action of debt lies for each sum, as it becomes due, and when that sum is paid, the debtor or contractor is for ever discharged from the contract to pay it. To understand, in this sense, the words of the act which are considered as restrictive, does not appear to the court to be such a violence to their natural import as to be inadmissible; and to understand them in this sense, reconciles the different parts of the clause with each other.

But although the counsel for the appellee may not have established the literal construction for which they insist, yet so much weight is admitted to be in the argument, that if they succeed in showing the case to be out of the mischief intended to be guarded against, or out of the spirit of the law, the letter would not be deemed so unequivocal as absolutely to exclude the construction they contend for.

It is urged, that the mischief designed to be guarded against, is confined to temporary contracts, and that by the spirit of the law, and the construction it has received, the time when the consideration, on which the debt is founded, moved from the creditor, is the real date of contract. But the court perceives no sufficient ground for saying that this case is taken out of the mischief or spirit of the law, by either of the circumstances which have been relied on.

The only real reason for supposing that the law might not be designed to comprehend interminable contracts is, that as paper money must unavoidably cease to circulate, during the continuance of the contract, the parties must  
\*25] have measured their agreement by a more permanent standard. \*Very great respect is certainly due to this argument, but it cannot be denied, that an agreement, which is to subsist for a very great length of time, as for a thousand years, would be entered into with precisely the same sentiments as an agreement to subsist for ever. The contracting parties would be as confident, in the one case, as in the other, that the agreement would subsist, after the paper currency would cease to circulate. Yet an agreement for a thousand years would be within the very words and the spirit of the law, which plainly comprehends engagements for different sums of money, to become due in future, at different periods. To suppose a distinction to have been contemplated between two such cases, is to suppose a course of reasoning too unsubstantial, and too finely drawn for the regulation of human action. It seems to be the date, and not the duration of the contract which was regarded by the legislature. The act is applied directly to the date of contract, and the motive for making it was, that contracts en-



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tered into during the circulation of paper money, ought in justice to be discharged, by a sum differing in intrinsic value from the nominal sum mentioned in the contract, and that when the legislature removed the delusive standard, by which the value of the thing acquired had been measured, they ought to provide that justice should be done to the parties.

That the time when the consideration was received constitutes the date of contract, according to the intention of the act, seems not to be a correct opinion; nor, if correct, would it affect the present case. If for example, a contract had been entered into, in 1779, to be executed in 1789, whereby a specific sum in current money was to be given for property, then to be delivered, no doubt would be entertained, but that the case would come within the law, although the thing sold would pass out of the vendor, after the first of January 1782; yet the contract to pay the money was entered into in 1779, and in the general legislative view of the subject, the value of the money at the date of the contract is supposed to have regulated the price of the article.

\*If, in the case of rents, this argument of the counsel for the ap-  
pellees was correct, it would follow, that rents accruing during the [\*26  
circulation of paper money, or leases made before the first of January 1777, were within the operation of the act. If enjoyment is the consideration for which the rent becomes payable, and the date of the consideration is, in the spirit of the act, the date of contract, then, rents accruing between the first of January 1777, and the first of January 1782, or leases made prior to the former period, would be payable according to the scale of depreciation, and rents accruing after the first of January 1782, or leases made for a short term of years, when depreciation was actually at the rate of 500 for one, would be payable in specie at their nominal sum. These consequences follow inevitably, from the construction contended for, and yet it is believed, that no person would admit an exposition which he acknowledged to involve them.

The position, then, that the value of the money at the time when the consideration for which it was to be paid was received, is the standard by which the contract is to be measured, is not a correct one, and if correct, it would not apply to this case, because the real consideration is found in the contract itself, by which the right to enjoy the premises is conveyed from the grantor to the grantee. This right was defeated by subsequent events, but does not originate in those events.

The case cited from 1 Wash. 8, by no means conflicts with this opinion. In that case, it was decided, that where a written instrument discloses on its face any matter which proves that the contract itself was of a date anterior to the paper by which it is evidenced, as when a bond carries interest from a past day, the contract shall be considered as of a date antecedent to its execution, and the scale of that antecedent date shall be applied to it. The reason of this decision is, that the price of the article sold was measured in nominal money, according to its value at the date of the original contract, and not according to its value when the instrument of writing was executed.

\*It is, then, the opinion of the court, that the contract of the 5th [\*27  
of August 1779, comes within the second section of the act "direct-  
ing the mode of adjusting and settling the payment of certain debts and con-  
tracts, and for other purposes."

It remains to inquire, whether it is a case proper for the interposition of



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that equitable power which is conferred on the court by the fifth section of that act, and if so, in what manner, and to what extent, that power ought to be interposed. It is contended by the counsel for the appellant, that this case does not come within the fifth section of the act, because, 1st. That section is designed only for the benefit of debtors. 2d. No testimony out of a written contract can be admitted to explain it. 3d. If the testimony be admitted, it does not prove one of those extraordinary cases which will be entitled to the benefits of that section.

1st. The fifth section is designed only for the benefit of debtors. That the provisions of an act, for the regulation of contracts, should be designed uniformly to benefit one of the parties only, is at first view a proposition replete with so much injustice, that the person who would maintain it must certainly show, either that the words of the act will admit fairly of no other construction, or that legislative aid on one side only was requisite, in order to do right between the parties. The counsel for the appellants endeavor to maintain both these propositions, and if they succeed in either, the case is clearly with them.

In reasoning from the words of the law, they say, that the two cases put  
 \*28] are by way of example, and as \*they are both cases where the scale established by the act is to be departed from, for the benefit of the debtor, the general power afterwards given to the court ought to be considered as designed to furnish a remedy in other similar cases, not occurring at the time to the legislature. The words of the section are, "that where a suit shall be brought for the recovery of the debt, and it shall appear, that the value thereof hath been tendered and refused; or where it shall appear that the non-payment thereof hath been owing to the creditor; or where other circumstances arise, which, in the opinion of the court before whom the cause is brought to issue, would render a determination agreeable to the above table unjust; in either case, it shall and may be lawful for the court to award such judgment as to them shall appear just and equitable."

The terms used in the third member of the sentence are certainly very comprehensive, and their general natural import does not appear to be so restrained by their connection with other parts of the section, as necessarily to confine their operation to cases where debtors only can derive advantage from them. The legislature was performing a very extraordinary act. It was interfering in the mass of contracts entered into between the first of January 1777, and the first of January 1782, and ascertaining the value of those contracts by a rule different from that which had been adopted by the parties themselves. Although the rule might, in the general, be a just one, yet that it would often produce excessive injury to one or other of the parties, must have been foreseen. It was, therefore, in some measure necessary to vest in the tribunals applying this rule a power to relax its rigor in such extraordinary cases. This sentiment might produce the fifth section, and if it did, the general terms used ought to be applied to the relief of the injured party, whether he was the creditor or the debtor.

The opinion that the creditor could not, in the contemplation of the legislature, be the injured party, because \*the scale of depreciation gave  
 \*29] him the full value of his contract, does not seem to be perfectly correct. According to the law of the contract, all moneys accruing under it, which were not received during the currency of paper, would be payable in

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such other money as might be current at the time of payment. It is impossible to say, by any general rule, what influence the knowledge of this principle might have on the parties, in every case where the contract was continuing, and was to be fulfilled at future very distant periods. Unless the rule applying to such cases possessed some degree of flexibility, it is apparent, that the one or the other of the parties would often be injured, by the interference of the legislature with their contract, and this injury would most generally be sustained by the creditor, in all cases like that at bar, because, in all such cases, the conviction that a more valuable medium than that circulating at the time would return during the continuance of the contract, must have had considerable influence on the parties, in fixing the sum of money agreed to be paid.

There appears, therefore, nothing in the state of the parties to be affected by the fifth section of the act, which should prevent its application, either to creditors or debtors, as the real justice of the case may require.

2d. But admitting the correctness of this opinion, it is contended, that no circumstances can be given in evidence, to explain a written contract, and therefore, it is said, that the judgment of the court in this case must be governed absolutely by the deed of August 1779, unless other subsequent and independent events should control that deed.

The rule which forbids a deed to be contradicted or explained by parol testimony, is a salutary one, and the court is not disposed to impair it. The application of that rule to this case, however, is not perceived. The testimony which brings this contract within the fifth section, neither contradicts nor explains the deed. It is not pretended, that the deed was not executed ~~on~~ the consideration expressed on the face of it. But according \*to [30 the law which existed when the deed was executed, that consideration would be payable only in gold and silver coin, when gold and silver coin should become the only currency of the country. The law changing the nominal sum of money by which the debt should be discharged, and giving a general rule by which a different sum, from that agreed on by the parties, is to be paid and received, authorizes a departure from the rule, where circumstances shall arise which render a determination agreeable to it unjust. The examination of these circumstances is not entered into for the purpose of contradicting or explaining the deed, but for the purpose of determining which of two rules given by the statute altering the law of the contract does really govern the case.

The argument that the exception, if it receives the construction which the court seems inclined to give it, would destroy the rule, must be founded on a supposition that in every case, the circumstances would be looked into, and a slight injustice in the application of the scale of depreciation to the contract, would be deemed a sufficient motive for departing from it. But this is not the opinion of the court, and it may very readily be perceived, that the great mass of contracts made during the circulation of paper money, may be decided by a general scale estimating the value of those contracts, although there may be very strong features in some few cases, which distinguish them as of such peculiar character, that they are embraced by the scale which measures their value by the standard of justice.

3d. But although the just construction of the 5th section of the law admits a creditor, who would be greatly injured by the application of the general



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rule to his case, to show circumstances which authorize a departure from that rule ; it is contended, that such circumstances have not been shown in the cause under consideration. It is said, that the case ought to be an extraordinary one ; that the circumstances ought to be uncommon, which would warrant a departure from the general principle established for the government of contracts generally.

\*31] \*This is true, and the court would certainly not feel itself at liberty to exercise, on a common occasion, a discretionary power, limited only by the opinion entertained of the naked justice of the case. But this appears to the court to be an extraordinary case. The evidence goes a great way in proving that the parties to the contract believed that the sums becoming due under it, would at no distant period be payable in specie only. This testimony is the more to be credited, because it is not easy to conceive any other motive for disposing of the property on the terms on which it was parted with ; and still more, because such was the operation of the existing law on the contract, when it was entered into. Under this impression, an impression warranted by the law of the land, a very valuable property has been conveyed away for what would have been, under the then existing law, a full consideration, but which a subsequent act of the legislature has reduced certainly to a tenth, perhaps to a twentieth, of the real value of the estate disposed of. Such a case is, in the opinion of the court, an extraordinary case, which is completely entitled to the extraordinary relief furnished by the act which has occasioned the mischief.

In inquiring to what extent this relief ought to be afforded, or, in the words of the law, what "judgment will be just and equitable," the court can perceive no other guide by which its opinion ought, in this case, to be regulated, but the real value of the property at the time it was sold. The record does not furnish satisfactory evidence of this value. It is proved, that a lot not superior to that which occasioned the present contest, rented in the year 1774, for 13*l.* 5*s.* per annum, and that other lots, perhaps not equal to it, rented in 1784, for 25*l.* per annum. It is even proved, that a small part of the very lots, about the value of which the inquiry is now to be made, rented in the year 1784, on a ground-rent for ever, for 25*l.* 16*s.* per annum. These are very strong circumstances in support of the decree of the circuit court, \*32] fixing the rent at 26*l.* per annum, \*the nominal sum mentioned in the lease. But a majority of the judges are of opinion, that the value must be ascertained by a less erring standard.

Neither the value in 1774, nor in 1784, ought to regulate the rent. The value at the date of the contract must be the sum which in equity and justice the lessee ought to pay, and as this value is not ascertained by the testimony in the record, it ought to be found by a jury. In finding this value, however, the jury ought not to be governed by the particular difficulty of obtaining gold and silver coin at the time, but their conduct ought to be regulated by the real value of the property, if a solid equivalent for specie had been made receivable in lieu thereof. On these principles, the court has directed the following decree :

This cause, which was abated by the death of the appellee, and was revived in the name of his administrator, came on to be heard on the transcript of the record, and was fully argued by counsel. On consideration whereof, the court is of opinion, that there is error in the decree of the circuit court in



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this ; that the rents reserved in the lease in the proceedings mentioned, bearing date the 5th day of August, in the year of our Lord, one thousand seven hundred and seventy-nine, and which were in arrear and unpaid, were decreed to be paid at their value according to the scale of depreciation when the same became due ; and that those rents which accrued after the first of January 1782, are decreed to be paid according to the nominal sum mentioned in the lease ; whereas, the annual rent reserved in the said lease ought to be reduced to such a sum in specie, as the property conveyed was, at the date of the contract, actually worth ; to ascertain which, the evidence of the cause not being sufficient for that purpose, an issue ought to have been directed, according to the verdict on which, if satisfactory to the court, the final decree ought to have been rendered.

This court is, therefore, of opinion, that the decree rendered in this cause in the circuit court for the county \*of Alexandria, ought to be reversed, and it is hereby reversed and annulled ; and the court, proceeding to [\*33 give such decree as the circuit court ought to have given, doth decree and order, that an issue be directed between the parties, to be tried at the bar of the said circuit court, in order to ascertain what was the actual annual value in specie, or in any other money equivalent thereto, of the half-acre lot of ground which was conveyed, by the executors of John Alexander, deceased, to Abraham Faw, on the 5th day of August 1779, and that in the account between the parties, in order to a final decree, the representatives of said Philip Marsteller be allowed a credit for the rent which has accrued, and which remains unpaid, estimating the said annual rent at such sum as the verdict of a jury, to be approved of by the said circuit court, shall ascertain the half-acre lot of ground before mentioned to have been fairly worth, at the date of the contract under which the same is claimed by the said Abraham Faw.

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OGLE v. LEE.

*Certificate of division.—Error to final judgment.*

If a question upon which the judges below differ in opinion be certified to this court, and here decided, the parties are not precluded from a writ of error on the final judgment, when the whole cause will be before the court.

THIS cause came up to this court, upon a question on which the opinions of the judges of the Circuit Court were opposed.

It was made a question, whether this court would consider the whole case, or only the question upon which the court below divided.

THE COURT were unanimously of opinion, that they could only consider the single question upon which the judges below divided in opinion;<sup>1</sup> but that the parties will not be precluded from bringing a writ of error upon

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<sup>1</sup> If the whole case be sent up, the cause will be remanded. *Saunders v. Gould*, 4 Pet. 392; *Harris v. Elliott*, 10 Id. 25; *Adams v. Jones*, 12 Id. 207; *Dennistoun v. Stewart*, 18 How. 565; *Daniels v. Rock Island Railroad*

Co., 350. Neither can the whole case be broken up into points, some of which may never arise. *Nesmith v. Sheldon*, 6 How. 41; *Luther v. Borden*, 7 Id. 1; *Webster v. Cooper*, 10 Id. 54. But see *United States v. Chicago*, 7 Id. 185.

Pennington v. Coxe.

the final judgment below; and the whole cause will then be before the court. A court may at any time reverse an interlocutory decree.

The case was afterwards settled by the parties.

PENNINGTON v. COXE.

*Internal taxes.*

Sugar refined, but not sold and sent out of the manufactory, before the 1st of July 1802, is not liable to any duty, upon being sent out after that day.

Coxe v. Pennington, 1 W. C. C. 65, reversed.

THIS was a feigned issue, between Tench Coxe, a citizen of the state of Pennsylvania, and Edward Pennington, a citizen of the state of New York, \*34] to try the question, \*whether sugar actually refined, but not sold and sent out of the manufactory, before the 1st of July 1802, is liable to any duty to the United States, upon being sent out after that day. (Reported, below, 1 W. C. C. 65.)

This question arose upon the act of congress, entitled "An act to repeal the internal taxes," passed April 6th, 1802. (2 U. S. Stat. 148.)

The declaration was upon a wager that the United States were entitled to collect the duty, and stated the following facts: That Pennington was a refiner of sugar, within the meaning of the several acts of congress imposing a duty on refined sugars; that he had refined a quantity of sugar between the 31st of March and the 1st of July 1802, which, if the act for repealing the internal taxes had not been made, would have been liable to a duty, exceeding in the whole, the sum of \$2500; that he did, from day to day, enter in a book or paper kept for that purpose, all the sugar refined by him as aforesaid, but that he did not, on the 1st of October 1802, render any account of the sugar which he had so refined, to any officer of the revenue, nor did he produce to any such officer (though required) the original book or paper whereon the entries from day to day were made as aforesaid, nor did he, on the said 1st of October, nor at any time, before or since, pay or secure any duties upon the said quantity of sugar so refined by him as aforesaid, during the period aforesaid; that the same was not sent out of the manufactory before the 1st of July 1802, but that the whole had been since sent out, viz., on the 30th of September 1802. To this declaration, there was a general demurrer and joinder; and it was agreed, that no advantage should be taken of want of form in the proceedings.

The judgment of the circuit court of the district of Pennsylvania was for the plaintiff below, and the defendant brought the writ of error.

The act imposing the duty was passed June 5th, 1794 (1 U. S. Stat. 384), and is entitled "An act laying certain duties upon snuff and refined sugars." The 2d section enacts, that from and after the 30th of September 1794, \*35] "there be levied, collected and paid, \*upon all sugar which shall be refined within the United States, a duty of two cents per pound." The third section directs, "that the duties aforesaid shall be levied, collected and accounted for," by certain officers therein described. The 5th section directs, that every refiner of sugar shall make true and exact entry and report in writing, at the office of inspection, of every house or building where



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such business shall be carried on, and every pan or boiler, together with the capacity of each; and shall also give bond in the sum of \$5000, with condition that he will enter in a book or paper, to be kept for that purpose, all sugar which he shall refine, and the quantities, from day to day, sent out of the building, where the same shall have been refined, and shall, on the first day of January, April, July and October, in each year, render a just and true account of all the refined sugar which he shall have sent out, from the time of the last account rendered, producing and showing therewith, the original book or paper, whereon the entries from day to day, to be made as aforesaid, have been made; "and he shall, at the time of rendering each account, pay or secure the duties which by this act ought to be paid upon the refined sugar in the said account mentioned."

By the 7th section, it is enacted, that every refiner of sugar shall, yearly, being thereunto required by an officer of inspection, make oath that the accounts which have been by him rendered of the quantities of refined sugar by him sent out of the building, have been just and true. By the 10th section, it is enacted "that all snuff and refined sugar, which shall have been manufactured or made within the United States, in manner aforesaid, after the said 30th day of September next, whereof the duties aforesaid have not been duly paid or secured, according to the true intent and meaning of this act, shall, upon default being made in the paying or securing of the said duties, be forfeited, and shall and may be seized, as forfeited, by any officer of the inspection or of the customs." By the 11th section, the refiner has the option to pay, upon rendering his account, "the duties which shall \*thereby appear to be due and payable," with a deduction of six per cent. for prompt payment, or to give bond payable in nine months. [\*36]

By the 11th section, a drawback of the duties "hereby laid upon sugar refined within the United States" is allowed upon exportation to a foreign port. But by the 16th section, such allowance is not to be made, unless the exporter shall make oath that the duties have been paid or secured. The 20th section declares, it shall be lawful to export refined sugar directly from the manufactory, free from duty.

The 1st section of the repealing act of April 6th, 1802, enacts, "that from and after the 30th day of June next, the internal duties on stills and domestic distilled spirits, on refined sugars, licenses to retailers, sales at auction, carriages for the conveyance of persons, and stamped vellum, parchment and paper, shall be discontinued, and all acts and parts of acts relative thereto shall, from and after the said 30th day of June next, be repealed: Provided, that for the recovery and receipt of such duties as shall have accrued, and on the day aforesaid, remain outstanding, and for the payment of drawbacks, or allowances on the exportation of any of the said spirits, or sugars legally entitled thereto, and for the recovery and distribution of fines, penalties and forfeitures, and the remission thereof, which shall have been incurred before and on the said day, the provisions of the aforesaid acts shall remain in full force and virtue."

*Ingersoll*, for the plaintiff in error.—By the repealing act, no duties upon refined sugar are to be collected, but such as had accrued and remained outstanding, on the 30th of June 1802. The sugars in question were refined before, but were not sent out, until after that day; and the question is,



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whether the duties upon them had accrued on that day, and then remained  
 \*37] outstanding. We contend, that the duty is to be collected \*only  
 upon sugar sent out of the building in which it was refined; and to  
 support this construction, we rely upon the general tenor of the act which  
 imposed the duty. It is a rule of construction of statutes, that "every act,  
 upon consideration of all the parts thereof together, is the best expositor of  
 itself." 4 Inst. 325. And it is another sound rule, that words distributed  
 into different sections, are to be considered, as if all were in one section.  
 By this rule, the 5th section of the act of June 5th, 1794, is to be connected  
 with the 2d. What is general in the 2d, is thus restricted and qualified by  
 the 5th. The 2d section enacts, that the duty shall be levied, collected and  
 paid, upon all sugar refined in the United States. If this section stood  
 alone, it is admitted, that it would be conclusive against the plaintiff in error.  
 But it is limited by the 5th section, not accidentally, but with a clear view  
 to collection, and that it might not operate as a tax upon labor, but upon  
 consumption. By this section two accounts are to be kept; one of the sugar  
 refined, the other of the refined sugar sent out; but the duty is only upon  
 that contained in the latter.

If the words of both sections were incorporated into one (and they are  
 to be construed as if they were), it would read thus: upon all sugar refined  
 within the United States, and sent out of the building, &c., there shall be  
 levied, collected and paid, a duty of two cents per pound.

The account of sugar refined, but not sent out, was intended merely as a  
 check. It was not to be delivered, but shown to the officer, and its purpose  
 was to enable him, by comparing the amount refined with that sent out,  
 and what remained on hand, to estimate the correctness of the account of  
 sugar sent out, upon which alone the duty was chargeable. It was clearly  
 the intention of the legislature, that the duty should be paid upon sugar,  
 only in such circumstances as would show that the tax would fall upon the  
 consumer, and not on the manufacturer.

But it will be contended, that there is a distinction between levying and  
 collecting. That the duty is levied upon the whole, but is payable only on  
 such as shall be sent out. But for this distinction there is not even an inti-  
 mation in the act of congress.

\*It will be said, on the part of the United States, that there is no  
 \*38] section but the 2d, which imposes the duty, and by that section it is  
 imposed on all sugar refined. But why impose a duty, which is not to be  
 collected? It is agreed, that the sending out is a prerequisite to the pay-  
 ment. What use can there be in imposing a duty, upon an article in circum-  
 stances which prevent its collection? If the duty arises from the act of re-  
 fining only, the 5th section might be expunged, and the law would remain  
 the same. That section is of no use, unless it operates upon the second.

The words "levied, collected and paid," in the 2d section, are commensu-  
 rate, though not of the same meaning. The word "levied" applies to the  
 act of the legislature, in imposing the duty. "Collected," refers to the act  
 of the officer. "Paid," to the act of the party. "Levied" means the same  
 as imposed. Each verb has the same subject: the same thing is to be levied,  
 collected and paid. Nothing is levied, but what is to be collected; nothing col-  
 lected, but what is to be paid; and nothing is to be paid, but on the sugar  
 sent out. Hence, no duty is levied but upon sugar sent out.

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There is no analogy between this duty and that upon goods imported. There, the duties are payable on the landing of the goods, and are payable even if the goods are destroyed as soon as landed. In such a case, a remission of the duties is matter of favor; but in the case of refined sugar, it is not so. The legislature did not intend, that the manufacturer should be the sufferer. The impost laws have no section restricting the general imposition. The bond to be given for the duties on sugar is to be payable in nine months after the time of sending out, not of refining: the bond given for impost is payable in six months after importation. Hence, if any analogy exists, the argument derived from \*it is in favor of the construction that the duty is not imposed, until the sugar is sent out. [\*39

A duty not to be paid is no duty. Suppose, the refining house should be burnt, and a quantity of refined sugar destroyed, no duty could be collected upon it. The relation of debtor and creditor had not arisen between the manufacturer and the United States: the duty had not accrued. That it be sent out, is descriptive of the subject-matter of the tax. It fixes a certain stage of the business of a manufacturer, at which the duty shall attach. It ascertains the quality and degree of refining, which otherwise might be the subject of much litigation. Sugar may not be fit to send into the market, and yet it may be strictly said to be refined.

The penalties and the duty must correspond. The duty of the manufacturer cannot exceed the penalty: the doctrine of relation will not extend to create a penalty or a forfeiture. The provisions of the old law are continued by the repealing law, only as to penalties and forfeitures, "which shall have been incurred before or on the 30th of June 1802." As no penalty or forfeiture for non-payment of the duty could be incurred, until after the sugar was sent out, and as the sugar was not sent out, until after the 30th of June, it is evident, no penalty or forfeiture, as to that sugar, could "have been incurred before or on that day." This shows that the provisions of the law to enforce the payment of duties on such sugar were not continued, and is a strong indication of the will of the legislature that none should be paid.

All the provisions in the act of 1794, subsequent to the 5th section, mention the subject of the duty as being sugar refined and sent out. Thus, the oath mentioned in the 7th section is to the truth of the account of sugar sent out. The drawback, the account to be rendered, the tax to be collected, and the bond for securing the duties, refer only to such sugar as shall have been sent out.

If there had been no express provision in the repealing act, and the duty had been repealed, generally, on the 30th \*of June, no duty could have been due on sugars then refined, but not sent out. The repealing law creates no obligation on the refiner to render an account of sugars refined before and sent out after the 30th of June. If the duty was levied upon all sugars refined before that day, and payable at any future indefinite time, when they should be sent out, it would be necessary to keep an officer in pay as long as a single loaf remained in the building. All parts of the acts were to cease, after the 30th of June, unless saved by the proviso; and that relates only to the recovery and receipt of all such duties as had then accrued and remained outstanding, and such penalties and forfeitures as had then been incurred. [\*40

The question then recurs, had these duties accrued, and were they re-



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maining outstanding on the 30th of June? The word "accrued" must mean *arisen, due*; at least, due at present, payable in future. But if they were due, the officer had a right to call for payment or security. It cannot be said to have accrued, until it is to be paid or secured. But the words "remaining outstanding" are still stronger. "Shall have accrued and remain outstanding," that is, having before accrued, shall *remain* outstanding. These expressions imply that the duties had been fixed and their amount ascertained; that the relation of debtor and creditor had arisen, and that the duties remained unpaid, either through negligence or indulgence.

The effect of the construction contended for on the part of the United States would be to throw the whole of these duties upon the refiner, for he could not make a difference in price between the sugars refined before, and those manufactured after the 30th of June. This effect would be in direct hostility to the general principle of the legislature, which is apparent through the whole act, and which was to tax consumption and not labor.

The proviso in the repealing law either enacts or declares. It is evident, that it does not enact any new regulations, but merely declares the continuance of former provisions. The remedy given by the former act was only by action, or forfeiture. But no action would lie, nor would any forfeiture be incurred, until after the sugars were sent out. It is a rule, that upon \*41] a new statute which prescribes a particular remedy, no remedy can be \*taken but that prescribed by the statute. *Stevens v. Evans*, 2 Burr. 1157.

But it will be objected, that the duties outstanding meant only those not bonded, because, when bonded, the debt is due by bond and not as a duty. But the law is not so; for a debt due by act of congress is at least of equal dignity with a debt due by bond, and cannot be extinguished by it.

Mr. Ingersoll cited *The Lead Company v. Richardson*, 3 Burr. 1341, to show that an act imposing a duty is not to be extended to other subjects than those expressly described.

*Lincoln* (attorney-general of the United States) and *Dallas*, for the defendant in error.—The whole question turns on the operation of the repealing act. If the duty had accrued and remained outstanding on the 30th of June, it was unaffected by the repeal. To show that the duty accrued on the act of refining the sugar, independently of the act of removing it, they relied, 1st. On the words and spirit of the act of 1794; and 2d. On the obvious meaning of other acts *in pari materia*.

I. The words and spirit of the act. Every revenue system consists of three parts: 1st. The subject of the tax: 2d. The time of payment: and 3d. The mode of collection. The act of 1794 discriminates between each of these, and the construction must not confound them.

1. The subject of the tax. The title of the act is general, "duties on snuff and refined sugar, not on the quality sold or sent out, but on the sugar refined." The 2d section is equally general, "upon all sugar which shall be \*42] refined within the United States." \*The 3d section directs by what officers the "duties aforesaid" shall be collected. The 2d is the only section which imposes the duty, the 3d provides for its collection, and nothing is left for the object of the 5th, but to ascertain the time of the payment. The 10th section contemplates the duty as attaching on the act of



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refining, and subjects the sugar to forfeiture, after removal, if the duty shall not have been duly paid or secured.

The subject, then, is refined sugar; and the process of refining being complete, the duty accrues. Without further provision, there could be no doubt, that all sugar refined between the 30th of September 1794, and the 1st of July 1802, would be liable to duty. Every subsequent provision respecting the time and manner of payment is consistent with this imposition of the duty. No express transfer is made of the duty from the act of refining to the act of removing; no substitution of the quantity removed for the quantity refined; no words restricting the general expression "all sugar refined within the United States." All the subsequent clauses respect the payment, not the imposition of the duty.

2. Time of payment. The duty attaches to the act of refining, but the fund for payment is created by the act of sale. Hence, the 5th section directs two accounts to be kept, one of the whole quantity refined, the other, of such as shall have been removed; and that, at the time of rendering the latter, the refiner "shall pay or secure the duties, which by this act ought to be paid, upon the refined sugar in the said account mentioned." This provision evidently is intended only to ascertain the amount which shall then be payable. The duties payable by this act are on all the sugar refined; if on *all*, it ought in strictness to be upon every part; but the United States say, we will accept a partial payment, in consideration that you have not yet sold the residue of the sugar. The quarterly account ascertains the amount of this partial payment; while the other regulations are intended  
[\*43  
\*to enable the officer to ascertain the gross quantity refined.

The terms of payment show how and when the duty shall be paid, but do not affect the subject of the tax. The legislature had power to give, or to refuse a credit; but the modification of the time or terms of payment does not create, and cannot discharge, the obligation to pay. It is but the common case of *debitum in presenti, solvendum in futuro*. By the 20th section, sugar may be exported directly from the manufactory "free from duty." This shows that the duty had attached, but was not to be exacted.

3. The mode of collection must conform to the primary and secondary objects of the law. These were, 1st. A revenue from all refined sugars: 2d. Accommodation in payment.

For the primary object, it takes measures to ascertain the gross quantity refined. For the secondary object, it takes measures to ascertain the quantity removed in each quarter. For the first, it obliges the manufacturer to enter and report his house, and implements, with all additions made thereto, under a penalty and forfeiture; and to give a bond of \$5000, to keep an account of all sugar refined, which is to be quarterly produced to the collecting officer. For the 2d, it obliges him to keep, and render quarterly to the officer, a daily account of refined sugar removed, which is to be substantiated by an oath, if required. Thus, all the provisions of the act harmonize with each other; but by an opposite construction, the duty is made incident to the time of payment, and not the time of payment incident to the duty. If what a man sells, and not what he refines, is the subject of the tax, the provision to ascertain the gross quantity refined is useless and vexatious.

It is true, that the two circumstances of refining and removing are

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necessary, before payment can be demanded, \*or a forfeiture for non-payment incurred; but the obligation to pay is coeval with the act of refining; the duty had then accrued, and must remain outstanding, until the removal of the sugar. The two circumstances are distinct in words and in purpose; the one creates the duty, the other fixes the time of payment. To connect them is to amplify, not only the words, but the sense of the legislature; but to keep them separate, preserves the intention of the law in consistency with its language.

Hypothetical arguments, extreme cases, and arguments *ab inconvenienti*, cannot alter the law. Such are the cases of the sugar being destroyed in the house; the necessity of keeping officers to collect the tax, and the sales of refined sugar, made in contemplation of their being free of duty, &c. If the sugar is destroyed, before removal, it is no longer refined sugar; and the duty being attached to the thing itself, is destroyed with it. The argument drawn from the supposed intention of the legislature to tax consumption, and not labor, applies only to the collection, not to the imposition, of the duty. The act of sending out, does not necessarily import sale. A manufacturer may remove the sugar to his own stores, separate from the manufactory, and would be liable to the duty. The legislature did not intend, that a sale should precede the imposition of the tax.

There is a case in 1 Anst. 450 (558), in which it was decided, that the duty had attached on the distillation of spirits, although the building and materials were destroyed, before the process was complete.

The words and spirit of the act are thus reconciled, and they are in unison with the repealing act, which meant to put all the internal taxes upon the same footing, up to the 30th of June. By the 3d section of the latter act, the owners of stills, of snuff-mills, the banks, retailers of wine and spirits, and the owners of carriages, are to pay the taxes up to that day; and if sugar refiners are to be excepted, it seems to be an exception, without any adequate reason. The objection which has been raised, that the duty upon sugars refined before and delivered after the 30th of June 1802, would fall upon the refiners, cannot avail them, because they received the duty upon \*45] sugars refined after the 6th of June 1794, and before \*the 30th of September in that year, without being accountable for it.

II. The construction contended for, is supported by the obvious meaning of the words of other acts, *in pari materia*. The analogy exists in the terms of imposing the duty; in the accommodation of credit, and in the security for collection. In the following acts, imposing duties on imported articles, the words which create the imposition are, "levied, collected and paid," viz., August 10th, 1790, § 1 (1 U. S. Stat. 180); June 7th, 1794, § 1 (Ibid. 384); and January 29th, 1795 (Ibid. 411). In other acts, the words are "laid, levied and collected," viz., March 3d, 1797, § 1 & 3 (Ibid. 504); July 8th, 1797, § 1 (Ibid. 533); and May 13th, 1800, § 1 (2 Ibid. 84).

In all these acts, the imposition of the tax necessarily precedes the collection; hence, we may infer, that when the legislature used the same words in the act of 1794, they intended, that the tax should be laid before the time of collection, and that from the time of the imposition, until paid or secured, the duty should be considered as outstanding. An outstanding duty can mean nothing more than a duty laid, but not collected or secured. As to bonded duties, it was not necessary that the provisions of the act of 1794



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should be continued in force, because a suit might have been maintained on the bond, notwithstanding the repeal; hence, it is evident, that by the expression "duties which shall have accrued and remain outstanding," the legislature could not mean bonded duties. What is the situation of the duties upon goods imported before bond given? They have attached upon the goods, and remain outstanding. A debt has accrued: the relation of debtor and creditor has arisen between the importer and the United States.

There is no difference between the case of the refiner of sugar and the distiller of spirits. In the latter, the act of distillation furnishes the subject of the tax; the removal \*designates the time of payment. Between [46 the distillation and removal, the duty remains outstanding. (1 U. S. Stat. 387-8, § 14 and 17.) The inspector is to estimate the gross quantity, by which he is to regulate the penalty of the bond, but the condition is to pay in nine months the duties upon such part as shall be removed in three months from the date of the bond. Had not the duties accrued when the bond was given? And yet does not the payment in fact, and in amount, depend on the removal within three months?

In the case of sales at auction (1 U. S. Stat. 397), the duty accrues at the time of sale, to be paid at the end of the quarter. So, in the instance of the carriage tax (Ibid. 373). Why, then, should it not attach on the sugar as soon as refined, when in all other cases, it attaches at a period antecedent to the time of payment.

In the act laying duties upon goods imported (1 U. S. Stat. 24), the duties are said to accrue from the time specified for their commencement, not from the time when they were to be paid or secured.

Again, in the case of snuff, the terms and conditions are the same as in the case of sugar. By the first section, the duty is laid on snuff manufactured for sale, not on snuff sold; and by the fourth section, the account of the quantity manufactured is to be exhibited. By a subsequent act (1 U. S. Stat. 426), the duty is transferred from the snuff to the mill. A license is to be granted, and a bond given for payment of the annual rate of the tax, in three instalments. This act shows that the employment of the mill, and not the sale of the snuff, was the object of the tax. The first section says, that the former duty shall cease on the last day of March, and shall not thenceforth be collected, and the 16th section provides for the recovery of such duties as shall then have accrued. Yet, the snuff, then manufactured, although not sent out, in fact, paid the duty; and in law, what could be referred to, but snuff manufactured and not removed? There could be no idea that the repeal of the duty applied to a bond given which had extinguished the duty.

Upon the whole, then, we find the repealing act perfectly correspondent to the words and spirit of the imposing act, and to analogous provisions *in pari materia*. \*The refiner was bound to pay, or secure, [47 before removal. But a bond was tantamount to a payment of the duty; it was a matter of option with the refiner. It released the sugar from a specific lien, or liability to forfeiture; and it changed the nature of the debt and the remedy. A discontinuance of the duty could not cancel the bond, nor render a provision to recover it necessary. The proviso, therefore, was not more calculated for a bond payment, than for a cash payment. But it is consistent, operative and necessary, if we suppose the



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legislature contemplated the recovery and receipt of duties which had accrued, when the sugar was refined, but which, according to pre-existing arrangements, must remain outstanding as duties, and which were not to be paid or secured, until removal of the sugar.

The duty to be paid was upon all sugar refined. But the duty on refined sugar was not discontinued, until after the 30th of June. The sugar in question was refined sugar, before the 30th of June: to exempt it from duty, therefore, is to discontinue the duty before the day of the repeal.

There can be no question as to the remedy; for if the duty had accrued, all the pre-existing remedies were continued.

If, then, we consider the words and spirit of the imposing act, the general nature and operation of a revenue system, the analogy of provisions *in pari materia*, and the words and spirit of the repealing act, little doubt can remain, that the legislature meant to impose the duty on the act of refining, and not the act of removing the sugar, and therefore, that the duties upon the sugar in question had accrued, and remained outstanding on the 30th of June 1802.

*Harper and Martin*, in reply.—The question has been truly stated to be, at what time did the duties upon refined sugar accrue? To ascertain this, all the provisions of the imposing act are to be considered in one view. This is the general rule of construction of all written instruments, and results from the principle that such instruments are only the evidence of the will of the maker. \*General expressions may be restricted by other parts of the  
\*48] instrument, or by its general import.

It is true, that the 2d section lays a duty upon all sugar which shall be refined within the United States, to be levied, collected and paid after the 30th of September 1794. If no time is fixed for the commencement of an act, it operates from the time of passing. By the strict construction of this section, it applies as well to those sugars refined after the passing of the act, and before the 30th of September, as to those refined after that day. But it is evident from the subsequent provisions of the act, that such was not the intention of the legislature. The act, therefore, cannot be construed strictly; and resort must be had to the other parts to ascertain its meaning.

If the duty was to be levied upon all sugar refined, the legislature would have directed a bond to be given for the duties on all such. Why should an account be rendered to the officer of all the sugar sent out, and not of all refined?

The general system of the excise laws was to tax, not the means of living, but the consumption of the article.

In respect to the impost, the duties are not due, while the goods are in the ship on the passage. The analogy is between goods landed, and refined sugar sent out. This is the decisive act which evidences that the sugar is for consumption. The expressions "recovery and receipt," in the repealing law, are not applicable to an unascertained duty; the term in such a case, would have been collection. In the revenue system, this difference is taken.

There is no analogy to the other cases mentioned, because the legislature have used different expressions, and therefore, it is reasonable to infer that they meant to enact different provisions. Wherever they meant that the

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duty should be laid at the time of the manufacture, they have so expressly declared.

In the case from Anstruther, the duty was laid upon wash, *totidem verbis*, and therefore, although the wash \*was destroyed before the process of distillation was complete, yet the court decided, that the duty had [\*49 attached. But here, we contend, that no duty is laid upon refined sugar, not sent out. The only inference from the case is, that the court judged from the general purview of the act; and that is what we contend ought to be done in our case.

It is an important consideration, that the penalties and forfeitures apply only to the sugar sent out. Hence, it may be strongly inferred, that the duty was laid only on such. The entry and report of the house, the number and capacity of the pans, boilers, &c., and the daily account of sugar refined, were only provisions enabling the officer to check the account of the quantity sent out.

It is said, that every revenue system consists of three parts; the subject of the tax, the time of payment, and the mode of collection. All these parts would be included in the 5th section, if the words "two cents per pound" had been introduced. It contains the subject of the tax, and provisions for the collection and payment.

As to the title, it is no part of the law, and is not to be considered in construing the act. But if it was, it is so general and indefinite, no argument can be derived from it.

The act ought to be construed favorably for the manufacturer. Penal laws, and laws giving costs, are to be construed strictly. Multitudes of cases are to be found, where general words shall be construed in favor of him on whom a penalty is imposed, but never against him.

No argument can be drawn from the 14th section, because the drawback is allowed only upon sugars which have paid the duty, and no duty is to be paid but upon sugars sent out. So, in the 10th section, the forfeiture is only of sugars on \*which the duty has not been duly paid; but no duty is [\*50 payable but upon sugar removed.

But it is said, that the contrary construction harmonizes the system. If the duties are payable upon sugars refined, but not removed, why not render an account of those refined as well as of those sent out? Why do none of the penalties apply to the former, but all to the latter?

As to the idea of *debitum in presenti, solvendum in futuro*; if the sending out is a condition precedent, no debt accrues, until the sugar has been sent out. If I am bound to A., to pay a sum when A. shall return from Rome, it is not a debt, until he has returned; and if he never returns, it is no debt.

In the case of impost, the duties accrue at the moment when they become payable. They must be paid or secured, when application is made for a permit, to land them. If they are destroyed, before landing, or application for the permit, no duties have accrued, and none are to be paid. With regard to distilled spirits, the bond is to pay the duty upon all such spirits as shall be removed, during the next three months. If no spirits are removed, during that time, nothing is due upon the bond. The duty upon sales at auction does not accrue, until the purchase-money is paid. It is a part of the price. The carriage tax accrues at the time of payment; and if not duly entered, and the duty paid, a penalty is incurred.



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As to snuff, the construction of the 4th section of the act of June 6th, 1794, ought to be the same as that of the 5th section respecting sugar. There has been no legislative construction, or judicial decision, that the duties upon snuff manufactured after the 3d of March 1795 (the date of the repealing law as to snuff), and before the 30th of March (when the duty was to cease), and not sent out until after the 30th of March, were payable. The gentlemen have said that those duties have been paid ; the fact may be so, but that cannot alter the law.

\*51] \*As the penalties and forfeitures respecting sugars not then sent out, ceased on the 30th of June, the legislature must have meant to provide for the recovery and receipt of such duties only as could be collected without penalties and forfeitures. These could only be upon sugar removed before that day.

February 22d, 1804. MARSHALL, Ch. J., delivered the opinion of the court.—In this case, a single point is presented to the court. The plaintiff in error was a refiner of sugar, in the city of Philadelphia, and had a large quantity of refined sugars in his refinery, on the 1st of July 1802. In April 1802, congress passed an act to repeal the internal taxes. The first section of the repealing law enacts “that from and after the 30th day of June next, the internal duties,” &c.

To recover the duty on sugars refined before the 30th of June, and sent out afterwards, this action was brought. The single question is, whether the duty had then accrued, and was on that day outstanding? This is admitted on both sides ; and the repealing law is to be construed, as if it had passed on the 30th of June, to take effect immediately, and the proviso had been expressed in words of the present tense, thus ; “provided, that for the recovery and receipt of such duties as have now accrued, and now remain outstanding, the provisions of the aforesaid act shall remain in full force and virtue.”

Had the duty accrued, and was it outstanding, in contemplation of the legislature, on sugars refined, but not sent out of the building in which the operation was performed? The solution of this question depends on the construction of the act by which the duty was imposed.

This act passed in June 1794, and is entitled “An act laying certain duties on snuff and refined sugars.” The first section imposes a duty on snuff, which shall be manufactured after the 30th of September then next ensuing, and the second section is in these words : “And be it further enacted, that from and after the said 30th day of September next, there be levied, collected \*and paid, upon all sugar which shall be refined \*52] within the United States, a duty of two cents per pound.”

The fourth section of the act contains provisions respecting the duty on snuff, and the fifth section, after making several regulations requiring the refiner of sugars to report the building and utensils to be employed in the manufacture, and to give bond with condition that he shall keep books in which he shall enter daily the sugars refined, as well as those sent out, proceeds to enact, “that he shall, on the first day of January, April, July and October, in each year, render a just and true account of all the refined sugar which he or she shall have sent out, or caused or procured to be sent out, from the first time of his or her entry and report aforesaid, until the



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day which shall first ensue, of the days above mentioned, for the rendering of such account, and thenceforth successively, from the time when such account ought to have been, and up to which it shall have been, last rendered, until the day next thereafter, of the days above mentioned, for the rendering of such account, producing and showing therewith the original book or paper, whereon the entries from day to day, to be made as aforesaid, have been made; and he or she shall, at the time of rendering each account, pay or secure the duties, which, by this act, ought to be paid upon the refined sugar in the said account mentioned."

Other sections of this act have been relied on by the counsel on both sides, and the phraseology of the law, in other acts, said to be *in pari materia*, has been brought into view. They have not been unnoticed by the court in forming the opinion now to be delivered; but as the case depends principally on the just construction of the sections which have been quoted, those sections only are stated for the present.

That a law is the best expositor of itself; that every part of an act is to be taken into view, for the purpose of discovering the mind of the legislature, and that the details of one part may contain regulations restricting the extent of general expressions used in another part of the same act, are among those plain rules laid down by common sense for the exposition of statutes, \*which have been uniformly acknowledged. If, by the ap- [\*53  
plication of these rules, it shall appear, that the duty on refined  
sugars did "accrue, and was outstanding," before the article was sent out of the building, then the refiner is unquestionably liable to pay it, notwithstanding the repeal of the law by which it was imposed.

To support the proposition, that the duty did accrue, the words of the second section of the act for imposing it have been relied on. These words are, "that from and after the 30th day of September next, there be levied, collected and paid, upon all sugar which shall be refined within the United States, a duty of two cents per pound." These words, it is said, contain an express charge upon all the sugars to be refined within the United States. It is admitted by the counsel for the plaintiff in error, that such would be the operation of the section, if unexplained, and not restrained by other parts of the law.

In order to determine the influence which other sections must necessarily have on this, it is proper to ascertain with precision, the import of the words which have been stated.

"There shall be levied, collected and paid," &c. Each of these words implies a charge upon the article, and if either of them had been used singly, no doubt could have been entertained that the article would have been burdened with the tax. They present to the mind distinct ideas, and when used together seem to designate distinct actions required by the law. It would not, perhaps, be assuming more than is warranted, to say, that either of them exclusively imports the creation and imposition of the duty. The word levy is selected for this purpose; and yet, in the succeeding section, the term is again used with a reference to that now under consideration, and very plainly designates the duty of the officer, not the operation of the act. The words of the third section are, "that the duties aforesaid shall be levied, collected and accounted for by the same officers," &c. The meaning [\*54  
\*of the term in this section is by no means equivocal, and there does

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not appear sufficient ground for saying, that it was used by the legislature, in the preceding section, in a different sense. Unquestionably, the requisition that a duty shall be levied, collected or paid, implies the existence of that duty: it seems to be as clearly implied by the one term as by the other. But, however this may be, they act on the same subject, and at the same time. The object of each verb is precisely the same. "There shall be levied"—on what? On "all sugars to be refined within the United States." There shall be "collected and paid"—from, and on what? "all sugars to be refined within the United States." It has, then, been very correctly said, that these words, though not synonymous, are certainly, as they stand in the sentence, co-extensive in their operation. They reach and embrace the same article, at the same time. If, then, the other parts of the act demonstrate that the words collected and paid, have not for their object all sugars to be refined, this section is necessarily restrained in its operation by those which follow, and designate more particularly what is, in the first instance, expressed in general terms.

That such is the real effect of the law is acknowledged. It is admitted by the counsel for the defendant in error, that the duties are not to be collected and paid on all sugars to be refined, but on all sugars to be refined and sent out of the building. It follows, then, that the general terms of the second section were intended by the legislature to be understood, in like manner, as if their intent had been expressly qualified, by adding the words "according to the regulations hereinafter prescribed;" or other words of similar import.

But admitting this view of the case to be correct, the great difficulty remains to be solved. It is contended by the defendant in error, that the fifth section neither imposes a duty, nor restrains to a more limited object the duty which was before imposed, and that its only effect is to prescribe the time of payment; that the duty on the article, taking the two sections together, constitutes a present debt, to be paid in future. On the other hand, the plaintiff \*55] in error insists, that \*the general terms of the second section are defined and restricted by the fifth, as well with respect to the object of the tax, as to the time of its collection and payment.

The court has felt great difficulty on this point. It is one on which the most correct minds may form opposite opinions, without exciting surprise. After the most attentive examination of the laws, and the arguments of counsel, a judgment has at length been formed, differing from that rendered in the circuit court.

The object of the act imposing the duty, being revenue, and not to discourage manufactures, it is reasonable to suppose, that the attention of the legislature would be devoted to the article in that state in which it was designed to be productive of revenue. There could be no motive for imposing a duty, never to be collected, or for imposing it on the article in that condition in which it might remain for ever, without yielding a cent to the treasury. The duty not being progressive, but complete in the instant of its commencement, being one entire thing, no purpose was to be effected, by charging it on an object from which it was not afterwards to be drawn. If, therefore, we find the whole attention of the legislature directed to the article in one state; if we find it productive only in one state; there is no



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reason for supposing, unless the words require that construction, that the duty was imposed upon it in a different state.

All those provisions of the act, which are calculated to bring the money arising from this tax into the treasury, or to create any liability in the person who is to pay it, apply exclusively to sugars sent out of the building. Of those sugars only is an account to be rendered; on those only are the duties to be paid or secured. It can scarcely be imagined, that the legislature, if imposing a duty on all sugars refined, should entirely neglect to take any means whatever to secure the collection of that duty, and should postpone those means, until a subsequent event should happen, which might never occur.

\*It is argued by the counsel for the defendant in error, that the happening of this event was certain, and that it was unnecessary for the legislature to perform any act which might occasion it, because the interest of the refiner was a sure pledge for his sending out the sugars he had refined. This is true; but the argument is not less strong, when urged, to prove that the legislature might rely on this interest to produce the state of things which would create the charge. If this interest was relied upon for the fact on which a duty should become payable, it might well be relied upon, to produce the fact on which the article should be chargeable with the duty; and it is, unquestionably, in the common course of legislative proceedings on the subject of revenue, to obtain security for the payment of duties, at the first convenient time after they shall have accrued. [\*56]

If, as is contended for the defendant in error, the act of refining the sugar creates a debt to be paid when sent out of the building, then the refiner becomes immediately the debtor of the government, and his situation by sending out the sugar, is changed in no other respect whatever, than that the debt before created does by that fact become payable. The position to be proved is that A., the refiner of sugars, becomes the debtor of the United States to the full amount of the sugars refined, which debt does not accrue, but only becomes payable, on the fact of their being sent out of the building. Let this proposition be examined.

If A. becomes the debtor, by the mere act of refining, then he remains the debtor, until he shall be legally discharged. Suppose him to part with his manufactory and his capital stock, there being at the time of transfer a quantity of refined sugars in the building, which pass with it to the purchaser. If, by the act of refining, A. became the debtor of the government, which debt became payable, whenever the sugars should be sent out of the building, then A. would remain the debtor, notwithstanding his sale, and would be liable for \*those duties, if the purchaser should send them out, without rendering any account of them, or securing their payment. [\*57]

Yet this construction would be admitted to conflict with the obvious meaning of the law. Not only the persons who sends out the sugars is to account and pay for them, but if he fails to do so, the consequences of his failure fall entirely on himself. The sugar is forfeited, and if lost to the purchaser, his recourse could only be against the person from whom he purchased.

But let it be supposed, that A. sends out his sugars, and parts with his building, before the day on which the account is to be rendered, and the

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duties paid or secured. Who, then, would be the debtor of the government? Who, in that case, would be liable for the duties that had thus accrued? It is believed, that only one answer could be given to this question. The person who sent out the sugars would unquestionably be liable for the duties on them, and if they should be seized for the non-payment of them, the purchaser would have recourse to him for compensation.

If these positions be correct, it would seem to be a plain and necessary deduction from them, that the fact of sending out the sugars, not the fact of refining them, created the debt, and that the person sending them out became the debtor.

It has been argued, that the provision of the 5th section, which requires a daily entry to be made on the books, of the quantity of sugars refined, evidences an intention in the legislature, to impose a tax on the article immediately. But this argument did not appear to be much relied on, and it is too apparent, that the regulations of the 5th section were designed to furnish the means of detecting any fraud which might be attempted, in the account of sugars sent out of the building, to require that the court should employ any time in demonstrating the correctness of that construction.

The argument drawn from the 3d section, which uses the expression "the \*58] duties aforesaid," does not \*appear to operate more in favor of the construction contended for by the counsel for the defendant in error. The section is employed, not in designating the tax to be collected, but the person to collect it, and the words have the same import, as if instead of "the duties aforesaid," the language had been changed, and the words "the duties imposed by this act" had been used.

The sections respecting drawbacks have been relied on by both plaintiff and defendant, as completely supporting his own construction of the act, but the court can perceive nothing in those sections in any degree affecting the case.

It has been stated by both parties, that all the revenue acts of the United States may be considered as *in pari materia*, as forming one connected system, and therefore, to be compared together, when any one of them is to be construed. In pursuance of this doctrine, they have been resorted to by the defendant in error, to show that the terms used in the 2d section of the act under consideration are such as in all those acts import the imposition of a duty. This is not questioned. It is not denied, that a tax is imposed, nor would this have been denied, if two of the three words used in the act had been omitted. It is the general phraseology of laws enacted for the purpose of raising money; but to reason by way of analogy, from the acts quoted to that under consideration, it would be necessary to show, that these general terms had been construed to be more extensive than the particular regulations which follow, for the purpose of carrying them into execution. It is not recollected, that this has been attempted.

It has been argued, that the duty on spirits of the home manufactory, is laid on their distillation, not on their removal, and that the legislature must, therefore, be presumed also to have imposed the duty on sugars, on the act \*59] of refining them, and not on the act of removal. \*But the force of this argument is not admitted. Those political motives which induce the legislature to select objects of revenue, and to tax them under particular circumstances, are not for judicial consideration. Where the legisla-



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ture distinguishes between different objects, and in imposing a duty on them, evidences a will to charge them in different situations, it is not for the courts to beat down these distinctions, on the allegation that they are capriciously made, and therefore, to be disregarded. It is the duty of the court, to discover the intention of the legislature, and to respect that intention. Where the provisions of two acts are so unlike each other, that the comparison exhibits only a contrast, instead of saying that their opposing regulations were designed to be similar, it would seem much more reasonable to say, that the one act exhibits a legislative mind materially variant in the particulars where the difference exists, from what is exhibited by the other.

Every regulation of the act imposing a duty on spirits distilled within the United States, respects exclusively the time of distillation, and they are all essentially variant from the regulations of the act imposing a duty on snuff and refined sugars. The duty on spirits is to be paid or secured previous to their removal. That on sugars, is not to be paid or secured until after their removal. The credit for the duties on distilled spirits is allowed from the date of a bond, to be quarter-annually given for all the spirits distilled, whether removed or not, so that the credit is as near as possible from the date of distillation. The credit for the duties on refined sugars is allowed from the date of a bond quarter-annually given for all the sugars removed from the building, so that the credit is as near as possible from the date of the removal. Spirits, having a duty imposed on them, at the time of distillation, are liable to seizure and confiscation, if removed without paying or securing the duty. \*Sugars, not being liable for the duty until removed, are not seizable, nor confiscable, unless the refiner, after re- [\*60 moval, shall have failed to pay or secure the duties which became payable at a given day after their removal.

With respect to country stills, the tax is laid on the capacity of the still, and is to be paid, without regard to the quantity distilled, but if this tax should become oppressive, it may be discharged, by paying the duty on the quantity actually distilled. In this case, no respect whatever is paid to the removal of the spirits. Their distillation alone attracts the attention of the legislature. With respect to all refined sugars, no duty can ever be demanded, unless the demand be predicated on the fact of removal. Spirits being chargeable with the duty, when distilled, cannot be removed without a permit. Sugars being only chargeable when sent out, may be removed at the will of the refiner.

It is going very far indeed, to argue a sameness of intention from these dissimilar regulations. The court thinks it much more correct to say, that the intention of the legislature with respect to these different objects was entirely different, and that in the case of spirits, the duty was imposed on the distillation, while in the case of sugars, the duty was imposed on the removal.

It is not improbable, that the difference in the progress made in the two pursuits, and the greater degree of forbearance required by the one than by the other; or that the difference in the facility with which frauds might be practised in the two cases, might occasion this apparent difference in the time of imposing the duty on the article. But this, it is repeated, is a legislative, not a judicial inquiry; and if the difference exists, it must be respected, whatever may be the motives which produced it.

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Some arguments have been drawn from the repealing law, which have  
 \*61] too much weight to be unnoticed. \*It has been said, that the provisions intended as a guard, to prevent frauds in the collection of duties on sugars sent out of the building, are dispensed with, so far as respects sugars refined before the 30th of June, but sent out after that day, and from thence it is argued, that the legislature could not have supposed sugars, under such circumstances, to be liable to a duty. The weight of this argument, if supported by the fact, is so apparent, that the counsel for the defendant in error controverts the fact itself, and not the inference drawn from that fact, if it be correctly stated.

It is, and must be, admitted, that the first part of the first section of the repealing law does away any forfeiture which was to be produced by the future operation of the act repealed. If, therefore, such forfeiture is retained, it must be by virtue of the saving in the subsequent part of the section. That saving clause is in these words, "provided," &c. It is contended, that the forfeiture of sugars sent out after the 30th of June 1802, and refined before that period, is preserved by this proviso. But this construction is deemed totally and clearly inadmissible. The forfeiture of the thing is not the recovery and receipt of a duty, but a punishment for the non-payment of it, and is never to be protected by a proviso extending only to remedies given for the recovery of the duty itself. To render this point still more clear, the proviso, in express terms, comprises fines, penalties and forfeitures incurred before the 30th of June. It is impossible to suppose, they would not have deemed it equally necessary to provide expressly for the preservation of those which might afterwards be incurred, if it was contemplated that the state of things introduced by the act admitted of such subsequent forfeitures. The force of this argument, therefore, remains undiminished.

It has very properly been observed at the bar, that it was, most apparently, the object of the legislature, through their whole system of imposts,  
 \*62] duties and excises, \*to tax expense and not industry, and that, in the particular case of the duty now in question, this intent is manifested with peculiar plainness. The refiner of sugars never hazards the payment of the duty himself, because he is never to pay it, until they are presumed to be sold, by being sent out of the building in which they have been refined. In most other cases, it has been deemed sufficient to secure this object, by a credit, which will allow time for the sale of the article, after which the duty must be paid, whether the article be sold or not. But in the case of refined sugars, the refiner never can be liable for the duty, but on a fact which is considered, and properly considered, as evidencing a sale, after which a credit for the collection of the duty is still allowed him. With respect to the refiner of sugars, then, it must, on an inspection of the act, emphatically be said, that the legislature designed him to collect the duty from the consumer, but never to pay it from the manufacture; that the tax should infallibly be imposed on expense, and never on labor. If this proposition be true, it furnishes an additional argument in favor of that construction which is believed to be correct.

If the duty is payable on sugars refined before the 30th of June 1802, whenever they may be sent out, that duty will fall on the refiner himself, because sugars refined before the 30th of June, must come into the market,



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at the same price with those refined afterwards, and cannot sell, in consideration of the duty with which they are burdened, at a higher price than sugars admitted not to be chargeable with that duty. So far as this effect would be produced by the repealing law, it would occasion an oppression which the enacting law has manifested a particular solicitude to avoid.

This effect, it is said, is produced, in the case of those distilled spirits which are subjected to a duty on the quantity distilled or removed, and therefore, the refiner of sugars ought to be considered as receiving the same measure. But it has already been shown, that a difference is made in the first creation of the tax, between the distiller and the refiner; and the same difference may be perceived throughout. But if they were viewed with \*precisely the same degree of favor, yet there is a difference between [\*63 relinquishing a right which was complete, when the law under which it accrued ceased to operate, and one depending on a fact afterwards to happen.

The argument which controverts the proposition, that the legislature designed in no instance to subject the refiner of sugars to the tax on the article, till a sale should take place, is founded on the circumstance, that the refiner may be himself a retailer, and may remove his sugars from the building to his retail store, and thus become liable for the tax before the sale. But the fallacy of this argument is immediately detected. A person acting in two distinct characters must, in many respects, be considered as two distinct persons. The refiner, who is, in a different place, the retailer of sugars, must be considered as selling them from the manufactory, when he sends them out of it to his retail store. The law contemplates the fact exactly in the same manner, and must give to it the same effect, as if they had been sent to the retail store of a different person, and considers them as sold.

It has also been contended, that the proviso in the act would be unnecessary, and absolutely inoperative, unless it be construed to apply to the duties on the sugars remaining in the building on the 30th of June. Those duties which were bonded, cannot, it is said, be the object of the proviso, because they, in contemplation of law, are not outstanding: they are paid by the bond given by the debtor, and there remains only the duty on sugars not sent out, which is outstanding, and is to be preserved by this part of the act. It requires but a very slight attention to the subject, to perceive, that this argument is not entitled to the weight which has been attributed to it.

The act imposing the duty, does in terms speak of its being bonded, in contradistinction to its being paid. The duty is either to be paid, or secured by bond. To say, then, that a duty secured by bond was not outstanding, in contemplation of the legislature, but was paid, would be to violate the very words of the act.

\*In addition to this circumstance, it ought to be observed, that the repeal takes effect at the close of the 30th of June, and the law [\*64 has no existence on the 1st of July. Yet the duties on sugars sent out during the last quarter are to be secured or paid on the 1st of July. All admit, that there was no disposition to relinquish these duties. Of consequence, if the proviso could be necessary in any possible construction of the law, it was necessary in this case.

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After the most attentive consideration of the acts of congress, and the arguments of counsel, the court is of opinion, that the duties on refined sugars remaining in the building on the 1st of July 1802, had not then accrued, and were not then outstanding. The judgment of the circuit court, which was in favor of the plaintiff below, must, therefore, be reversed, and judgment rendered for the plaintiff in error.

## The CHARMING BETSY.

ALEXANDER MURRAY, Esq., v. The Schooner CHARMING BETSY.

*Marine trespass.—Probable cause.—Damages.—Expatriation.—Armed vessel.*

An American vessel, sold in a Danish island, to a person who was born in the United States, but who had *bonâ fide* become a burgher of that island, and sailing from thence to a French island, in June 1800, with a new cargo purchased by her new owner, and under the Danish flag, was not liable to seizure, under the non-intercourse law of 27th of February 1800.<sup>1</sup>

If there was no reasonable ground of suspicion that she was a vessel trading contrary to that law, the commander of a United States ship of war, who seizes and sends her in, is liable for damages.<sup>2</sup>

The report of assessors appointed by the court of admiralty to assess the damages, ought to state the principles on which it is founded, and not a gross sum, without explanation.

An American citizen, residing in a foreign country, may acquire the commercial privileges attached to his domicile; and by making himself the subject of a foreign power, he places himself out of the protection of the United States, while within the territory of the sovereign to whom he has sworn allegiance.

*Quære?* Whether a citizen of the United States can divest himself absolutely of that character otherwise than in such manner as may be prescribed by law?

Whether, by becoming the subject of a foreign power, he is freed from punishment for a crime against the United States?

What degree of arming constitutes an armed vessel?

THE facts of this case are thus stated by the District Judge in his decree.<sup>3</sup>

"The libel in this cause, is founded on the act entitled "an act further to suspend the commercial intercourse between the United States and France, and the dependencies thereof" (27th February 1800, 2 U. S. Stat. 7); and states that the schooner (The Charming Betsy) sailed from Baltimore, after the passing of that act, owned, hired or employed by persons resident within the United States, or by citizens thereof, resident elsewhere, bound to Guadaloupe, and was taken on the high seas, on the 1st of June 1800, by the libellant, then commander of the public armed ship the Constellation, in pursuance of instructions given to the libellant, by the President of the United States, there being reason to suspect her to be engaged in a traffic or commerce contrary to the said act, &c. The claim and answer, replication and rejoinder, are referred to for a further statement of the proceedings \*in this case, on all which I ground my decree. On a careful  
\*65] attention to the exhibits and testimony in this cause, and after hear-

<sup>1</sup> And see *Sands v. Knox*, 3 Cr. 499.

<sup>2</sup> *Maley v. Shattuck*, 3 Cr. 458; s. c. 1 W. C. PETERS, J.

C. 245. And see *The Eleanor*, 2 Wheat. 345.

<sup>3</sup> In the district court of Pennsylvania,



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ing of counsel, I am of opinion, that the following facts are either acknowledged in the proceedings, or satisfactorily proved.

"That on or about the 10th of April 1800, the schooner, now called the Charming Betsy, but then called the Jane, sailed from Baltimore, in the district of Maryland, an American bottom, duly registered according to law, belonging to citizens of, and resident in, the United States, and regularly documented with American papers; that she was laden with a cargo belonging to citizens of the United States; that her destination was first to St. Bartholomew, where the master had orders to effect a sale of both vessel and cargo; but if a sale of the schooner could not be effected at St. Bartholomew, which was to be considered the 'primary object' of the voyage, the master was to proceed to St. Thomas, with the vessel and such part of the flour as should be unsold, where he was to accomplish the sale. That although a sale of the cargo, consisting chiefly of flour, was effected at St. Bartholomew, yet the vessel could not there be advantageously disposed of, and the master proceeded, according to his instructions, to St. Thomas, where a *bonâ fide* sale was accomplished, by Captain James Phillips, on behalf of the American owners, for a valuable consideration, to a certain Jared Shattuck, a resident merchant in the island of St. Thomas.

"That although it is granted that Jared Shattuck was born in Connecticut, before the American revolution, yet he had removed, long before any differences with France, in his early youth, to the island of St. Thomas, where he served his apprenticeship, intermarried, opened a house of trade, owned sundry vessels, and, as it is said, lands; which none but Danish subjects were competent to hold and possess. About the year 1796, he became a Danish burgher, invested with the privileges of a Danish subject, and owing allegiance to his Danish majesty. The evidence on \*this head is sufficient to satisfy me of these facts; though some of them might [\*66 be more fully proved. It does not appear, that Jared Shattuck ever returned to the United States to resume citizenship, but constantly resided, and had his domicile, both before and at the time of the purchase of the schooner Jane, at St. Thomas. That although the schooner was armed and furnished with ammunition, on her sailing from Baltimore, and the cannon, arms and stores were sold to Jared Shattuck, by a contract separate from that of the vessel, she was chiefly dismantled of these articles at St. Thomas, a small part of the ammunition, and a trifling part of the small arms excepted. That the name of the said schooner was at St. Thomas changed to that of the Charming Betsy, and she was documented with Danish papers, as the property of Jared Shattuck. That so being the *bonâ fide* property of Jared Shattuck, she took in a cargo belonging to him, and no other, as appears by the papers found on board, and delivered to this court.

"That she sailed, with the said cargo, from St. Thomas, on or about the 25th day of June 1800, commanded by a certain Thomas Wright, a Danish burgher, and navigated according to the laws of Denmark, for aught that appears to the contrary, bound to the island of Guadaloupe.

"That on or about the first of July last, 1800, she was captured, on her passage to Guadaloupe, by a French privateer, and a prize-master and seven or eight hands put on board; the Danish crew (except Captain Wright, an old man and two boys) being taken off by the French privateer. That on the 3d of the same July, she was boarded and taken possession of by some

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of the officers and crew of the *Constellation*, under the orders of Captain Murray, and sent into the port of St. Pierre, in Martinique, where she arrived on the 5th of the same month of July. I do not state the contents of a paper called a *procès verbal*, which, however, will appear among the exhibits, because, in my opinion, it contains statements, either contrary to the real facts, or illusory, and calculated to serve the purposes of the French \*67] \*captors. Nor do I detail the number of cutlasses, a musket and a small quantity of ammunition, found on board, when the schooner was boarded by Captain Murray's orders. The Danish papers were on board, and, except the *procès verbal*, formed by the French captors, no other ship's papers. The instructions of Captain Murray from the President of the United States comprehend the case of a vessel found in the possession of French captors, but then it should seem, that it must be a vessel belonging to citizens of the United States. It does not appear, that Captain Murray had any knowledge of Jared Shattuck being a native of Connecticut, or of any of the United States, until he was informed by Captain Wright, at Martinique.

"It is unnecessary to go into any disquisition about the instructions to the commanders of public armed ships, whether they were directory to Captain Murray in the case in question; and if so, whether they were, or not, strictly conformable to law, does not finally justify an act which, on investigation, turns out to be illegal, either as it respects the municipal laws of our country or the laws of nations. Captain Murray's respectable character, both as an officer and a citizen, forbids any idea of his intention to do a wanton act of violence towards either a citizen of the United States, or a subject of another nation. He, no doubt, thought it his duty to send the vessel in question to the United States for adjudication. He had also reasons prevailing with him, to sell Jared Shattuck's cargo in Martinique. His sending the schooner to Martinique was evidently proper, and serviceable to the owner, as she had not a sufficient number of the crew on board to navigate her. But the further proceeding turns out, in my opinion, wrong. Whatever probable cause might appear to Captain Murray to justify his conduct, or excite suspicion at the time, he ran the risk of, and is amenable for, consequences.

"On a full consideration of the facts and circumstances of this case, I am of opinion, that the schooner *Jane*, being the same in the libel mentioned, \*68] did \*not sail from the United States with an intent to violate the act, for a breach whereof the libel is filed. That she did not belong, when she sailed from St. Thomas, for Guadaloupe, to a citizen of the United States, but to a Danish subject. Jared Shattuck either never was a citizen of the United States, under our present national arrangement, or, if he should at any time have been so considered, he had lawfully expatriated himself, and became a subject of a friendly nation. No fraudulent intent appears in his case, either of eluding the laws of the United States, in carrying on a covered trade, by such expatriation, or that he became a Danish burgher for any purposes which are considered as exceptions to the general rule which seems established on the subject of the right of expatriation. That, being a Danish burgher and subject, he had a lawful right to trade to the island of Guadaloupe, any law of the United States notwithstanding, in a vessel *bonâ fide* purchased, either from citizens of the United States, or any other vessel



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documented and adopted by the Danish laws. I do not rely more than it deserves, on the circumstance of Jared Shattuck's burghership, of which the best evidence, to wit, the brief, or an authenticated copy, has not been produced. I know well, that this brief alone, unaccompanied by the strong ingredients in his case, might be fallacious. I take the whole combination to satisfy me of his being *bonâ fide* a Danish adopted subject; and altogether it amounts, in my mind, to proof of expatriation.

"The master (Wright) produces his Danish burgher's brief. He is a native of Scotland. But even the British case of *Pollard v. Bell*, 8 T. R. 435, to which I have been referred, shows that, with all the inflexibility evidenced in the British code, on the point of expatriation, a vessel was held to be Danish property, if documented according to the Danish laws, though the master, who had obtained a Danish burgher's brief, was a Scotchman. It shows, too, that, in the opinion of the British judges (who agree, on this point, with the general current of opinions of civilians and writers on general law), the municipal laws or ordinances of a country do not control the laws of nations. The British courts have gone great lengths to modify their ancient \*feudal law of allegiance, so as to moderate its rigor, and adapt [69 it to the state of the modern world, which has become most generally commercial. They hold it to be clearly settled, that although a natural-born subject cannot throw off his allegiance to the king, but is always amenable for criminal acts against it, yet for commercial purposes he may acquire the rights of a citizen of another country. Com. Rep. 677, 689. I cite British authorities, because they have been peculiarly tenacious on this subject. Naturalization in this country may sometimes be a mere cover; so may, and, no doubt, frequently are, burghers' briefs. But the case of Shattuck is accompanied with so many corroborating circumstances, added to his brief, as to render it, if not incontrovertibly certain, at least, an unfortunate case on which to rest a dispute as to the general subject of expatriation. I am not disposed to treat lightly the attachment a citizen of the United States ought to bear to his country. There are circumstances in which a citizen ought not to expatriate himself. He never should be considered as having changed his allegiance, if mere temporary objects, fraudulent designs, or incomplete change of domicil, appear in proof. If there are any such in Shattuck's case, they do not appear, and therefore, I must take it for granted that they do not exist. That, therefore, the ultimate destruction of his voyage, and sale of his cargo, are illegal.

"The vessel must be restored, and the amount of sales of the cargo paid to the claimant, or his lawful agent, together with costs, and such damages as shall be assessed by the clerk of this court, who is hereby directed to inquire into and report the amount thereof. And for this purpose, the clerk is directed to associate with himself two intelligent merchants of this district, and duly inquire what damage Jared Shattuck, the owner of the schooner Charming Betsy and her cargo, hath sustained, by reason of the premises. Should it be the opinion of the clerk, and the assessors associated with him, that the officers and crew of the Constellation benefited the owner of the Charming Betsy, by the rescue from the French captors, they \*should [70 allow in the adjustment, reasonable compensation for this service.

(Signed)

RICHARD PETERS.

28th April 1801."

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On the 15th of May following, upon the report of the clerk and assessors, a final decree was entered for \$20,594.16 damages, with costs. From this decree, the libellant appealed to the circuit court, who adjudged, "that the decree of the district court be affirmed, so far as it directs restitution of the vessel, and payment to the claimant of the net proceeds of the sale of the cargo in Martinique, deducting the costs and charges there, according to the account exhibited by Captain Murray's agent, being one of the exhibits in this cause : and that the said decree be reversed for the residue, each party to pay his own costs, and one moiety of the custody and wharfage bills for keeping the vessel until restitution to the claimant." From this decree, both parties appealed to the supreme court.

The cause was argued, at last term, by *Martin*, *Key* and *Mason*, for the claimant. No counsel was present for the libellant.

For the *claimant* it was contended, that the sale of the schooner to Shattuck was *bonâ fide*, and that he was a Danish subject. That although she was in possession of French mariners, she was not an armed French vessel, within the acts of congress, which authorized the capture of such vessels. That neutrals are not bound to take notice of hostilities between two nations, unless war has been declared : that the right of search and seizure is incident only to a state of war. That neutrals are not bound to take notice of our municipal regulations : that the non-intercourse act was simply a municipal regulation, binding only upon our own citizens, and had nothing \*71] to do with \*the law of nations ; it could give no right to search a neutral. That in all cases where a seizure is made under a municipal law, probable cause is no justification, unless it is made so by the municipal law under which the seizure is made.

As to the position that the sale was *bonâ fide*, the counsel for the claimant relied on the evidence, which came up with the transcript of the record, which was very strong and satisfactory. Upon the question whether Shattuck was a Danish subject, or a citizen of the United States, it was said, that although he was born in Connecticut, yet there was no evidence that he had ever resided in the United States, since their separation from Great Britain. But it appears by the testimony, that he resided in St. Thomas, during his minority, and served his apprenticeship there. That he had married into a family in that island ; had resided there ever since the year 1789 ; had complied with the laws which enabled him to become a burgher, and had carried on business as such, and had for some years, been the owner of vessels and lands. Even if, by birth, he had been a citizen of the United States, he had a right to expatriate himself. He had, at least, the whole time of his minority in which to make his election of what country he would become a citizen. Every citizen of the United States has a right to expatriate himself and become a citizen of any other country which he may prefer, if it be done with a *bonâ fide* and honest intention, at a proper time, and in a public manner. While we are inviting all the people of the earth to become citizens of the United States, it surely does not become us to hold a contrary doctrine, and deny a similar choice to our own citizens. Circumstances may, indeed, show the intention to be fraudulent and collusive, and merely for the purpose of illicit trade, &c. But such circumstances do not appear in the present case. Shattuck was fairly and *bonâ fide* domiciliated at St. Thomas



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before our disputes arose with France. The act of congress, "further to suspend," &c., cannot, therefore, be considered as operating upon such a person. The first act to suspend the intercourse was passed on the 13th of June 1798 (1 U. S. Stat. 565), and expired with the end of the next session of congress. The next act, "further to suspend," &c., was passed on the 9th of February 1799 (Ibid. 613), and expired on the 3d of March 1800. [\*72] The act upon which the present libel is founded, and which has the same title with the last, was passed on the 27th of February 1800 (2 Ibid. 7). All the acts are confined in their operations to persons resident within the United States, or under their protection.

She was not such an armed French vessel as comes within the description of those acts of congress, which authorized the hostilities with France. She had only one musket, twelve ounces of powder, and twelve ounces of lead. The only evidence of other arms arises from the deposition of one McFarlan. But he did not go on board of her, until some days after the capture, and his deposition is inadmissible testimony, because he was entitled to a share of the prize-money, if the vessel should be condemned; and although a release from him to Captain Murray appears among the papers, yet that release was not made, until after the deposition was taken; and the fact is expressly contradicted by other testimony. The mere possession, by nine Frenchmen, did not constitute her an armed vessel. She was unable to annoy the commerce of the United States, which was the reason of the adjudication of this court, in the case of *The Amelia*. (See *Talbot v. Seeman*, 1 Cr. 1). The *procès verbal* is no evidence of any fact but its own existence. If she had arms, they ought to have been brought in, as the only competent evidence of that fact. No arms are libelled, and none appear, by the account of sales, to have been sold in Martinique.

It being then, a neutral unarmed vessel, Captain Murray had no right to seize and send her in. A right to search a neutral arises only from a state of public known war, and not from a municipal regulation. In time of peace, the flag is to be respected. Until war is declared, neutrals are not bound to take notice of it.

The decrees of both the courts below have decided, that the vessel was not liable to capture. The only question is, whether the claimant is entitled to damages? Captain Murray has libelled her upon the non-intercourse act. He does not state that he seized her, because she was a French armed vessel. although he states her to be armed, at the time of capture. It has also been decided by both the courts, that she is Danish property. If [\*73] an American vessel had been illegally captured by Captain Murray, he would have been liable for damages; *a fortiori* in the case of a foreign vessel where, from motives of public policy, our conduct ought not only to be just but liberal.

In cases of personal arrest, if no crime has in fact been committed, probable cause is not a justification, unless it be made so by municipal law. As in the case of hue and cry, he who raises it is liable, if it be false. If the sheriff has a writ against A., and B. is shown to him as the person, and he arrests B. instead of A., he is liable to an action of trespass at the suit of B. *Wale v. Hill*, 1 Bulst. 149. So, if he replevies wrong goods, or takes the goods of one, upon a *fi. fa.* against another. In these cases, it is no justification to the officer, that he was informed, or believed, he was right. He must

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in all cases, seize at his peril. So it is with all other officers, such as those of the revenue, &c., probable cause is not sufficient to justify, unless the law makes it a justification. If the information is at common law, for the thing seized, and the seizure is found to have been illegally made, the injured party must bring his action of trespass; but by the course of the admiralty, the captor, being in court, is liable to a decree against him for damages. *The Fabius*, 2 Rob. 202. The case of *Wale v. Hill*, in 1 Bulst. 149, shows that where a crime has not been committed, there, probable cause can be no justification. But where a crime has been committed, the party arresting cannot justify by the suspicion of others; it must be upon his own suspicion.

In the case of *Papillon v. Buckner*, Hardr. 478, although the goods seized had been condemned by the commissioners of excise, yet it was not held to be a good justification. In *Purviance v. Angus*, 1 Dall. 182, it was held, that an error in judgment would not excuse an illegal capture; and in \*74] *Leglise v. Champante*, \*2 Str. 820, it is adjudged, that probable cause of seizure will not justify the officer. (a)

In 3 Anstr. 896, is a case of seizure of hides, where no provision was made in the law that probable cause should be a justification. This case cites *Pickering v. Truste*, 7 T. R. 53. For what reason do the revenue laws provide that probable cause shall be a justification, if it would be so, without such a provision? In these cases, the injury by improper seizures can be but small compared with those which might arise under the non-intercourse law. Great Britain has never made probable cause an excuse for seizing a neutral vessel for violating her municipal laws. A neutral vessel is only liable to your municipal regulations, while in your territorial jurisdiction; but as soon as she gets to sea, you have lost your remedy: you cannot seize her on the high seas. Even in Great Britain, if a vessel gets out of the jurisdiction of one court of admiralty, she cannot be seized in another. It is admitted, that a law may be passed, authorizing such a seizure, but then it becomes a question between the two nations. If the present circumstances are sufficient to raise a probable cause for the seizure, and if such probable cause is a justification, it will destroy the trade of the Danish islands. The inhabitants speak our language, they buy our ships, &c. It will be highly injurious to the interests of the United States; and this court will consider what cause of complaint it would furnish to the Danish nation. If a private armed vessel had made this seizure, the captain and owners would have been clearly liable on their bond, which the law obliges them to give. The object of this act of congress was

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(a) The CHIEF JUSTICE observed, that this case was overruled, two years afterwards, in a case cited in a note to Gwillim's edition of Bac. Abr.<sup>1</sup> The case cited in the note, is from 12 Vin. 173, tit. Evidence, P, b. 6, in which it is said "that Lord Ch. Baron BURY, in *Montague and Page v. Price*, held, that where an officer had made a seizure, and there was an information upon it, &c., which went in favor of the party, who afterwards brings trespass, the showing these proceedings was sufficient to excuse the officer; it was competent to make out a probable cause for his doing the act. Mich., 6 Geo. I."

<sup>1</sup> The case of *Leglise v. Champante* was in 2 Geo. II. That cited in the note to Bac. Abr., referred to by the chief justice, was in 6 Geo. I.

The mistake arises from the note in Gwillim's edition not mentioning the date of the case cited from Viner.



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more to prevent our vessels falling into the hands of the French than to make it a war measure, by starving the French islands.

\*Even if a Danish vessel should carry American papers and American colors, it would be no justification. In a state of peace, we have no right to say they shall not use them, if they please. In time of war, double papers, or throwing over papers, are probable causes of seizure, but this does not alter the property; it is no cause of condemnation. The vessel is to be restored, but without damages. [\*75]

The mode of ascertaining the damages adopted by the district court, is conformable to the usual practice in courts of admiralty. See Marriott's Rep., and in the same book, p. 184, in the case of *The Vanderlee*, liberal damages were given.

In the revenue laws of the United States, vol. 4, p. 391, probable cause is made an excuse for the seizure; but no such provision is, or ought to have been, made in the non-intercourse law. The powers given were so liable to abuse, that the commander ought to act at his peril.

The CHIEF JUSTICE mentioned the case of *The Sally*, Captain Joy, in 2 Rob. 185 (Amer. edit.), where a court of vice-admiralty had decreed, in a revenue case, that there was no probable cause of seizure.

This cause came on again to be argued, at this term, by *Dallas*, for the libellant, and *Martin* and *Key*, for the claimant.

*Dallas*, as a preliminary remark, observed, that the judge of the district court had referred to the clerk and his associates to ascertain whether any and what salvage should be allowed. This was an improper delegation of his authority, not warranted by the practice of courts of admiralty, nor by the nature of his office. Although they had not reported upon this point, yet he submitted it to the court for their consideration.

After stating the facts which appeared upon the record, and such as were either admitted or proved, he divided his argument into three general points.

1. That Jared Shattuck was a citizen of the United States, at the time of capture and recapture; and therefore, \*the vessel was subject to seizure and condemnation, under the act of congress usually called the non-intercourse act. [\*76]

2. That she was in danger of condemnation by the French, and therefore, if not liable to condemnation under the act of congress, Captain Murray was at least entitled to salvage.

3. That if neither of the two former positions can be maintained, yet Captain Murray had probable cause to seize and bring her in, and therefore, he ought not to be decreed to pay damages.

I. The vessel was liable to seizure and condemnation under the non-intercourse act; Shattuck being a citizen of the United States at the time of recapture. Captain Murray's authority to capture the *Charming Betsey*, depends upon the municipal laws of the United States, expounded by his instructions, and the law of nations. Before the non-intercourse act, measures had been taken by congress to prevent and repel the injuries to our commerce which were daily perpetrated by French cruisers. By the act of 28th May 1798 (1 U. S. Stat. 561), authority was given to capture "armed ves-

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sels sailing under authority, or pretence of authority, from the republic of France," &c., and to retake any captured American vessel. The act of 28th June 1798 (Ibid. 574), regulates the proceedings against such vessels, when captured, ascertains the rate of salvage for vessels re-captured, and provides for the confinement of prisoners, &c. The act of July 9th, 1798 (Ibid. 578), authorizes the capture of armed French vessels anywhere upon the high seas, and provides for the granting commissions to private armed vessels, &c.

The right to retake an armed, or unarmed neutral vessel, in the hands of the French, is nowhere expressly given; but is an incident growing out of the state of war; \*and is implied in several acts of congress. This \*77] was decided in the case of *Talbot v. Seeman*, in this court, at August term 1801 (1 Cr. 33). The right of recapture, carrying with it the right of salvage, gave the right of bringing into port; and that port must be a port of the captor.

The first non-intercourse act was passed June 13th, 1798 (1 U. S. Stat. 565); a similar act was passed February 9th, 1799 (Ibid. 613). The act upon which the present libel is founded was passed February 27th, 1800 (2 Ibid. 7). These are not to be considered as mere municipal laws for the regulation of our own commerce, but as a part of the war measures which it was found necessary at that time to adopt. It was, *quoad hoc*, tantamount to a declaration of war.

Happily, there is not, and has not been, in the practice of our government, an established form of declaring war. Congress have the power, and may, by one general act, or by a variety of acts, place the nation in a state of war. So far as congress have thought proper to legislate us into a state of war, the law of nations in war is to apply. By the general laws of war, a belligerent has a right not only to search for her enemy, but for her citizens trading with her enemy. If authorities for this position were necessary, a variety of cases decided by Sir WILLIAM SCOTT might be cited.

As to the present case, France was to be considered as our enemy. The non-intercourse act of 1800 prohibits all commercial intercourse "between any person or persons resident within the United States, or under their protection, and any person or persons resident within the territories of the French republic, or any of the dependencies thereof." And declares, that "any ship or vessel, owned, hired or employed, in whole or in part, by any \*78] person or persons resident within the United States, or any citizen \*or citizens thereof, resident elsewhere," &c., "shall be forfeited, and may be seized and condemned." A citizen of the United States, resident "elsewhere," must mean a citizen resident in a neutral country. If Shattuck was such a citizen, the case is clearly within the statute. It is not necessary that the vessel should be registered as an American vessel; it is sufficient, if owned by a citizen of the United States: registering is only necessary to give the vessel the privileges of an American bottom. Nor is it necessary that she should have been built in the United States.

By the 8th section of the act of 27th February 1800 (2 U. S. Stat. 10), reasonable suspicion is made a justification of seizure, and sending in for adjudication. The officer is bound to act upon suspicion, and that suspicion applies both to the character of the vessel, and to the nature of the voyage. Although the act of congress mentions only vessels of the United



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States, still, from the nature of the case, the right to seize and send in must extend to apparent as well as real American vessels.

Such is the contemporaneous exposition given by the instructions of the executive. (a) The words of these instructions are : "You are not only to do all that in you lies, to prevent all intercourse, whether direct or circuitous, between the ports of the United States and those of France and her dependencies, in cases where the vessels or cargoes are apparently, as well as really American, and protected by American papers only, but you are to be vigilant that vessels or \*cargoes, really American, but covered by Danish or other foreign papers, and bound to or from French ports, [\*79 do not escape you." The law and the instructions having thus made it his duty to act on reasonable suspicion, he must be safe, though the ground of suspicion should eventually be removed.

Under our municipal law, therefore, the following propositions are maintainable. 1. That a vessel captured by the French, sails under French authority ; and if armed, is, *quoad hoc*, a French armed vessel. The degree of arming is to be tested by the capacity to annoy the unarmed commerce of the United States. 2. The right to recapture an unarmed neutral is an incident of the war, and implied in the regulations of congress. 3. The non-intercourse law justifies the seizure of apparent, as well as of real American vessels.

Nor does this doctrine militate with the law of nations. A war, in fact, existed between the United States and France. An army was raised, a navy equipped, treaties were annulled, the intercourse was prohibited, and commissions were granted to private armed vessels. Every instrument of war was employed ; but its operation was confined to the vessels of war of France upon the high seas. So far as the war was allowed, the laws of war attached.

That it was a public war, was decided in the case of *Bas v. Tingy*, in this court, February term 1800. (4 Dall. 37.) No authorities are necessary to show that a state of war may exist without a public declaration. And the right to search follows the state of war. Vattel, lib. 3, c. 7, § 114 ; *The Maria*, 1 Rob. 304 ; *Garrels v. Kensington*, 8 T. R. 234. Whether the vessel was American or Danish, she was taken out of the hands of our enemy.

\*The law of nations in war gives not only the right to search a neutral, but a right to re-capture from the enemy. On this point, [\*80 the case of *Talbot v. Seeman* is decisive, both as to the law of nations, and as to the acts of congress, and that the rule applies as well to a partial as to a general war. Captain Murray's authority, then, was derived, not only from our municipal law, and his instructions, but from the law of nations. If he has pursued his authority in an honest and reasonable manner, al-

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(a) Upon Mr. Dallas offering to read the instructions—

CHASE, J., said, he was always against reading the instructions of the executive ; because, if they go no further than the law, they are unnecessary ; if they exceed it, they are not warranted.

MARSHALL, Ch. J.—I understand it to be admitted by both parties, that the instructions are part of the record. The construction, or the effect they are to have, will be the subject of further consideration. They may be read.

CHASE, J.—I can only say, I am against it, and I wish it to be generally known. I think it a bad practice, and shall always give my voice against it.

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though he may not be entitled to reward, yet he cannot deserve punishment.

It remains to consider, whether the vessel was, in fact, liable to seizure and condemnation. What were the general facts to create suspicion at the time? 1. The vessel was originally American. The transfer was recent, and since the non-intercourse law. The voyage was to a dependency of the French republic, and therefore, prohibited, if she was really an American vessel. 2. The owner was an American by birth. The master was a Scotchman. The crew were not Danes, but chiefly Americans, who came from Baltimore. 3. The *procès verbal* calls her an American vessel; which was corroborated by the declarations of some of the crew. 4. The practice of the inhabitants of the Danish islands to cover American property in such voyages.

What was there, then, to dispel the cloud of suspicion, raised by these circumstances? 1. The declarations of Wright, the master, whose testimony was interested, inconsistent with itself, and contradicted by others. 2. The documents found on board.

These were no other than would have been found, if fraud had been intended. These were, \*1. The sea-letter or pass from the governor-  
\*81] general of the Danish islands, who did not reside at St. Thomas, but at St. Croix. It states only by way of recital that the vessel was the property of Jared Shattuck, a burgher and inhabitant of St. Thomas. It does not state that he was naturalized or a subject of Denmark. 2. The muster-roll, which states the names and number of the master and crew, who were ten besides the captain, viz., William Wright, master, David Weems, John Robinson, Jacob Davidson, John Lampey, John Nicholas, Frederick Jansey, George Williamson, William George, Prudentio, a Corsican, and Davy Johnson, a Norwegian. There is but one foreign name in the whole. Wright, in his deposition, says that three were Americans, one a Norwegian, and the rest were Danes, Dutch and Spaniards. The muster-roll was not on oath, but was the mere declaration of the owner. 3. The invoice, which only says that Shattuck was the owner of the cargo. 4. The bill of lading, which says that he was the shipper. 5. The certificate of the oath of property of the cargo, states only by way of recital, that Shattuck, a burgher, inhabitant and subject, &c., was the owner of the cargo, but says nothing of the property in the vessel. By comparing this certificate with the oath itself, it appears that the word "subject" has been inserted by the officer, and was not in the original oath. 6. Shattuck's instructions to Captain Wright. 7. The bill of sale by Phillips, the agent of the American owners, to Shattuck; but his authority to make the sale was not on board.

To show what little credit such documents are entitled to, he cited the opinion of Sir W. Scorr, in the case of *The Vigilantia*, 1 Rob. 6-8 (Amer. ed.), and in the case of *The Odin*, Ibid. 208-211. The whole evidence on board was a mere custom-house affair, all depending upon his own oath of  
\*82] property. His \*burgher's brief was not on board, nor did it appear, even by his own oath, that Shattuck was a burgher. And no document is yet produced, in which he undertakes to swear that he is a Danish subject. Such documents could not remove a reasonable suspicion founded



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upon such strong facts. There could never be a seizure upon suspicion, if this was not warrantable at the time.

What has appeared since, to remove the suspicion, and to prove Shattuck to be a Danish subject? All the original facts remain, and the case rests on Shattuck's expatriation, whence arise two inquiries. 1. As to the right, in point of law, to expatriate. 2. As to the exercise of the right, in fact.

1. As to the right of expatriation. He was a native of Connecticut, and for aught that appears in the record, remained here until the year 1789, when we first hear of him in the island of St. Thomas. This was after the revolution, and therefore, there can be no question as to election, at least, there is no proof of his election to become a subject of Denmark.

If the account of the case of *Isaac Williams*, 1 Tuck. Bl. part 1, App. p. 436, (a) is correct, it was \*the opinion of Ch. J. ELLSWORTH, that a citi-

(a) The state of the case, and the opinion of Ch. J. ELLSWORTH, as extracted by Judge Tucker from "The National Magazine," No. 3, p. 254, are as follows:<sup>1</sup>

On the trial of Isaac Williams, in the district (*quære?* circuit) court of Connecticut, February 27th, 1797, for accepting a commission under the French republic, and under the authority thereof, committing acts of hostility against Great Britain, the defendant alleged, and offered to prove, that he had expatriated himself from the United States and became a French citizen, before the commencement of the war between France and England. This produced a question as to the right of expatriation, when Judge ELLSWORTH, then Chief Justice of the United States, is said to have delivered an opinion to the following effect:

"The common law of this country remains the same as it was before the revolution. The present question is to be decided by two great principles; one is, that all the members of a civil community are bound to each other by compact; the other is, that one of the parties to this compact cannot dissolve it by his own act. The compact between our community and its members is, that the community shall protect its members; and on the part of the members, that they will at all times be obedient to the laws of the community, and faithful to its defence. It necessarily results, that the member cannot dissolve the compact without the consent or default of the community. There has been no consent, no default. Express consent is not claimed; but it is argued, that the consent of the community is implied, by its policy, its condition and its acts. In countries so crowded with inhabitants that the means of subsistence are difficult to be obtained, it is reason and policy, to permit emigration; but our policy is different, for our country is but sparsely settled, and we have no inhabitants to spare. Consent has been argued from the condition of the country, because we are in a state of peace. But though we were in peace, the war had commenced in Europe; we wished to have nothing to do with the war, but the war would have something to do with us. It has been difficult for us to keep out of the war; the progress of it has threatened to involve us. It has been necessary for our government to be vigilant in restraining our own citizens from those acts which would involve us in hostilities.

"The most visionary writers on this subject do not contend for the principle in the unlimited extent, that a citizen may at any, and at all times, renounce his own, and join himself to a foreign country.

"Consent has been argued from the acts of our government, permitting the naturalization of foreigners. When a foreigner presents himself here, we do not inquire what his relation is to his own country; we have not the means of knowing, and the inquiry would be indelicate; we leave him to judge of that. If he embarrasses himself by contracting contradictory obligations, the fault and folly are his own; but this implies no consent of the government that our own should also expatriate themselves. It

<sup>1</sup> Also reported in Whart. St. Tr. 652, and 4 Hall's L. J. 461.

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zen of the United States could not expatriate himself. That learned judge is reported to have said in that case, that the common law of this country remains the same as it was before the revolution. But in the case of *Talbot v. Jansen*, 3 Dall. 133, this court inclined to the opinion that the right exists, but the difficulty was, that the law had not pointed out the mode of election and of proof.

It must be admitted, that the right does exist, but its exercise must be accompanied by three circumstances. 1. Fitness in point of time. 2. \*84] Fairness of intent. \*3. Publicity of the act.

But the right of expatriation has certain characteristics, which distinguish it from a locomotive right, or a right to change the domicile. By expatriation, the party ceases to be a citizen and becomes an alien. If he would again become a citizen, he must comply with the terms of the law of naturalization of the country, although he was a native. But by a mere removal to another country, for purposes of trade, whatever privileges he may acquire in that country, he does not cease to be a citizen of this.

With respect to other parties at war, the place of domicile determines his character, enemy or neutral, as to trade. But with respect to his own country, the change of place alone does not justify his trading with her enemy; and he is still subject to such of her laws as apply to citizens residing abroad. *The Hoop*, 1 Rob. 165; *Gist v. Mason*, 1 T. R. 84; and particularly, *Potts v. Bell*, 8 Ibid. 548, where this principle is advanced by Doct. Nicholl, the king's advocate, in p. 555, admitted by Doct. Swabey, in p. 561, and decided by the court.

This principle of general law is fortified by the positive prohibition of the act of congress. In France, the character of French citizen remains, until a naturalization in a foreign country. In the United States, we require an oath of abjuration, before we admit a person to be naturalized. If he was naturalized, he has done an act disclaiming the protection of the United States, and is no longer bound to his allegiance. But if he has acquired only a special privilege to trade, it must be subject to the laws of his country.

2. But has he, in fact, exercised the right of expatriation? And is it proved by legal evidence? His birth is *prima facie* evidence that he is a \*85] citizen of the United States, and throws the burden of proof upon him. No law has been shown, by which he could be a naturalized subject of Denmark, nor has he himself ever pretended to be more than a burgher of St. Thomas. What is the character of burgher, and what is the nature of a burgher's brief? It is said, that to entitle a person to own ships, there must have been a previous residence; but no residence is necessary, to enable a man to be a master of a Danish vessel. It is a mere license to trade; a permit to bear the flag of Denmark; like the freedom of a corporation. It implies neither expatriation, an oath of allegiance, nor residence. *The Argo*, 1 Rob. 133; *Pollard v. Bell*, 8 T. R. 434. These cases show with what facility a man may become a burgher; that it is a mere mat-

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is, therefore, my opinion, that these facts, which the prisoner offers to prove in his defence, are totally irrelevant," &c. The prisoner was accordingly found guilty, fined and imprisoned.



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ter of purchase, and that it is a character which may be taken up and laid aside at pleasure, to answer the purposes of trade.

But there is no evidence that he ever obtained even this burgher's brief. He went from Connecticut, a lad, an apprentice or clerk, in 1788 or 1789: he was not seen in business there, until 1795 or 1796. In going, in 1789, he had no motive to expatriate himself, as there was then no war. We find him first trading in 1796, after the war, and the law of Denmark forbids a naturalization in time of war. At what time, then, did he become a burgher? If he ever did become such, in fact, and it was in time, he can prove it by the record. Wright's burgher's brief is produced, and shows that they are matters of record. The brief itself, then, or a copy from the record, duly authenticated, is the best evidence of the fact, and is in the power of the party to produce. Why is it withheld, and other *ex parte* evidence picked up there, and witnesses examined here? All the evidence they have produced is merely matter of inference. They have examined witnesses to prove that he carried on trade at St. Thomas, owned ships and land, married, and resided there. By the depositions, they prove that a man is not by law permitted to do these things, without being a burgher; and hence, they infer his burghership.

\*These facts are equivocal in themselves, and not well proved. [\*86  
Certificates of citizenship are easily obtained, but are not always true. This is noticed by Sir. W. SCOTT, in the cases before cited. A case happened in this country, *United States v. Villato*, 2 Dall. 370; where a person having taken the oath of allegiance to Pennsylvania, agreeable to the naturalization act of that state, obtained a certificate from a magistrate, confirmed by the attestation of the supreme executive of the state, that he was a citizen of the United States. But upon a trial in the circuit court of Pennsylvania, it was adjudged, that he was not a citizen. *Captain Barney* also went to France, became a citizen, took command of a French ship of war, returned to this country, and is now certified to be a citizen of the United States, So, in the case of the information against the ship *John and Alice*, Captain Whitesides, he was generally supposed to be a citizen of the United States. On the trial, evidence of his citizenship was called for, when it appeared, that his father brought him into this country, in the year 1784, and remained here until 1792, when the father died. Neither he nor his father were naturalized, and the vessel was condemned. These instances show the danger of crediting such custom-house certificates.

All these certificates, in the present case, do not form the best evidence, because better is still in the possession of the party, and he ought to produce it. The general and fundamental rules of evidence are the same in courts of admiralty, as in courts of common law. If they appear to relax, it is only in that stage of the business, where they are obliged to act upon suspicion. In the present case, the opinion of merchants only is taken as to the laws of Denmark. No judicial character, not even a lawyer, was applied to. Certificates of merchants are no evidence of the law. *The Santa Cruz*, 1 Rob. 58. The evidence offered is both *ex parte* and *ex post facto*. Fraud is not to be presumed, but why was not the burgher's \*brief produced, as well as the other papers, such as the oath of property, &c., [\*87  
when it was certainly the most important paper in the case? The only reason which can be given is, that it did not exist. It was a case like that

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of Captain Whitesides, where people were led into a mistake from the length of his residence, and from having seen him there from the time of his youth.

Upon the whole, then, we have a right to conclude that Jared Shattuck was not a Danish subject; or that if he was, the fact is not proved, and therefore, he remains a citizen of the United States, in the words of the act of congress, "residing elsewhere." The consequence must be a condemnation of the vessel.

II. She was in danger of condemnation in the French courts of admiralty, and therefore, Captain Murray is entitled to salvage. This depends, 1. On the right to retake; 2. On the degree of danger; and 3. The service rendered.

1. He had a right to retake, on the ground of suspicion of illicit trade, in violation of the non-intercourse law, as well as on the ground of her being a vessel sailing under French authority, and so armed as to be able to annoy unarmed American vessels. He had also a right to bring her in for salvage, if a service was rendered. If his right to retake depends upon the suspicion of illicit trade, or upon her being a French armed vessel, he could take her only into a port of the United States.

The point of illicit trade has already been discussed. That the vessel was sailing under French authority is certain; the only question is, whether she was capable of annoying our commerce. She had port-holes, a musket, powder and balls, and \*eight Frenchmen, who, probably, as is usual, had \*88] each a cutlass. Vessels have been captured, without a single musket: three or four cutlasses are often found sufficient. The vessel was sufficiently armed to justify Captain Murray, under his instructions, in bringing her in.

If, then, the taking was lawful, has she been saved from such danger as to entitle Captain Murray to salvage? There is evidence that Captain Wright requested Captain Murray to take the vessel, to prevent her falling into the hands of the English. He consented to be carried into Martinique. He protested only against the privateer, not against Captain Murray. His letter to Captain Murray does not complain of the re-capture, but of the detention. The taking was an act of humanity, for if Captain Murray had taken out the Frenchmen, and left the vessel with only Captain Wright and the boy, they could not have navigated her into port, and she must have been lost at sea, or fallen a prey to the brigands of the islands. This alone was a service which ought to be rewarded with salvage.

But she was in danger of condemnation in the French courts of admiralty. The case of *Talbot v. Seeman* has confirmed the principle adopted by Sir W. Scott, in the case of *The War Onskan*, 2 Rob. 246, that the departure of France from the general principles of the law of nations, varied the rule that salvage is not due for the re-capture of a neutral out of the hands of her friend; and that the general conduct of France was such as to render the re-capture of a neutral out of her hands, an essential service, which would entitle the re-captors to salvage. If she had been carried into a French port, how unequal would have been the conflict? Who would have been believed, the privateer or the claimant? The Danish papers would have been considered only as a cover for American property. The danger is shown by the apprehensions of Captain Wright and his crew; by the declarations of the



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privateer; by the *procès verbal*; and by the actual imprisonment of the crew.

\*But independent of the general misconduct of France, there are [89 several French ordinances, under which she might have been condemned. The case of *Pollard v. Bell*, 8 T. R. 444, shows that such ordinances may justify the condemnation. The case of *Bernardi v. Motteaux*, 2 Doug. 575, shows that the French courts actually do proceed to condemnation upon them, as in the case of throwing over papers, &c. So, in the case of *Mayne v. Walter*, Park on Insurance 414 (363), the condemnation was because the vessel had an English supercargo on board.

By the ordinances of France, Code des prises, vol. 1, p. 306, § 9, "all foreign vessels shall be good prize in which there shall be a supercargo, commissary or chief officer of an enemy's country; or the crew of which shall be composed of one-third sailors of an enemy's state; or which shall not have on board the *roles d'équipage* certified by the public officers of the neutral places from whence the vessels shall have sailed." And by another ordinance, 1 Code des prises, 303, § 6, "No regard is to be paid to the passports granted by neutral or allied powers, to the owners or masters of vessels, subjects of the enemy, if they have not been naturalized, or if they shall have not transferred their domicil to the states of the said powers, three months before the 1st of September, in the present year; nor shall the said owners or masters of vessels, subjects of the enemy, who shall have obtained such letters of naturalization, enjoy their effect, if, after they shall have obtained them, they shall return to the states of the enemy, for the purpose of there continuing their commerce;" and by the next article, "vessels, enemy built, or which shall have been owned by an enemy, shall not be reputed neutral or allied, if there are not found on board authentic documents, executed before public officers, who can certify their date, and prove that the sale or transfer thereof had been made to some of the subjects of an allied or neutral power, before the commencement of hostilities; and if the said deed or transfer of the property of an enemy to the subject of the neutral or ally, shall not have been duly enregistered before the principal officer of the place of departure, and signed by the owner, or the person by him authorized."

\*In violation of these ordinances, the chief officer, Captain Wright, [89 was a Scot, an enemy to France: for although he had a burgher's brief, yet it did not appear, that he had resided three months before he obtained it; and we have before seen, that a previous residence was not necessary, by the laws of Denmark, to entitle him to a burgher's brief, for the purpose of being master of a vessel. In the next place, the whole number of the crew, with the master, being eleven, and three of the crew being Americans and the master a Scot, more than one-third of the crew were enemies of France. The muster-roll did not describe the place of nativity of the crew. The vessel was purchased after the commencement of hostilities between France and the United States. And there was no authority on board from the American owners to Phillips, the agent who made the sale, in violation of the regulation of 17th February 1794, art. 4 (2 Code des prises, p. 14), which declares "the vessel to be good prize, if being enemy built, or belonging originally to the enemy, the neutral, the allied, or the French proprietor, shall not be able to show, by authentic documents, found on board,

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that he had acquired his right to her before the declaration of war." See also 2 Valin 249, § 9 ; 251, § 12, and 244.

What chance of escape had this vessel, under all these ordinances, which the French courts were bound to enforce? The case of *Pollard v. Bell*, 8 T. R. 434, is precisely in point. The vessel in that case was Danish, and had all the papers usually carried by Danish vessels. But she was condemned in the highest court of appeal in France, because the master was a Scot, who had obtained a Danish burgher's brief, subsequent to the hostilities. Has there, then, been no service rendered?

It is no objection to the claim of salvage, that it is not made in the libel. Salvage is a condemnation of part of the thing saved. The prayer for condemnation of the whole includes the part : it may be made by petition, or even *ore tenus*.

The means used for saving need not be used with that sole view. *Talbot* \*91] v. *Seeman*. \*As to the *quantum* of salvage, he referred to the opinion of Sir W. Scott, in the case of *The Sarah*, 1 Rob. 263.

III. But if the Charming Betsy is not liable to condemnation, under the non-intercourse law, and if Captain Murray is not entitled to salvage, yet the restitution ought to be made of the net proceeds of the sale only, and not with damages and costs.

In maritime cases, probable cause is always a justification. The grounds of suspicion, in the present instance, have been already mentioned ; and when to these are added the circumstances, that it was at Captain Wright's request that Captain Murray took possession of the vessel ; that he consented to be carried into Martinique ; that if he had taken out the Frenchmen, and left the vessel in the midst of the ocean, with only Captain Wright and his boy, they would have been left to destruction ; that part of the cargo was damaged, part rifled, and all perishable ; and that Captain Murray offered to release the vessel and cargo, on security, there can hardly be a stronger case to save him from a decree for damages.

In the case of the *Two Susannahs*, 2 Rob. 110, it is, by Sir W. Scott, taken as a principle, that a seizure is justified by an order for further proof, and he decreed a restitution of the proceeds only, it not being shown that the captors conducted themselves otherwise than with fair intentions. In the present case, there is no pretence that Captain Murray did not act from the purest motives, and from a wish faithfully to execute his instructions.

*Key, contra*.—1. The schooner Charming Betsy and her cargo were neutral property, and not liable to capture under the non-intercourse law. 2. When re-captured, she was not an armed French vessel capable of annoying our commerce, and therefore, not liable under the acts of congress author- \*92] izing the capture of such vessels. \*3. She was not in imminent danger when re-captured, and therefore, Captain Murray is not entitled to salvage. 4. Under all the circumstances of the case, he acted illegally, and is liable for damages which have been properly assessed.

I. As to the neutral character of the vessel and cargo, he contended, 1. That Jared Shattuck never was an American citizen. 2. That if he was, he had expatriated himself, and had become a Danish subject. 3. That if not a Danish subject, yet he was not a citizen of the United States.

1. The evidence is, that he was born in Connecticut, but before the decla-



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ration of independence, and was, therefore, a natural-born subject of Great Britain. He was in trade for himself, in St. Thomas, in 1794. This he could not do, until he was twenty-one years of age, which will carry back the date of his birth to the year 1773. He was an apprentice at St. Thomas in the year 1788 or 1789. There is no evidence of his being in the United States since the declaration of independence. But if he had been, yet he went away while a minor, and he could not make his election during his minority. There is no evidence, that his parents were citizens of the United States. Being a natural-born subject of Great Britain, he could not become a citizen of the United States, unless he was here at the time of the revolution, or his parents were citizens, or unless he became naturalized according to law. It is incumbent upon Captain Murray, to prove him to be a citizen of the United States. It is sufficient for us, to show that he was born a subject of Great Britain. They must show how he became a citizen. This is a highly penal law, and everything must be proved which is necessary to bring the case within the penalty.

2. But if he ever was a citizen of the United States, he had expatriated himself. \*That every man has a right to expatriate himself, is admitted by all the writers upon general law; and it is a principle peculiarly congenial to those upon which our constitutions are founded. Some of the states of the Union have expressly recognised the right, and even prescribed the form of expatriation. But where the form is not prescribed, nothing more is necessary, than that it be accompanied with fairness of intention, fitness of time, and publicity of election. [93]

In the present instance, all these circumstances concur. No time could have been more fit than the year 1788 or 1789, when all Europe and America were in a state of profound peace. His country had then no claim to his service. The fairness of intention is evidenced by its having been carried into effect, by an actual *bonâ fide* residence of ten or eleven years; by serving an apprenticeship; by actual domiciliation; by marriage; by becoming a burgher; by acquiring lands, and by owning ships. The publicity of election is witnessed by the same acts, and by taking the oath of allegiance to Denmark. The United States have prescribed no form of expatriation. All that he could do to render the act public and notorious, has been done.

It is said, a man cannot cease to be a citizen of one state, until he has become a citizen or subject of another. But a man may become a citizen of the world; an alien to all the governments on earth. (a) It is in evidence, that by the laws of Denmark, a man cannot become a subject and carry on trade, without being naturalized; that an oath of allegiance and an actual domicil are necessary to naturalization; but that a domicil is not necessary to \*become a burgher, for the purpose of navigating a Danish vessel. [94]

In the two cases cited from 1 Rob. 133 (*The Argo*), and 8 T. R. 434 (*Pollard v. Bell*), the question was only as to the national character of the

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(a) MARSHALL, Ch. Justice.—There can be no doubt of that.

*Dallas* said, he had been misunderstood. He only said, that the act of becoming a citizen of another state was the most public act of expatriation, and the best evidence of the fact.

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master of the vessel, not of the owner; and therefore, they do not apply to the present case.

The burgher's brief of Captain Wright is dated 19th May 1794, and certifies that he had taken the oath of fidelity to his Danish majesty, and was entitled to all the privileges of a subject.

3. But if the facts stated in the record are not sufficient to prove Shattuck to be a Danish subject, yet they do not prove him to be a citizen of the United States, and if he is not a citizen of the United States, it is immaterial of what country he is a subject. By the law of nature and nations, a man may, by a *bond fide* domicil, and long continued residence in a country, acquire the character of a neutral, or even of an enemy. In the case of *Scott v. Schawrtz*, Comyns 677, it was decided, that residence in, and sailing from, Russia, gave the mariners of a Russian ship the character of Russian mariners, within the meaning of the British navigation act: and in the case of *The Harmony*, 2 Rob. 264, Sir W. Scott condemned the goods of an American citizen, because, by a residence in France, for four years, he had acquired a domicil in that country which had given his property the character of the goods of an enemy. In the case of *Wilson v. Marryat*, 8 T. R. 31, it was adjudged, that a natural-born British subject might acquire the character of a citizen of the United States for commercial purposes.

II. The Charming Betsy was not a French armed vessel, capable of annoying our commerce, and therefore, not liable to capture or condemnation, by virtue of the limited war which existed between the United States and \*95] France. In supporting this proposition, it is not intended to interfere \*with the decision of this court in the case of *Talbot v. Seeman*. There is a great difference between the force of the *Amelia*, in that case, and that of the Charming Betsy. The *Amelia* had eight cannon, was manned by twelve Frenchmen, and had been in possession of the French ten days, and must be admitted to have been such an armed French vessel as came within the meaning of the acts of congress.

But in the present case, the vessel was built at Baltimore, and owned by citizens of the United States. When she sailed from Baltimore, she had four cannon, a number of muskets, &c., which Shattuck was obliged to purchase with the vessel, and which he afterwards sold at a considerable loss. The master swears, that at the time of re-capture, she had only one musket, a few balls and twelve ounces of powder; and although McFarlan deposes to a greater quantity of arms, yet it appears that he did not go on board of her until eight days after the re-capture. If arms were on board, they ought to have been brought in with the vessel: this is particularly required by the act of congress. No arms are mentioned in the account of sales; it is to be presumed, as none were brought in, that none were on board. The master expressly swears that the French put no force or arms on board, when they took her. She could not, therefore, be such an armed vessel as was intended by the acts of congress.

III. She was not in imminent danger, when re-captured, and therefore, the re-captors are not entitled to salvage. It is a general principle, that the re-capture of a neutral does not entitle to salvage.

It is not intended to question the correctness of the decision of this court in the case of *Talbot v. Seeman*, nor that of Sir W. Scott, in the case



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of *The War Onskan*. Those cases were exceptions to the general rule, because the conduct of France was in violation of the law \*of nations, and because neutral vessels had no chance of escaping the rapacity of the French prize courts. This system of depredation upon neutral commerce continued during the years 1798 and 1799. The *Amelia* was recaptured by Captain Talbot, in September 1799, while the *arrêt* of 18th January 1798, so injurious to neutral commerce, and the violences of the prize courts, were in full operation. [\*96]

The *Charming Betsy* was re-captured by Captain Murray, on the 3d of July 1800. During this interval, great events had occurred in France. On the 9th of November 1799, Bonaparte was placed at the head of the government, and a new order of things commenced. On the 24th of December 1799, the *arrêt* of the council of five hundred, of 18th January 1798, which made the character of neutral vessels dependent upon the quality of the cargo, and declared good prize all those laden in whole or in part with the productions of England or her possessions, was repealed, and by a new decree, the ordinance of 1778 was re-established. The government adopted a more enlightened and liberal policy towards neutrals. On the 26th of March 1800, a new tribunal of prizes was erected, at the head of which was placed the celebrated Portalis, author of the Civil Code. On the 29th of May 1800, their principles were tested in the case of *The Pigou*, an American ship belonging to Philadelphia. This case was a public declaration to all the world, that they began to entertain a proper respect for the law of nations, and from this time, the rule of salvage, as established in the case of *The War Onskan*, ceased.

The *Pigou* had been condemned in an inferior tribunal. On an appeal to the council of prizes, PORTALIS, with a degree of liberality and correctness which would confer honor upon any court in the world, declared that \*excepting the case when a prize is evidently and actually enemy's property, all questions about the validity or invalidity of prizes, come to the examination of a fact of neutrality." And in discussing the question, as to the necessity of a *role d'équipage*, he says, "I will begin with the principle that all questions about neutrality are what are called in law, questions *bonâ fide*, in which due regard is to be had to facts, and weigh them properly, without adhering to trifling appearances." "But it would be a gross error, in believing that the want of, or the least irregularity in, one of these papers, could operate so far as to cause the vessel to be adjudged good prize. Sometimes regular papers cover an enemy's property, which other circumstances unmask. In other circumstances, the stamps of neutrality break through omissions and irregularities in the forms, proceeding from mere negligence, or grounded on motives free from fraud. [\*97]

"We must speak to the point; and in these matters, as well as in those which are to be determined, we must decide not by mere strict forms, but by the principles of good faith; we must say, with the law, that mere omissions or mere irregularities in the forms, cannot prejudice the truth, if it is stated by any other ways: and *si aliquid ex solemnibus deficit, cum equitas poscit, subveniendum est*." "The main point in every case is, that the judge may be satisfied that the property is neutral or not." He then cited a case decided upon the 6th article of the regulation of the 21st of October 1744; by which article, the act of throwing over papers is made a substan-

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tive ground of condemnation. But it was decided, that the papers ought to be of such a nature as to prove the property to be enemy's.

The two grounds upon which the *Pigou* was condemned in the inferior tribunal, were, that she was armed for war, without any commission or authority from the United States, and that there was on board no *role d'équipage*, attested by the public officers of the port of departure. She mounted ten guns, and was provided with muskets and other warlike stores.

\*98] Upon the first point, it was decided in the council of prizes, that she was not armed for war, but for lawful defence; and on the second, that a *role d'équipage* was not absolutely necessary, if the property appeared otherwise clearly to be neutral. (a)

(a) There is so much reason, justice and good sense appearing through a bad translation of, probably, not a very accurate account of this case, that it is with pleasure transcribed, as it has been published in this country, from the London public prints.

Opinion of PORTALIS.—After having read the opinion of commissioners of the government, left in writing on the table, which is as follows: It appears, that a judgment of the tribunal of commerce at l'Orient, had granted Captain Green the replevy of his vessel and part of the goods and specie which composed the cargo; and that on the appeal entered by the comptroller of marine at l'Orient, against that judgment, the tribunal of the department of Morbihan declared the vessel and cargo a good prize.

The grounds on which rested the decision of the tribunal of Morbihan were, that the vessel was armed for war, without any commission or authorization from the American government; and that there was on board no *role d'équipage* attested by the public officers of the port of his departure. The captured claim the nullity of the prize, and that the vessel be reinstated in the situation she was in, when captured, and that she be delivered up, as well as her cargo, and the dollars which were on board, and also the papers, with damages and interest adequate to the losses they had sustained.

To be able to determine on the respective demands, we must first fix upon the validity or invalidity of the prize; excepting the case when a prize is evidently and actually enemy's property, all questions about the validity or invalidity of prizes come to the examination of a fact of neutrality.

In this case, was the tribunal of Morbihan authorized to determine that the ship *Pigou* was in such circumstances as to be prevented from being acknowledged and respected as neutral? It is said, the vessel was armed for war, and without any authorization from her government; that she mounted ten guns of different rates, and that muskets and warlike stores have been found in her. The captured reply, that the vessel being bound to India, was armed for her own defence, and that the warlike ammunition, the muskets and guns, did not exceed what is usual to have on board for long voyages; for my part, I think it is not for having arms on board only, that a vessel can be said to be armed for war. The warlike armament is merely of an offensive nature; it is deemed so, when there is no other end than attacking, or, at least, when everything shows that attack is the main point of the armament; then a vessel is reputed inimical or pirate, if she has no commission or papers which may remove the suspicion. But defence is of natural right, and every means of defence is lawful, in voyages at sea, as in every other dangerous occurrence of life. A vessel consisting but of a small crew, and whose cargo in goods amounted to a considerable sum, was evidently intended for trade, and not for war. The arms found on board were not to commit plunder and hostility, but to avoid them; not for attack, but for defence. The pretence of armament for war, in my opinion, cannot be founded.

\*99] I am now to discuss the second argument against the captors, on the want of a *role d'équipage*, attested by the public officers of the place of her departure. To support the validity of the prize, they allege the regulation of the 21st October 1774, of the 26th of July 1778, and the decree of the directory of the 12th Ventose, 5th year,



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In another case (*The Statira*), which was decided very shortly after that of *The Pigou*, by the same council of prizes, two questions arose, 1st. Whether the *Statira*, being an American vessel captured by a British ship,

which require a *role d'équipage*. The captured, on their part, claim the execution of the treaty of commerce between France and the United States of America, of the 6th February 1778; they contend, that general regulations could not derogate from a special treaty, and that the directory could not infringe the treaty by an arbitrary decree.

It is a fact, that the regulations of 1774 and 1778 and the decree of the directory, require a *role d'équipage* attested by the public officers of the place of departure. It is also a fact, that the *role d'équipage* is not mentioned in the treaty of the 6th February, as one of the papers requisite to establish neutrality; but I believe, I am not under the necessity of discussing, whether the treaty is superior to the regulations, or whether the regulations are superior to the treaty.

I will begin with the principle, that all questions about neutrality, are what are called in law, questions *bond fide*, in which due regard is to be had to facts which are to be properly weighed, without adhering to trifling appearances. Neutrality is to be proved; for this reason, the regulation of marine of 1681, article 9, on prizes, states, that vessels with their cargoes, which shall not have on board charter-parties, bills of lading nor invoices, shall be considered as good prize. From the same motives, the regulations of 1774 and 1778 put the commanders of neutral vessels under obligation of proving at sea, their property being neutral, by passports, bills of lading, invoices and vessels' papers. The regulation of 1774, whose enacting parts have been renewed by the directory, literally expresses, among the papers requisite to prove neutral property, that there must be a *role d'équipage*, in due form.

But it would be a gross error, to suppose that the want of, or the least irregularity in, one of these papers, could operate so far as to cause the vessel to be adjudged good prize. Sometimes, regular papers cover an enemy's property, which other circumstances unmask. In other circumstances, the stamps of neutrality break through omissions and irregularities in the forms, proceeding from mere negligence, or grounded on motives free from fraud. We must speak to the point, and in these matters as well as on those which are to be determined, we must decide, not by mere strict forms, but by the principles of good faith; we must say, with the law, that mere omissions, or mere irregularities in the forms, cannot prejudice the truth, if it is stated by any other ways; and *si aliquid ex solemnibus deficiat, cum equitas poscit, subveniendum est*.

Therefore, the regulation of the 26th July 1778, art. 2, having stated that the masters of neutral vessels shall prove at sea, their property being neutral, by passports, bills of lading, invoices and other vessel-papers, adds, one of which, at least, shall establish the property being neutral, or shall contain an exact description of it. It is not then necessary, in every case, to prove the property neutral, by the simultaneous concurrence of all the papers enumerated in the regulations. But it is sufficient, according to the circumstances, that one of \*these papers establish the property, if it is not opposed or destroyed by more peremptory circumstances. The main point in every case is, that the judge may be satisfied that the property is neutral or not. [\*100]

We have a precedent of what I assert, in art. 6, of the regulation of the 21st October 1774; by that article, every vessel, belonging to what nation soever, neutral, enemy or ally, from which papers shall be proved to have been thrown overboard, shall be adjudged good prize, on the proof only of the papers having been thrown overboard; nothing can be more explicit. Some difficulties arose on the execution of that severe clause of the law, which has been renewed by the regulation of 1778. On the 13th November 1779, the king wrote to the admiral, that he left entirely to him and to the commissioners of the council of prizes, to apply the rigidity of the decree, and of the regulation of the 26th July, or to moderate their clauses, as peculiar circumstances would require it, in their opinion.

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and \*re-captured by a French privateer, was liable to confiscation on the ground of her being in the hands of an enemy; and 2d. Whether her cargo was ground of condemnation?

On the first point, it was held, that the mere capture does not, before condemnation, vest the property in the captor, so as to make it transferable to the re-captor, and therefore, no ground of confiscation. On the 2d, there were two inquiries: 1st. Whether, in point of law, the character of the vessel, neutral or not, should be determined by the nature of the cargo? 2d. Whether the cargo consisted of contraband?

As to the first, the commissary (PORTALIS) reviews the laws upon this subject, prior to the *arrêt* of the council of 500, of the 29th Nivose, year 6 \*102] (January 18th, 1798), \*the severity of which he condemns; but as the Statira was captured, while it was in force, the captor was entitled to have the capture tried by it. He observes, that such regulations are improperly styled laws, and they are essentially variable *pro temporibus*

A judgment of the council, of the 27th December, in the said year, rendered between Pierre Brandebourg, master of the Swedish ship Fortune, and M. de la Rogre-dourden, captain of the king's xebec, the Fox, liberated the said vessel, notwithstanding some papers had been thrown overboard. It was determined, that to ground an adjudication of the vessel, on the papers being thrown overboard, they ought to be of such nature as to prove the property enemy's, and that the captain ought to have had a concern in throwing his papers overboard: which was not the case with the Swedish master.

In this case, without discussing whether American masters are obliged or not to exhibit a *role d'équipage*, attested by the public officers of the place of their departure, I observe, that this *role* is supplied by the passport, and that the captured allege the impossibility for them to have their *role d'équipage* attested by public officers in Philadelphia, since the intercourse was forbidden, under pain of death, with Philadelphia, where a most tremendous epidemic was raging; I must add, that the passport, the invoice, and all the vessel's papers, establish evidently the property of the vessel and cargo being neutral; none of these papers have ever been disputed. Thus, the invalidity of the capture is obvious; whence it follows, that everything which has been taken from them ought to be restored, in kind, or by a just indemnification.

As to their claim for damages and interest, I must observe, that such a claim is not, in every case, the sequel of the invalidity of the capture. Suspicious proceedings of the captured may occasion the mistake of the captors. But when the injustice on the part of the captors cannot be excused, the captured have a right to damages and interest. Let us apply these principles to the cause. Could the captors entertain any grounded suspicions against the captain of the ship Pigou? was not the neutrality of the ship proved, by her being an American built ship, by her flag, by her destination, by the crew being composed of Americans, by her cargo consisting of American goods, without any contraband articles, by the name and the character of Captain Green, very well known by services he rendered to the French nation, by the register, the passport the invoice, by the papers on board, finally, by the place where she was captured, which was far from any suspicious destination? It was then impossible for the captors to make any mistake; the vessel struck her colors, at the first summons, the officers and crew made faithful declarations; they answered plainly in their examination; no pretence whatever was left to the captors; they don't appear to have observed the forms prescribed by the regulation. Some very heavy charges are uttered against them; but I think it is not time yet to take notice of them; they will be discussed when the articles captured are restored.

In these circumstances, I am of opinion, that a more absolute and full replevy be



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*et causis*; that they should always be tempered by wisdom and equity. He adverts to the words *in whole or in part*, by which, he says, ought to be understood, a great part, according to the judicial maxim *parum pro nihilo habetur*. Upon this principle, he is of opinion, that a ship ought not to be subject to confiscation, even under the law of the 29th Nivose, unless such a part of the cargo comes under the description of what is there made contraband, as ought to excite a presumption of fraud against all the rest.

The question of contraband related to forty barrels of pitch, part of the cargo of the *Statira*. He observed, that pitch was not made contraband by the treaty of 1778, but as France was, by that treaty, entitled to all the advantages of the most favored nation, and as by a subsequent treaty between the United States and Great Britain, pitch was among the enumerated articles of contraband, it necessarily became such in regard to France. He, however, decides the quantity to be too small to justify condemnation, even upon the principle of the law of 24th (*quere* ? 29th) Nivose. And the ship was restored. (a)

granted to Captain Green of the American ship *Pigou* and her cargo, as well as the papers found on board; as to the claim of damages and interest, made by Captain Green, that the former be granted to him, and they shall be settled by arbitrators in the usual form.

(Signed)

PORTALIS.

Paris, 6 Prairial, 8th year.

The council declare that the capture of the ship *Pigou* and her cargo is null and of no effect; therefore, grant a full and absolute replevy of the vessel, rigging and apparel, together with the papers and cargo to Captain John Green; as to the damages and interest claimed by Captain Green, the council grant them to him, and they shall be settled by arbitrators in the usual forms.

Done at Paris on the 9th Prairial, 8th year of the republic.

Present,

Citizen  
PresidentsREDON,  
NIOU CANTE,  
MOREAU,  
MONTIGNY,  
MONPLACID,BARENNES,  
DUSAUB,  
PAREVAL,  
GRANDMAISON,  
TOURNACHER.

(a) The following account of the case of *The Statira* is extracted from London papers of June 1800. We stated to our readers, some time ago, the principles upon which the new council of prizes at Paris proceeded with respect to neutral vessels, and we gave the decision at length upon the American ship *Pigou*, which was ordered to be restored with costs. That decision showed that a greater degree of system had been established, and that the loose and frequently unjust principles upon which the directory acted with respect to captures of neutral ships, were meant to be abandoned. The following is the decision of the council on another case, that of *The Statira*.

The *Statira*, Captain Seaward, an American ship, had been captured by an English vessel, and re-captured by the French privateer, the *Hazard*. The first point which the commissary considers is, the effect which the *Statira*, having been in the pos- [\*103 session of the English, ought to have. \*He observes, that if the vessel captured and recovered had been French, and re-captured by a national vessel, there would have been nothing due to the re-captor, because this is only the exercise of that protection which the state owes to all its subjects in all circumstances. If it had been re-captured by a privateer, the French regulation gives the property of the vessel to the re-captor, on account of the risk and danger of privateering. It might be an act of generosity to restore the vessel to the original owner, but it is not of right, that it should.

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These cases are read, to show that France had abstained from those violations of the law of nations, which had caused the rule in the case of *The War Onskan*; and to bring the present case within the principles established by the court in the case of *Talbot v. Seeman*.

\*105] The general conduct of France having been changed, it is to be presumed, she would have been released, with damages and costs; if not upon the principles of justice, good faith, and the law of nations, yet upon those of policy. France was at war with Great Britain; partial hostilities existed with the United States. The non-intercourse law prevented our vessels from trading with France, or her dependencies; and the French West Indies could only be supplied from the Danish islands. It is not to be believed, therefore, that they would, by condemning this vessel (coming to them with those very supplies which they wanted), embarrass a trade so necessary to their very existence.

But independently of the general misconduct of France towards neutrals, the captors rely upon three points arising under French ordinances.

In the next place, he considers the case of a neutral re-captured from the enemy. If really neutral, he says, the vessel must be released. The ground of this higher degree of favor for a neutral, he states to be, that the French vessel must have been lost to the country. But it is not certain, that the neutral captured by an enemy may not be released by the admiralty courts of the enemy. The mere capture does not vest the property immediately in the captor, so as to make it transferable to the captor. The commissary considers the property not vested in the captor, until sentence of condemnation.

We believe this is much milder, and more favorable for neutrals than our practice. The being a certain time in the enemy's custody, or *intra mœnia*, transfers the property to the captor. This was held in the late well-known case of the Spanish prize, captured by the French, and re-captured by the English. It is to be observed, however, that a principle of reciprocity is pursued, and that we give the same indulgence to the neutral which they would have given us in a similar case.

Having proved that the *Statira* was not liable to confiscation, on the ground of her being in the hands of an enemy, the commissary considers whether her cargo was ground of confiscation. Upon this point, he considers two questions; 1st. Whether, in point of law, the character of the vessel, neutral or not, should be determined by the nature of the cargo? 2d. Whether the cargo consisted of contraband? He then reviews all the laws upon this head. He shows, that until the decree of the 29th Nivose (year 6), January 18th, 1798, the regulation states, "His majesty prohibits all privateers to stop and bring into the ports of the kingdom the ships of neutral powers, even though coming from, or bound to, the ports of the enemy, with the exception of those carrying supplies to places blockaded, invested or besieged. With regard to the ships of neutral states, laden with contraband commodities for the enemy, they may be stopped, and the said commodities shall be seized and confiscated, but the vessels and the \*104] residue of their cargo shall be restored, unless the said contraband commodities constituted three-fourths of the value of the cargo, in which case, the ship and cargo shall be wholly confiscated. His majesty, however, reserves the right of revoking the privileges above granted, if the enemy do not grant a reciprocal indulgence in the course of six months from the date hereof."

The law of the 29th Nivose (year 6) overturned all this system, and enacted, "that the state of ships, in regard to their being neutral or hostile, should be determined by their cargo; that accordingly, every vessel found at sea, laden in whole or in part with commodities coming from England, or its possessions, should be declared good prize,



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1. That the *role d'équipage*, wants the place of nativity of the crew. But according to the opinion of Portalis, this is not a fatal defect, nor is it, of itself, a sufficient ground for condemnation.

\*2. That more than one-third of the crew were enemies of France. [\*106 The word *matelot*, in the ordinance of 1778, means a sailor, in contradistinction to the captain or master. Exclude the master, and there were only ten persons on board, and only three of those are pretended to be enemies; so that one-third were not enemies, within the meaning of the ordinance.

But these three pretended enemies were Americans. The hostilities which existed between France and the United States amounted at most to a partial, limited war, according to the decision of this court in the case of *Bas v. Tinny*. It was only a war against French armed force found on the high seas. It did not authorize private hostilities between the citizens of the

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whoever might be owners of their articles and commodities." The severity of this regulation the commissary condemns, but as the *Statira* was captured while it was in force, the captor was entitled to have the capture tried by it.

He examines next how the regulation applies, premising his opinion, that such regulations are improperly styled laws, and they are essentially variable *pro temporibus et causis*; that they should always be tempered by wisdom and equity. He adverts to the words "in whole or in part." By the whole, he says, ought to be understood a great part, according to the judicial maxim *parum pro nihilo habetur*. Upon this principle, then, he is of opinion, that a ship ought not to be subject to confiscation, even under the law of the 29th Nivose, unless such a part of the cargo comes under the description of what is there made contraband, as ought to excite a presumption of fraud against all the rest. What that part should be, is not capable of definition, but should be left to the enlightened equity and sound discretion of the judge.

The *Statira* had on board sixty barrels of turpentine and forty barrels of pitch. The captor contended that these were contraband; the captured said, that by the treaty of 1778 with the Americans, they were not enumerated as contraband. But the commissary shows, that the Americans, by the treaty, were bound to admit the French to all the advantages of the most favorite nations; that having, in a subsequent treaty with England, made pitch contraband, with respect to the latter, necessarily, it became contraband with regard to France. The learned commissary, however, thinks, that even upon the principle of the law of the 24th Nivose, the quantity of pitch was too small to justify confiscation.

In the next place, the captor alleged that 2911 pieces of Campeachy wood, part of the cargo of the *Statira*, was the produce of English possessions. This point, however, had not been regularly ascertained, as the report on the subject was made without the captured being called as a party. The commissary states, however, strong circumstances of suspicion on this head. The captured had not appealed against the confiscation of the cargo; the point came under the consideration of the court, on the appeal of the captor, who wanted to get both ship and cargo. The commissary, therefore, saw no reason for condemning the ship, which was clearly neutral; but on account of the suspicions against the character of the cargo, he thought no indemnification whatever was due to the captured. Judgment was pronounced accordingly.

The piratical decree of the 29th Nivose (year 6), mentioned above, with so much severity by Portalis, has been repealed, and things have been placed upon the footing of the regulation of 1778; that is, the French are to treat neutrals in regard to contraband, in the same way in which they are treated by us; they will not allow the Americans to carry into England a commodity which the English would seize as contraband going into the ports of France.

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two countries. Individuals are only enemies to each other, in a general war. The war extended only to those objects pointed out in the acts of congress; as to everything else, the state of the two nations was to be considered as a state of peace. It was a war only *quoad hoc*. The individuals of the two nations were always neutral to each other. A citizen of the United States could only be considered as an enemy of France, while in arms against her; the neutrality was the counterpart, or (to use a mathematical expression) the complement of the war. A citizen of the United States, peaceably navigating a neutral vessel, could not be burdened with the character of enemy.

3. The master was a Scot by birth. The ordinance cited from 1 Code des Prises, 303, § 6, in support of this objection, is in the alternative. The master of the vessel must be naturalized in a neutral country, or must have transferred his domicile to the neutral country, three months before the first of September in that year. Naturalization is not necessary, if there be such a transfer of the domicile; and the domicile is not necessary, if the party be naturalized. But the authority of Portalis shows that these decrees are not \*107] to be considered as laws, but *sub modo*. \*They are only regulations made at particular times, for particular purposes.

If the same evidence had been produced at Guadaloupe, which has been brought here (and the same would have been more easily obtained there), there can be no doubt the vessel would have been restored. It is in evidence, that other vessels of Mr. Shattuck had been released. No salvage can be allowed, unless the danger was imminent, not problematical.

IV. Under all the circumstances of the case, Captain Murray acted illegally, and is liable for damages; which have been properly assessed. His subsequent conduct rendered the transaction tortious, *ab initio*. If he was justified in rescuing the vessel from the hands of the French, his subsequent detention of the vessel, and the sale of the cargo at Martinique, by his own agent, without condemnation, were unauthorized acts, in violation of the rights of neutrality. The libel says nothing of the cargo: it is first mentioned in the replication. The libel only prays condemnation of the vessel, on the ground of violation of the non-intercourse law.

By law, he was bound to bring the vessel and cargo into a port of the United States for adjudication, and had no authority to sell the cargo, before condemnation. As to the pretence of her being an armed French vessel, he ought to have sent the arms into port with the vessel, as the only evidence of their existence.

The commander of the French privateer, in his commission to the prize-master, calls her the Danish schooner Charming Betsy, William Wright, master. There was no evidence to impeach the credence due to the papers \*108] found on board of her, and which at that \*time had every appearance of fairness, and which have since been incontestably proved to be genuine.

The facts stated in the *procès verbal* are, that she had no log-book; that the mate declared himself to be an American; that the flag and pendant were American; that the Danish flag had been made, during the chase, which was confirmed by the two boys, and that she had no pass from the French consul. Whatever weight might be given to these facts, if true, yet the outrageous and disorderly conduct of the crew of the privateer,



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entirely destroys the credit of the *procès verbal*, and at best, it would be only the declaration of interested plunderers.

But it is said, that, by the law of nations, probable cause is a sufficient excuse; and that this law operates as the law of nations. In revenue laws, probable cause is no justification, unless it is made so by the laws themselves. This is not a war measure. If the United States were at war, it was unnecessary, because the act of trading with an enemy is itself a ground of condemnation. This law was passed, because the United States were not at war, and wished to avoid it, by showing their power over the French colonies in the West Indies. It is a municipal regulation, as well suited to a state of peace as of war. It affects our own citizens only. It is no part of the law of nations. What would other nations call it, were they bound to notice it? It can give no right to search and seize neutrals. It could not affect their rights.

He who takes, must take at his peril. The law only gives authority to seize vessels of the United States. If he takes the vessel of another nation, he must answer it.

As to the damages. Nothing can justify Captain Murray; but it was a mistake of the head, not of the heart. His intentions were honest and correct, but he suffered his suspicions to carry him too far. If it was an error in judgment, shall he have salvage? If an injury has been done to the innocent and unfortunate \*owner, shall he have no redress? The consequences to him were the same, whatever might have been the motive. [\*109 The damages have been properly assessed in the district court. If damages are to be given, they ought not to be less than the original cost of vessel and cargo, with the outfit, insurance, interest and expenses; and upon calculation, it will be found, that the damages assessed do not exceed the amount of these.(a)

*Dallas.*—It is said, that Mr. Shattuck never was a citizen of the United States. What is averred and admitted need not be proved. Mr. Soderstrom, in his rejoinder, expressly admits that he was once a citizen of the United States by alleging that he had transferred his allegiance from the government of the United States to his Danish majesty. Mr. Shattuck's burgher's brief is, at length, for the first time, produced and admitted to be made a part of the record. It bears date on the 10th of April 1797. It may here be remarked, that some of the witnesses have testified, that he became a burgher in 1795. This shows how little reliance ought to be placed upon their testimony. If, then, Mr. Shattuck did expatriate himself, it was not until April 1797. It has been conceded, that a man cannot expatriate himself unless it be done in a fit time, with fairness of intention, and publicity of act.

As to the fitness of the time. What was the situation of this country and France in the year 1797? In 1795, the British treaty had excited the jealousy of France. In 1796, she passed several edicts highly injurious to

(a) MARSHALL, Ch. J.—What would have been the law as to probable cause, if there had been a public general war between France and the United States, and the vessel had been taken on suspicion of being a vessel of the United States, trading with the enemy, contrary to the laws of war? Would probable cause excuse, in such a case, if it should turn out that she was a neutral?

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our commerce. Mr. Pinckney had been sent as an envoy extraordinary, and was refused. France had gone on in a long course of injury and insult, which at \*length roused the spirit of the nation. On the 14th of \*110] June 1797, the act of congress was passed, prohibiting the exportation of arms; on the 23d, the act for the defence of the ports and harbors of the United States; on the 24th, the act for raising 80,000 militia; on the 1st July, the act providing a naval armament; on the 13th of June 1798, the first non-intercourse bill was passed, and on the 7th of July, the treaties with France were annulled. These facts show that the time when Mr. Shattuck chose to expatriate himself, was a time of approaching hostilities, and when everything indicated war.

As to the fairness of his intention. The same facts show what that intention was. It was to carry on that trade which everything tended to show would soon become criminal by the laws of war, and from the exercise of which the other citizens of the United States were about to be interdicted. The act of congress points to this very case. It was to prevent transactions of this nature, that the word "elsewhere" was inserted.

But why was not this burgher's brief, or a copy of it, put on board the vessel? The answer is obvious, because it would have discovered the time of expatriation, which would have increased the suspicions excited by the origin of the vessel, by the recent transfer, by the nature of the cargo, and by the character of the crew. Domicil in a neutral country gives a man only the rights of trade; it will not justify him in a violation of the laws of his country.

If, then, Mr. Shattuck could not expatriate himself, or if he has not expatriated himself, he is bound to obey the laws of the United States. A nation has a right to bind, by her laws, her own citizens residing in a foreign country; as the United States have done in the act of congress respecting the slave-trade, and in the non-intercourse law.

The question, whether the vessel was capable of annoying our commerce, depends upon matter of fact, of which \*the court will judge. The \*111] number of men was sufficient; the testimony respecting the cutlasses is supported by the nature of the transaction, and by the usage in such cases. Some arms were necessary to prevent Captain Wright and his boys from rising and rescuing the vessel. Circumstances are as strong as oaths, and are generally more satisfactory. The vessel, having port-holes, was constructed for war, and in an hour after her arrival at Guadaloupe, might have been completely equipped. Upon the principles of the case of *Talbot v. Seeman*, Captain Murray was bound to guard against this, and he would have been culpable, if he had suffered her to escape.

But it is said, that she was not in danger of condemnation by the French, because France had ceased from her violation of the laws of nations, because she had repealed the obnoxious *arrêt* of 18th January 1798, and because one-third of the crew were not her enemies. Admitting all this, yet if one ground of condemnation remained, she would have been condemned. The vessel was transferred from an enemy to a neutral, during the heat of hostilities. This alone was a sufficient ground of condemnation, under the ordinance already cited from 1 Code des Prises, 304, art. 7. In the case of *Talbot v. Seeman*, the ground of salvage was, that the vessel was liable to con-



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demnation under a French *arrêt*. And that the courts of France were bound to carry the *arrêt* into effect.

The conduct of Captain Murray was not illegal. He was bound, by law, as well as by his instructions, to take the vessel out of the hands of the French. It was with the consent, if not at the request, of Captain Wright; and it was, in itself, an act of humanity. His conduct was fair, upright and honorable in the whole transaction. He offered to take security for the vessel and cargo. The cargo was perishable: if it had been brought to the United States, it would not have been in a merchantable condition; or if it had been, it would not have sold so high here (being chiefly articles of American produce) as at Martinique. The sale was fair, and the proceeds brought to the United States to wait the event of the trial.

Probable cause is a thing of maritime jurisdiction; and authorities in point may be found, even at common law. \*If it is a municipal regulation, it is one which affects the whole world. It is engrafted upon [\*112 the law of nations. It is municipal only as it emanates from the municipal authority of the nation. But the whole world is bound to notice a law which affects the interests of all nations in the world.

As to the damages. The principles upon which they are assessed do not appear from the report of the assessors, but the probability is, that they were founded upon the estimates of the probable profits of the voyage, as stated in the testimony of some of the witnesses. In a case of this kind, where the purity of intention is admitted, it can never be proper to give speculative or vindictive damages.(a)

*Martin*, in reply.—1. As to the national character of Shattuck. He was born before the revolution; probably, in 1773 or 1774; at least twenty-one years before April 10th, 1797, which will bring it before the declaration of independence. In *Duane's Case*, it was decided, that even if it had been proved, that he was born in New York, yet his birth being before the revolution, and having been carried to Ireland, during his minority, he was an alien.

The rejoinder of Mr. Soderstrom does not admit the fact, that Shattuck was a citizen of the United States; but if it did, it is coupled with an express allegation that he had duly expatriated himself; and if part is taken, the whole must be taken. The words of the rejoinder are, "and this party expressly alleges and avers that the said Jared Shattuck, at the several times and periods above mentioned, and long before, and in the intermediate times which elapsed between the said several times or periods, had been, then was, ever since hath been, and now is, a subject of his majesty the king of Denmark, owing allegiance to his \*said majesty, and to no [\*113 other prince, potentate, state or sovereignty whatever; and that he the said Jared Shattuck had, long before his said purchase of the said schooner, duly expatriated himself from the dominions of the United States, to those of his said majesty; and transferred his allegiance and subjection from the said United States and their government, to his said majesty and

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(a) In answer to an inquiry by the Chief Justice, for authorities to support the position that probable cause is always a justification, in maritime cases, Mr. DALLAS referred generally to Brown's Civil and Admiralty Law, and to the decisions of Sir Wm. Scott.

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his government." The whole purport of which is, that if he was ever a citizen of the United States, he had expatriated himself.

Even if it was an admission of the fact, yet it could not prejudice Mr. Shattuck, as the rejoinder is by Mr. Soderstrom, in character of consul of Denmark, and as the representative of the nation. If he was born before the revolution, he never owed natural allegiance to the United States; and if he remained here, after the revolution, during part of his minority, he owed only a temporary and local allegiance; during the existence of which, if he had taken up arms against the United States, he would have been guilty of treason. But that allegiance continued only while he was a resident of the country; he had a right to transfer such temporary allegiance whenever he pleased. Foster's Cr. Law 183, 185.

That he acted with a fair and honest intention is proved, by his *bonâ fide* residence and domicile for ten or eleven years. 2 Browne's Civil and Admiralty Law 328. The navigation act of Great Britain is a municipal law, and yet a *bonâ fide* domicile and residence of foreigners, were held sufficient to bring the persons within its provisions. *Scott, qui tam, v. Schwartz*, Comyns 677.(a)

\*But a stronger case than that is found in 1 Bos. & Pul. 430 \*114] (*Marryatt v. Wilson*), in the exchequer chamber, on a writ of error from the king's bench. In that case, a natural-born British subject, naturalized in the United States, since the peace, was adjudged to be a citizen of the United States, within the treaty and navigation acts of Great Britain, so as to carry on a direct trade from England to the British East Indies. The opinion of EYRE, Ch. J., beginning in p. 439, is very strong in our favor.

There is no probability that the vessel would have been condemned at Guadaloupe. Mr. Shattuck, and his course of trade, were well known there, and they had already released some of his vessels. Another reason is, that Bonaparte was at that time negotiating with the northern powers of Europe, to form a coalition to support the principle that free ships should make free goods; and he would have succeeded, but for the able negotiations of Lord Nelson at Copenhagen.

In Park on Insurance 363, it is said, "If the ground of decision appear to be, not on the want of neutrality, but upon a foreign ordinance mani-

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(a) The case of *Scott v. Schwartz* was an information against the Russian ship The Constant, because the master and three-fourths of the mariners were not of that country or place, according to the statute of 12 Car. II., c. 18, § 8. The ship was built in Russia, and the cargo was the product of that country. The master was born out of the Russian dominions, but in 1733, was admitted, and ever since continued, a burgher of Riga; and had been a resident there, when not engaged in foreign voyages, and traded from thence nine years before the seizure. There were only eleven mariners on board, of whom four were born in Russia. Morgan, a fifth, was born in Ireland, and there bound apprentice to the master, and as such went with him to Riga, and from three or four years before the seizure, served on board the same ship, and sailed therein from Riga, on this and former voyages. The other six were born out of the dominions of Russia, but Stephen Hanson, one of them, had resided at Riga eight years next before the seizure; Hans Yasper five years; Rein Steingrave four years, and Derrick Andrews, the cook, seven years; and these four, during those years, had sailed from Riga in that and other vessels. It was adjudged, that these people were of that country or place, within the meaning of the statute, and the vessel properly manned and navigated.



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festly unjust, and contrary to the law of nations, and the insured has only infringed such a partial law ; as the condemnation did not proceed on the point of neutrality, it cannot apply to the warranty so as to discharge the insurer." And in support of this position he cites the case of *Mayne v. Walter*.

There is no ordinance of France, which, upon the principles established in the case of *The Pigou*, would have been a sufficient ground of condemnation. \*The circumstances required by those ordinances are only evidence of neutrality, which is always a question of *bona fides*. A condemnation [\*115 upon either of these ordinances alone, would have been contrary to the law of nations ; but if they are considered as only requiring certain circumstances, tending to establish the fact of neutrality, they are perfectly consistent with that law. This is the light in which they have been considered by Portalis. The French have never considered our vessels as the vessels of an enemy. Our vessels have not been condemned by them as enemy property ; but their sentences have always been grounded upon a pretended violation of some particular ordinance of France. Hence, it appears, that they would not have considered an American vessel, sold to a Dane, as an enemy's vessel transferred to a neutral during a state of war.

But the claim of salvage is an afterthought. It was not necessary to bring her to the United States to obtain salvage. Salvage is a question of the law of nations, and may be decided by the courts of any civilized nation. Instead of rendering a service, he has done a tenfold injury. Captain Murray's intentions were undoubtedly correct and honorable, and we do not wish vindictive damages ; but Mr. Shattuck will be a loser, even if he gains his cause, and recovers the damages already assessed. Probable cause cannot justify the taking and bringing in a neutral ; but it may prevent vindictive damages.

February 22d, 1804. MARSHALL, Ch. J., delivered the opinion of the court.—The *Charming Betsy* was an American built vessel, belonging to citizens of the United States, and sailed from Baltimore, under the name of the *Jane*, on the 10th of April 1800, with a cargo of flour for St. Bartholomew ; she was sent out for the purpose of being sold. The cargo was disposed of at St. Bartholomew ; but finding it impossible to sell the vessel at that place, the master proceeded with her to the island of St. Thomas, where she was disposed of to Jared Shattuck, who changed her name to that of the *Charming Betsy*, \*and having put on board her a cargo consisting [\*116 of American produce, cleared her out, as a Danish vessel, for the island of Guadaloupe.

On her voyage, she was captured by a French privateer, and eight hands were put on board her for the purpose of taking her into Guadaloupe as a prize. She was afterwards re-captured by Captain Murray, commander of the *Constellation* frigate, and carried into Martinique. It appears, that the master of the *Charming Betsy* was willing to be taken into that island ; but when there, he claimed to have his vessel and cargo restored, as being the property of Jared Shattuck, a Danish burgher.

Jared Shattuck was born in the United States, but had removed to the island of St. Thomas, while an infant, and was proved to have resided there ever since the year 1789 or 1790. He had been accustomed to carry on trade as a Danish subject ; had married a wife and acquired real

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property in the island, and also taken the oath of allegiance to the crown of Denmark in 1797.

Considering him as an American citizen, who was violating the law prohibiting all intercourse between the United States and France, or its dependencies, or the sale of the vessel as a mere cover to evade that law, Captain Murray sold the cargo of the Charming Betsy, which consisted of American produce, in Martinique, and brought the vessel into the port of Philadelphia, where she was libelled under what is termed the non-intercourse law. The vessel and cargo were claimed by the consul of Denmark as being the *bond fide* property of a Danish subject.

This cause came on to be heard before the judge for the district of Pennsylvania, who declared the seizure to be illegal, and that the vessel ought to be restored, and the proceeds of the cargo paid to the claimant, or his lawful agent, together with costs and such damages as should be assessed by the clerk of the court, who was directed to inquire into and report the amount thereof; for which purpose, he was also directed to associate with himself two intelligent merchants of the district, and duly inquire what damage Jared Shattuck had sustained by reason of the premises. If they should be of opinion that the \*officers and crew of the Cor-  
\*117] stellation had conferred any benefit on the owners of the Charming Betsy, by rescuing her out of the hands of the French captors, they were, in the adjustment, to allow reasonable compensation for the service.

In pursuance of this order, the clerk associated with himself two merchants, and reported that having examined the proofs and vouchers exhibited in the cause, they were of opinion, that the owner of the vessel and cargo had sustained damage to the amount of \$20,594.16, from which is to be deducted the sum of \$4363.86, the amount of moneys paid into court arising from the sales of the cargo, and the further sum of \$1300, being the residue of the proceeds of the said sales remaining, to be brought into court, \$5663.86. This estimate is exclusive of the value of the vessel, which was fixed at \$3000. To this report, an account is annexed, in which the damages, without particularizing the items on which the estimate was formed, were stated at \$14,930.30.

No exceptions having been taken to this report, it was confirmed, and, by the final sentence of the court, Captain Murray was ordered to pay the amount thereof. From this decree, an appeal was prayed to the circuit court, where the decree was affirmed so far as it directed restitution of the vessel, and payment to the claimant of the net proceeds of the sale of the cargo in Martinique, and reversed for the residue. From this decree, each party has appealed to this court.

It is contended on the part of the captors, in substance, 1st. That the vessel Charming Betsy and cargo are confiscable under the laws of the United States. If not so, 2d. That the captors are entitled to salvage. If this is against them, 3d. That they ought to be excused from damages,  
\*118] \*because there was probable cause for seizing the vessel and bringing her into port.

1. Is the Charming Betsy subject to seizure and condemnation for having violated a law of the United States? The libel claims this forfeiture, under the act passed in February 1800, further to suspend the commercial intercourse between the United States and France and the dependencies



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thereof. That act declares, "that all commercial intercourse," &c. It has been very properly observed, in argument, that the building of vessels in the United States for sale to neutrals, in the islands, is, during war, a profitable business, which congress cannot be intended to have prohibited, unless that intent be manifested by express words, or a very plain and necessary implication. It has also been observed, that an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains, and consequently, can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country. These principles are believed to be correct, and they ought to be kept in view, in construing the act now under consideration.

The first sentence of the act which describes the persons whose commercial intercourse with France, or her dependencies, is to be prohibited, names any person or persons resident within the United States, or under their protection. Commerce carried on by persons within this description is declared to be illicit. From persons the act proceeds to things, and declares explicitly the cases in which the vessels employed in this illicit commerce shall be forfeited. Any vessel owned, hired or employed, wholly or in part, by any person residing within the United States, or by any citizen thereof, residing elsewhere, which shall perform certain \*acts recited in the law, becomes liable to forfeiture. It seems to the [\*119 court, to be a correct construction of these words, to say, that the vessel must be of this description, not at the time of the passage of the law, but at the time when the act of forfeiture shall be committed.

The cases of forfeiture are, 1st. A vessel of the description mentioned, which shall be voluntarily carried, or shall be destined, or permitted to proceed to any port within the French republic. She must, when carried, or destined, or permitted to proceed to such port, be a vessel within the description of the act. The second class of cases are those where vessels shall be sold, bartered, intrusted or transferred, for the purpose that they may proceed to such port or place. This part of the section makes the crime of the sale dependent on the purpose for which it was made. If it was intended, that any American vessel, sold to a neutral, should, in the possession of that neutral, be liable to the commercial disabilities imposed on her while she belonged to citizens of the United States, such extraordinary intent ought to have been plainly expressed ; and if it was designed to prohibit the sale of American vessels to neutrals, the words placing the forfeiture on the intent with which the sale was made ought not to have been inserted. The third class of cases are those vessels which shall be employed in any traffic by or for any person resident within the territories of the French republic, or any of its dependencies. In these cases, too, the vessels must be within the description of the act, at the time the fact producing the forfeiture was committed.

The *Jane* having been completely transferred, in the island of St. Thomas, by a *bond fide* sale, to Jared Shattuck, and the forfeiture alleged to have accrued on a fact subsequent to that transfer, the liability of the vessel to forfeiture must depend on the inquiry, whether the purchaser was within the description of the act.

Jared Shattuck having been born within the United \*States, and [\*120

## The Charming Betsy.

not being proved to have expatriated himself, according to any form prescribed by law, is said to remain a citizen, entitled to the benefit, and subject to the disabilities, imposed upon American citizens; and therefore, to come expressly within the description of the act which comprehends American citizens residing elsewhere.

Whether a person born within the United States, or becoming a citizen according to the established laws of the country, can divest himself absolutely of that character, otherwise than in such manner as may be prescribed by law, is a question which it is not necessary at present to decide. The cases cited at bar, and the arguments drawn from the general conduct of the United States on this interesting subject, seem completely to establish the principle, that an American citizen may acquire, in a foreign country, the commercial privileges attached to his domicile, and be exempted from the operation of an act expressed in such general terms as that now under consideration. Indeed, the very expressions of the act would seem to exclude a person under the circumstances of Jared Shattuck. He is not a person under the protection of the United States. The American citizen who goes into a foreign country, although he owes local and temporary allegiance to that country, is yet, if he performs no other act changing his condition, entitled to the protection of his own government; and if, without the violation of any municipal law, he should be oppressed unjustly, he would have a right to claim that protection, and the interposition of the American government in his favor, would be considered as a justifiable interposition. But his situation is completely changed, where, by his own act, he has made himself the subject of a foreign power. Although this act may not be sufficient to rescue him from punishment for any crime committed against the United States, a point not intended to be decided, yet it certainly places him out of the protection of the United States, while within the territory of the sovereign to whom he has sworn allegiance, and consequently, takes him out of the description of the act.

\*121] It is, therefore, the opinion of the court, that the \*Charming Betsy, with her cargo, being at the time of her re-capture the *bonâ fide* property of a Danish burgher, is not forfeitable, in consequence of her being employed in carrying on trade and commerce with a French island.

2. The vessel not being liable to confiscation, the court is brought to the second question, which is—Are the re-captors entitled to salvage?

In the case of *The Amelia* (1 Cr. 1), it was decided, on mature consideration, that a neutral armed vessel, in possession of the French, might, in the then existing state of hostilities between the two nations, be lawfully captured; and if there were well-founded reasons for the opinion, that she was in imminent hazard of being condemned as a prize, the re-captors would be entitled to salvage. The court is well satisfied with the decision given in that case, and considers it as a precedent not to be departed from in other cases attended with circumstances substantially similar to those of the *Amelia*. One of these circumstances is, that the vessel should be in a condition to annoy American commerce.

The degree of arming which should bring a vessel within this description has not been ascertained, and perhaps, it would be difficult precisely to mark the limits, the passing of which would bring a captured vessel within the description of the acts of congress on this subject. But although there



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may be difficulty in some cases, there appears to be none in this. According to the testimony of the case, there was on board but one musket, a few ounces of powder and a few balls. The testimony respecting the cutlasses is not considered, as showing that they were in the vessel at the time of her re-capture. The capacity of this vessel for offence appears not sufficient to warrant the capture of her as an armed vessel. Neither is it proved to the satisfaction of the court, that the Charming Betsy was in such imminent hazard of being condemned, as to entitle the re-captors to salvage.

\*It remains to inquire, whether there was in this case such probable cause for sending in the Charming Betsy for adjudication, as will [\*122 justify Captain Murray for having broken up her voyage, and excuse him from the damages sustained thereby. To effect this, there must have been substantial reason for believing her to have been at the time, wholly or in part, an American vessel, within the description of the act; or hired or employed by Americans; or sold, bartered or trusted for the purpose of carrying on trade to some port or place belonging to the French republic.

The circumstances relied upon are, principally, 1st. The *procès verbal* of the French captors. 2d. That she was an American built vessel. 3d. That the sale was recent. 4th. That the master was a Scotchman, and the muster-roll showed that the crew were not Danes. 5th. The general practice in the Danish islands of covering neutral property.

The *procès verbal* contains an assertion that the mate declared that he was an American, and that their flag had been American, and had been changed, during the cruise, to Danish, which declaration was confirmed by several of the crew. If the mate had really been an American, the vessel would not, on that account, have been liable to forfeiture, nor would that fact have furnished any conclusive testimony of the character of the vessel. The *procès verbal*, however, ought for several reasons to have been suspected. The general conduct of the French West India cruisers, and the very circumstance of declaring that the Danish colors were made during the chase, were sufficient to destroy the credibility of the *procès verbal*. Captain Murray ought not to have believed that an American vessel, trading to a French port, in the assumed character of a Danish bottom, would have been without Danish colors.

\*That she was an American vessel, and that the sale was recent, cannot be admitted to furnish just cause of suspicion, unless the sale [\*123 of American built vessels had been an illegal or an unusual act. That the master was a Scotchman, and that the names of the crew were not generally Danish, are circumstances of small import, when it is recollected, that a very great proportion of the inhabitants of St. Thomas are British and Americans. The practice of covering American property in the islands might and would justify Captain Murray in giving to other causes of suspicion more weight than they would otherwise be entitled to, but cannot be itself a motive for seizure. If it was, no neutral vessel could escape, for this ground of suspicion would be applicable to them all.

These causes of suspicion, taken together, ought not to have been deemed sufficient to counterbalance the evidences of fairness with which they were opposed. The ship's papers appear to have been perfectly correct, and the information of the master, uncontradicted by those belonging to the vessel who were taken with him, corroborated their verity. No circumstance ex-

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isted which ought to have discredited them. That a certified copy of Shattuck's oath, as a Danish subject, was not on board, is immaterial, because, being apparently on all the papers a burgher, and it being unknown that he was born in the United States, the question, whether he had ceased to be a citizen of the United States, could not present itself.

Nor was it material, that the power given by the owners of the vessel to their master to sell her in the West Indies, was not exhibited. It certainly was not necessary, to exhibit the instructions under which the vessel was acquired, when the fact of acquisition was fully proved by the documents on board, and by other testimony.

Although there does not appear to have been such cause to suspect the Charming Betsy and her cargo to have been American, as would justify Captain Murray in bringing her in for adjudication, yet many other circumstances combine with the fairness of his character, to \*produce a conviction, that he acted upon correct motives, from a sense of duty ; for which reason this hard case ought not to be rendered still more so, by a decision in any respect oppressive.

His orders were such as might well have induced him to consider this as an armed vessel within the law, sailing under authority from the French republic ; and such too as might well have induced him to trust to very light suspicions respecting the real character of a vessel, appearing to belong to one of the neutral islands. A public officer, intrusted on the high seas to perform a duty deemed necessary by his country, and executing according to the best of his judgment the orders he has received, if he is a victim of any mistake he commits, ought certainly never to be assessed with vindictive or speculative damages. It is not only the duty of the court to relieve him from such, when they plainly appear to have been imposed on him, but no sentence against him ought to be affirmed, where, from the nature of the proceedings, the whole case appears upon the record, unless those proceedings are such as to show on what the decree has been founded, and to support that decree.

In the case at bar, damages are assessed as they would be by the verdict of the jury, without any specification of items, which can show how the account was made up, or on what principles the sum given as damages was assessed. This mode of proceeding would not be approved of, if it was even probable, from the testimony contained in the record, that the sum reported by the commissioners of the district court was really the sum due. The district court ought not to have been satisfied with a report, giving a gross sum in damages, unaccompanied by any explanation of the principles on which that sum was given. It is true, Captain Murray ought to have excepted to this report. His not having done so, however, does not cure an error apparent upon it, and the omission to show how the damages which were given had accrued, so as to enable the judge to decide on the propriety of the assessment of his commissioners, is such an error.

Although the court would in any case disapprove of this mode of proceeding, yet, in order to save the parties the cost of further prosecuting this business in the circuit \*court, the error which has been stated might have \*125] been passed over, had it not appeared probable, that the sum, for which the decree of the district court was rendered, is really greater than it



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ought to have been, according to the principles by which the claim should be adjusted.

This court, therefore, is not satisfied with either the decree of the district or circuit court, and has directed me to report the following decree:

DECREE OF THE COURT.—This cause came on to be heard, on the transcript of the record of the circuit court, and was argued by counsel; on consideration whereof, it is adjudged, ordered and decreed as follows, to wit: That the decree of the circuit court, so far as it affirms the decree of the district court, which directed restitution of the vessel, and payment to the claimant of the net proceeds of the sale of the cargo in Martinique, deducting the costs and charges there, according to amount exhibited by Captain Murray's agent, being one of the exhibits in the cause, and so far as it directs the parties to bear their own costs, be affirmed; and that the residue of the said decree, whereby the claim of the owner to damages for the seizure and detention of his vessel was rejected, be reversed.

And the court, proceeding to give such further decree as the circuit court ought to have given, doth further adjudge, order and decree, that so much of the decree of the district court as adjudges the libellant to pay costs and damages, be affirmed; but that the residue thereof, by which the said damages are estimated at \$20,594.16, and by which the libellant was directed to pay that sum, be reversed and annulled. And this court does further order and decree, that the cause be remanded to the circuit court, with directions to refer it to commissioners, to ascertain the damages sustained by the claimants, in consequence of the refusal of the libellant to restore the vessel and cargo at Martinique, and in consequence of his sending her into a port of the United States for adjudication; and that the said commissioners be instructed to take the actual prime cost of the cargo and vessel, with interest thereon, including \*the insurance actually paid, and such expenses as [\*126 were necessarily sustained in consequence of bringing the vessel into the United States, as the standard by which the damages ought to be measured. Each party to pay his own costs in this court, and in the circuit court. All which is ordered and decreed accordingly. (a)

### CAPRON v. VAN NOORDEN.

#### *Absence of jurisdiction.*

A plaintiff may assign for error, the want of jurisdiction in that court to which he has chosen to resort.

A party may take advantage of an error in his favor, if it be an error of the court.

The courts of the United States have not jurisdiction, unless the record shows that the parties are citizens of different states, or that one is an alien, &c.

ERROR to the Circuit Court of North Carolina. The proceedings stated Van Noorden to be late of Pitt county, but did not allege Capron, the plaintiff, to be an alien, nor a citizen of any state, nor the place of his residence.

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(a) Captain Murray was reimbursed his damages, interest and charges, out of the treasury of the United States, by an act of congress, January 31st, 1805. (6 U. S. Stat. 56.)

Capron v. Van Noorden.

Upon the general issue, in an action of trespass on the case, a verdict was found for the defendant, Van Noorden, upon which judgment was rendered.

The writ of error was sued out by Capron, the plaintiff below, who assigned for error, among other things, first, "that the circuit court aforesaid is a court of limited jurisdiction, and that by the record aforesaid it doth not appear, as it ought to have done, that either the said George Capron, or the said Hadrianus Van Noorden, was an alien, at the time of the commencement of said suit, or at any other time, or that one of the said parties was, at that, or any other time, a citizen of the state of North Carolina where the suit was brought, and the other a citizen of another state; or that they, the said George and Hadrianus were, for any cause whatever, persons within the jurisdiction of the said court, and capable of suing and being \*127] sued there." \*And secondly, "that by the record aforesaid, it manifestly appeareth, that the said circuit court had not any jurisdiction of the cause aforesaid, nor ought to have held plea thereof, or given judgment therein, but ought to have dismissed the same, whereas, the said court hath proceeded to final judgment therein."

*Harper*, for the plaintiff in error, stated the only question to be, whether the plaintiff had a right to assign for error, the want of jurisdiction in that court to which he had chosen to resort?

It is true, as a general rule, that a man cannot reverse a judgment for error in process, or delay, unless he can show that the error was to his disadvantage; but it is also a rule, that he may reverse a judgment for an error of the court, even though it be for his advantage. As, if a verdict be found for the debt, damages and costs, and the judgment be only for the debt and damages, the defendant may assign for error that the judgment was not also for costs, although the error is for his advantage.

Here, it was the duty of the court to see that they had jurisdiction, for the consent of parties could not give it. It is, therefore, an error of the court, and the plaintiff has a right to take advantage of it. 2 Bac. Abr. tit. Error, K. 4; *Beecher's Case*, 8 Co. 59 a; 1 Roll. Abr. 759; Moore 692; *Bernard v. Bernard*, 1 Lev. 289.

The defendant in error did not appear, but the citation having been duly served, the judgment was reversed.



## HEAD &amp; AMORY v. THE PROVIDENCE INSURANCE CO.

*Marine insurance.—Powers of corporations.*

If the insured make a proposition to the underwriters, to cancel the policy, which proposition is rejected; and the underwriters afterwards assent to the proposition, but before information of such assent reaches the insured, they have notice of the loss of the vessel insured, such proposition and assent do not in law amount to an agreement to cancel the policy.

A corporate body can act only in the manner prescribed by the act of incorporation which gives it existence. It is the mere creature of law, and derives all its powers from the act of incorporation.<sup>1</sup>

THIS was an action on the case brought by the plaintiffs in error, upon two policies of insurance, in the Circuit Court of the first circuit, holden at Providence, in the district of Rhode Island, (a) in which action, judgment was rendered, at April term 1802, for the plaintiffs in error, upon one of the policies only, viz., that upon the vessel.

\*The declaration consisted of four counts. 1. A special count upon a policy dated September 12th, 1779, by which the defendants in error [\*128 insured the plaintiffs "ten thousand dollars on merchandise, on board the Spanish brig Neuva Empressa, at and from Malaga to Vera Cruz, and at and from thence to her port of discharge in Spain; the property being shipped in the name of the Spaniards, and the assured not appearing as owners in any of the papers," "beginning the adventure upon the said merchandise, at Malaga as aforesaid, and to continue during the voyage aforesaid, and until said vessel shall be arrived and moored at anchor twenty-four hours in safety." 2. A special count on another policy dated April 5th, 1800, on the vessel, at and from Cuba, to her port of discharge in Spain, by which the defendants insured the plaintiffs the sum of six thousand dollars. 3. A count for money had and received. 4. A count for money paid, laid out and expended.

The defendants pleaded the general issue, and the defence set up at the trial was, that the first policy (viz., on the merchandise) was discharged by a subsequent agreement between the plaintiffs and defendants.

The jury returned the following verdict: "We find, on the first count of the plaintiffs' declaration, that the defendants did not promise in manner and form as set forth in the declaration. On the second count, we find the defendants did promise in manner and form as set forth in the declaration, and assess damages for the plaintiffs in the sum of \$1542.05, being the sum due on said policy, after deducting the amount of the premium notes due on both said policies, with costs."

A bill of exceptions was taken by the plaintiffs, at the trial, which stated that they gave in evidence a copy of the act of incorporation of the said company, and the \*two policies of insurance, which were admitted by [\*129 the defendants' counsel to have been duly executed in behalf of the company. That the defendants' counsel "further agreed and confessed before the said court and jury, that the plaintiffs had interest in the said vessel,

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(a) Under the act of congress of February 13th, 1801, by which sixteen circuit judges were appointed.

<sup>1</sup> United States Bank v. Dandridge, 12 Wheat. 64; Bank of Augusta v. Earle, 13 Pet. 519; Runyan v. Carter, 14 Id. 122; Paine v. Chesapeake and Delaware Canal Co., 9 How. 172; Pearce v. Railroad Co., 21 Id. 444.

Head v. Providence Insurance Co.

called the Nueva Empressa, and the cargo on board the same, to the full amount of the sums assured as aforesaid in said policies ; and that the same were captured in and upon the prosecution of the voyage mentioned in said policy, on the first day of August 1800 ; and afterwards, on the 30th day of said month of August, were condemned by the court of vice-admiralty at St. John's, Newfoundland, as prize of war to the officers and crew of the British ship of war, called the Pluto, who captured the same as aforesaid, whereby the property insured as aforesaid was utterly lost to the plaintiffs. Whereupon, the said defendants, by their counsel, did contend and insist before the said court and jury, that the force, effect and obligation of said policy on said cargo, was settled and discharged by a subsequent agreement, which they alleged to have been made between the plaintiffs and the said Providence Insurance Company, and thereupon, read and give in evidence to the jury, on the trial aforesaid, a certain letter from the said Head & Amory to Nicholas Brown and Thomas P. Ives, merchants, doing business under the firm of Brown & Ives, bearing date the 21st of August 1800, which letter was admitted by the plaintiffs," and is as follows :

Boston, August 21, 1800.

Messrs. Brown & Ives,

Gentlemen.—We have your favor under the 18th inst. The brig *Neuva Empressa* is still detained at the Havana ; having expected a convoy, and the place being closely watched by British cruisers, the master has thought it prudent for all concerned, not to proceed to sea ; we have no direct advices from him, but we learn by an American master from thence, that the vessel \*130] is very much eaten by the worms, and was so leaky, that \*great repairs must be made, and perhaps, it will be necessary to reship the effects in some other Spanish bottom. We are about making the attempt to have the voyage terminated at the Havana, which can only be done by the consent of the officers of the Spanish government there, and that gained by a considerable *douceur*, but before we make this attempt, we wish to know at what rate we can settle with the underwriters on the merchandise, and if we can make it for our interest, and permission as aforesaid can be obtained, we would terminate the adventure at the Havana. Some of the concerned have made an agreement with their underwriters in this town, to return twenty-five per cent. and finish the risk, on the above conditions, the hazard of her getting safe to Spain, free from capture, being very great ; we wish a conditional permission from our underwriters to end the voyage, if we can effect it, and the rate of premium they will, in such case, return. We are, &c.

HEAD & AMORY.

The bill of exceptions then stated that the defendants' counsel further offered and gave in evidence to the jury the following papers :

1. A letter from Brown & Ives to the plaintiffs, dated August 26th, 1800, in which they say, "Your letter to us on the subject of that vessel (The *Nueva Empressa*) was laid before the Insurance Company, and the secretary says, 'If Messrs. Head & Amory are disposed to make a settlement and cancel the policies, the directors will agree to return 25 per cent., but they are not disposed to make any conditional agreement.'"

2. A letter from the plaintiffs to Brown & Ives, dated Boston, August 28th, 1800, as follows : "We have your favor under the 26th instant. We



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note the answer of The Providence Insurance Company to our proposal ; we are sorry they will not accede to our proposition for making the agreement conditional. On reflection, we conclude to accept their offer and cancel our policy, they giving up our note, on our paying one-half the \*amount [\*131 of the same, and the risk to cease at the Havana."

3. A letter from Brown & Ives to the plaintiffs, dated Providence, September 2d, 1800, which says, "Your letter to us, saying that you would settle the policy on the Spanish brig, on a return of 25 per cent., was shown to the company, and we have received the following note :

'Providence Insurance Office, Sept. 1, 1800.

'Gentlemen.—The Providence Insurance Company will agree to settle both of the policies upon the Spanish brig Nueva Empressa, &c., at the Havana, and to return 25 per cent. upon the first, and 31, 83 $\frac{1}{3}$  per cent. on the last, but they decline making a partial settlement of one without the other. The premium note for the first policy, say \$5002.75, will fall due at bank, 12th instant.

Yours, &c.,

JOHN MASON, Pres't.

'Messrs. Brown & Ives.'

"You will please to give us your instructions. The other company will settle at the same rate, say retain 1 $\frac{1}{2}$  per cent."

4. A letter from the plaintiffs, to Brown & Ives, dated Boston, Sept. 3d, 1800, as follows : "We have your favor under the 2d instant, handing us a copy of a note received from the president of the Providence Insurance Company. When we consented to their proposition of settling the policy by paying 25 per cent., it was not because it was most agreeable to us. We wished to make it conditional, as has been done in this town ; and we had a right to suppose, when we consented to their terms, the business was settled. If we can succeed with the Spanish government, the policies \*on ves- [\*132 sel and freight will be withdrawn, of course, at the usual custom ; but we do not think it right to make one the condition of the other. If we make this settlement, we shall make every effort, by money and interest, to have the adventure terminate at the Havana, and the sooner we know the better. By the last accounts, the vessel was very much eaten by the worms, and wanted very great repairs. This, we hope, will induce them to grant us the permission. The terms we acceded to were very favorable to the company, as it was paying them at the rate of 35 per cent. for the outward premium."

5. A letter from Brown & Ives to the plaintiffs, dated Providence, September 9th, 1800, as follows: "Gentlemen, your letter of the 3d instant was laid before the directors of the Providence Insurance Company, and they have returned the following note:

'September 6th, 1800.

'As there appears to have been a misunderstanding in the business as it respects the first propositions of the company, the directors are willing to accede to Messrs. Head & Amory's proposition (viz.), to settle the policy on the merchandise, at 25 per cent., although it was their intention and expectation to have both policies included in the settlement. Messrs. Head & Amory will please to forward the policy and have it cancelled immediately. Premium note due 12-15 September.

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"You will please to govern yourself accordingly, and we will attend to your wishes."

6. A letter from the plaintiffs' clerk to Brown & Ives, dated Boston, Sept. 12th, 1800, viz: "Gentlemen, this is to acknowledge the receipt of your favor of the 9th instant, containing the note from the directors of the Providence Insurance Company. Mr. Head is absent on a journey, he will return on Tuesday or Wednesday next, when your letter will be delivered him."

7. A letter from the plaintiffs to Brown & Ives, dated Boston, Sept. 17th, 1800, as follows: "Gentlemen, we have this day seen your letter of \*133] the 9th instant, containing \*the propositions of the Insurance Company to cancel the policy on merchandise on board the brig Nueva Empressa, at 25 per cent. Previous to our seeing this letter, intelligence had arrived of the capture of this vessel, and of course, it prevents any further negotiation on that subject. This circumstance you may suppose was quite unexpected by us, but unfortunately there is direct proof of it: a Spaniard being now in town who came from Newfoundland, and saw the brig there, being perfectly acquainted with Captain Zevallos, and he knows the vessel and cargo were condemned, and the master has gone to Lisbon. As the office is now in our debt, we presume they will not desire us to pay the note for the premium, but deduct it, when the loss is paid. You will, of course, mention this loss to the office. The news reached town a day or two before the return of our I. Head. We are," &c.

8. The note or letter of the defendants referred to in Brown & Ives's letter of 26th of August 1800, signed by William H. Mason, secretary of the company.

9. The note or letter of the defendants referred, to in Brown & Ives's of Sept. 2d, signed by John Mason, president of the company, and dated Sept. 1st, 1800.

10. The note or letter of the defendants of the 6th Sept. 1800, referred to in Brown & Ives's letter of 9th Sept. 1800, not signed, but written in the handwriting of the secretary of said company, and by him delivered at the counting-house of Brown & Ives, as the answer of the board of directors of said company; all of which notes or letters of the defendants were handed to Brown & Ives, by the secretary of the company, and were answers to the letters of the plaintiffs.

The bill of exceptions also stated, that it was proved by the testimony of Mr. Brown, of the house of Brown & Ives, that he delivered the plaintiffs' letter of the 3d of September 1800, to the secretary of said company, at their office, on the 4th of September. That the board of directors did not meet, of course, until the meeting of the 6th, when the said note bears date.

\*134] That the following day (that \*is, the 7th) was Sunday. That Brown went from Providence into the country, in the afternoon of the 6th, and continued absent from Providence until 10 o'clock in the forenoon of Monday the 8th; when he returned and received the same note of the 6th, which had been left at the counting-house, as before mentioned, and that he forwarded the same to the plaintiffs, on the next post-day, as is stated in Brown & Ives's letter of Sept. 9th, and that it went in the mail, and came in due course to the hands of the plaintiffs' clerk, at their usual place of doing business, on the 10th or 11th of Sept.



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It further stated, that Richard Jackson, jun., of Providence, president of another marine insurance company, was also sworn as a witness and testified, "that in effecting insurance, or settling a policy, or making any adjustment or agreement about insurance, the assent of the parties to doing a thing, was in all respects as binding on the parties as the thing done, according to the usage and practice among underwriters."

The bill of exceptions then proceeded as follows: "The above correspondence was offered by the defendants as evidence of a proposal on the part of the plaintiffs, acceded to by the defendants, and it was contended by the defendants' counsel, that the effect of the said correspondence, accompanied with the testimony of the said Nicholas Brown, and of the said Richard Jackson, jun., as aforesaid, was a good defence against the plaintiffs' claim on the policy on the cargo. And the said plaintiffs did, by their counsel, object to the admittance of said papers purporting to be notes or letters from the said Providence Insurance Company as evidence of any proposal or agreement on their part; more especially to the said note of the 6th of Sept. 1800; by reason that the said Providence Insurance Company could not make any agreement but by an instrument made and signed by the president of said company, or some other person specially appointed to sign the same, according to the provisions of the act aforesaid. Also, that no evidence was given of any record or entry in the books or papers of the said Providence Insurance Company relative to the said supposed agreement.

\*"The counsel for the plaintiffs did also contend and insist before the said court and jury, that the said Head & Amory were not bound [\*135 or obliged, by the letters signed by them as aforesaid, to discharge the said policy on the said cargo, and that the same policy, notwithstanding the letters aforesaid, was in full force and effect.

"But the said court, notwithstanding all the objections aforesaid, did admit and allow the said notes and letters from the said Brown & Ives, and the said Providence Insurance Company, in manner aforesaid, to be given in evidence to the said jury on the trial aforesaid.

"And the said Honorable John Lowell, chief judge of said court, who alone addressed the jury in the said cause, did then and there declare and deliver, as the opinion of the court, to the jury aforesaid, that the said correspondence of the parties contained in the letters and notes aforesaid, according to the usage of merchants and underwriters, did import an agreement on the part of the plaintiffs to settle and discharge the said policy on the cargo, on the terms proposed and acceded to in said correspondence; and that, in the opinion of the court, nothing remained to be done, after the said note of the 6th of September 1800, to discharge the said policy, but that the same ought to be considered as settled and terminated, in consequence of the plaintiffs' proposal, and the subsequent agreement thereto on the part of the defendants, as contained in said correspondence.

"The said chief judge further stated to the jury, that if they concurred with the court in this opinion, above expressed, on the legal effect of said correspondence, and other evidence adduced as aforesaid, they ought to find for the defendants, on the first count in the plaintiffs' declaration, and for the plaintiffs, on the second count, for the damages therein demanded, deducting the premium notes. But if the jury were of opinion, that anything further

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remained to be done, after the said note of the 6th of Sept., to close and complete the contract proposed on the part of the plaintiffs for cancelling \*136] \*said policy, then they ought to find for the plaintiffs on the first and second counts in said declaration. The reduction of the said premium notes by the jury was done by consent of parties.

"And the said jury then and there gave their verdict for the plaintiffs only on the second count in said declaration, and assessed the defendants in damages \$1542.05, the said jury, by the consent of parties, first deducting from the damages on the said second count, and which were not disputed, the amount of the premium notes, and which deduction was made by consent of the parties; and as to the said first count, on the said policy upon the said cargo, the jury found that the defendants did not promise; all which was in consequence of the evidence admitted as aforesaid, against the objections of the plaintiffs, and from the direction given to the jury by the honorable court aforesaid." Whereupon, the plaintiffs excepted to the said evidence, and to the opinion and direction of the court given as aforesaid. (a)

The case was now argued by *J. Q. Adams*, of Massachusetts, and *Mason*, attorney for the district of Columbia, on behalf of the plaintiffs in error; and by *Hunter*, of Rhode Island, and *Martin*, attorney-general of Maryland, for the defendants.

\*137] *Adams*, for the plaintiffs in error.—The errors assigned are, \*1. That judgment was given for the defendants, on the first count, when it ought to have been given for the plaintiffs. 2. That the evidence referred to in the bill of exceptions ought not to have been admitted. 3. That the court ought to have directed the jury that the evidence proved no contract of the plaintiffs to discharge the first policy. 4. That if the evidence did prove a contract, it should have been given, not in this, but another action. 5. That the judgment and proceedings were altogether erroneous.

The first and last of these assignments of error, being of a general nature, will be noticed only so far as to submit to the court a question arising from the face of the proceedings, and which cannot come within the purview of the three intermediate and specific assignments.

The declaration consists of four counts; two upon the policies; the third for money had and received; the fourth for money paid, laid out and expended. There is but one issue (the general issue) joined upon the four counts. The verdict finds for the defendants upon the first count; for the plaintiffs upon the second, and says nothing of the two others. A part of the issue only is, therefore, found by the verdict.

(a) The circuit court was holden by *LOWELL*, Chief Judge, and *BOURNE*, Assistant Judge. The bill of exceptions was dated April 7th, 1802, and was sealed only by Judge *BOURNE*, who annexed to it the following certificate:

I, Benjamin Bourne, one of the afore-named justices, do hereby certify, that the exceptions contained in the foregoing bill were made at the trial of the said cause, and then substantially reduced to writing. And after the form was settled as aforesaid, and agreed to by the honorable John *LOWELL*, chief judge of the said court, but before he put his seal thereto, he died. Witness my hand and seal, this 30th June, A. D. 1802.

BENJ. BOURNE, Judge of  
the Circuit Court. } SEAL }



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We shall not make this a subject of argument, but merely read one or two authorities in point. Trials per Pais, 63 : "If upon an issue all the matter be not fully inquired, a *venire facias de novo* shall issue." In the same book, p. 287 : "A verdict that finds part of the issue, and finding nothing for the rest, is insufficient for the whole, because they have not tried the whole issue wherewith they are charged. 1 Inst. 227 a.

\*The 2d error assigned is, that the evidence referred to in the bill of exceptions ought not to have been admitted. The grounds upon [\*138 which we support this allegation depend in some degree upon the state of the cause when this evidence was offered. It appears from the bill of exceptions, that the plaintiffs had then substantially proved their demand upon both the policies. The contract, the interest, the loss, were all proved, and the claim of the plaintiffs was in the same condition upon both. The evidence of the defendants, excepted to, was produced to prove a subsequent agreement of the parties to discharge the obligation of the policy upon the cargo.

This evidence ought not to have been admitted. 1. Because it was all evidence of a supposed parol agreement. 2. Because part of it was given as proof of the acts of a corporation. 3. Because another part was testimony to a point of law.

The whole mass of this evidence consisting, 1st. Of letters from the plaintiffs to Messrs. Brown & Ives ; 2d. Of notes purporting to be acts of the defendants ; 3d. Of the testimony of Mr. Brown ; and 4th. Of that of Richard Jackson, president of another insurance company in Providence, was combined together, to prove one point ; a contract of the plaintiffs to discharge the contested policy. If, therefore, any part of it was improper, the whole was so.

1. Parol evidence. It is not denied, that there are cases in which evidence of a parol agreement may be admitted to discharge the obligations of a written contract ; but as this is a deviation from a very general and important principle of \*law, it has never been done, but where it was [\*139 necessary to prevent fraud on the part of the party claiming the benefit of the written contract, and where the parol agreement has been executed. There is no instance, where an executory parol contract, or mere mutual promises, have been allowed to discharge the obligation of a written executed contract.

2. Acts of the corporation. By the rules of the common law, the acts of a corporation can be proved only by instruments under their seal. By the charter and constitution of the Providence Insurance Company, they are authorized to make policies and other instruments, under the signature of their president, countersigned by their secretary. In the evidence excepted against, there are three letters or notes which were admitted as proofs of the company's acts, neither of which is authenticated, either by their seal, which alone could make them valid at common law, or by the double signature of the president and secretary, as required by the charter and constitution of the company. One of them is signed by the president alone ; one by the secretary alone, and the third is not signed at all. The reasons upon which these rules are founded, appear in 1 Bl. Com. 475 ; 6 Viner 268, 287, 288 ; Kyd on Corporations, 1, 449, 450, 259, 268.

3. As to Richard Jackson's testimony. This was the most exceptionable

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testimony admitted, because it was evidently to a point of law, and not to fact. Usage is, in its nature, matter of fact. But whether the fact of usage be binding is, in its nature, a point of law. This testimony seems to have been the hinge upon which the whole cause turned ; and it is the more important, as it was the ground upon which the court below adopted it as law ; it is all abstract proposition ; large and liberal indeed ; but altogether principle, without reference to any fact. Among underwriters, says he, promise is in all respects as binding as performance. 1 Bl. Com. 75, 76.

\*The third assignment of error is, that the court should have directed the jury that the evidence proved no contract of the plaintiffs. \*140] As this point embraces most essentially the merits of the controversy, it is proper to examine the particular nature of the transaction.

What was the ultimate object of the parties ? On the part of the plaintiffs, it was to cancel the policy, on certain conditions. On the part of the defendants, the intention was different in every one of their notes ; but still the ultimate object of cancelling was contained in all. From the tenor of the whole correspondence, there is no evidence of an intention by either of the parties to make a contract for cancelling the policies. On both sides, it was meant to consummate the thing, and not to make a new bargain for discharging that which existed.

In the first letter of the plaintiffs, there is, indeed, an inquiry, whether the defendants would make a conditional contract, to depend upon the contingency of their obtaining leave from the Spanish government at the Havana to terminate the adventure there ; where they supposed the vessel still to be. But this was explicitly denied by the defendants ; and this denial itself serves strongly to show, that they were determined not to leave the business in the unsettled state of a new contract ; but either to adhere to that which existed, or to finish the business in the usual and obvious way, by cancelling the instrument in which it was contained. The whole transaction, therefore, must be considered in the light of a negotiation ; mere communications between the parties, which could be consummated on one side only by cancelling the policy ; and on the other, by giving up the premium notes.

A circumstance which further corroborates this view of the thing is, that neither of the parties ever indicated a time for finishing the business. Had it been in the \*contemplation of either, to make a bargain for discharging the existing obligations between them, this would naturally have been one of the most important points to be settled. For until they had agreed upon the time when their new reciprocal obligations should commence, what would have been their situation ? The policy was in the hands of the plaintiffs ; the note was in possession of the defendants ; and both were negotiable instruments. It is expressly laid down in the books, that mutual promises must be made at the same time. Until the new bargain was completed, the defendants were bound by the risks of the policy ; and it would have been very material to both parties, to fix the moment when their obligation to these risks should cease.

Let us go further, and inquire, if these papers can be construed into a mutual engagement, *when* they became so. The first letter of the plaintiffs contained only an inquiry, and manifested a desire to settle conditionally one of the policies. The note of the defendants in answer, contained in the



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letter of Brown & Ives, of 26th August, refuses to make a conditional settlement; but offers to cancel the policies, retaining 25 per cent. of the premium upon both.

Let it here be remarked, that although the defendants made this offer, supposing it bottomed on the intimations of the plaintiff's first letter, yet it was founded upon a gross mistake of the insurance company, not only as to those intimations, but as to the state of the two policies at that time. They have, in their third note, expressly declared, that their intention and expectation in the first was, to cancel both the policies; and on the same terms.

The first policy was for \$10,000, on the cargo of the vessel, on a double voyage, from Malaga to Vera Cruz, and from thence back to Spain; at a premium of 50 per cent. The outward voyage insured by this instrument had been safely performed. The return-voyage had commenced; and in its progress, the vessel had been \*driven into the Havana, where the [\*142 plaintiffs supposed she still remained. The second policy was for \$6000, on the vessel, made after the plaintiffs knew she was at the Havana. It was for a single voyage at and from the Havana to Europe, and the premium was at 33 1-3 per cent.

On the first policy, the outward voyage was completed, and the homeward voyage had commenced: no apportionment of the premium was possible. The plaintiffs could not cancel the contract, but with the consent of the defendants; and the terms upon which they naturally and reasonably wished to settle were, to give the defendants one-half of the amount of the premium as a compensation for the risk they had incurred. On the second policy, the risk had barely commenced, as they supposed. Their intention was, if they could obtain permission from the government at the Havana, to break up the voyage, and terminate the adventure there. Had they done so, they might have withdrawn the policy, and obtained a restoration of the whole premium, with the customary deduction of half per cent. For this, they did not want the consent of the defendants; it was their right so to do.

This circumstance is important in two points of view. First. It laid the foundation of the mistake of the plaintiffs, in their answer to this offer of the defendants; and of all the subsequent mistakes and differences between the parties. It is impossible to suppose, that the defendants meant to trifle with the plaintiffs. They intended to make a serious offer; and the fairest construction is, that they made it, without attending to the subject-matter; without looking into their own records, to see the different situation of the two policies; and without advertg to the plaintiff's letter, which expressly limited the negotiation to the policy on the cargo.

\*In the second place, it furnishes a violent presumption, that the [\*143 defendants had, at the time, no idea that they were engaged in the serious and deliberate employment of making a contract; a contract, too, which they now contend, must dissolve an instrument so serious in its nature, so forcible in its operation, so various in its details, so precise and specific in all its conditions, and so minute and discriminative in the effect of all its stipulations, as a policy of insurance. An individual underwriter, when he pledges himself by his signature to indemnify a merchant for the numerous and deplorable calamities to which navigation is liable, must feel himself bound, by all the ties of duty to himself and his fellow-creature, to act

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with caution, and with a knowledge of the right he acquires, and of the duty he incurs. A corporation, by their essential character and constitution, are under obligations of a still higher nature, to do nothing inconsiderately. They are a deliberative body: the members who act in their behalf, bind not only themselves but their associates. They are responsible not only to themselves and their families, but to the public, to the legislature under whose sanction their proceedings are regulated, and to their country, which is interested in the accuracy of their transactions. Is it, then, possible, to suppose, that such a body should have conceived themselves performing solemnly one of the acts for which they were intrusted with all the powers and attributes of a corporation, when they accomplished it with such utter ignorance of the whole subject upon which they were engaged; with such gross negligence as, in the eye of the law, is equivalent to fraud? For the honor of the defendants, we hope not.

But the present inquiry is, at what time this supposed solemn contract to discharge a perfect claim to indemnity took place; and certainly, if the defendants did consider themselves as contracting, this, at least, is not the time when the obligation of the parties took effect. The real offer to settle both policies on the same terms was certainly such as the defendants ought not to have made; and such as the plaintiffs could not accept. Indeed, its absurdity furnishes a full apology for the mistake of the plaintiffs, which appears in their reply of the 28th of August, and in which they manifest<sup>\*144]</sup> their acceptance of what they supposed the offer to be. That is, to settle one policy; the policy on the merchandise. But in accepting it, the plaintiffs add conditions, and there is no evidence that these conditions were ever assented to by the defendants. It is clear, therefore, that no agreement, binding upon the parties, can be found at the date of this letter of the plaintiffs. Here was a mere mistake.

This mistake on the part of the plaintiffs was very natural. They either did not perceive the *s* at the end of the word policy, in the answer of the defendants, communicated in the letter of Brown & Ives; or if they did, they might well suppose it was an error in the copy, especially, as that is not the usual orthography of the plural of the word policy. They might have taken it for a comma, or a careless stroke of the pen, but could not suppose that it contained the whole substance of the defendants' offer. Hitherto, then, there is nothing like a contract. There was nothing but mistake on both sides.

The next of these papers is the second letter signed by the president of the Insurance Company, dated September 1st, directed to Brown & Ives, and enclosed by them in their letter to the plaintiffs of 2d September. This makes a proposal entirely new. That the company will agree to settle both the policies at the Havana, and return 25 per cent. on the first, and 31, 83½ per cent. on the last, but they decline making a partial settlement of one without the other. This note, as well as the former, evidently shows that the company had no idea of having agreed to anything. In both, they say they will agree, necessarily implying a further act on their part to complete the settlement, even if their offers had been accepted.

We come now to the plaintiffs' letter of September 3d, which, in the opinion of the learned and lamented judge who tried the cause, contained a proposal to the defendants, which, by their acceptance on the 6th, became a



complete contract between the parties, and by the custom of merchants and underwriters, sufficient of itself to dissolve the policy. With the utmost deference for his opinion, and the highest respect for his memory, we apprehend, \*there was error both in regard to his idea of this letter, and [\*145 of the operation of the laws of insurance in this particular. In the first part of this letter, it is true, the expressions imply a strong degree of disappointment on the part of the plaintiffs, at finding the directors had receded from what the plaintiffs had supposed was their first offer. But in the second part, they explicitly decline the last offer of the company. They say, that if they can succeed with the Spanish government, the policies on vessel and freight will, of course, be withdrawn at the usual custom ; but they will not make one the condition of the other. And in the next sentence, they most unequivocally show that they had abandoned all idea of holding the defendants to their supposed offer, and were only desirous of having it made in reality. "If we make this settlement," "the sooner we know the better." "The terms we acceded to were very favorable to the company." Each of these expressions indicates that they considered the former transactions as given up ; and that they had no idea of binding themselves to a settlement, before they could know whether the defendants would agree to make one.

Let us now consider the force and effect of the unsigned note of the 6th of September. The opinion of the court below, as expressed in the bill of exceptions is, that after this note, nothing remained to be done ; but that the policy was settled and discharged. What says the note ? It begins, by acknowledging that there had been a misunderstanding in the business, as respected the first propositions of the company, and by admitting that this misunderstanding was justly imputable to them ; for it makes that the inducement upon which the directors express their willingness to accede to the plaintiffs' propositions. It does not say, the directors have acceded, nor even that they do accede, but they are willing to accede. And to what proposition ? To settle the policy on the merchandise at 25 per cent. Nothing is said about when or where the risk should cease ; nor about taking up the note on the payment of one-half. Is this the language proper for the final completion of a solemn bargain ? They were willing to accede to a proposition ; they go on to specify that proposition, \*and in specifying it, they leave out half the particulars, [\*146 especially, that important one which the proposition contained, the cessation of the risk.

It may be said, this is scrutinizing with hypercritical nicety, the expressions of a loose note, the terms of which were not so accurately weighed ; and which was not drawn up by a special pleader. But it may be asked, is it just, rational or proper, that such unguarded, immature notes as this should, by the solemn sanction of law, be adjudged to be of a force and obligation paramount to that of a policy of insurance ; an instrument, in the printed parts of which, there is scarcely the cross of a *t*, or the dot of an *i*, but has had its comment and its adjudication. Lord MANSFIELD has observed, that the merchants seldom introduce a written clause into a policy, but it ends in a lawsuit. And we are now told by Mr. Jackson, that a succession of blunders, under the name of an assent of parties, is to overthrow the whole force and effect of an

important instrument, which has gone through the crucible of three hundred years' experience.

The parties never could intend that these inconsiderate, shapeless approximations to a settlement, should of themselves operate as a final settlement. At the close of this note, it is said, "Messrs. Head & Amory will please to send the policy immediately to be cancelled," and after it, "premium note due 12-15 September." If nothing remained to be done, why were the directors so anxious to have the policy sent immediately to be settled? Why were they so accurate and precise in noting both the day and the day of grace, when the note would become due? Why, but because they were sensible, that the most important part of the business still remained to be done? Why, but because they were conscious, that the plaintiffs still had their option, either to send the policy to be cancelled, or to pay the note at its day of payment? Loose as these notes are; hasty and inartificial as their language is, some meaning must be given to their contents; and when we see the defendants so solicitous to have the policy cancelled, and so punctilious to mark the days of payment for the note, we can give their words no possible construction, importing on their part that the policy was settled; that nothing remained to be done.

\*147] We are still seeking for the time when this supposed contract of dissolution took effect. By all the laws in the world, but those of Mr. Jackson, mutual promises are considerations of each other. Both parties must be bound to the performance of their respective promises. One promise cannot be binding, and the other remain invalid. To find this time, we have sought in vain through the whole correspondence of the parties. It is equally vain, to seek it in the opinion of the court, which is, that nothing remained to be done, after the said note of the 6th September 1800. Here also is a want of precision in conveying the idea of time, and it is a defect which lies in the nature of the thing. The words "after the said note of the 6th of September," are not a designation of time. Had the court said, after the signing of the note (and, as we conceive, all the promises of the company ought by their charter to be signed), the time would have been fixed at the date of the signature. But this they could not say; the note is unsigned. Had the court said, after the writing of the note; then the engagement of the company would have been contracted, not by the note of the directors, but by the handwriting of the clerk. Had the court said, after the delivery of this note, the question would recur, delivery to whom? And to whom could it be, but to the plaintiffs? This would, doubtless, have altered the state of the question; for if the reciprocal engagements were binding only from the time of delivery, or notice of this note, then they were dissolved by an external event, before they were formed. The whole superstructure had crumbled to atoms: for the plaintiffs had received information of the loss of the vessel and cargo. I say dissolved, before they were formed; and the absurdity of the expression, is only the genuine mirror of the impossibility of the thing.

The meaning of the court must have been, that the note of the directors, on the 6th of September, constituted the assent of the company, as they considered the plaintiffs' letter of the 3d September as proof of their assent. The plaintiffs, then, must be considered as having made their promise on



the 3d, when they wrote their letter ; and the correspondent promise of the defendants as having been made on the 6th, by the note of the directors. If so, the plaintiffs were bound from the 3d, and the defendants from the 6th of September.

\*The promises were not made at the same time ; both parties [ \*148 were not equally bound ; for one was bound three days sooner than the other. Will it be said, that the offer and the acceptance must be considered as one transaction, because it was impossible it should be completed at once, the parties residing more than forty miles distant from each other ? This is an additional proof that the consummation of the thing, the cancelling of the policy, and the taking up of the note, was, and alone could be, the intent of the parties, and until that was effected, the original instruments must, in the nature of things, retain all their validity.

Consider how unequal the situation of the parties was, if the plaintiff were bound on the 3d, and the defendants only on the 6th. From the moment the plaintiffs became obligated by the new engagement, the risk of the policy was transferred from the defendants to them ; yet their obligation to pay the whole premium note had not ceased ; nor could it cease, until the defendants had decided whether they would accept or reject the offer. On the other hand, the defendants, from the 3d of September, must have been *de facto* released from all the risks of the policy, and at the same time entitled to recover the whole of the premium note from the plaintiffs. During all this interval, the plaintiffs must have been at once liable to all the risks of the policy, and to the payment of the whole premium, while the defendants were discharged from the risk and entitled to the premium. Is there any measure of equal justice, or common equity, which can sanction such a state of things as this ?

But this is not all. From the moment when the plaintiffs sent their letter of the 3d September to the post-office, their promise was out of their power. According to this system of justice, they had no longer the right or the power to retract from this offer. Their word and their property were pledged ; yet the defendants retained the right of adhering to the policy and the premium, or of dissolving them on the terms of the offer : the plaintiffs were entirely at their mercy. The policy, it is true, remained in their hands uncanceled, but it had lost all its force and effect. The unsigned note of the secretary, like the ghost of paper money in McFingal, had turned it back to rags again. But this was unknown to the \*plaintiffs ; and before they knew it, they had received information of the loss, and [ \*149 had acquired a perfect right to indemnity.

Hitherto, the argument has proceeded upon the supposition that the plaintiffs' letter did really contain a certain proposal, and the unsigned note an acceptance of that proposal. It has been endeavored to prove that, even admitting this, they did not constitute an agreement sufficient to dissolve the policy. The necessity of fixing a time when the mutual engagements of the parties could take effect, must be obvious. The necessity of notice to both parties, that the new engagement had superseded that of the policy, must be equally clear. But neither the time nor the notice can be found, until after the perfect right to the indemnity secured by the policy was vested in the plaintiffs.

Let us now consider the subject, in another point of view. One of the

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principal reasons which must always give a contract, written and signed with deliberate solemnity, a more powerful sanction than a verbal agreement, is its superior certainty. There is no instrument reduced to a greater degree of certainty, than a policy of insurance. It is a general maxim of law, as well as an obvious dictate of reason, that every contract requires the same power to effect its dissolution, as to effect its creation. The whole system of law, founded upon the statute of frauds, is built upon the principle, that a contract in writing, and signed by the party contracting the engagement, is more forcible and binding in its nature, than an engagement verbally made, or agreed to, without being reduced to that form. The circuit court seems to have been of opinion, that this supposed agreement of the parties was something more than a parol agreement; and indeed, it did pass, whatever it was, in the form of letters and notes. But if certainty is one of the characters of a written contract, this was far from possessing that requisite.

A written agreement, in contemplation of law, as well as in the common understanding of mankind, must be a paper containing the whole meaning of the parties, and signed by them, or, at least, by one of them. When the contract is altogether executory, containing merely promise for promise, it \*150] seems equally to require the signature of both. A policy of insurance, for instance, is signed only by one of the parties, but that is because its existence depends upon performance by the other: it commences only by the payment of the premium. It is difficult to conceive, how a contract which must be picked out piecemeal from nine or ten letters and notes, and spliced by the verbal testimony of two witnesses in open court, can be considered as a written agreement.

If, however, these papers could be grappled and dovetailed into an agreement, as between individuals, we ask, whether this can be done, when one of the parties is a corporation aggregate? By the principles of the common law, the promises of a corporation can be authenticated only by a record, or by their seal. By the charter of the Providence Insurance Company, the signature of their president and secretary are necessary to give validity to their policies, and other instruments. The act of the company, which constituted, as we are told, their assent to the propositions of the plaintiffs, was done at a weekly meeting of the directors. Yet of this act (in their own view, higher in its nature than the act of making a policy), no record was made; no instruments delivered to the plaintiffs, or even drawn up, excepting this note of the secretary, unsigned, undirected, and not even indicative of the subject to which it relates, otherwise than in the general terms of "the business."

If the intelligence received by the plaintiffs on the 14th of September had been, not that the vessel was lost, but that she had arrived safe in Spain; would the defendants have been contented with half the premium? They must now say so, to support their present ground; but they would then have discovered, that while the policy remained uncanceled, and the premium note in their hands, something did remain to be done. They would have called upon the plaintiffs for payment of the whole note, and if payment had been refused, would have sued them. What defence could the present plaintiffs have had against their action? Could they have produced all this mass of evidence on their side? Would not the company



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then have said, we never meant to consider these as the final transactions, and you knew it; we never entered so much as a minute of them on our records; we never did an act to authenticate them, as all our acts must be authenticated; we considered \*ourselves bound, until the policy [\*151 should be cancelled. You knew we could not be bound by a written agreement, unless signed and countersigned as our charter requires, and you shall not produce in evidence, to discharge the debt you justly owe us, these notes, which we purposely made irregular, to prevent your supposing they could dissolve the force of a previous contract. Surely, the court would have admitted the weight of these objections. They would not have suffered such shapeless nothings as these notes, to be shown as the formal release of a corporation.

The defendants might have added, that the notes themselves did not fully meet the propositions of the plaintiffs. It is true, they agreed to settle the policy at 25 per cent., but they had not promised to deliver up the note. The plaintiffs, therefore, could not have produced those papers, to prove the promise of the defendants, and of course, there was no consideration for the bargain; and the defendants would have said it was little less than fraud, if the plaintiffs, after the arrival of their vessel, had attempted by such means to evade the payment of half the premium note. The subject has been presented in this light, to enforce the objection against these papers, as evidence of the acts of a corporation. In point of equity, the case is infinitely stronger on the side of the plaintiffs, than it would have been on the side of the defendants. If it was an agreement at all, the defendants were not bound by it, until three days later than the plaintiffs, and when the company bound themselves, it was with the full knowledge that the plaintiffs were bound too. The defendants did not remain from the 3d to the 17th of September, without knowing whether the agreement was made or not.

It has thus been endeavored to prove that this transaction was not, and could not possibly be, an agreement between the parties, of force and effect, to dissolve the obligations of the policy. 1. Because the object of the negotiation was to act, and not to promise; to cancel, and not to make an agreement for cancelling. 2. Because the business was transacted much too loosely on both sides, and especially, on that of the company, to show any intention to make a bargain, paramount in force to the policy. \*3. [\*152 Because it is impossible to fix any one time, or even any one day, upon which the agreement became binding on both parties. 4. Because, if understood as an agreement, its operation was altogether unequal upon the two parties; all the benefit being on one side, and all the burden on the other. 5. Because, in point of form, it could not be an agreement; one of the parties being a corporation; and no authentication of its assent being given.

In opposition to all this, what is said? That in agreements about insurance, the assent of the parties to the doing of a thing, is, in all respects, as binding as the thing done. As we apprehend the fallacy, upon which the defendants prevailed in this cause, before the circuit court, lies in this opinion of Mr. Jackson, we shall examine it with some attention, and hope to show that, in its only possible application to this cause, it is a great mistake; that in the most punctilious court of honor, it would not be true; and

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that, instead of according with the usage and practice of underwriters, it is in direct opposition to the whole system of insurance law.

In the first place, the assent of the parties to the doing of a thing must be founded upon a certain state of things and relations between the parties, at the time when the assent is given. If, before the thing is done, that state of things is totally changed by external events, the basis of the agreement has failed, and the assent of parties cannot bind them as much as the thing done.

I write to Mr. Jackson, "Sir, your word is as good as your deed ; so is mine. I have a ship at Newport, that I wish to sell for ten thousand dollars, will you buy it? If so, I will execute the bill of sale, and you shall pay me the money." Mr. Jackson answers me, "I will buy your ship, on the terms you propose." After Mr. Jackson has written this letter, and before I receive it, my ship is burnt. Is there any court of honor which will say, because his word is as good as his deed, that he is bound to take my \*153] bill of sale of a ship which no longer \*exists, when he gave me his word to take my bill of sale of a ship which did exist. Is there any court of equity which would decree that I should make the conveyance, and that he should pay me the money? Examine, to this point, 5 Viner 509, 505, 514, 517, 526.

Let us now apply the principle to cases of insurance. Mr. Jackson's testimony is, that this assent of parties to the doing of a thing is as binding as the thing done, in effecting insurance, as much as in discharging a policy. Let us suppose, that this whole negotiation between the parties had been, not to cancel, but to make a policy.

The plaintiffs' first letter to Brown & Ives would have said, we want insurance for \$10,000 done on the brig, at and from the Havana to Spain. The same risk has been insured here at 25 per cent. ; what can you do it for, at the Providence Insurance Company? They say, "we will insure on the brig and cargo at 25 per cent. but not conditionally." The plaintiffs mistake this for an offer to insure on the brig alone, and write, "we accept this offer, and will send a premium note in due time." On receiving this, the defendants find there has been a mistake. They make a new offer to insure the brig at 25 per cent. and the cargo at another premium. The plaintiffs, on receiving this, say, "we thought the matter settled ; we have insured on the cargo elsewhere ; we say again, we want insurance on the brig. If we make this insurance, we shall order the brig to sail at once, and the sooner we know, the better." This is exactly their letter of the 3d September, only supposing it was a policy to be made, and not a policy to be discharged.

On the 6th of September, the directors say, "as there appears to have been a misunderstanding, we are willing to make insurance on the brig alone, at 25 per cent., though we meant, and expected, to insure both brig and cargo. Messrs. H. & A. will please to send their premium note immediately, and we will have the policy made."

Now, put the case on both sides. Before the plaintiffs \*receive \*154] this note, they have had information that their vessel, which they supposed at the Havana, had sailed, and was safely arrived in Spain. Before that insurance, to which both parties had assented, could be done, there was no insurance to do. Will any one say, that the defendants could, in



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such a case, have recovered from the plaintiffs, the premium of a policy never made, merely because it had been agreed to be made? In what form of action, either at law or in equity, could they have called upon the plaintiffs to pay a premium, upon an adventure known to be terminated before the risk could be incurred?

Again, suppose, that before the plaintiffs receive this note, they have had information that the vessel had sailed and was lost, what would the defendants have said, if the plaintiffs had written them thus: "Gentlemen, the vessel you have agreed to insure is lost; we have never paid you the premium, nor even given a note for it; but the assent of the parties to the doing a thing is as binding as the thing done; pay us \$10,000 for our loss." would not the defendants have justly replied, "you have never paid or secured to us our premium; before the transaction could be completed you knew your vessel to be lost: how can you call upon us for an indemnity we never undertook?"

The assent of the parties is so far from placing an agreement about insurance out of the reach of external events, that it does not, even in numerous instances, prevent the parties themselves from retracting. The contract of insurance is, perhaps, of all others, that of which the obligation most forcibly depends upon performance, in contradistinction to mere assent. To evince this, I will refer to a very ingenious writer upon the subject. Millar 110, 383, 434, 534.

I have dwelt so entirely upon this third assignment of error, which appears to me to embrace the vitals of the cause, that I have nothing left to say upon the fourth, which is, that if the evidence did prove a contract, it ought not to have been produced in this, but another action.

\*As to the objections of form, the incomplete verdict of the jury, [\*155 the inadmissibility of the evidence, the incapacity of a corporation to contract, but by instruments peculiarly authenticated, and the insufficiency of this defence to meet this action—without feeling myself authorized to abandon them, I hope, I have wasted no time in maintaining them. But the plaintiffs in this action are not only my clients, they are my friends. Their letters subsequent to the time when the dispute arose, very explicitly declare, that they considered the whole proceedings as mere communications, and, that they never considered themselves, or the company, as discharged from the obligations of the policy, and of the premium note. I have, therefore, been anxious to show, that upon principles of law, of justice, of equity and of honor, their opinion was well founded; that the policy was not discharged; that they were and still are entitled to the indemnity, which they had purchased with so heavy a premium; and of course, that there was error in the proceedings and judgment of the circuit court. If the object of the parties, to cancel conditionally the policy, was never completed, if the company, by their egregious mistake in the first instance, and by their dilatory proceedings in the last, were the real cause why it was never completed, it seems to me, they have no reason to pretend, that the plaintiffs ought to be bound by an unfinished project of settlement which cannot be carried into effect, without discarding the most established rules of law, and the most unequivocal dictates of equity.

*Hunter*, contra.—The question is, was there a bargain made? Does the correspondence prove an agreement?

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The objection to the form of the verdict is cured by the act of congress of 24th September 1789. (1 U. S. Stat. 91, § 32.)

1. It is objected, that there can be no contract, because it is not under the corporate seal, nor signed by the president, and countersigned by the secretary. If the intention of the parties is clear, and the substance of the agreement has been reduced to writing, it is sufficient.

\*The doctrine that a corporation cannot act but by its seal, may answer for the transactions of bishops, deans and chapters, abbots and monks, but according to modern decisions, does not apply to mercantile corporations, and mercantile transactions. 2 Bac. Abr. 13 (Gwillim's edition). The bank of England, the East India company, and similar corporations may, by an agent, make promissory notes, draw and accept bills of exchange, and make all kinds of contracts and promises, like natural persons. It will be presumed, that the authority so given to the agent is matter of record, or under the corporate seal.

The Providence Insurance Company are, by their charter, empowered to make policies, and other instruments, without seal. The second section declared "that all policies of assurance and other instruments made and signed by the president of said company, or any other officer thereof, according to the ordinances, by-laws, and regulations of said company, or of their board of directors, shall be good and effectual in law, to bind and oblige the said company to the performance thereof in manner as set forth in the constitution of said company hereinafter recited and ratified."

The 5th article of their constitution provides, that "the directors shall meet statedly, once in every week, and at such other times as the president, or board of directors shall think necessary. The president, with two directors in rotation, shall assemble daily at the insurance office, for the dispatch of business, agreeably to the rules and regulations of the general meeting of stockholders, and of the board of directors." "The president, with the two directors in rotation, shall have full power and authority, in behalf of the company, to make insurances upon vessels and property laden therein." "And all policies thereon shall be subscribed by the president, as president of the Providence Insurance Company, and countersigned by the secretary; and the president and committee of attending directors shall ascertain and agree for the premiums, and the security of the payment thereof, as they shall think proper." "All losses arising on any policy, subscribed as aforesaid, shall be adjusted by the president and board of directors."

\*If the great object of their institution may be accomplished without seal, *à fortiori*, may the means for attaining that object; *omne majus continet in se minus*. The provision in the charter that they might make policies and other instruments, without seal, was introduced for their ease and benefit; but it would be of no advantage to them, if all their preliminary acts must still be under the corporate seal.

2. As to the rule *eo ligamine, &c.*, it does not always apply to mercantile instruments. A charter-party may be dissolved by parol. Abbott on Shipping 260. And less solemnity is required in dissolving, than in completing a mercantile contract. However strict the rule may be at law, in other cases, yet it does not prevail in equity; and in questions of insurance, which is a contract founded upon broad, equitable principles, courts of common law are bound by the same rules of decision as courts of equity. Park 3.



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But in the present case, the agreement to dissolve the policy was made by the same authority which made the policy. By the constitution of the company, the president and two directors have power to make insurance ; and the agreement to dissolve was also by the president and directors. The note of the 6th of September was in the handwriting of the secretary, who was acknowledged by both parties as the authorized agent of the company, to signify their assent, and was by him delivered to Brown & Ives, the authorized agents of the plaintiffs. It contains the names of the directors, and purports to be by their authority ; and although the authority of the secretary does not appear to be under the corporate seal, or on record, yet it is to be presumed, that he was so appointed. Thus, in the case of *Rex v. Bigg*, 3 P. Wms. 419, which was an indictment for erasing an indorsement from a note of the bank of England, signed by one Adams, their cashier, it was contended, that it was not a note of the bank, because not under the corporate seal, and the jury found that Adams was not authorized by the bank, under their seal, to sign notes for them, but was intrusted and employed by them for that purpose. Upon that indictment, the prisoner was convicted ; which shows that, even in a capital case, it \*was held, that a corporation aggregate may act by an agent, although not authorized under the corporate seal. [\*158]

But the plaintiffs have, by their bill of exceptions, admitted the note of the 6th of September to be the answer of the company to their letter of the 3d, and therefore, cannot now deny the authority of the secretary. *Neal v. Irving*, 1 Esp. 61.

If the defendants had insisted upon the whole premium, this correspondence would have been a complete defence for the plaintiffs.

It is not necessary, that the note should have been signed. Their charter authorizes the company to contract, without signature. Signature is required only to policies and other instruments. It is not contended, that this correspondence can be called an instrument, and yet it may be evidence of a contract. Even under the statute of frauds, which requires a note in writing, signed by the party charged, it is not necessary that the signature should be at the bottom of the note. It is sufficient, if the name of the party be written by him in any part of it. 1 Powell on Contracts 286.

It has been said, that mutual promises must be made at the same time, or both will be *nuda pacta*. This is true, but not applicable to the case. In making an agreement, it is not necessary that the proposition on one part, and the assent on the other, should be both made at the same time. The assent may be either precedent, concomitant or subsequent. 1 Powell 131.

3. It is objected, that the intention of the parties was not to contract, but to act ; that there was no agreement, and that the correspondence amounts only to an incomplete negotiation for cancelling the policy. Nothing more is necessary to make an agreement or contract, than the assent of both parties. In this case, the plaintiffs requested, and the defendants gave their assent. The assent of the plaintiffs was precedent, and required nothing more to be done on their part. When the defendants assented to the proposition of the plaintiffs, the \*bargain was closed, and neither could retract. Nothing more was necessary to be done : or if anything remained, it was [\*159] only what ought to be done, according to the agreement, and therefore, it is to be considered as if done. If notice was necessary, it was given to Brown

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& Ives, the agents of the plaintiffs, and from that time, at least, the bargain was finished.

There is no objection in the record to the testimony of Mr. Jackson. It was only evidence of the usage and custom of underwriters in this country ; and it is every day's practice, to produce witnesses as to the custom of merchants, and the usages of trade. *Stanley v. Ayles*, 3 Keb. 444 ; *Lumley v. Palmer*, 2 Str. 1000 ; *Abbott* 133, 140. As to the citations from Millar, they apply only to the commencement of a contract of insurance, not to its dissolution ; and we hope our case is to be decided by English law, and not by Scotch metaphysics. But even if we go to the civil law, here was the precise form of a Roman stipulation. *Promittis?* promitto. *Spondes?* spondeo.

*Martin*, on the same side.—The question is, what was excepted to on the trial. The letter of 21st of August, which was the beginning of the correspondence, was admitted by the plaintiffs to be read. The other letters were in answer, and were only a continuation of the correspondence, and therefore, were properly admitted by the court. There is no objection, in the bill of exceptions, to Mr. Jackson's testimony. He was examined only to the usage of insurance companies, and as to the manner in which such agreements are considered among underwriters. That this is usual, appears from the case of *Henkle v. Royal Exchange Assurance Company*, 1 Ves. 317, which case also states the principle, that equity will consider that as done which ought to be done. In mercantile cases the rule of law is the same as that of equity. *Tooke v. Hollingworth*, 5 T. R. 229, BULLER's opinion.

\*160] \*Brown & Ives were the agents of the plaintiffs, and are to be considered as the plaintiffs themselves.

The words of the note of September 6th are not in the future tense, as has been alleged, but in the present. They are, "the directors are willing."

The last words of the note, mentioning the time when the premium note would become due, are relied upon. But they prove nothing, because, at all events, the plaintiffs were bound to provide for half of that note, and therefore, it was proper to give them that information.

The words of the learned judge who tried the cause, are, that "nothing remained to be done, after the said note of the 6th of September 1800, to discharge said policy : but that the same ought to be considered as settled and terminated, in consequence of the plaintiffs' proposal, and subsequent agreement thereto on the part of the defendants, as contained in said correspondence."

We admit, that notice of accepting a contract must be in reasonable time. But the rule respecting bills of exchange, as to the shortest possible time, does not apply. It was the duty of Brown & Ives to have had some person at their counting-house, to receive the answer and transmit it to the plaintiffs; and the absence of Mr. Brown cannot be imputed as *laches* to the defendants. The time when the contract was complete was, when the note of the 6th was delivered at the counting-house of Brown & Ives. The effect of that note was to discharge the plaintiffs from one-half of the premium note, and if the vessel had arrived safe, the defendants could have recovered only the other half.

Pothier, in his *Treatise on Obligations*, vol. 1, p. 4, 5, defines an agreement to be "the assent of two or more persons, to form an engagement be-



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tween them, or to dissolve or modify one already formed. *Duorum vel plurium in diem placitum consensus.*" "A contract \*includes a concurrence of the will of two persons, at least, one of whom makes, and the other accepts, the promise." In the present case, the assent of the plaintiffs is proved by their continued anxiety and wish to have that done, which the defendants at length agreed to do. [\*161]

*Mason*, in reply.—The question upon the merits of this case is very simple. Does the evidence prove a contract to cancel this policy; or does it only prove a negotiation on foot, with a view to that subject, not terminated? We hold the latter.

Brown & Ives were not the agents of the plaintiffs, but only the instruments of communication. They had no power to contract, and the defendants knew it. As well may the postman who carries the letter be called an agent.

The plaintiffs' letter of 21st of August contains no proposition; but merely asks for one. The first offer is made in the note of 26th of August, signed by the secretary. The letter of the plaintiffs of the 28th accepts what they mistook for the real offer. But the reply of the president, of September 1st, corrects the mistake and makes a new offer, and rejects the terms contemplated by the plaintiffs. Here, then, the thing ends. Did the plaintiffs' letter of the 3d renew the proposition? It contains no proposition; nor does it authorize Brown & Ives to make one. It is merely a letter of complaint. They say, "if we make this settlement," thereby clearly showing that they reserved to themselves an option to renew the negotiation or not, as they should judge proper. The worm-eaten state of the ship is alleged as the reason for their hope that the Spanish government would permit them to terminate the voyage at the Havana; \*not that the defendants would permit them to cancel the policy. [\*162]

Suppose, then, the letter of the 3d of September as out of the question, would the note of the 6th make a contract, the former negotiation having ended? The renewal, or acceding by the defendants to a proposition which they had before refused, and which the plaintiffs considered as rejected, did not revive the proposition of the plaintiffs (if such it may be called), contained in their letter of the 28th of August; and that they could not be bound, without a new assent.

The case is analogous to that of *Cooke v. Oxley*, 3 T. R. 653, where Oxley having proposed to sell to Cooke 266 hogsheads of tobacco, at a certain price, gave him a certain time, at his request, to determine whether he would buy them or not. Cooke, within the time, determined to buy them, and gave notice thereof to Oxley; yet Oxley was held not liable, in an action for not delivering them; for Cooke not being bound by the original contract, there was no consideration to bind Oxley.

Thus far, on the effect of these communications as between man and man. We shall now endeavor to show, that the defendants have done nothing in the course of this negotiation, which was binding on them, and therefore, the plaintiffs cannot be bound on their part.

It is not pretended, that a simple contract cannot be dissolved by a parol agreement; but we say, it must be such a parol agreement as will bind both parties. The note of the 6th is neither an act, nor a declaration of the com-

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pany. All the powers of a corporation aggregate are derived either from the common law, or from statute law. By the statute, the seal is dispensed with, but other solemnities are substituted, with which they must comply. They can act as a corporate body only in the mode prescribed. There is no law or by-law which gives authenticity to such a note. The president and directors may speak as natural persons, and say what they will do in their corporate capacity, but they cannot bind the corporation but by the means provided \*163] \*by law. They may make preliminary arrangements, but they can conclude nothing. That this was their own understanding, is evident by their not having made any record of these transactions upon their books, and leaving everything upon this loose, unsigned note of their secretary.

It has been said, that there was no exception to the testimony of Mr. Jackson; but the fact is not so. The words of the bill of exceptions are, "whereupon, the counsel for the said Head & Amory did except to the aforesaid evidence," which includes the whole evidence offered on the part of the defendants.

Customs are of two kinds; general and special. The latter only are the proper subject of oral proof; but then they must be proved by facts, and not by opinions. In this case, the testimony was not as to fact or opinion, but as to the law. *Edie v. East India Company*, 2 Burr. 1216, 1220.

February 25th, 1804. MARSHALL, Ch. J., delivered the opinion of the court.—This is a declaration on a policy of insurance, and the only question in the case is, whether the policy was vacated by a subsequent agreement between the parties. This question depends entirely on the legal operation of certain written communications between them, which appear in the record.

Messrs. Head & Amory, of Boston, had obtained insurance, through their correspondents, Messrs. Brown & Ives, of Providence, on the cargo of the Spanish brig, the *Nueva Empressa*, at and from Malaga to Vera Cruz, and at and for thence to her port of discharge in Spain. An insurance was afterwards obtained on the brig, at and from Cuba (she having been chased into the Havana by British cruisers), to her port of delivery in Spain.

The vessel having been detained in port, closely watched by cruisers, until she was worm-eaten, Head & Amory became desirous of terminating \*164] their risk at the Havana, \*which could only be effected by permission of the government at that place, which was not to be obtained but with considerable expense. They, therefore, applied to the insurance company, through their correspondents, Brown & Ives, by a letter, dated Boston, the 21st August 1800, to know whether a conditional permission could be obtained from the underwriters, to terminate the voyage at the Havana, provided the consent of the government could be obtained; and if so, on what terms that conditional permission would be granted. The underwriters refused to make any conditional agreement, but offered to vacate both policies on terms mentioned in a letter signed by their president.

Misunderstanding the letter as a proposition for vacating the policy on the cargo only, the terms proposed were acceded to, and a letter was written from Head & Amory to Brown & Ives, declaring their acceptance of the proposition, understood to be made by the insurance company, in such a manner as very clearly to show the mistake under which it was written. On



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seeing this letter, the misapprehension of the parties was discovered and explained, and the agreement considered as not being made; at the same time, a new proposition was made for settling both policies. To this letter, declining absolutely any agreement respecting either policy singly, and proposing specific terms on which they would settle both, Head & Amory returned an answer, dated the 3d of September 1800, which was addressed to Brown & Ives, and is in these words. (See *ante*, p. 131.) This letter was laid by Brown & Ives before the company, and their secretary returned the following note without a signature. (See the note of September 6th, 1800, *ante*, p. 132.) This note was forwarded by Brown & Ives to Messrs. Head & Amory, but before they received it, intelligence came to hand, that the Nueva Empressa had sailed from the Havana, and had been captured, and was condemned as a prize, late in the month of August. Head & Amory, therefore, insisted on their policy.

\*Everything respecting the delays in the communications, is laid out of the case, because they do not appear to the court in any manner to affect it. [\*165]

Richard Jackson, the president of another Insurance Company, was also examined, and testified, that in effecting insurance, or settling a policy, or making any adjustment or agreement about insurance, the assent of the parties to doing a thing was in all respects as binding on the parties, as the thing done, according to the usage and practice among underwriters. Upon this testimony, the court instructed the jury that the agreement to cancel the policy for the cargo was fully proved, and they ought to find for the defendants on that count. The jury accordingly found for the defendants, and the plaintiffs have sued out a writ of error to bring the cause into this court. The opinion and instructions of the judges of the circuit court to the jury are said to be erroneous, because, the communications which have been cited do not import a contract. They were negotiations preparatory to an agreement, but not an agreement itself.

The letter of the 3d of September certainly manifests some degree of disappointment, at finding that the agreement supposed to have been concluded had not really been made; and also proves their opinion, that the negotiation was not absolutely broken off, but was yet pending. "If we make this settlement," say they, "we shall make every effort, by money and interest, to have the adventure terminated at the Havana, and the sooner we know the better." "The terms we acceded to were very favorable to the company, as it was paying them at the rate of 35 per cent. for the outward premium." Yet the letter contains no direction to make any specific proposition to the company, and may be construed either as a mere inquiry, whether the company would cancel the policy for the insurance on the cargo singly, on the terms which had before been understood to have been offered, or as a new and positive proposition, the acceptance of which would complete the contract.

\*It is also very questionable, whether the unsigned note delivered by the secretary is such an acceptance as to form, when taken with the letter of the 3d of September, an absolute agreement obligatory on the company. It is a general rule, that a corporation can only act in the manner prescribed by law. When its agents do not clothe their proceedings with those solemnities which are required by the incorporating act, to enable

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them to bind the company, the informality of the transaction, as has been very properly urged at the bar, is itself conducive to the opinion, that such act was rather considered as manifesting the terms on which they were willing to bind the company, as negotiations preparatory to a conclusive agreement, than as a contract obligatory on both parties.

The communications stated in the record, lead to an event, which might have been so readily completed, that it might have been, and probably was, supposed unnecessary to pass through the previous solemnities of a contract binding themselves to do that which, if really the wish of both parties, might so speedily be accomplished ; so short a space of time was requisite to have the policy delivered up and cancelled, that the forms of completing a contract to cancel it, might have been deemed useless. On this account, and on account of the known incapacities of a body corporate to act or speak but in the manner prescribed by law, it may well be doubted, whether communications which, between individuals, would really constitute an agreement, were viewed by the parties before the court in any other light, than as ascertaining the terms on which a contract might be formed.

This course of reasoning relative to the intent of the parties, is plainly founded on the idea that the note of the 6th of September is, in its legal operation, a mere informal paper, which may, perhaps, amount to notice of an act, if such act was really performed, but which is not, in itself, an act of any legal obligation on the company. That if the proposition contained in the letter of the 3d of September had been regularly accepted, \*167] this note might possibly have been considered as notice \*of that acceptance, but is not in itself an acceptance. If this idea be incorrect, so is the reasoning founded on it. If it be correct, then it follows, that no contract was made, because the proposition of the 3d of September, if it really was one, was not accepted by the company, before it was withdrawn by Head & Amory.

This leads us to inquire, whether the unsigned note of the 6th of September be a corporate act obligatory on the company ? Without ascribing to this body, which, in its corporate capacity, is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may correctly be said to be precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes. To this source of its being, then, we must recur, to ascertain its powers, and to determine whether it can complete a contract, by such communications as are in this record.

The act, after incorporating the stockholders, by the name of The Providence Insurance Company, and enabling them to perform, by that name, those things which are necessary for a corporate body, proceeds to define the manner in which those things are to be performed. Their manner of acting is thus defined: "Be it further enacted, that all policies of assurance and other instruments, made and signed by the president of the said company, or any other officer thereof, according to the ordinances, by-laws and regulations of the said company, or of their board of directors, shall be good and effectual in law, to bind and oblige the said company to the performance thereof, in manner as set forth in the constitution of the said company, hereinafter recited and ratified."



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An instrument, then, to bind the company must be signed by the president, or some other officer, according to the ordinances, by-laws and regulations of the company or board of directors.

\*A contract varying a policy is as much an instrument as the policy itself, and therefore, can only be executed in the manner prescribed by law. The force of the policy might indeed have been terminated by actually cancelling it, but a contract to cancel it, is as solemn an act, as a contract to make it, and to become the act of the company must be executed according to the forms in which by-law they are enabled to act. The original constitution of the company, which is engrafted into the act of incorporation, does not aid the defendants. That agreement does not appear to dispense with the solemnities which the law is supposed to require. It demands the additional circumstance that a policy should be countersigned by the secretary. It appears to the court, that an act not performed according to the requisites of the law, cannot be considered as the act of the company, in a case relating to the formation or dissolution of a policy. [\*168]

If the testimony of Mr. Jackson is to be understood as stating, that an assent to the formation or dissolution of a policy, if manifested according to the forms required by law, is as binding as the actual performance of the act agreed to be done, it is probable, that the practice he alludes to is correct. But if he means to say, that this assent may be manifested by parol, the practice cannot receive the sanction of this court. It would be to dispense with the formalities required by law, for valuable purposes, and to enable these artificial bodies to act, and to contract, in a manner essentially different from that prescribed for them by the legislature.

Nor do the cases which have been cited by the gentlemen of the bar appear to the court to apply in principle to this. An individual has an original capacity to contract and bind himself, in such manner as he pleases. For the general security of society, however, from frauds and perjuries, this general power is restricted, and he is disabled from making certain contracts by parol. This disabling act has received constructions which take [\*169] out of its operation several cases not within the mischief, but which might very possibly be deemed within the strict letter of the law. He who acts by another, acts for himself: he who authorizes another to make a writing for him, makes it himself. But with these bodies which have only a legal existence, it is otherwise: the act of incorporation is to them an enabling act; it gives them all the power they possess; it enables them to contract, and when it prescribes to them a mode of contracting, they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated.

It is, then, the opinion of this court, that the circuit court erred in directing the jury, that the communications contained in the record in this case, amounted to a contract obligatory on the parties, and therefore, the judgment must be reversed, and the cause remanded for a new trial.

CHASE, J.—I concur with my brethren as to the operation of the testimony given by the Providence Insurance Company in evidence to the jury, and that it created no legal obligation on the company; but I am also of opinion, that the testimony given by them in evidence was inadmissible, and

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that the circuit court ought not to have permitted the same to have been given in evidence to the jury.

The judgment of reversal was as follows, viz.: This cause came on to be heard, on the transcript of the record of the circuit court, and was argued by counsel ; on consideration whereof, the court is of opinion, that there is error in the proceedings and judgment of the said circuit court, in this, that the court gave it in charge to the jury, that the several written papers in the record contained, and the testimony of Richard Jackson, in the said record also stated, did in law amount to full proof of a contract entered into between the plaintiffs and defendants, which was obligatory on both parties ; whereas, it is the opinion of this court, that the instruments of writing and testimony aforesaid, do not in law amount to a contract. It \*170] is, therefore, considered \*by the court, that the judgment aforesaid be, for this cause, reversed and annulled, and that the cause be remanded to the said circuit court to be again tried, with direction, that the testimony, in the said record contained, does not amount to evidence of a contract concluded between the parties ; and that the defendants do pay to the plaintiffs their costs.<sup>1</sup>

<sup>1</sup> A contract is only complete and binding, when a proposition made by one party is met by an acceptance on the part of the other, which corresponds with it entirely and adequately. *Insurance Co. v. Lyman*, 15 Wall. 664; *McCotter v. New York*, 37 N. Y. 325; *Sourwine v. Truscott*, 17 Hun 432. An application for insurance, by mail, is not a binding contract, unless accepted. *Bentley v. Columbia Ins. Co.*, 17 N. Y. 421. Where parties treat by letter and telegraph, there must be a distinct offer on the one hand, and an acceptance of it on the other, showing a concurrence of the minds of both parties, before either is bound. *Deshon v. Fosdick*, 1 Woods 286. Until the terms of the agreement have received the assent of both parties, the negotiation is open, and imposes no obligation. *Snow v. Miles*, 3 Cliff. 608. Thus, an offer to sell at a fixed price, may be revoked, at any time prior to its acceptance; a conditional acceptance does not make it binding as a contract. *Stitt v. Huidekoper*, 17 Wall. 384; *Dox v. Shaver*, 14 Hun 392; *Hochster v.*

*Baruch*, 5 Daly 440. But where one party proposes, by mail, a contract with another, residing at a distance, and the latter accepts it, and deposits its acceptance in the post-office, addressed to the former, it is, from that moment, a complete and binding contract, though the letter of acceptance be never received. *Vassar v. Camp*, 11 N. Y. 441. Provided such acceptance be put in a course of transmission, within a reasonable time. *Chicago and Great Eastern Railway Co. v. Dane*, 43 N. Y. 240. So, a contract negotiated by telegraph, is deemed completed, when an unqualified acceptance of the proposal is furnished to the telegraph-office, for transmission, if done within a reasonable time, considering the nature of the contract. *Minnesota Oil Co. v. Collier Lead Co.*, 4 Dill. 431. And this, though the acceptance be not received in time to enable the party to comply with his proposal, in consequence of a derangement of the line of telegraph. *Trevor v. Wood*, 36 N. Y. 307. And see *Howard v. Daly*, 61 Id. 362.



## THE FLYING FISH.

LITTLE *et al.* v. BARREME *et al.**Responsibility of naval officer for illegal seizure.—Probable cause.*

The commander of a ship of war of the United States, in obeying his instructions from the President of the United States, acts at his peril: if those instructions are not strictly warranted by law, he is answerable in damages to any person injured by their execution.<sup>1</sup>

The act of the 9th of February 1799, did not authorize the seizure upon the high seas of any vessels sailing from a French port; and the orders of the President of the United States could not justify such a seizure.

*Quere?* Whether probable cause will excuse from damages?

APPEAL from the Circuit Court for the district of Massachusetts.

On the 2d of December 1799, the Danish brigantine Flying Fish was captured, near the island of Hispaniola, by the United States frigates Boston and General Greene, upon suspicion of violating the act of congress, usually termed the non-intercourse law, passed on the 9th of February 1799 (1 U. S. Stat. 613), by the 1st section of which it is enacted, "That from and after the first day of March next, no ship or vessel owned, hired or employed, wholly or in part, by any person resident within the United States, and which shall depart therefrom, shall be allowed to proceed directly, or from any intermediate port or place, to any port or place within the territory of the French republic, or the dependencies thereof, or to any place in the West Indies, or elsewhere, under the acknowledged government of France, or shall be employed in any traffic or commerce with or for any person, resident within the jurisdiction or under the authority of the French republic. And if any ship or vessel, in any voyage thereafter commencing, and before her return within the United States, shall be voluntarily carried or suffered to proceed to any French port or place as aforesaid, or shall be employed as aforesaid, contrary to the intent hereof, every such ship or vessel, together with her cargo, shall be forfeited; and shall accrue, the one-half to the use of the United States, and the other half to the use of any person or persons, citizens of the United States, who will inform and prosecute for the same; and shall be liable to be seized, and may be prosecuted and condemned, in any circuit or district court of the United States, which shall be holden within or for the district where the seizure shall be made."

\*And by the 5th section it is enacted, "That it shall be lawful [\*171 for the President of the United States to give instructions to the commanders of the public armed ships of the United States, to stop and examine any ship or vessel of the United States, on the high seas, which there may be reason to suspect to be engaged in any traffic or commerce contrary to the true tenor hereof; and if, upon examination, it shall appear that such ship or vessel is bound or sailing to any port or place within the territory of the French republic, or her dependencies, contrary to the intent of this act, it shall be the duty of the commander of such public armed vessel, to seize every such ship or vessel engaged in such illicit commerce,

<sup>1</sup> See *Otis v. Bacon*, 7 Cr. 589; *Tracy v. Swartwout*, 10 Pet. 80; *Kendall v. United States*, 12 Id. 525; *Gray v. Lawrence*, 3 Bl. C. 117; *Gilchrist v. Collector of Charleston*,

1 Hall L. J. 429; *Foster v. Peaslee*, 21 Law Rep. 341; *Magruder v. United States*, Dev. Ct. Cl. 21.

## The Flying Fish.

and send the same to the nearest port in the United States ; and every such ship or vessel, thus bound or sailing to any such port or place, shall, upon due proof thereof, be liable to the like penalties and forfeitures as are provided in and by the first section of this act."

The instructions given in consequence of this section, bear date the 12th of March 1799, and are as follows :

"SIR—Herewith you will receive an act of congress further to suspend the commercial intercourse between the United States and France, and the dependencies thereof, the whole of which requires your attention. But it is the command of the president, that you consider particularly the fifth section as part of your instructions, and govern yourself accordingly. A proper discharge of the important duties enjoined on you, arising out of this act, will require the exercise of a sound and impartial judgment. You are not only to do all that in you lies, to prevent all intercourse, whether direct or circuitous, between the ports of the United States and those of France and her dependencies, in cases where the vessels or cargoes are apparently, as well as really, American, and protected by American papers only ; but you are to be vigilant that vessels or cargoes really American, but covered by Danish or other foreign papers, and bound to or from French ports, do not escape you.

\*172] \* "Whenever, on just suspicion, you send a vessel into port to be dealt with according to the afore-mentioned law, besides sending with her all her papers, send all the evidence you can obtain to support your suspicions, and effect her condemnation. At the same time that you are thus attentive to fulfil the objects of the law, you are to be extremely careful not to harass, or injure the trade of foreign nations with whom we are at peace, nor the fair trade of our own citizens."

In the district court of Massachussets, the vessel and cargo were ordered to be restored, without damages or costs. Upon the question of damages, the Honorable Judge LOWELL delivered the following opinion :

"This libel is founded on the statutes of the United States, made to suspend the commercial intercourse between the United States and France, and the dependencies thereof. The libellants not having produced sufficient proof to bring this vessel and cargo so far within the provisions of these statutes as to incur a forfeiture thereof, the same has been decreed to be delivered to the claimants. The question remaining to be decided is, whether the claimants are entitled to damages, which they suggest to have arisen to them, or those for whom they claim, by the capture and detention.

"The facts which appear and are material to this question are, that the vessel was owned, and her cargo, by Samuel Goodman, a Prussian by birth, but now an inhabitant of the Danish island of St. Thomas ; that the master was born in, and is now of, the same island, but for several years had been employed in vessels of citizens of the United States, and sailed out of our ports ; that he speaks our language perfectly, in the accent of an American, and has the appearance of being one. The mate is a citizen of the United States, born here, and having always continued such. The rest of the seamen are Englishmen, Portuguese and negroes : the supercargo, a Frenchman. The vessel had carried \*a cargo of provisions and dry goods

\*173] from St. Thomas to Jeremie, and was returning thither, loaded with coffee, when captured. That during the chase by the American frigates, the



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master threw overboard the log-book, and certain other papers. That there was on board a protest signed by the master, supercargo and several seamen, in which they declared that the vessel had been bound from St. Thomas to Port-au-Prince, and was compelled by Rigaud's vessels to go into Jeremie, which was false and totally unfounded; and that, after the capture, the master inquired of his seamen, whether they would stand by him respecting this pretence. That the statutes of the United States prohibiting intercourse with France and its dependencies had been long before known at St. Thomas, and that it had been since a common practice there, to cover American property for the purpose of eluding the law.

"If a war of a common nature had existed between the United States and France, no question would be made but the false papers found on board, the destruction of the log-book and other papers, would be a sufficient excuse for the capture, detention and consequent damages. It is only to be considered, whether the same principles, as they respect neutrals, are to be applied to this case?

"My mind has found much difficulty in settling this question. It is one altogether new to me, and arises from the peculiar imperfect war existing at this time between the United States and France. I have embraced an opinion with much diffidence, and am happy that it may be revised in the superior courts of the United States.

"On what principles is the right of belligerent powers to examine neutral vessels, and the duty of neutrals to furnish their ships with proper papers, and to avoid such conduct as may give cause to suspect they are other than they pretend to be, founded? Do they not necessarily result from a compromise of their respective rights in a state of war? Neither of the belligerent \*powers have an original and perfect right to capture the property of neutrals, but they have a right, unless restrained by [\*174 treaty, however disguised or covered by the aid of neutrals.(a) It is a breach of neutrality to attempt to defeat this right. The practice of nations, therefore, for many ages has been, on the one hand to exercise, and on the other to prevent, this examination, and to establish a principle that neutral vessels shall be furnished with the usual documents to prove their neutral state; shall destroy none of their papers, nor shall carry false papers, under the hazard of being exposed to every inconvenience resulting from capture, examination and detention, except the eventual condemnation of the property; and even this, by some writers, has been held to be lawful, and enforced by some great maritime powers. Every maritime nation must be involved in the war, on the side of one or the other of the belligerent powers, but from the establishment of these principles. It is not the edicts, statutes or regulations of any particular nation which confer these rights, or impose these duties. They are the result of common practice, long existing, often recognised, and founded on pacific principles. Whenever a state of war exists, these rights and duties exist.

"It does not appear to me to be material, what is the nature of the war, general or limited. Nothing can be required of neutrals but to avoid

(a) It is believed, that there has been an error in copying this passage. It is, however, printed *verbatim* from the transcript of the record. The words to be supplied probably are, "to search for and seize the property of their enemies," to be inserted after the word "treaty."

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duplicity. Sufficient notice to neutrals of the existing state of hostilities is all that is necessary, to attach to them the duties, and to belligerent nations, the rights, resulting from a state of war. This notice is given in different ways, by proclamations, heralds, statutes published, and even by the mere existence of hostilities for a length of time. As the island of St. Thomas, being a dependency of a neutral nation, situated near the dependencies of the belligerent power with whom the United States had prohibited intercourse, and having had long and full knowledge of the state of things, its inhabitants were, \*as I conceive, bound not to interfere or attempt to \*175] defeat the measures taken by our government, in their limited war. We find, however, that these attempts have been frequent; that American vessels have, in many instances, been covered in that island, and the trade which our government has interdicted has been thus carried on. It behooved, then, those of its inhabitants who would avoid the inconveniences of restraint to act with openness, and avoid fraud and its appearances.

"This construction of the state in which the United States are (although I am of opinion that, abstractedly from other considerations, it would give them the rights of belligerent powers), places the neutral powers in no new predicament, nor imposes the necessity of any new documents, or other conduct than they were obliged to from the pre-existing state of war between most of the great naval powers. On the whole, I am of opinion, that no damages are to be paid the claimants for the capture and detention, and do so decree, and that each party bear their own costs."

From this decree, the claimants appealed to the circuit court, where it was reversed, and \$8504 damages were given. The following is the decree of the circuit court.

"This court having fully heard the parties on the said appeal, finds the facts stated in the said decree to be true, and that the said Little had instructions from the President of the United States, on which the action in the said libel is founded, a copy of which instructions is on file. And it further appearing that the said brigantine and her cargo were Danish, and neutral property, and that the said George Little knew that the said brig, at the time of the said capture, was bound and sailing from Jeremie to St. Thomas, a Danish and neutral port, and not to any French port; this court is of opinion, that although Captain Little had a right to stop and examine \*176] the said brig, in case of suspecting \*her to be engaged in any commerce contrary to the act of the 9th of February 1799, yet that he was not warranted by law to capture and send her to a port of the United States. That it was at his risk and peril, if the property was neutral; and that a probable cause to suspect the vessel and cargo American, will not, in such case, excuse a capture and sending to port. It is, therefore, considered, adjudged and decreed by this court, that the said decree respecting damages and costs be, and it is hereby reversed, and that the said claimants recover their damages and costs."

The damages being assessed by assessors appointed by the court, a final sentence was pronounced, from which the captors appealed to this court.

The cause was argued, at December term 1801, by *Dexter*, for the appellants, and by *Martin* and *Mason*, for the claimants.



## The Flying Fish.

February 27th. MARSHALL, Ch. J., now delivered the opinion of the court.—The Flying Fish, a Danish vessel, having on board Danish and neutral property, was captured on the 2d of December 1799, on a voyage from Jeremie to St. Thomas, by the United States frigate Boston, commanded by Captain Little, and brought into the port of Boston, where she was libelled as an American vessel that had violated the non-intercourse law. The judge before whom the cause was tried, directed a restoration of the vessel and cargo, as neutral property, but refused to award damages for the capture and detention, because, in his opinion, there was probable cause to suspect the vessel to be American. On an appeal to the circuit court, this sentence was reversed, because the Flying Fish was on a voyage from, not to, a French port, and was, therefore, had she even been an American vessel, not liable to capture on the high seas.

\*During the hostilities between the United States and France, an act for the suspension of all intercourse between the two nations was [\*177 annually passed. That under which the Flying Fish was condemned, declared every vessel owned, hired or employed, wholly or in part, by an American, which should be employed in any traffic or commerce with or for any person resident within the jurisdiction, or under the authority, of the French republic, to be forfeited, together with her cargo; the one-half to accrue to the United States, and the other to any person or persons, citizens of the United States, who will inform and prosecute for the same. The 5th section of this act authorizes the President of the United States to instruct the commanders of armed vessels “to stop and examine any ship or vessel of the United States, on the high seas, which there may be reason to suspect to be engaged in any traffic or commerce contrary to the true tenor of the act, and if upon examination, it should appear, that such ship or vessel is bound, or sailing to, any port or place within the territory of the French republic or her dependencies, it is rendered lawful to seize such vessel, and send her into the United States for adjudication.

It is by no means clear, that the President of the United States, whose high duty it is to “take care that the laws be faithfully executed,” and who is commander-in-chief of the armies and navies of the United States, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited, by being engaged in this illicit commerce. But when it is observed, that the general clause of the first section of the act, which declares that “such vessels may be seized, and may be prosecuted in any district or circuit court, which shall be holden within or for the district where the seizure shall be made,” obviously contemplates a seizure within the United States; and that the 5th section gives a special authority to seize on the high seas, and limits that authority to the seizure of vessels bound, or sailing to, a French port, the legislature seem to have prescribed \*that the manner in which this law shall be carried into execution, [\*178 was to exclude a seizure of any vessel not bound to a French port. Of consequence, however strong the circumstances might be, which induced Captain Little to suspect the Flying Fish to be an American vessel, they could not excuse the detention of her, since he would not have been authorized to detain her, had she been really American.

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It was so obvious, that if only vessels sailing to a French port could be seized on the high seas, that the law would be very often evaded, that this act of congress appears to have received a different construction from the executive of the United States ; a construction much better calculated to give it effect. A copy of this act was transmitted by the secretary of the navy, to the captains of the armed vessels, who were ordered to consider the 5th section as a part of their instructions. The same letter contained the following clause :

"A proper discharge of the important duties enjoined on you, arising out of this act, will require the exercise of a sound and an impartial judgment. You are not only to do all that in you lies, to prevent all intercourse, whether direct or circuitous, between the ports of the United States and those of France or her dependencies, where the vessels are apparently as well as really American, and protected by American papers only, but you are to be vigilant that vessels or cargoes, really American, but covered by Danish or other foreign papers, and bound to or from French ports, do not escape you."

These orders, given by the executive, under the construction of the act of congress made by the department to which its execution was assigned, enjoin the seizure of American vessels sailing from a French port. Is the officer who obeys them liable for damages sustained by this misconstruction of the act, or will his orders excuse him? If his instructions afford him no protection, then the law must take its course, and he must pay such damages as are legally awarded against him; if they excuse an act, not otherwise excusable, it would then be necessary to inquire, whether this is a case in which the \*179] probable cause \*which existed to induce a suspicion that the vessel was American, would excuse the captor from damages when the vessel appeared in fact to be neutral?

I confess, the first bias of my mind was very strong in favor of the opinion, that though the instructions of the executive could not give a right, they might yet excuse from damages. I was much inclined to think, that a distinction ought to be taken between acts of civil and those of military officers ; and between proceedings within the body of the country and those on the high seas. That implicit obedience which military men usually pay to the orders of their superiors, which indeed is indispensably necessary to every military system, appeared to me strongly to imply the principle, that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which, in general, requires that he should obey them. I was strongly inclined to think, that where, in consequence of orders from the legitimate authority, a vessel is seized, with pure intention, the claim of the injured party for damages would be against that government from which the orders proceeded, and would be a proper subject for negotiation. But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is, that the instructions cannot change the nature of the transaction, nor legalize an act which, without those instructions, would have been a plain trespass.

It becomes, therefore, unnecessary to inquire whether the probable cause afforded by the conduct of the Flying Fish to suspect her of being an American, would excuse Captain Little from damages for having seized and sent her into port? since, had she been an American, the seizure would have been



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unlawful. Captain Little, then, must be answerable in damages to the owner of this neutral vessel, and as the account taken by order of the circuit court is not objectionable on its face, and has not been excepted to by counsel before the proper tribunal, this court can receive no objection to it.

There appears, then, to be no error in the judgment of the circuit court, and it must be affirmed with costs.

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[\*180]

*Presumption of payment.*

To raise a presumption of payment, from the age of a bond, twenty years must have elapsed exclusive of the period of the plaintiff's disability.<sup>1</sup>

Legal impediments to the recovery of British debts existed in Virginia, until the year 1793.

This was a writ of error to the Circuit Court of the district of Columbia, sitting in Alexandria. The only question in the case arose upon the following bill of exceptions.

"In this case, the plaintiffs were admitted to be, and always to have been, British subjects, residing in Great Britain, and the defendant to be, and have been, a native and always a citizen of the now state of Virginia; and this suit was commenced on the — day of —, in the year 1802. The debt was contracted in 1773, in Virginia, at which time, the bond was executed on which the suit was brought. It was also admitted, that the plaintiffs had an agent authorized to collect their debts, so far as the plaintiffs could authorize the same to be collected, during the whole time from the date of the bond to this day; which agent resided in the county in which the defendant lived; also open war subsisted between Great Britain and Virginia, from the 19th day of April 1775, until September 1783.

Further to repel the presumption of payment, the plaintiffs produced the following acts of the general assembly of Virginia upon the subject of British debts contracted before the peace, which acts are in the words following" (Here were inserted the acts dated in March 1785, and Dec. 1787, May 1781, and Nov. 1781): "And the fourth article of the treaty of peace of 1783, and the 6th article of the treaty of peace of 1794, between Great Britain and the United States." The plaintiffs also gave evidence that William Wilson, their agent, delivered over the bond to William Hunter, jun., in 1776, to be collected, at which time he (William Wilson) went to Europe. And when he returned, in 1784, he received back the bond from W. Hunter. Some time after the year 1789, he delivered the said bond to James Johnson for collection, who returned it, and neither of those persons stated that the money, or any part, was collected; that Johnson died in 1797.

Whereupon, the counsel for the defendant prayed the court to instruct the jury, that from the length of time they ought to presume payment of the aforesaid bond. Upon which, the court instructed the jury that from the \*length of time stated in the facts above agreed on, the bond, in law, [\*181 is presumed satisfied, unless they should find from the evidence, that interest was paid on the bond within twenty years from the 5th of September 1775 (the time of the last payment), or that a suit or demand was made

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<sup>1</sup> s. p. Penrose v. King, 1 Yeates 344; Bailey v. Jackson, 16 Johns. 210.

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on the said bond, within twenty years from the last-mentioned time, exclusive (in both cases) of five years, five months and twenty days, taken out of the act of limitations. To which opinion of the court, the plaintiffs, by their counsel, except, &c.

The defendant relied on the plea of payment, and on the length of time to support it.

*E. J. Lee*, for the plaintiffs in error, relied principally upon the legal impediments which existed in Virginia, to repel the presumption arising from the lapse of time. He contended, that the rule that the lapse of twenty years shall induce a presumption of payment of a bond, is not an absolute and arbitrary rule, but at most is only *primâ facie* evidence, and induces nothing more than a presumption. Any circumstances which can reasonably account for the delay of the plaintiffs in prosecuting their right, without supposing the bond to be satisfied, may be given in evidence to destroy that presumption.

From the year 1774 to 1791, the plaintiffs were incapacitated to maintain a suit, and to recover the money by legal process. The first impediment was caused by the expiration of the fee-bill on the 12th of December 1774, whereby the courts of justice were shut against all persons. This impediment was general, and continued until the commencement of the war, on the 19th of April 1775. From this period, until the peace, in September 1783, the state of war prevented British subjects from bringing suits in our courts, if no other impediment had existed. The first act of assembly of Virginia, applying to British creditors in particular, is that passed in October 1777, sequestering \*British property, and suspending executions, \*182] until the further order of the legislature, in all cases where a British subject was plaintiff, and a citizen of the commonwealth defendant. Chancery Revisal of Laws, p. 64. The 2d act of impediment is that of November 1781, c. 22, § 3, p. 147, to suspend executions in certain cases. The 3d is the act of May 1782, c. 44, § 2, p. 165, to repeal so much of a former act as suspends the issuing executions upon certain judgments, until December 1783. The 4th is the act of October 1782, to amend an act entitled "an act to repeal so much of a former act as suspends the issuing of executions on certain judgments, until December 1783." The 5th is the act of December 1783, c. 45, p. 182, to revive and continue in force the several acts of assembly for suspending the issuing of executions on certain judgments, until December 1783, p. 218. This last act expired in July 1784.

If the legal impediments had ceased in the year 1784, with the expiration of this act, we should still have been in time with our suit; for it is brought within twenty years from that time. But these impediments did not cease at that period, but were still continued by the acts of 1785 and 1787.

In addition to these legal impediments, created by the acts of the legislature, were the decisions of juries and courts of law, who supported the plea in bar that the plaintiff was a British subject for several years afterwards. The report of the commissioners under the 6th art. of the treaty with Great Britain mentions a number of cases decided in the courts of Virginia to that effect, from which two only are supposed necessary to be cited. The first is the case of *Warwick's Administrators v. Gaskins*, in



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Lancaster county, upon the plea that the testator was a British subject ; the suit was dismissed in March 1788. \*The next case is that of *Gibson, Donaldson & Hamilton*, plaintiffs, v. *Bannister's Executors*, defendants, in Prince George's county, August 1791, in which the plea that the plaintiffs were British subjects was sustained. The fact is notorious, that it was the general opinion of the inhabitants of the state, and of juries, that a British debt could not be recovered. This is acknowledged to be the case in Mr. Chancellor Wythe's report of the case of *Page v. Braxton*, p. 127, in the year 1793, which was the first in which it had been decided in any of the superior courts, that a British debt was recoverable. [\*183]

MARSHALL, Ch. J.—There can be no doubt of this fact. The only difficulty is, to show that it requires twenty years after the removal of the impediments, to create the presumption of payment. It may be a doubt, whether the same time, after the removal of the impediments, is necessary to raise the presumption, as if the bond had borne date at the time of such removal.

*Swann*, for the defendant, contended, that the time between the 19th of April 1775, and September 1783, being deducted from the age of the bond, when put in suit, the residue, being about twenty years and six months, should be considered as the lapse of time which was to induce the presumption that the disability of the plaintiff ceased on the ratification of the treaty of peace. There are no cases decided in the superior courts of Virginia, in which the plea of disability of the plaintiff, as being a British subject, has been allowed, since the peace. The cases cited are county court cases, and do not appear in the record. They are facts which this court cannot notice.

But if we travel out of the record, other cases may be cited from other countries, in which contrary decisions have taken place. It is a fact, that in Fairfax county, where the defendant always resided, British debts could always be recovered, since the year 1783. If the cases cited against us are admitted to rebut the presumption, this fact is equally strong, and ought to be admitted to support it.

*Lee*, in reply.—Although it was stipulated by the treaty, \*that all legal impediments to the recovery of debts should be removed, yet that did not alter the existing state of things. The obnoxious laws remained in full force, in practice. The fact was, that the legal impediments were not removed. We are not now to consider, what the law ought to have been, but what it was in practice. For if the impossibility of recovering the debt still remained, it destroyed all presumption arising from the lapse of time. [\*184]

February 28th, 1804. MARSHALL, Ch. J., delivered the opinion of the court.—The only circumstance which could create a question in this case is, that twenty years had not elapsed, exclusive of the period during which the plaintiffs were under a legal disability to recover, before the action was brought.

The principle, upon which the presumption of payment arises from the lapse of time, is a reasonable principle, and may be rebutted by any facts which destroy the reason of the rule. That no presumption could arise

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during a state of war, in which the plaintiff was an alien enemy, is too clear to admit of doubt. But it is not so clear, that upon a bond so old as this, the same length of time, after the removal of the disability, is necessary to raise the presumption, as would be required, if the bond had borne date at the time of such removal.

It appears, from the decisions of the courts of Virginia, from the pleas in bar in the federal courts, and particularly from the observations of the chancellor of Virginia, in the case cited, that it was the general understanding of the inhabitants of that state, that British debts could not be recovered: and until the year 1793, there was no decision of the superior courts that such debts were recoverable.

The only question is whether, in case of an old debt, the same time is required to raise the presumption, as in the case of a debt accruing since the impediments have been removed. In such a case, it is not easy to establish \*185] a new rule, and \*the court think it best to adhere to the old decisions, that twenty years must have elapsed, exclusive of the period of the plaintiff's disability; and are of opinion, that the circuit court erred in directing the jury that payment ought to be presumed.

The judgment of the court is entered upon the minutes, in the following terms:—THE COURT having heard the arguments of counsel, and maturely considered the same, is of opinion (and do adjudge, order, and decree accordingly), that the circuit court erred in instructing the jury, "that from the length of time, they were to presume the bond, in the record mentioned, to be satisfied, unless they should find, from the evidence, that interest was paid on the bond, within twenty years from the 5th of September 1775 (the time of the last payment), or that a suit or demand was made on said bond, within twenty years from the last-mentioned time, exclusive, in both cases, of five years, five months and twenty days, taken out of the act of limitations;" there being circumstances in this case which oppose the presumption which would have arisen from the length of time which has elapsed since the date of the bond. And this court doth further adjudge, order and decree, that this cause be remanded to the said circuit court, to be there tried, with directions that there is no presumption of payment of the said bond, as directed by the said circuit court.

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BLAKENEY v. EVANS.

*Assumpsit for work and labor done.*

If a man agrees to do certain work, and he does it jointly with another, he is still entitled to recover upon the agreement.<sup>1</sup>

Evans v. Blakeney, 1 Cr. C. C. 126, affirmed.

A SPECIAL action of *assumpsit* was brought, in the Circuit Court of the district of Columbia, sitting at Alexandria, by Evans against Blakeney, upon the following written agreement:

"I will rent of Mr. Evans thirty-one feet of ground on King street by

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<sup>1</sup> Under a count for work and labor, the plaintiff may show services rendered by his wife. Hackman v. Flory, 16 Penn. St. 196.



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one hundred feet deep, to a ten feet alley, for which lot I will pay him 13*l*. 10*s*. per annum, in yearly payments, the rent commencing from the 1st day of November 1799. \*I will also agree to find work and materials in my line for Mr. Evans's houses, provided he will find the same in his line for my house I intend to build on the above described lot, each work and materials to be measured and valued agreeably to the customary mode in Alexandria, and whatever balance there may be on either side, at any time they choose to have the work and materials valued, is to be paid in cash, on demand.

(Signed)

ABEL BLAKELEY.  
JOHN EVANS."

"September 3d, 1799."

The action was brought to recover a balance due upon this valuation. The defendant pleaded the general issue. The plaintiff produced in evidence the following writing :

"Alexandria, March 23d, 1802. We, the subscribers, being called on by Messrs. Evans and Burford, on the one part, and Abel Blakeney on the other, to measure and value sundry jobs of work done by the parties, each for the other, and have done the same to the best of our knowledge, and upon comparing the accounts, find a balance in favor of Evans and Burford, of fifty-two pounds, ten shillings and one penny.

(Signed)

DANIEL BISHOP.  
ISAAC McLEAN."

He proved by the said Isaac McLean, that the work and materials were measured and valued agreeably to the customary mode in Alexandria, and that according to such measure and value, that balance was due from the defendant to the plaintiff. That he and the said Bishop were called upon by Evans and Blakeney, and not by the said Burford ; but that he was present, and the witness understood from all the parties, that he was interested in the work. To the admission of this evidence, the defendant took a bill of exceptions, and brought a writ of error.

March 1st, 1804. The transcript of the record was submitted to THE COURT without argument, who affirmed the judgment, with ten per cent. damages, and costs ; observing, that the meaning of the agreement was, that each party should procure the work to be done, and not that they should do it personally.

## \*CHURCH v. HUBBART.

*Marine insurance.—Illicit trade.—Foreign laws.*

If it be inserted in a policy, that "the insurers are not liable for seizure by the Portuguese for illicit trade," and the vessel be seized and condemned for an attempt to trade illicitly, the underwriters are not liable for the loss.<sup>1</sup>

The right of a nation to seize vessels, attempting an illicit trade, is not confined to their harbors, or to the range of their batteries.<sup>2</sup>

Foreign laws must be proved like other facts: they must be verified by oath, or by some other such high authority that the law respects not less than the oath of an individual. The certificate of a consul of the United States, under his seal, is not sufficient.

A certificate of the proceedings of a court, under the seal of a person who states himself to be the secretary of foreign affairs in Portugal, is not evidence.

If the decrees of the Portuguese colonies are transmitted to the seat of government, and registered in the department of state, a certificate of that fact, under the great seal, with a copy of the decree, authenticated in the same manner, would be sufficient *prima facie* evidence.<sup>3</sup>

ERROR from the Circuit Court for the district of Massachusetts, in an action on the case, upon two policies of insurance, whereby John Barker Church, Jr., caused to be insured \$20,000 upon the cargo of the brigantine *Aurora*, Nathaniel Shaler, master, at and from New York to one or two Portuguese ports on the coast of Brazil, and at and from thence back to New York.

At the foot of one of the policies was the following clause: "The insurers are not liable for seizure by the Portuguese for illicit trade;" and in the body of the other was inserted the following, "*N. B.* The insurers do not take the risk of illicit trade with the Portuguese."

The vessel was cleared out for the Cape of Good Hope, and Mr. Church went out in her, as supercargo. On the 18th of April, she arrived at Rio Janeiro, where she obtained a permit to remain fifteen days, and where Mr. Church sold goods to the amount of about \$700, which were delivered in open day, and in the presence of the guard which had been previously put on board, and to all appearance, with the approbation of the officers of the customs. On the 6th of May, she sailed from Rio Janeiro, bound to the port of Para, on the coast of Brazil, and on the 12th, fell in with the schooner

<sup>1</sup> A warranty against illicit trade has in view the municipal laws of the country where it is to be carried on; and foreigners going there are bound to know and observe them. *Smith v. Delaware Ins. Co.*, 3 W. C. C. 127. But to bring a case within the exceptions, the seizure must be *bonâ fide*, and upon reasonable grounds. *Carrington v. Merchants' Ins. Co.*, 8 Pet. 495. Where the trade is no otherwise unlawful, than in consequence of an accident, over which the assured has no control, the underwriters cannot avail themselves of it, as a breach of warranty. *Savage v. Pleasants*, 5 Binn. 403; *Hallet v. Jenks*, 3 Cr. 210; s. c. 1 Caines Cas. 43; 1 Caines 60. A seizure and condemnation, under pretext of illicit trade, is not a breach, if the trade be, in fact, legal. *Johnston v. Ludlow*, 1 Caines Cas. xxix; s. c. 2 Johns. Cas. 481; *Laing v. United Ins. Co.*, Id.

487. The prohibition must be a legal one, such as the prohibiting power had a right to make. *Smith v. Delaware Ins. Co.*, 3 S. & R. 73; *Fau-del v. Phoenix Ins. Co.*, 4 Id. 29. And the underwriter is liable for a loss occasioned by illicit trade barratrously carried on by the master. *Suckley v. Delafield*, 2 Caines 222; *Dunham v. American Ins. Co.*, 2 Hall 422; s. c. 12 Wend. 463; 15 Id. 9. And to bring a case within the warranty, there must be both a seizure and proof of an illicit trade. *Graham v. Pennsylvania Ins. Co.*, 2 W. C. C. 113.

<sup>2</sup> *Talbot v. Seeman*, 1 Cr. 1; *Strother v. Lucas*, 6 Pet. 673; *Armstrong v. Lear*, 8 Id. 52; *Stern v. Bowman*, 13 Id. 209; *Eanis v. Smith*, 14 How. 400.

<sup>3</sup> *Rothschild v. United States*, 6 Ct. Cl. 204; *Dauphin v. United States*, Id. 221.



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Four Sisters, of New York, Peleg Barker, master, bound to the same port, who agreed to keep company, and on the 12th of June, they came to anchor, about four or five leagues from the land, off the mouth of the river Para, in the bay of Para, about west and by north from Cape Baxos, and about two miles to the northward of the cape "on a meridian line drawn from east to west." The land to the westward could not be observed from the deck, but might be seen from the mast-head.

The destination of the vessel, after her departure from Rio Janeiro, was, by the master, kept secret from the crew, at the request of Mr. Church, and the master assigned as a reason why they came to anchor off the river Para, that they were in want of water and wood, which was truly the case, the greater part of the water on board having been caught a night or two before, and the crew had been on an allowance of water for ten days.

\*After the vessels had come to anchor, Mr. Church, with two of the seamen of the brig, and the mate of the schooner, with two of her [188 seamen, went off in the schooner's long boat, to speak a boat seen in shore, to endeavor to obtain a pilot to carry the vessels up the river, that they might procure a supply of wood and water, and, if permitted, sell their cargo.

Shortly after the long boat had left the schooner, the latter got under way (the master of the brig having first gone on board of her), proceeding towards shore; and observing a schooner-rigged vessel coming from the westward, from whom they expected to get a pilot, they fired a shot ahead of her, to bring her to, but not regarding the first shot, a second was fired, when she came to, and her master came on board, apparently much alarmed, as if he supposed the schooner and brig to be French. The persons in the Portuguese boat got off, in a squall of wind and rain, leaving their captain on board the Four Sisters.

Mr. Church, and the others who went on shore with him, as well as the second mate of the schooner, who was sent on shore with the master of the Portuguese vessel, and in search of Mr. Church, were seized and imprisoned; and on the 14th of June, both the brig and schooner were taken possession of by a body of armed men, on board of three armed boats, and carried into Para. The masters and crews were imprisoned, and underwent several examinations, the principal object of which seemed to be, to ascertain whether they were not employed by some of the belligerent powers to examine the coast, &c.; whether they had not come with intention to trade; whether they had not traded at Rio Janeiro, and why they had kept so close along the coast. They denied the intention to trade, but alleged that they were obliged to put in for wood and water, and to refit. On the 28th of July, the master of the brig was put on board a vessel for Lisbon, but was taken on the passage by a Spanish vessel, and sent to Porto Rico, from whence he obtained a passage to the United States. The Aurora was armed with two carriage guns mounted, and about one hundred weight of powder.

It was in evidence also, that when vessels belonging to foreigners go into Rio Janeiro, they allege a pretence of \*want of repairs, want of water, [189 or something of that kind, on representing which, they obtain leave to sell part of the cargo for repairs, and to remain a certain time, usually twenty days, and then, by making presents to the officers, they are not prevented from selling the whole; but without those presents, they would

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probably be informed against. Such trade is a prohibited trade, but it is frequently done, without a bribe.

The defendant, to prove that the trade was illicit, offered a copy of a law of Portugal, entitled "A law by which foreign vessels are prohibited from entering the ports of India, Brazil, Guinea, and Islands and other provinces of Portugal," which, after reciting a prior law of 1591, prohibiting foreign vessels, and foreigners of whatever station or quality, to go, either from the ports of Portugal, or from any other ports whatever, to the conquests of Brazil, without special license of the king, ordains, "that from the day of the publication hereof, no vessel whatever, of any foreign nation, shall be permitted to go to India, Brazil, Guinea, or Islands, nor to any other province or islands of my conquests, either already discovered, or that may be discovered hereafter." (The Azores and Madeira are excepted.) "And I am further pleased to order, that no stranger whatever shall be permitted to go in any vessels, belonging to my subjects, even though he be an inhabitant of my kingdoms." "And any foreign vessel that shall hereafter go to any of the said ultramarine ports, against the contents of this my law, I am pleased to order, that it shall be seized, with all the cargo, as well that of the master and proprietors of the said vessel, as of any other persons; and further, that all those who, on board of said foreign vessels, shall load any goods or merchandise, shall lose all whatever else they possess, and they shall be banished for life to Africa, without remission, and no petition for pardon shall be received from them, nor shall it be valid, even if dispatched; and any foreigner who, in any ship of his own, or any other, or in any ship or vessel of my subjects, shall go to said ports, contrary to this my law, besides incurring the loss of all his property, shall likewise incur the penalty of death, which shall be put in execution against him, without appeal, by order of any governor, captain or judge before whom they are accused, even \*190] if such execution \*in other cases should not come within their authority; and the same penalty of death shall be incurred by any of my subjects who shall freight said vessels, or by any other manner send them, either on their own account, or on any other person's account, to said ultramarine possessions, which shall be put into execution against them in the manner above mentioned, without appeal. And all those who, in any manner, shall go against this my law, may be denounced by any person whatever, and the denouncer shall be entitled to, and receive, one-half of the goods appertaining to the accused, and the other half shall be forfeited to my treasury. And I am further pleased to order, that all those who, from henceforth, shall in any manner act against the said law made by the king my father (whom God keep!) or shall change their voyage, or cause the same to be done, shall be accused in the manner above mentioned by any person whatever. And I hold as strong and valid all the contents of this my law, and order that it should be fully complied with and observed, notwithstanding any contrary laws, orders, gifts, privileges, contracts, or any grants, either general or particular, being all hereby repealed, as if each one in particular was herein mentioned. And this law shall be as valid as any letter made in my name, signed by myself, and passed through chancery, notwithstanding the ordinance of book the second, title the 40th, which orders the contrary. And that the knowledge of the contents hereof should be made manifest to all, I order the high chancellor to cause it to be published



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in chancery, and to pass a certificate of the same on the back hereof, and have it registered in the books of my exchequer court, India house, custom-house of this city of Lisbon, and in all other parts of the kingdom of Portugal; for which purpose, the comptroller of my exchequer shall send copies hereof to the said ports, and similar ones to all the ports in India, Brazil, Guinea, and Islands, to the end that this my law be there published and registered, and reach to the knowledge of all. Made in Valladolid, the 18th of March 1605. The secretary, Luis de Figueiredo, had it written.

(Signed)

KING."

"\*I, William Jarvis, consul of the United States of America, in this city of Lisbon, &c., do hereby certify to all whom it may or doth [\*191 concern, that the law in the Portuguese language, hereunto annexed, dated the 18th March 1605, is a true and literal copy from the original law of this realm, of that date, prohibiting the entry of foreign vessels into the colonies of this kingdom, and as such, full faith and credit ought to be given it in courts of judicature or elsewhere. I further certify, that the foregoing is a just and true translation of the aforesaid law. In testimony whereof, I have hereunto set my hand and affixed my seal of office, at Lisbon, this 12th day of April 1803.

(Signed)

WILLIAM JARVIS."

Another law was produced, said to be made at Lisbon, on the 8th of February 1711, certified in the same manner, entitled, "A law in which is determined the non-admission of foreign vessels into the ports of the conquests of this kingdom," which directs, "That orders should be given to the governors of the conquests, not to admit into any of their ports the vessels of any foreign nation, unless they went in with the fleets of this kingdom, and returned with the same, in conformity to treaties, or obliged by tempestuous weather, or for want of provisions; in which cases, providing them with the necessaries they require, they ought to be ordered out again, without permitting them to do any business; and as this cannot be done without the consent and tolerance of the governors, which requires a speedy and efficacious remedy, on account of the consequences which may result from a toleration and overlooking of this traffic, and the equity of justice requiring that so great an injury should be avoided, and the inflicting a punishment on those who should in any way be concerned in such an illicit trade with foreigners; I am pleased to order, that the persons who shall traffic with them, or shall consent that such traffic shall be carried on, or, knowing it, shall not hinder it, such person, being a governor of any of my ultramarine conquests, \*shall incur the penalty of paying to my treasury the three [\*192 doubles of the salary which he receives, or may have received, by such office of governor, besides losing all the gifts he holds from the crown, and remaining inhibited from ever being employed in any other offices or governments for the future: such person being an officer in the army, or of justice, or any other private person, being a Portuguese and a subject of this kingdom, shall incur the penalty of confiscation of all his goods and possessions, one-half for the denouncer, and the other half for my royal treasury." Then follow other provisions for the detection and punishment of offenders against the law; and an order to all governors of the ultramarine conquests to carry

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it into execution, and that it should be published and registered in all necessary places.

To prove that the vessel was seized for illicit trade, the defendant produced the following paper, purporting to be a copy of "the sentence of the governor of the capital of Para, on the brig Aurora."

"In consequence of the acts of examination made on board the brig Aurora, questions put to Nathaniel Shaler, who it is said is the captain of her, and to those said to be the officers and crew, and according to the act of examination, made in the journal annexed, which they present as such passport and dispatches, together with other papers; I think, the motives hereby alleged for having put into a port of this establishment, are unprecedented and inadmissible, and the causes assigned cannot be proved: I, therefore, believe it to be all affected, for the purpose of introducing here commercial and contraband articles of which the cargo is composed (if there are not other motives besides these, of which there is the greatest presumption): 1st. Because it cannot be supposed that an involuntary want of water and wood would take place in thirty-four days' voyage from Rio Janeiro, where the said vessel was provided with every necessary, until she passed the Salinas, without alleging and proving an unforeseen accident, when there was none in sixty-four days' passage from New York to said port of Rio Janeiro, and it \*193] appears by these papers, and by the information \*from the commanders of registry or guard at the Salinas, and it is not to be believed, that they did not see that land at the hour of the morning which they passed it, on the 9th day of the present month, as well as they were seen; and when it ought to be supposed, that they should have solicited immediately the remedy for such urgent necessity as they wish to make it. 2d. Because, after they were in sight and opposite to the village of Vigia, on the 12th of the said month, having also got clear and passed safely by the shoals, and after, by violent means, having boarded and obliged different vessels to board him, it does not appear, that any of those that were brought to the village as prisoners, alleged the want of water as a motive for coming in, nor that they had made the least endeavors, or demanded to be supplied with such want; it being very well known, on the contrary, that all their endeavors were to obtain *pratic*, and to proceed to this capital, alleging the pretext of being leaky, but which, from the examination made on board by the masters of the arsenal, did not appear to be true. 3d. And finally, because in the space of eight or ten days from the time they passed the cape of St. Agostinho, until they passed by the Salinas, should their want of water be true, they might have supplied themselves with it, in any of the numerous ports on the northern coast of the Brazils, till that of Pernambuco, or they would have directed their course directly for the destined port of Martinico and Antilles, as they say; it appearing very strange, they should come to sound all the coast, the excuse of the winds not being admissible. But by the same informer's journal, it appears, that from the 28th of May, when, by observation, they were northward of St. Agostinho, they had constantly the trade-winds upon the quarter, until the 3d instant, with which they steered always along the coast, when they ought only to have gone to this latitude, to have continued the same winds to the said islands, and to have got clear of the calms and currents of the coast; if it had not been their only intention to look for the same coast and to this port, for business and smuggling, which he could not



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perform at the Rio Janeiro, for the reason which is specified in the letters annexed to folio —; it being presumed, that the master of this brigantine \*ought to be understood as having the same disposition as that of the schooner Four Brothers, with which he sailed and fell into conversa- [\*194 tion. Therefore, I command, that in conformity to the law made on the 5th October 1715, the observance of which has been so repeatedly recommended and revived to me by government, let their papers be brought to the house of justice, to be continued as prescribed in the same law, and laws of the kingdom (they remaining in prison until the final decision), for which they gave cause by the hostile means which they practised.

“Palace of Para, the 27th June 1801.

D. FRANCISCO DE SOUZA COUTINHO.”

“On the 27th June 1801, these deeds were given to me by his excellency the governor and captain-general of state, D. Francisco de Souza Coutinho, with his sentence, *ut supra*, of which I made this term; and I, Joseph Damazo Alvarez Bandiera wrote and finished the same.

“It is hereby determined by the court, &c., that in the certainty of it being affected and unprecedented, that the brig Aurora, Captain Nathaniel Shaler, putting into this port as in the decision fol. 43; as it is justly declared and adopted for the same incontestible causes there specified, that in consequence thereof, and of the respective laws thereto applying, she ought to be condemned, they concurring to convince that it was the project of the said captain (if he had no other reason besides these, of which there is suspicion) to look for a market for the merchandise, which were found, not only as it appears by the letters hereto annexed, but in the society and conversation in which he sailed with the schooner Four Brothers, which captain is convicted, by very clear proofs, of such an intention, and the same specious pretext with which he pretends to color the cause for putting into this port, manifesting in this manner that he was not ignorant of the laws of the state concerning coming in and doing business therein. \*Therefore, [\*195 they declare him to have incurred the transgression of the order fol. 1 to 107, and decree of the 18th March 1605, and they order that after proceeding in the sequester on the vessel and cargo, to send the captain as prisoner, with the necessary information by the competent secretary, that his royal highness may be pleased to determine about him, as may be his royal pleasure.

“Para, 27th June 1801. D. Jono de Almeida de Mello de Castro, of the council of state of the prince regent our lord, and his minister and secretary of state of the foreign affairs and war departments, &c., do hereby certify that the present is a faithful copy taken from the original deeds relative to the brig Aurora. In witness whereof, I order this attestation to be passed and goes by me signed and sealed with the seal of my arms. Lisbon, the 27th January 1803.

(Signed)

D. JONO DE ALMEIDA DE MELLO DE CASTRO.”

“I, William Jarvis, consul of the United States of America, in this city of Lisbon, &c., do hereby certify unto all whom it may concern, that the foregoing is a true and just translation of a copy from the proceedings against the brig Aurora, Nathaniel Shaler, master, at Para, in the Brazils, which is hereto annexed and attested by his Excellency Don Jono de Almeida

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de Mello de Castro, whose attestation is dated the 27th January 1803. In testimony whereof, I have hereunto set my hand and affixed my seal of office, in Lisbon, this 16th day of April, one thousand eight hundred and three.

WILLIAM JARVIS."

The bill of exceptions, besides the foregoing, stated a variety of depositions, papers and other evidence, which it is deemed unnecessary here to insert, and then proceeded as follows :

"Whereupon, the said plaintiff did then and there insist before the said court, that the said paper writings offered in evidence as aforesaid, by the defendant, ought \*not to be admitted and allowed to be given in evidence to the jury, on the said trial, in behalf of said defendants ; but the said judges did then declare and deliver their opinions, that the same paper writings ought to be admitted in evidence to the jury. Whereupon, the said counsel for the said defendant, did then and there insist before the said judges, that the said several matters so produced, and given in evidence on the part of the said defendant as aforesaid, were sufficient, and ought to be admitted and allowed as sufficient evidence, to prove that the loss of the said brig and cargo was by a peril within the exception made in the aforesaid policies, respecting seizure by the Portuguese for illicit trade, and therefore, that the said Church ought to be barred of his aforesaid action, and the said defendant acquitted thereof. And thereupon, the said defendant, by his counsel, did then and there pray the said judges to admit and allow the said matters and proof, so produced and given in evidence for the defendant aforesaid, to be sufficient evidence to bar the said Church of his action aforesaid. But to this the counsel of said John Barker Church, Jr., on behalf of said Church, did insist before the said court, that the matters and evidence aforesaid, so produced and proved on the part of the said defendant, were not sufficient, nor ought to be admitted or allowed, to bar the plaintiff of his action, and that it did not prove the loss of the said brig and cargo to be by a peril within the exception contained in said policies, respecting seizure by the Portuguese for illicit trade, but that the evidence, on the part of the plaintiff did prove the same loss to have happened through a peril for which the underwriters on said policies were liable, by the terms thereof.

"And the said WILLIAM CUSHING, Esq., did then and there deliver his opinion to the jury aforesaid, in the words following, to wit : The first objection to this action is, that it is brought in the name of John B. Church, Jr., when the contract was not made with him, but with his father, John B. \*Church. But from the evidence of Mr. Samuel Blagge, it is plain, the policy was made for the son, in pursuance of the express application and direction of the witness. The property of ship and cargo is proved to be in the plaintiff.

"The principal question is, whether the brig Aurora and cargo (insured by these policies) were seized by the Portuguese for (or on account of) illicit trade? If so seized, the insurer is not liable ; if not seized for illicit trade, the defendant must answer for the sums by him insured.

"The brig went to Brazil for the purpose of trade ; first to Rio Janeiro, where, with leave, part of the cargo was sold, then proceeded to Para. It



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is pretty well understood, that a trade there is illicit and prohibited, unless particular license can be obtained; sometimes it is obtained, sometimes not; and in want of leave, seizures have been made. It seems, that the seizure and sequestration which took place at Para, were on account of attempting to trade there. The sentence of the governor of Para appears to me decisive as to this point, that there was an attempt to trade, and that was against the effect of the Portuguese law referred to in the decree.

"It is contended, that this vessel was not within the Portuguese dominions, and therefore, not in violation of any of their laws. It appears, the vessel was hovering on the coast of Para, and anchored upon that coast, and that the plaintiff, with others from the vessel, went on shore in the boat among the inhabitants.

"It is said, that this sentence has no appearance of an admiralty decree; but there does not appear any other authority at Para to condemn for illicit trade than that of the governor. The governor does undertake to decide, and I do not know that he had not authority, according to their modes of colony government, so to do. One thing seems certain, that is, that the property was seized and sequestered and taken away, by \*the gov- [\*198 error's sentence, on account of prohibited trade; in part, at least.

"As to a design against the country, it is said, there were suspicions. It does not seem probable, that the government of Para could seriously think the country endangered, by a few Americans coming with a cargo for trade.

"I am, therefore, of opinion, that it falls within the meaning and true intent of the exceptions in the policies, viz., 'that the insurers should not be liable for seizure by the Portuguese for illicit trade,' and that you ought to find for the defendant."

"Whereupon, the said counsel for the plaintiff did then and there, in behalf of the plaintiff, except as well to the said opinion of the said judges in relation to the said paper writings, as to the opinion of the said CUSHING, delivered to the said jury," &c.

*Stockton*, for plaintiff in error, contended, that the circuit court had erred, 1st. On the general merits of the case; and 2d. In admitting improper evidence to go to the jury.

I. As to the merits. The exception in the policies is of the case of seizure for illicit trade, not of seizure for an attempt to trade. The latter case is within the policy, and is one of the risks which the underwriters have taken upon themselves. Actual trade, and a consequent seizure therefor, must both concur, in order to protect the underwriters. The evidence stated in the record, if it proves anything, does not show that the seizure was for any act of illicit trade. To make the most of it, would be to say, that it was a seizure on suspicion. But it rather seems to be an act of violence, a marine trespass, not warranted even by the law which the defendant has produced. It appears in the record, that the trade has been, generally speaking, interdicted, ever since the year 1591, and that this fact was known to both parties. Every general history of the country proves the general prohibition of the trade, but that it is sometimes permitted. The intent to trade is not an illicit trade. The real import of the policy is this, "we know the general prohibition of the trade, but that permission is sometimes granted. Go on

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with the voyage, \*try to get permission, but see that you do not trade without leave; if you do, it is not at our risk. Underwriters are always presumed to know the nature of the voyage, and the course of the trade. "In general," says Lord MANSFIELD, in *Pelly v. Royal Exchange Assurance Co.* (1 Burr. 341), "what is usually done by such a ship, in such a voyage, is understood to be referred to by every policy, and to make a part of it, as much as if it were expressed." The same principle is recognised in *Noble v. Kennoway*, Park (49) 44; 2 Doug. 512.

No objection can be taken to the policy, because it was upon a voyage for a trade illicit by the laws of Portugal, although a policy upon a trading voyage, made illegal by our own laws, might be vacated. *Delonada v. Motteux, Planche v. Fletcher, and Lever v. Fletcher*, Park 268 (236).

The intention to trade can never be construed an actual trading. The difference between the intent and the act, in the case of a deviation, is taken in Park 359 (314), *Foster v. Wilmer*, and *Carter v. Royal Exchange Assurance Co.* If the intention could be taken for the act, the vessel might have been seized by the Portuguese, on the very day she left New York, and the underwriter would be discharged.

The sentence does not go on the ground of illicit trade. At most, it only expresses a suspicion. Besides, the vessel was seized five leagues from the land, at anchor on the high seas. The seizure was not justified by their own laws: she was not within their territorial jurisdiction. By the law of nations, territorial jurisdiction can extend only to the distance of cannon-shot from the shore. Vattel, lib. 1, c. 23, § 280, 289. A vessel has a right to hover on the coast: it is no cause of condemnation. It can, at most, justify a seizure for the purpose of obtaining security that she will not violate the laws of the country. The law which is produced forbids the vessel to enter a port, but does not authorize a seizure upon the open sea. Great Britain, the greatest commercial nation in the world, has extended her revenue laws the whole length of the law of nations, to prevent smuggling. But she authorizes seizures of vessels only within the limits of her ports, or \*200] \*within two leagues of the coast; and then only for the purpose of obtaining security. 4 Bac. Abr. 543.

The reason that the supercargo went on shore was the want of water; and the evidence proves that the want was real. For this purpose, he had a right to go on shore, and although he thereby placed his person in their power, yet that did not bring the vessel into port.

The sentence is not evidence of the facts which it recites. It is conclusive only as to the very point of the judgment. Peake's Law of Evidence, 46, 47. It shows on its face, that the seizure was made, not for an actual trading, but on suspicion of an intention to trade.

II. The circuit court erred in admitting the evidence which was objected to.

1. It did not appear to be the sentence of a court having competent jurisdiction. *The Henrick and Maria*, 4 Rob. 55. "A legal sentence must be the result of legal proceedings, in a legitimate court, armed with competent authority upon the subject-matter, and upon the parties concerned; a court which has the means of pursuing the proper inquiry, and of enforcing its decisions." The court may, perhaps, take judicial notice of the proceedings of a court of admiralty, but this cannot apply to the sentence of a



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governor. The circuit judge declared the sentence to be evidence, because he did not know that there was any other tribunal. But the jurisdiction of the court ought to appear. The laws which are produced do not show the authority of the governor to condemn. Peake's L. Ev. 47, 48.

2. But the laws themselves are not sufficiently authenticated. They are only certified by a secretary of state, with his sign manual and private seal. They ought at least to be certified under the great seal. A private act of this country must be proved by a sworn copy compared with the roll. So of foreign laws: they must be proved as facts, by testimony in court. *Freemount v. Dedire*, 1 P. Wms. 431; *Mostyn v. Fabrigas*, Cowp. 174; *Collet v. Lord Keith*, 2 East 260, 272-3. \*It appears by the testimony in the [\*201 record, that the vessel was not seized for an attempt to trade, but captured on suspicion of being an enemy, or as a spy sent by the French.

3. The sentence is not duly authenticated. Is a secretary of state a proper certifying officer of a judgment of a court in the colonies? To ascertain what is a sufficient mode of authentication, the principles of the common law must be our guide. By that law, there are only three modes: 1. Exemption under the great seal: 2. A sworn copy, proved by a person who has compared the copy with the original: 3. The certificate of an officer specially authorized *ad hoc*. It has not even the seal of the court. If the court had no seal, that fact ought to have been proved. Why was it not certified under the great seal? One nation will take notice of the national seal of another. Why was not the American consul sworn? Of what validity is the certificate, or the seal of a consul? Why have they not produced a sworn copy of the proceedings? An American consul is not a certifying officer. The court can take no more notice of his certificate than of that of a private person. There is no case to be found in a court of common law where it has ever been received as evidence. Bull. N. P. 226-29; *Leyfield's Case*, 10 Co. 93; *Anon.*, 9 Mod. 66; *Greene v. Proude*, 1 Ibid. 117; *Hughes v. Cornelius*, 2 Show. 232; *Green v. Walker*, 2 Ld. Raym. 863; Peake's L. Ev. 48.

*Adams*, for defendant.—From the papers which have been read to the court, and from the statement of the case made by the gentleman who opened the cause in behalf of the plaintiff in error, it becomes unnecessary to make any preliminary observations, to possess the court of the questions between the parties now to be decided. The verdict of the jury, and the sentence of the court being in favor of the defendant, the underwriter on the two policies, the judgment, it is presumed, will, of course, be affirmed, unless the objections stated against it by the plaintiff in error should be deemed by this court sufficiently substantiated, and of such a conclusive character as necessarily to require a reversal. It \*is, therefore, incumbent on us, [\*202 only to meet the exceptions taken by the plaintiff's counsel against the judgment of the circuit court; which exceptions are two: 1st. Against the construction given by the circuit judge to the policies; and 2d. Against the evidence admitted for the defendant; the one of substance, the other of form. The one involving the merits of the only question upon which the issue of this litigation can depend, and the other only pointed at the weight and authenticity of the evidence admitted by the circuit court. The one founded on the position, that the defendant has no good bar to the claim of the plain-

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tiff against him ; the other resting on the basis, that strong and unanswerable as his defence may be, the proof that supports it was not clothed with that official solemnity which could alone entitle it to credit, and that it wanted that most powerful of all tests of truth—a bit of sealing-wax.

I shall ask the liberty of inverting the course of argument adopted by the gentleman who opened the cause, because, in point of time, the objection against the omission of the evidence, naturally precedes the discussion on its legal operation. He certainly was aware of this, and it is presumable, that he himself inverted the natural order of his argument, only because he wished to reserve for the last, the point upon which he placed his principal, perhaps, his only, reliance for success. A similar motive, however, must produce the contrary effect upon me, and induce me to return into that direct road, that broad highway, from which he deviated, only because the winding path gave him a shorter passage to the term at which he was desirous to arrive. For my own part, though confident, as before the decision of this court I ought to be, that the objections against the evidence are not so powerful as that gentleman's eloquence represented them, though persuaded that this court will concur rather with the opinion of the circuit court, than with that of the plaintiff's counsel, even upon this point, yet I will candidly confess, that I feel more sanguine upon the question to the merits, than upon the question to the forms ; for if the evidence can but show its face in the cause, we think it must require the utmost refinements of ingenuity, to raise the shadow of a doubt upon its operation.

The objection against the evidence divides itself into two branches :  
 \*203] \*1. Against the two Portuguese laws. 2. Against the sentence of condemnation by the governor at Para.

Before I examine the reasons and authorities upon which these papers are respectively questioned, I must make one remark, which will be alike applicable to the attacks upon both. All the arguments by which they are assailed, rest only upon the rules, and not upon the principles of evidence. I do not mean to say, that the rules of evidence are not founded upon principles. I know them to be founded upon the soundest principles ; but the operation of the rule which is positive, and, in some sort, arbitrary, is not always conformable to the principles upon which it is founded. Thus written evidence is in its nature of superior weight to mere parol testimony, for *verba volant, littera scripta manet* ; words barely spoken are fleeting, but when written become permanent. From this principle, is derived the rule, that parol testimony shall not control the operation of a written instrument : yet it often happens, from various causes, that parol testimony is stronger than written evidence, and in such cases, it is the practice of all courts to receive it, in contradiction to the general rule. Thus, as all the positive rules of evidence are derived from some principle, so, in their operation, they are always governed by this principle at once of reason and of humanity, that no man can be required to perform impossibilities. Hence, all the positive rules and gradations of evidence are subject to this exception, and both in courts of law and of equity, no party can be required to produce evidence of a higher order than he can obtain. It cannot possibly be necessary to produce the authorities, with which the books teem, of cases in which evidence of a lower order has been admitted, when the higher evidence, appropriate to the cause, was not accessible to the party. But if the principle itself be re-



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cognised, I trust it will be in our power to show, that the defendant comes within the rule of its application, and that this testimony was the best which it was in his power to obtain. These observations will furnish an answer to the rules and authorities which the gentleman adduced in support \*of his objections, both against the laws, and against the sentence of con- [\*204 demnation.

I. As to the laws.—We are told that foreign laws must be proved ; and what the foreign law is ; and the authorities alleged in support of this assertion are, Cowp. 174, and 2 East 260, 273. This we are not at all disposed to deny ; though reasons might be given, why the rule ought not to be admitted, in its fullest latitude, in this country. This question is, however, quite immaterial to us, in the present case ; because we did adduce proof of these foreign laws, and the only point to settle is, whether it was good and sufficient proof.

It is said, that foreign laws must be put on the footing of private laws, and must be authenticated, 1st. By an exemplification under the great seal ; or 2d. By a sworn copy from the rolls. To this we answer—

1st. That the rules for the proof of foreign laws ought not to be put upon the footing of private laws ; for this plain reason, that every subject can obtain, of right, an exemplification under the great seal, or a sworn copy, from the rolls, of a private act of parliament. But it is not the practice of all foreign governments, to issue exemplifications under the great seal ; or to keep their laws in rolls of parchment. It is not the practice, for instance, in Portugal, as is apparent from these laws themselves. The practice appears to be, to register the laws in sundry public offices, and one of them, the comptroller of the exchequer, is required to send copies to the possessions abroad ; but it does not appear, that any subject, much less any foreigner, can obtain copies of them by application to any officer whatsoever. The first law is dated at Valladolid, was made by a King of Spain, while Portugal was under the dominion of that kingdom, and was a public law. To require, therefore, an exemplification, or a copy from the rolls of this, would be, as if a party, in these \*United States should be called upon to produce [\*205 an exemplification, under the great seal of England, or a copy from the rolls of parliament, of a public act of parliament, passed in the reign of Queen Elizabeth, in order to prove it a law in this country. A copy from the rolls, therefore, where there are no rolls to copy ; an exemplification under the great seal of Portugal, of records in the chancery of Spain, are impossible things ; a party can never be required to produce them, and the authentication of these foreign laws, at least, cannot be put on a footing with that of private statutes in Great Britain.

Yet even if the rules relative to private statutes were applicable to the case, we should certainly come within the exceptions which have been allowed in the British courts. The rule itself is founded rather on a quaint and artificial process of reasoning, than upon a fair and liberal principle ; and when the object of a private statute is in any degree public, or is of a nature to be notorious, the English judges do relax from the rigid muscle of the common law, and receive the printed statute book as evidence. 2 Bac. Abr. 609 (Gwillim's edition), and the authorities there cited.

If the principles recognised in these authorities are just, they apply eminently to this case. Here is a law, public in its nature, known to all the

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world, for these two centuries, and confessedly known to both the parties in the present action. On principle, therefore, a printed copy would be admissible; and if, by the reasoning of the English judges, the printed statute book derives authenticity from the types of the king's printer, surely this copy of a foreign law must be allowed to derive more authenticity from the official certificate of so respectable an officer as a consul.

But with all submission to the opinion of the court, I contend, that under the circumstances of this case, the certificate of the consul was the best evidence, which, in the nature of the thing, could be produced, of these laws. To whom else could the parties have applied? Even in England, a copy of public acts of parliament, from the rolls, would not be furnished to individual applicants. In Portugal, there is every reason to presume, no such \*206] copy could be obtained. As it respects the first law, made by \*a king of Spain, two hundred years ago, it may be considered as demonstrated. The jealousy of the country with regard to any intercourse between foreigners and their colonies, might, and probably would, have made it dangerous for any foreigner to apply for a copy, under the great seal, or with any extraordinary authentication, of these laws. And after all, when obtained, would the great seal of Portugal, or the signature of the chancellor of Portugal, have been so well known to this court, as the seal and signature of an officer of our own government, residing there?

We are asked for an office copy, certified by an officer intrusted *ad hoc*. But why is credit given to office copies? Because the officer is publicly known; because his business to keep the records is equally notorious, and courts of justice will take notice of it. Surely, this can give no credit to the office copy of a Portuguese clerk or secretary. Surely, neither the name, nor office, nor trust, nor duty of a scribe in the chancery at Lisbon, can be so well known to this court, as the consul commissioned by the executive government of our own country.

We are called upon for a sworn copy; but by whom should the affidavit be made? By the consul, said the gentleman. And before whom? This he did not say, but it could be only before a Portuguese magistrate. And who is to authenticate the magistrate's certificate of the oath? The consul. So that, in the end, the authenticity of the whole transaction must depend upon the consul's certificate. The magistrate who administers oaths, is a person of notoriety to his own government; but to make him equally known to the tribunals of foreign nations, requires, in general practice, the attestation of some officer recognised by the law of nations. Such an officer is a consul; and where no public agent of a higher rank from the same nation is resident, I cannot imagine any attestation of the laws of one country, to the courts of another, so well entitled to credit, as that of the consul from the nation to whose courts the attestation is to be made.

I have observed, that by the Portuguese practice, the laws are registered, and not enrolled. There is an express authority that a copy attested by a \*207] notary-public, \*of an agreement *registered* in Holland, may be given in evidence; and if a public notary's certificate is sufficient to authenticate a registered agreement, I see not why a consul's certificate should not be equally well adapted to authenticate a registered law. 12 Viner 123.

Let me add, that in this country there are peculiar reasons for unscrewing the most rigorous positive rules for the forms of evidence, in these cases



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where transactions beyond seas are to be ascertained. The intercourse of European nations with one another is carried on by a continual and almost daily interchange of mails. In six weeks, a communication and its return may be accomplished from one extremity of Europe to the other. Defects of forms in obtaining evidence may be repaired, within the term of a court in session, or at most, from one quarterly term to another. An accident, by the loss of papers transmitted by the post-offices, seldom happens: and happening, can speedily be remedied. The delay and expense to the party is not necessarily of material importance to him, even if he is compelled to renew an experiment to obtain papers properly authenticated. The same inflexibility of rule must, in the nature of things, much more powerfully check and retard the pace of justice in this country. There is no regular and periodical communication of mails, for instance, between the United States and Portugal. Instructions to get evidence can be sent, and answers received, only by the occasional conveyance of commercial navigation. Six months, on an average, is the shortest period of time within which answers to letters can be received. If any of the accidents of the seas happen to the orders transmitted, or to the documents returned, the time requisite to receive them is more than doubled. This court, the court of final resort for most cases in which these rules of evidence can apply to the matter in dispute, sits but once a year. It is remote from many of the cities where causes requiring evidence from abroad must in general arise. If an end of litigation is an object of importance to the public welfare; if it be of the greatest interest to all individual suitors, every inducement, public and private, must combine to prescribe rules of facility, and not rules of rigor for the mere formalities of evidence to be brought from beyond the Atlantic. \*If, [\*208 then, the unbending maxims of the common law really required for foreign laws a different authentication than the certificate of a consul, there would still be the most cogent reasons for admitting it as sufficient in this country.

2d. The same reasons apply still more forcibly to the sentence of the Governor of Para. How is it possible to require that a suitor should produce an exemplification, a sworn copy, or an office copy, of a document, when he is forbidden, on pain of death and confiscation, to set his foot in the country where alone those modes of authentication could be obtained? The practice of the Portuguese government appears upon the face of these papers. The governor transmits to the secretary of state at Lisbon, the original sentence of condemnation, with the proceedings upon which it was founded. And the secretary of state, who remains in possession of these original papers, furnishes, under his hand and seal, a copy of them to the public agent of the nation to which the condemned vessel and cargo belonged. If this evidence is not of so high a nature as an exemplification under the broad seal, it derives, from the high and important station of the attesting officer, a higher credit than a mere office copy, or even than a copy attested by the affidavit of an obscure individual. *Bingham v. Cabot*, 3 Dall. 19-42.

The laws, therefore, and the sentence of the governor are authenticated by the best evidence which, in the nature of things, was attainable by the party; and if this court should be of opinion, that it ought to have been rejected, I should be altogether at a loss to instruct my client, where or how to apply for better, unless the court would themselves condescend to give

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their directions ; the methods suggested by the plaintiff's counsel being altogether impracticable.

3d. But it is said, the sentence was not of a court of competent jurisdiction upon the subject-matter ; and we are called upon to prove the jurisdiction of the court. This objection was made by the gentleman, before he \*209] questioned the evidence as to the laws ; and he appealed \*to the laws themselves, to support it. He said, the laws themselves speak of judges : that this court will not presume the jurisdiction of the governor of a province ; and that it is not like a court of admiralty, which is a court for all the world. But—

1. The laws do, in many places, give, by necessary implication, and in express words, jurisdiction to the governor,

2. The second law does speak of other judges ; but they are appointed for the trial of the governors themselves, and of Portuguese subjects offending against the laws, and not of foreigners. Indeed, most of the penalties of the second law are pointed against the subjects of Portugal engaging in, or conniving at, the forbidden traffic, as those of the first law are chiefly directed against the foreigner. And—

3. The comparison between the governor's court and a court of admiralty is inapplicable, for the very reason which the gentleman suggests. A court of admiralty is a court for all nations ; and no such court can exist, where all nations but one are excluded upon the most vindictive penalties. The gentleman's arguments against the colonial jurisdiction of a governor might be of weight, addressed to the court of Lisbon, to persuade them to open the ports of their colonies to all the world, and establish courts of admiralty in the ports of Brazil ; but they cannot take from the governor the jurisdiction given by the laws, and further recognised by the attestation of the Portuguese secretary of state to the papers transmitted by him.

II. I shall now return to the first point of the gentleman's argument, and considering the evidence as duly authenticated, examine his objections against the opinion of the circuit judge, relative to the construction of the policies. The opinion of the judge was, that the loss came within the exceptions in the policies, and therefore, that the underwriter was not liable.

\*The plaintiff, by his counsel, says, that the loss was not within \*210] the exceptions, and that, therefore, the underwriter was liable. The question, therefore, is a question of construction upon the true intent and meaning of the exceptions contained in the policies ; and it will be proper to state the words in which the exceptions are couched, and then apply to them the facts in evidence, and the proper rules of construction adopted in similar cases.

The words in one policy are, 1. "The insurers are not liable for seizure by the Portuguese for illicit trade." In the other, 2. "*N. B.* The insurers do not take the risk of illicit trade with the Portuguese." In both instances, the words are within the body of the policy, and in their effect are in the nature of a warranty *quoad hoc*. The meaning appears to be exactly the same in both instances, and had the words been "warranted against seizure by the Portuguese, for illicit trade," their force and meaning would have been exactly the same.

If there can be a reasonable doubt as to the construction of these words, we must recur to the ordinary rules of construction, which govern the cases



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of warranties and exceptions. There is no rule more universally known, than that, as for what the underwriter takes upon him in the policy, a large and liberal construction must be given to his words, to favor the assured; so, for what is excepted out of the policy, or warranted by the assured, a rigorous and strict construction must be given, to favor the underwriter; upon the reasonable and reciprocal principle, that words introduced for the benefit of either party shall receive the construction most favorable to the interest of that party. Hence, if the meaning of these words were, in either case, equivocal, that construction which would be \*most favorable to the underwriter, for whose benefit they were introduced, [\*211 ought to prevail.

I apprehend, however, that there will be no occasion for resorting to this rule of construction. To me, the meaning of the parties appears so obvious, in the expressions used, that they are susceptible only of one construction. It must be remembered, that this was professedly a voyage for the purpose of illicit trade. The voyage itself was illegal, according to the Portuguese laws, and known to be so by both parties. The vessel, though bound to two Portuguese ports, was cleared out for the Cape of Good Hope, a deception not intended to be practised on the underwriters, but on the Portuguese, and proving to demonstration, the full knowledge on the part of the plaintiff, that the mere act of going to Brazil, was a violation of the Portuguese trade laws, subjecting his vessel and cargo to seizure and confiscation. Indeed, the gentleman who opened the cause for the plaintiff, in one part of his argument, admitted, and strenuously urged, this knowledge of the illegality of the voyage, and most ingeniously attempted to draw from it a deduction in favor of Mr. Church's claim. I shall notice this hereafter; at present, I shall only remark, that the directly opposite inference, appears to me the true one. It appears by the papers, that the instructions to Mr. Blagge, in Boston, the agent who effected the insurance, were to obtain it at the Marine Insurance Office, in preference. Yet the insurance was not effected there, nor at the other incorporated office, then existing in Boston. They never make insurance of any kind on voyages known to be illegal. Mr. Church's agent, therefore, could obtain insurance only at the private offices of individual underwriters, and that on the express condition, that they would take no risk for illicit trade, nor answer for seizure on that account.

The exception, therefore, is not, and could not be, against illicit trade; for this was intended; and it would have been absurd, to warrant against what was the sole object of the voyage. But this was a risk which the underwriters would not assume; and their language in \*the policy is, [\*212 we will insure you against the usual risks of an ordinary voyage, and although you clear out for the Cape of Good Hope, you shall go to one or two ports of Brazil; but as your voyage, by the laws of that country, is illegal, we will bear none of the perils which this circumstance may lead you into with the Portuguese. Your profits from the voyage may be enormous; but you may get into trouble, and those chances you must take entirely upon yourself.

The language in the exceptions is conformable to this idea. It refers entirely, not to the act of the party, but to the acts of the Portuguese. It excepts, not against the illicit trade itself, but against seizure on that ac-

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count ; and against the risk with which it must be attended. So that, if there had been no sentence of condemnation, but merely an order for seizure, on account of illicit trade, by the Governor of Para, the underwriters would have been discharged. There is some analogy between this exception and an ordinary warranty of neutrality ; but this is a much stronger case. To falsify a warranty of neutrality, the sentence of a court of admiralty is necessary, because that alone can decide the question of neutral or not. But a warranty against detention for not being neutral, or against capture as enemy's property, would resemble this ; and such a warranty would undoubtedly discharge the underwriters, from the moment of the detention or capture on that account, without needing the sentence of a court of admiralty on the question of prize or not.

The gentleman, in the principal part of his argument on this point, urged, however, that the exception was not against the risk of illicit trade, not against seizure for illicit trade, but against illicit trade itself ; that is, against the sole object of the voyage. He says the language of the underwriters is, go and get permission to trade, if you can ; but take care not to trade, without permission, and he has laid great stress upon the depositions, to show that all nations do trade there, with permission. But the whole weight of this reasoning rests upon the idea, that the permission to trade, by the governor, \*would have made the trade legal, and that  
 \*213] the plaintiff did not intend to trade illegally. This contradicts the whole tenor of the gentleman's argument, founded upon the known illegality of the trade. It contradicts the words of both exceptions, which explicitly refer, not to the trade, but to its perils, and it contradicts the whole tenor of the testimony, as well as what is known, and what I shall prove, that permission could not make the trade legitimate.

We are told, however, that the voyage alone could not be within the policy, because it was at and from New York to one or two Portuguese ports in Brazil ; and authorities have been cited to show that underwriters are bound to know the course of the trade. The voyage alone was not without the policy, in respect to all the perils undertaken ; but it was without the policy, in respect to the perils excluded by the exception. Thus, although the vessel was cleared out for the Cape of Good Hope, and the course from Rio Janeiro to Para was as wide as possible from that of such a destination, yet it was within the policy, and the underwriters could not have discharged themselves, on the ground of deviation. Thus far they were bound to know the course of the trade ; and they did know it, for they expressly declared they would take no risk arising from the peculiar character of the trade on which the vessel was bound. As to the authorities which the gentleman has read to show that no nation takes notice of the revenue laws of another, and that underwriters may be bound by insurance on a trade, illicit by the laws of the country where it is carried on, I shall not dispute them ; but they seem altogether inapplicable. The difference between the case of *Lever v. Fletcher* and ours is, that there, the underwriters had not thrown the risk of illicit trade out of the policy by any express exception : in ours, they have. Had our policies been without this exception, undoubtedly, the underwriters must, and would, have paid for this loss. But can any one imagine that if, in that case of *Lever v. Fletcher*, the words of our exception had been in the policy, Lord MANSFIELD would



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have told the jury that the underwriter might be liable for a risk of illicit trade, which they had, in so many words, excluded ?

\*It is said, that all nations do trade, with permission ; and to this I have replied, that even such permission does not legitimate the trade. [\*214 This is proved by the deposition of one of the plaintiff's witnesses, who testifies, "that when vessels go into Rio Janeiro, belonging to foreigners, they allege a pretence of want of repairs, want of water, or something of that kind, on representing which they obtain leave to sell part of the cargo for repairs, and to remain a certain time, usually twenty days, and then, by making presents to the officers, they are not prevented from selling the whole, but without those presents, they would probably be informed against. Such trade is a prohibited trade, but it is frequently done without a bribe." From this process, which is confirmed by historical testimony, it is apparent, that the Portuguese governors have no authority to license the trade. The same thing is equally clear, from the most ancient of these laws.

The principles of the Spanish and Portuguese governments have always, from the earliest periods of their colonial establishments, been founded on this total exclusion of strangers. In the autumn of the year 1604, a treaty of peace was concluded between Philip III. of Spain, and James I. of England. These two nations had, before that time, been for many years at war, and just then, their political interests attracted them towards a close alliance together. In the negotiations for the peace, this jealousy of the Spaniards against any commercial intercourse between foreigners and their colonies, formed one of the points upon which the greatest difficulties occurred. Spain insisted, not only that British subjects should be excluded from all trade to the Indies, but that James should expressly prohibit them from engaging in such trade, by his royal proclamation. This the British government peremptorily refused. The parties were, for some time, on the point of breaking off, at this very knot ; and they finally could meet on no other terms, than those of total silence on the subject. Spain, therefore, as a substitute for negotiation, immediately afterwards issued this decree, which has never since been repealed ; and when Portugal, some forty years afterwards, asserted and maintained her independence, she adopted, and has ever since practised on the same law. But in times when the mother country has been at war, and unable to superintend, with the usual keenness of observation, \*the conduct of the colonial governors ; when she is unable, from the obstructions in her navigation, to furnish the colonies with the sup- [\*215 plies they are accustomed to receive from her, in peaceable times ; when the demand for these supplies swells the prices of articles to exorbitant rates, and the governors are at once assailed by the impulse of opportunity, of necessity and of temptation, they have always occasionally yielded to the force of those inducements, and in various modes, have sacrificed the severity of official duty to the sweets of profitable corruption. They shut their eyes, and open their palms. They connive at the trade, and secure to themselves a large portion of its advantages. But the modes of transacting this business are themselves the most decisive proofs of its illegality. To show this, and as a comment upon the depositions which have been read in this case, I must ask permission to read a short passage from Raynal's Hist. of the Indies, vol. 6, p. 326.

"The illicit trade of Jamaica was carried on in a very simple manner.

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An English vessel pretended to be in want of water, wood or provisions; that her mast was broken, or that she had sprung a leak, which could not be discovered or stopped, without unloading. The governor permitted the ship to come into the harbor to refit. But for form's sake, and to exculpate himself to his court, he ordered a seal to be affixed to the door of the warehouse where the goods were deposited; while another door was left unsealed, through which the merchandise that was exchanged in this trade was carried in and out by stealth. When the whole transaction was ended, the stranger, who was always in want of money, requested that he might be permitted to sell as much as would pay his charges, and it would have been too cruel, to refuse this permission. It was necessary, that the governor, or his agents, might safely dispose in public of what they had previously bought in secret; as it would always be taken for granted, that what they sold could be no other than the goods that were allowed to be bought. In this manner, were the greatest cargoes disposed of."

Thus we see, that the modes of procedure in these cases are uniform, and hence, we may duly estimate the real secret both of Mr. Church's and Captain Barker's want of \*water and of wood. The fuel, of which they \*216] stood in need, was the produce, not of the forests, but of the mines. The thirst they suffered, was the thirst of gold: and as the clown in the play says, that Carolus must be the Latin for one and twenty shillings, so here, as from time immemorial, want of wood and water, on the coast of Brazil, is the Portuguese for want of money.

The fact, therefore, that foreigners do sometimes trade in Brazil, can be of little avail to the plaintiff's cause. Truly, they do trade; at great hazard, and sometimes, with great success. But as Mr. Church took the chance of this success upon himself, so he must be content to bear the consequences of its hazards, it being expressly so stipulated in the contract with the underwriters.

His counsel, however, has endeavored to assist him with another distinction between trade and an attempt to trade. "There is," says he, "no exception in the policies against an attempt to trade;" now, here, was no actual trading; for the seizure and confiscation took place before that could be accomplished. If this be a solid distinction, and can bear at all upon this cause, it is very certain, that the words of the exceptions in both the policies were very insignificant and immaterial, both to Mr. Church and to the underwriters. If the perils which they so cautiously excluded from the policy, were only such as could arise from actual trading, after bargain and sale of the cargo, the exceptions themselves were not worth the ink with which they were written. The only risk of the trade, the only peril of seizure for the trade, to which Mr. Church could possibly be exposed, was, before he could effect his sales. Could he once have got over the danger of going to the port, and of landing his goods, there was no danger of any subsequent seizure for illicit trade. To say, therefore, that an attempt to trade, is not within the exceptions, is to say, that the exceptions meant nothing at all; that they were precautions against misfortunes which could never happen; anxious guards against impossible contingencies; it is to remove the railing of security from the borders of the precipice which needs it, to the middle of a plain, where it can have no use. Strange, indeed, must be the construction which supposes parties so keen to pene-



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trate, and \*fence themselves against a peril which could not befall, and so blind to the foresight of the very thing that did happen, and was most likely to happen. It is the attempt to trade which constitutes the offence punishable with seizure and confiscation. When the trade is once effected, the danger is removed; the governor's connivance is secured; the laws are soundly slumbering, under the specific opiate of corruption, and the governor, instead of seizing the property, is satisfied with partaking of its proceeds.

It is, then, manifest, that the voyage itself, especially, when accompanied with the actual landing of persons from the vessel, constitutes the illicit trade. So it is there understood, and so it is understood by the trade laws of our own, and of all other countries. The gentleman has taken the definition of smuggling from the English law-books, and has argued, as if all illicit trade were synonymous with it. Smuggling is, indeed, said to be the landing or running of goods, contrary to law; but in the British revenue laws, and our own, there are many acts of illicit trade which subject to seizure and confiscation, without the landing of the goods. (1 U. S. Stat. 694, § 84; *Ibid.* 701, § 103.)

The gentleman, to illustrate his distinction between an attempt to trade, and actual trade, compared it to the case of deviation, and has read an authority (Park 359, 361), to show that an intended deviation, never carried into effect, does not vacate a policy, though an actual deviation does. But deviation consists of a single fact, and the intent can never be taken for the thing. Trading consists of a great variety of acts, each of which constitutes part of the thing. Navigation is trade; fishery is trade; bargain and sale of goods is trade, and the attempt to accomplish this, in the revenue and colonial laws of all countries, is equivalent to the last act of bargain and sale. The intent to deviate is so totally distinct from its accomplishment, that there can be no such thing as an attempt at deviation. As to trade, carrying goods from one place to another, is as much an act of trade as selling the goods carried. We say of a ship that she is a London or an Indian trader. An important branch of our business is the carrying trade. The word itself, like many others, \*has various meanings, [\*218 and must be understood in the sense dictated by the subject-matter to which it relates. Thus, by the Portuguese laws, going to Brazil for the purpose of trade, is itself illicit trade; as by our collection laws, a false entry of goods for the benefit of a drawback, or an importation of beer or spirits in casks or vessels different from those prescribed by law, would be acts of illicit trade, in our own country.

The second ground, upon which the gentleman alleges that the loss was within the policy is, that this was not a legal seizure for illicit trade; but a mere marine trespass; a violent, outrageous trespass committed by the governor. This, he says, appears, 1. From the testimony; and 2. Upon the face of the sentence.

If the meaning of the exceptions be such as I have contended, and as their express words import, this question might fairly be laid out of the case. If the exceptions were meant against seizure, and the risk of illicit trade, the only fact the underwriters can be required to establish is, that the property was seized for illicit trade. Whether the seizure was legal or not, is not for them to prove, as Mr. Church reserved that peril for himself. Let us, however, examine whether, either from the testimony or from the sen-

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tence, it was so outrageous a proceeding on the part of the Governor of Para. That it was, on the contrary, conformable both to the law of nations and to the Portuguese laws, will, I think, not be very difficult to prove.

It is said, that the testimony proves that the vessel was at anchor, five leagues from the shore. That by the law of nations, cannon shot is the boundary of territorial jurisdiction. And therefore, that the Governor of Para had no authority to seize and condemn the vessel and cargo.

1st. As to the fact. It will be found, upon examining and comparing the depositions, that they were manifestly drawn up with a view to taking this ground. The distance and the bearings from Cape Baxos, the extreme south and east point of land at which the Bay of Para pours into the Atlantic, is laid down in all the depositions with most minute attention, and \*219] three depositions repeat \*not only the distance at which the vessel lay from that Cape, but also the exact distance northward of it, by a meridian line drawn due east and west. Captain Shaler, however, only undertakes to say the distance from Cape Baxos was four or five leagues, and he candidly confesses that, at the time, both he and Captain Barker did call the place where they were anchored, the Bay of Para. Now, it is very apparent from their geographical bearing, so precisely laid down, which was west and by north, about four or five leagues distant, and only two miles north, that they called it by its right name, or that they were at least within a bay. Thus, then, stands the fact. They were about four or five leagues from Cape Baxos, and within the bay.

2d. As to the law. The gentleman read a passage from Vattel, to show that cannon shot from the coast is, by the law of nations, the utmost bound of territorial jurisdiction. Lib. 1, § 289. This passage is evidently restricted to the extent to which the rights of a neutral territory extend in time of war. The rule is apparently laid down for the sake of the inference from it, that a belligerent vessel cannot be taken under the cannon of a neutral fortress. It is a very indefinite rule, indeed, even for the purpose to which it extends, for it makes the extent of a nation's territory depend upon the weight of metal, or projectile force of her cannon. It is a right which must resolve itself into power; and comes to this, that territory extends so far as it can be made to be respected.

But this principle does not apply to the right of a nation to cause her revenue and colonial laws to be respected. Here, all nations do assume, at least, a greater extent than cannon-shot; and other passages from Vattel show the distinctions which are acknowledged on this point. Lib. 1, § 287, 288. It will also be remarked, that the territorial rights of a nation are extended in the utmost latitude to bays. Thus, then, Mr. Church's vessel was completely within the territorial jurisdiction of Brazil.

\*220] But the gentleman read an authority from 4 Bac. Abr. \*543, upon smuggling. "The British revenue laws," says he, "go as far as the law of nations will permit, and they extend the right of boarding smugglers only to two leagues." Instead of appealing to Bacon's Abridgment, and British laws, I prefer looking into our own statute book, and take there the measure which our own government has asserted for the extent of our jurisdiction. (1 U. S. Stat. 646, § 25-27; Ibid. 700, § 99.) Here we see the principles are assumed of exercising this jurisdiction four leagues from the coast, and at indefinite distances, within bays. All this is perfectly conform-



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able to the law of nations. But it proves that the *Aurora*, when at anchor within the Bay of Para, and four or five leagues from Cape Baxos, was completely within the territorial jurisdiction of the governor of Para.

I have here said nothing of Mr. Church's going on shore for purposes of trade, nor of the imprudent conduct of the people with whom he was associated, which probably occasioned the exercise of the governor's authority. Either of these facts, however, would have warranted the governor in seizing the vessels, even if they had not been within his territorial jurisdiction. Mr. Church's going on shore was, under these laws, an act of hostility, which, undoubtedly, gave the governor a right to seize the vessel in which he came, as well as his person. But a much more offensive act of hostility was committed by the vessel in company with which Mr. Church's vessel was. For it appears from the testimony, that they had forced a Portuguese schooner, in the bay, to board them, by firing two guns successively to bring her to ; and had detained the master of that schooner, on board their own vessel, because they wanted a pilot. The people in the Portuguese schooner were excessively alarmed ; nor is it surprising they should be. They immediately went into port, and doubtless, complained of the usage they had received. Now, I ask, what sort of laws they would be, which, under such circumstances, should deny to the government of a country, the right to touch a vessel thus conducting, because she is anchored \*four or five [\*221 leagues distant from the shore. I cannot dwell upon this argument. The Governor of Para knew of no such laws. The next day, he sent three armed gun-boats, which took possession of both the vessels. And far from seeing anything outrageous in this procedure, I think the governor would have been guilty of a high breach of duty had he done otherwise.

But Mr. Church really wanted water, and had a right to go on shore to procure it ! After the deposition of Van Voorhies, with the commentary of Raynal, it is scarcely possible to hear this allegation, without a smile. It is, however, very conclusively answered by the governor's sentence, and I shall notice it, in examining the objections to that. The court will need no argument to show that, if Mr. Church wanted water, it was his own fault, and in consequence of his own purpose. But further, the testimony is express, that he went for trade as well as for water, and this alone made him liable to the loss of his vessel and cargo.

But the testimony shows the seizure was on account of their being French spies ! When these vessels and their force was known, there could be very little occasion to fear them as enemies. But I have no doubt, questions of the kind were put to the witnesses, as they state in their depositions ; and the reason for those questions is explained by that imprudent firing and forcing of the Portuguese schooner to board them, which I have before noticed. It was very natural, that the people of the Portuguese schooner should be alarmed ; and on going ashore, that they should communicate their alarms, which would, of course, be immediately spread, with exaggeration. Such acts of direct and violent hostility, within the bay, might, and in all probability would, be imputed to French cruisers, and not to American traders ; to a nation with which Portugal was at war, and not to a people with whom she was at peace. Hence, suspicions, probably, at first, existed which led to the examination of the witnesses on those questions. But when the truth was discovered, the governor gives the real reasons for his decision.

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\*Thus much, to justify the governor's sentence, from the testimony ; upon which I shall conclude with one more observation. It is extremely probable, that this firing of guns, and the violence done to a Portuguese schooner, was the foundation of all the severity used towards Mr. Church, his companions and their property. When he landed in the evening, most probably, the people of the Portuguese schooner had got in before him. They had, doubtless, entered their complaint, and represented the detention of their captain on board the American vessel. The offence was irritating to the highest degree : it must, in any civilized country, have alarmed the sympathies, and roused the resentments, of the people. It was one of those cases which call in a voice of thunder upon the ruling power of a country to exercise, with firmness and rigor, all its force for the protection of the laws, and the personal security of the subject. Let us, but for a moment, suppose one of our own coasting vessels to go into a harbor of Chesapeake or Delaware Bay, with intelligence that she had been forcibly brought to, and her master taken from her, by a vessel at anchor within four or five leagues of the shore. Is there a governor of one of these states, who, upon such a representation made to him, would not feel it his duty to use the strongest arm of the law to protect his fellow-citizens, and to punish the outrage ? Surely not. He would immediately send an armed force and take possession of the vessel ; and if, upon the examination, it should appear that the vessel itself came for the purpose of prohibited trade, in the name of common sense, and common justice, what indulgence could the supercargo or crew of such a vessel expect at the hands of the public officers of the country ? If

In the corrupted currents of this world,  
Offence's *gilded* hand can shove by justice,

she must, in truth, gild her hand, and not arm it with steel. Had the Governor of Para been ever so much disposed to grant Mr. Church the permission to trade, he could not have indulged his inclination, after what had taken place.

\*223] The sentence itself seems also to carry its own justification \*with it. The order and sentence condemn the property, on account of their having put into a port of the establishment ; and of their having incurred the transgression of the decree of the 18th March 1605. When we apply the facts in evidence to the law of 18th March 1605, we find that Mr. Church and his property had actually incurred these penalties. They certainly had put into a port of Brazil ; and for trading purposes. They had even traded at Rio Janeiro ; and although that was to a small amount, and with permission, the Governor of Para, comparing their traffic there, under pretence of distress, with their conduct afterwards, in coming within his own province, might justly recur to that former act, as connected with the present one, in constituting the offence against the law.

But the sentence goes further. It states the reasons upon which it is founded. It recites the allegations of the master in his defence, and assigns the reasons of the court for disbelieving them. It notices in a special manner the pretence of wanting water, and very conclusively disproves it.

1. Because they were only 34 days from Rio Janeiro ; and had suffered no want of water, in a voyage of double that time from New York to that place. The reason is certainly logical in substance, if not in form. If they



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were supplied with water for more than sixty days from New York, why were they not supplied for an equal length of time from Rio Janeiro? No accident being even pretended for the failure of their supply.

2. Because they had neglected to supply themselves, as they might have done, at various places along the coast.

3. Because they had, at their first landing, alleged a wish to traffic and not to obtain water.

4. Because they had alleged that the vessel had sprung a leak, which, upon regular examination of the ship, had proved not to be the case.

\*5. Because they were steering their course wide from the pretended destination of their voyage, and had neglected to sail for the trade-winds, which they would have wanted for that destination. [\*224

6. Because they must be considered as accessory to the hostile acts of the vessel with which they were in company; against which vessel the proofs were decisive. And—

7. Because these false allegations were themselves a proof that the person who made them was not ignorant of the laws he had violated.

Far from considering this sentence, therefore, as an outrageous act, I cannot avoid expressing the opinion, that it indicates a sound judgment, a sincere respect for the rights of humanity and of innocence, and a punctilious adherence to the law of nations, and the duties of hospitality. Certain it is, that the governor's reasoning led him to a conclusion which was just in fact; for Captain Shaler tells us that, on his examination, he denied that trade was intended, and he also tells us, that trade was intended. The governor, therefore, had not learned the truth from him; but he had discovered it, by just deductions from fair premises, though in direct opposition to Shaler's declaration.

The regard for the rights of humanity and the duties of hospitality is apparent, from the anxious care with which the governor details his reasons for believing that the want of water was falsely alleged; mere pretence; mere affectation; for this solicitude to disprove the fact, is the strongest implication that had he believed the want of water real, and unintentional, he would not have seized the vessel. The variance between the professed destination of the vessel and the course of her navigation, would be strong presumptive proof, in any judicial court. The company kept by the two vessels together, and the landing of the two parties from them, in the same boat, and at one and the same time, would, upon the principles of the common law itself, have made each party a principal to the hostile and illegal acts of the other. And what reasoning can be better founded \*than that the allegation of falsehood proves the knowledge, the consciousness of illegal conduct [\*225 in the person guilty of it. The order of seizure, therefore, contains a charge of unlawful acts, knowing them to be unlawful, and even in our own country, where the freedom of our citizens requires that every accusation should be direct, precise and pointed, I know of no one essential ingredient of indictment, which is not contained in this order of seizure by the governor of Para. The sentence of condemnation is founded upon it, and adopts its conclusions. It has, therefore, all the material characteristics of a legal condemnation for illicit trade; and must be a decisive bar against Mr. Church's claim of indemnity upon these policies.

I have now gone through the examination of the grounds upon which the

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exceptions of the plaintiff against the judgment of the circuit court were attempted to be supported by his counsel. It has been my endeavor to show that the evidence was properly admitted, and that its operation was justly held conclusive against his demand in this action. I shall not detain the court with any further argument, but leave the remainder of my client's defence to the management of abler hands.

*Mason*, on the same side.—It is objected, that this is the sentence of the governor, and it does not appear that he had admiralty jurisdiction. But the record produced does not state the condemnation of the vessel to have been made by the governor, but by a court. The governor only ordered the vessel to be seized, the master and crew imprisoned, and their papers to be sent to the house of justice. But the condemnation begins with these words: "It is hereby determined by the court," &c., and goes on, "therefore, *they* declared him to have incurred," &c.

It is admitted, that the trade is illegal. A permission obtained by bribery and corruption, cannot make it lawful. But it is said, that two things must concur to bring the case within the exception to the policy; an act of trading, and a seizure for that cause. \*Why should the underwriters insure against the risk of attempting to trade, and yet refuse to insure against a seizure for actual trade, when the whole risk of the insured was in the attempt? For after the water and the wood are gone, and the vessel, in due form, sprung a leak; when the goods are landed, and one of the doors of the warehouse sealed, and the other left open, all risk is past; for although the trade does not become lawful, yet a security is gained against prosecution.

It is objected, that the Portuguese had no right, by the law of nations, to legislate respecting vessels in the situation in which this vessel was seized. But every nation has a right to appropriate to her own use a portion of the sea about her shores; and to legislate respecting vessels coming within that line. A vessel, coming within the line, contrary to the municipal laws of the country, may lawfully be seized. Vattel, lib. 1, § 287.

The insurers did not take the risk of illicit trade; that is, of the unlawfulness of the trade. The word trade cannot be confined to the act of landing, or of selling the goods, but must mean the general course of the trade. And if any risk attended the attempt to land, or sell the goods, it was certainly one of the risks of the trade, and clearly within the letter of the exception. But if the evidence respecting the laws of Portugal, and the sentence, ought to have been rejected, still enough remains, to show that the loss is within the exception. For it is admitted, that the trade which the voyage was intended to effect, was illicit; the testimony shows that the vessel was seized by the Portuguese, and the jury had a right to infer that the seizure was on account of such illicit trade.

*Martin*, in reply, made two points.—1st. That the evidence was not admissible. 2d. That if admissible, it did not warrant the instruction given by the judge to the jury.

1st. As to the admissibility of the evidence. \*Foreign laws must be proved as private acts of parliament. Public laws are permitted to be read from the statute book, not because that is evidence, for no evidence is necessary, as the judges are presumed to know the law, but the



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statute book is permitted to be read, to refresh their memory. Our courts are not bound to notice the laws of Portugal; they must, therefore, be proved by evidence. And in this, as in every other case, the best evidence which the nature of the case will admit, must be produced; that is, the evidence produced must be such as does not show better evidence in the power of the party producing it.

The customs and usages of a foreign country may be proved by testimony of persons acquainted with them, by a public history, or by cases decided. But an edict, registered in any particular office, must be proved by a copy, authenticated in one of three modes. 1st. By an exemplification under the national seal; and this is admitted as evidence, because one nation is presumed to know the public seal of another. Peake's L. of Ev. 48. 2d. Under the seal of the court, which seal must be proved, if it be of a municipal court; or 3d, By a sworn copy collated by a witness. An exception has been allowed, as to the seal of courts of admiralty, in cases under the law of nations, because they are courts of the whole civilized world, and every person interested is a party. *The Maria*, 1 Rob. 296.

A copy certified by a person authorized *ad hoc*, is good in his own, but not in a foreign country, without evidence of his being such an officer.

Why is not a copy of the law produced, certified under the great seal of Portugal? In excuse for not producing such a copy, they ought at least to show that they have demanded it, and that it has been refused. They might have applied to the officer who kept the \*original, for a certified copy. [\*228 If they have done so, and have been refused, where is their evidence of that fact? They might have got a witness to compare a copy with the original, and proved it. The laws themselves, if authentic, show that there is a place where they are registered, and where the defendant might have applied.

The certificate of the consul is no authentication. He was not an officer authorized by the laws of this country to certify that the magistrate of the foreign country, before whom an oath has been taken, was a magistrate authorized to administer such an oath. He was not authorized *ad hoc*; and his certificate is not better than that of any other person. England, a great commercial nation, has many consuls in foreign countries, yet there is no case decided in England, in which the certificate of one of her consuls has been held to be evidence in the courts of common law.

As to the case of the notarial certificate, cited from 12 Viner, a notary-public is an officer of the law of nations. In the case cited, he was an officer of Holland, not of England; and the reason why the court allowed his certificate to be evidence, seems to have been, that the opposite party had also taken a like copy from the same notary.

The common mode of obtaining evidence was open for the defendant, and he ought to have availed himself of it, by taking a commission to Portugal, to examine witnesses there.

The case of *Bingham v. Cabot*, from 3 Dall. 19, is not in point. The question was not made, as to the validity of the certificate of the register of the court of admiralty, respecting the order given by the Marquis de Bouille, nor was the decision of the court given upon that point.

There is no proof that the law of 1605 was ever \*adopted by Portugal; but if it was, yet that is not the law upon which the governor [\*229

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proceeded, for he himself says he proceeded upon the law of 15th of October 1715.

The sentence of the governor was not a sentence of a court of admiralty. It was not conclusive. The decrees of courts of admiralty are only conclusive when deciding upon questions of the law of nations; Peake's L. Ev. 47. When deciding upon other questions, they are to be considered as mere municipal courts. This was not a question of the law of nations, but of their own municipal law. Even if it was a court of admiralty, deciding upon a question of the law of nations, no evidence could be admitted of its decree, but a copy under the seal of the court. But the judgment of a municipal court, upon a municipal law, must be proved like any other fact. Even the seal of the court would not be sufficient, without other evidence, that there was such a court, having such a seal.

Another objection to the evidence is, that the proceedings at large ought to have been set forth, not the sentence alone; and even the sentence is not complete, for it refers to other pages of the proceedings which are not produced. Peake's L. Ev. 26; Loft's Gilbert 24, 25; Bull. N. P. 228.

It has been said, that in this country the rule of evidence ought to be relaxed, on account of the distance from Europe, and the difficulties in procuring testimony. This might be a good argument before a legislature, but it cannot alter the law in this court. The rules of evidence already established ought to be strictly guarded. To break in upon them, would be to strike out every star and every constellation which can guide us through the tempestuous sea of legal litigation.

There is no evidence that the original proceedings were sent to the secretary of state in Portugal. There is no \*certificate of the clerk of  
\*230] any court. If it is a copy of the original proceedings, they appear to have all taken place on the same day. The judgment is only an interlocutory decree, and is not signed by any body. The officer who certifies that it is a true copy, resided at Lisbon, and not at Para. There is no evidence that he was authorized *ad hoc*, and he has affixed only his private seal.

In order to make a legal sentence, there must be legal proceedings, in a legitimate court, armed with competent authority upon the subject-matter, and upon the parties concerned. *The Henrick and Maria*, 4 Rob. 55. The defendant must show the law which gives the court of Para jurisdiction, and that the authority has been pursued. The authority of the court does not appear; and it is contrary to the natural principles of justice, to condemn the vessel, without giving the owner an opportunity to be heard. In this case, there was no monition issued. No forms were pursued, either against the vessel or the owner, and the evidence shows that he had no notice. The sentence, if it proves anything, does not show that the condemnation was for illicit trade, or even for an attempt to trade; and it cannot be evidence of any collateral fact.

As to the pretended act of hostility, it was by another person, not the owner or master of this vessel. It was in its nature equivocal, and is explained away by the testimony.

2d. The instruction of the judge to the jury ought not to have gone further than that, if they were of opinion, that the vessel was seized for illicit trade, the insurers were discharged; but if for any other cause, they were liable. If any ground of condemnation can be gathered from the sen-



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tence, it is that of being an enemy, and not illicit trade. Although the trade is generally prohibited, yet it is a well known fact, that foreign ships do trade there, and have done so for a century. It is not illegal, to insure smuggling voyages against the risk of seizure by a foreign government. There is no instance of a vessel being seized for going along shore, or into the ports of the colonies of \*Spain or Portugal for the purpose of [\*231 trading, if they could gain permission, provided they did not actually trade without permission. There must be some act done, more than going into port. This must be the construction of the law. Such is the construction given to the English law, which prohibits foreign vessels from going into their ports. They are not liable to seizure, unless they go *malá fide*. Reeves' Law of Shipping, 203.

The premium is twenty per cent., which implies extraordinary risks. In the case of *Graves v. Boston Marine Insurance Company*,<sup>1</sup> now pending in this court, the premium was only twenty per cent., and yet no such exception was made.

The exception is not a warranty. Policies are to be construed in favor of the assured. The exception is the language of the insurers, and to be taken most strongly against them. It means only legal seizures. A warranty against all claims, means all legal claims. The general clause of the policy is against all seizures; the exception, therefore, must mean all legal seizures.

No act of trading is proved. If the intention makes the offence, a Portuguese vessel might have seized the *Aurora*, on the day after her leaving the port of New York, and carried her to Portugal and condemned her. If, then, her sailing with the intention to trade was not an act of illicit trade, something further was necessary to constitute the offence. The policy does not except the risk of seizure for suspicion of illicit trade. It is a general rule, that words are to be construed most strongly against the person using them, and who ought to have explained himself.

If the evidence respecting the laws and the sentence be rejected, the remaining evidence will only show that a seizure was made, but not that it was lawful; and for all unlawful seizures, the underwriters are liable. Legal seizures only are excepted. To make it a lawful seizure, it must be for some act done; not merely upon suspicion. The underwriters meant that the plaintiff should go and \*try to get permission to trade; but if he [\*232 attempted to trade, without leave, they would not take the risk.

March 5th, 1804. MARSHALL, Ch. J., delivered the opinion of the court.—If, in this case, the court had been of opinion, that the circuit court had erred in its construction of the policies, which constitute the ground of action; that is, if we had conceived, that the defence set up would have been insufficient, admitting it to have been clearly made out in point of fact, we should have deemed it right to have declared that opinion, although the case might have gone off on other points; because it is desirable to terminate every cause, upon its real merits, if those merits are fairly before the court, and to put an end to litigation, where it is in the power of the court to do so. But no error is perceived in the opinion given on the construction of the

<sup>1</sup> Reported, *post*, p. 419.

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policies. If the proof is sufficient to show that the loss of the vessel and cargo, was occasioned by attempting an illicit trade with the Portuguese ; that an offence was actually committed against the laws of that nation, and that they were condemned by the government on that account, the case comes fairly within the exception of the policies, and the risk was one not intended to be insured against.

The words of the exception in the first policy are, "the insurers are not liable for seizure by the Portuguese for illicit trade." In the second policy the words are, "the insurers do not take the risk of illicit trade with the Portuguese." The counsel on both sides insist that these words ought to receive the same construction, and that each exception is substantially the same. The court is of the same opinion. The words themselves are not essentially variant from each other, and no reason is perceived, for supposing any intention in the contracting parties to vary the risk.

For the plaintiff, it is contended, that the terms used require an actual \*233] traffic between the vessel and inhabitants, \*and a seizure in consequence of that traffic, or at least, that the vessel should have been brought into port, in order to constitute a case which comes within the exception of the policy. But such does not seem to be the necessary import of the words. The more enlarged and liberal construction given to them by the defendants, is certainly warranted by common usage ; and wherever words admit of a more extensive or more restricted signification, they must be taken in that sense which is required by the subject-matter, and which will best effectuate what it is reasonable to suppose was the real intention of the parties.

In this case, the unlawfulness of the voyage was perfectly understood by both parties. That the crown of Portugal excluded, with the most jealous watchfulness, the commercial intercourse of foreigners with their colonies, was, probably, a fact of as much notoriety as that foreigners had devised means to elude this watchfulness, and to carry on a gainful but very hazardous trade with those colonies. If the attempt should succeed, it would be very profitable, but the risk attending it was necessarily great. It was this risk which the underwriters, on a fair construction of their words, did not mean to take upon themselves. "They are not liable," they say, "for seizure by the Portuguese for illicit trade." "They do not take the risk of illicit trade with the Portuguese ;" now, this illicit trade was the sole and avowed object of the voyage, and the vessel was engaged in it, from the time of her leaving the port of New York. The risk of this illicit trade is separated from the various other perils to which vessels are exposed at sea, and excluded from the policy. Whenever the risk commences, the exception commences also, for it is apparent that the underwriters meant to take upon themselves no portion of that hazard which was occasioned by the unlawfulness of the voyage.

If it could have been presumed by the parties to this contract, that the laws of Portugal, prohibiting commercial intercourse between their colonies and foreign merchants, permitted vessels to enter their ports, or to hover off their coasts for the purposes of trade, with impunity, and only subjected \*234] them to seizure and condemnation \*after the very act had been committed, or if such are really their laws, then, indeed, the exception might reasonably be supposed to have been intended to be as limited in its



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construction, as is contended for by the plaintiff. If the danger did not commence, until the vessel was in port, or until the act of bargain and sale, without a permit from the governor, had been committed, then it would be reasonable to consider the exception as only contemplating that event. But this presumption is too extravagant to have been made. If, indeed, the fact itself should be so, then there is an end of presumption, and the contract will be expounded by the law? but as a general principle, the nation which prohibits commercial intercourse with its colonies, must be supposed to adopt measures to make that prohibition effectual. They must, therefore, be supposed to seize vessels coming into their harbors, or hovering on their coasts, in a condition to trade, and to be afterwards governed in their proceedings with respect to those vessels, by the circumstances which shall appear in evidence. That the officers of that nation are induced occasionally to dispense with their laws, does not alter them, or legalize the trade they prohibit. As they may be executed, at the will of the governor, there is always danger that they will be executed, and that danger the insurers have not chosen to take upon themselves.

That the law of nations prohibits the exercise of any act of authority over a vessel in the situation of the *Aurora*, and that this seizure is, on that account, a mere marine trespass, not within the exception, cannot be admitted. To reason from the extent of protection a nation will afford to foreigners, to the extent of the means it may use for its own security, does not seem to be perfectly correct. It is opposed by principles which are universally acknowledged. The authority of a nation, within its own territory, is absolute and exclusive. The seizure of a vessel, within the range of its cannon, by a foreign force, is an invasion of that territory, and is a hostile act which it is its duty to repel. But its power to secure itself from injury may certainly be exercised beyond the limits of its territory. Upon this principle, the right of a belligerent to search a neutral vessel on the high seas, for contraband of war, is universally admitted, because the belligerent has a right to prevent the injury done to himself, by the assistance intended for his enemy: so too, a nation has a right to prohibit any commerce with its colonies. Any attempt to violate the laws made to protect this right, is an injury to itself, which it may prevent, and it has a right to use the means necessary for its prevention. These means do not appear to be limited within any certain marked boundaries, which remain the same, at all times and in all situations. If they are such as unnecessarily to vex and harass foreign lawful commerce, foreign nations will resist their exercise. If they are such as are reasonable and necessary to secure their laws from violation, they will be submitted to.

In different seas, and on different coasts, a wider or more contracted range, in which to exercise the vigilance of the government, will be assented to. Thus, in the channel, where a very great part of the commerce to and from all the north of Europe, passes through a very narrow sea, the seizure of vessels on suspicion of attempting an illicit trade, must necessarily be restricted to very narrow limits; but on the coast of South America, seldom frequented by vessels, but for the purpose of illicit trade, the vigilance of the government may be extended somewhat farther; and foreign nations submit to such regulations as are reasonable in themselves, and are really

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necessary to secure that monopoly of colonial commerce, which is claimed by all nations holding distant possessions.

If this right be extended too far, the exercise of it will be resisted. It has occasioned long and frequent contests, which have sometimes ended in open war. The English, it will be well recollected, complained of the right claimed by Spain to search their vessels on the high seas, which was carried so far, that the *guarda costas* of that nation seized vessels not in the neighborhood of their coasts. This practice was the subject of long and fruitless negotiations, and at length, of open war. The right of the Spaniards was supposed to be exercised unreasonably and vexatiously, but it never was contended, that it could only be exercised within the range of the cannon \*236] from their batteries. Indeed, the \*right given to our own revenue cutters, to visit vessels four leagues from our coast, is a declaration that, in the opinion of the American government, no such principle as that contended for has a real existence. Nothing, then, is to be drawn from the laws or usages of nations, which gives to this part of the contract before the court, the very limited construction which the plaintiff insists on, or which proves that the seizure of the *Aurora*, by the Portuguese governor, was an act of lawless violence.

The argument that such act would be within the policy, and not within the exception, is admitted to be well founded. That the exclusion from the insurance of "the risk of illicit trade with the Portuguese," is an exclusion only of that risk, to which such trade is by law exposed, will be readily conceded. It is unquestionably limited and restrained by the terms "illicit trade." No seizure, not justifiable under the laws and regulations established by the crown of Portugal, for the restriction of foreign commerce with its dependencies, can come within this part of the contract, and every seizure which is justifiable by those laws and regulations, must be deemed within it.

To prove that the *Aurora*, and her cargo, was sequestered at Para, in conformity with the laws of Portugal, two edicts and the judgment of sequestration have been produced by the defendants in the circuit court. These documents were objected to, on the principle, that they were not properly authenticated, but the objection was overruled, and the judges permitted them to go to the jury. The edicts of the crown are certified by the American consul at Lisbon, to be copies from the original law of the realm, and this certificate is granted under his official seal.

Foreign laws are well understood to be facts which must, like other facts, be proved to exist, before they can be received in a court of justice. \*237] The principle \*that the best testimony shall be required which the nature of the thing admits of ; or, in other words, that no testimony shall be received, which presupposes better testimony attainable by the party who offers it, applies to foreign laws, as it does to all other facts. The sanction of an oath is required for their establishment, unless they can be verified by some other such high authority that the law respects it not less than the oath of an individual.

In this case, the edicts produced are not verified by an oath. The consul has not sworn ; he has only certified that they are truly copied from the originals. To give to this certificate the force of testimony, it will be necessary to show, that this is one of those consular functions to which, to use its own language, the laws of this country attach full faith and credit. Con-



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suls, it is said, are officers known to the law of nations, and are intrusted with high powers. This is very true, but they do not appear to be intrusted with the power of authenticating the laws of foreign nations. They are not the keepers of those laws : they can grant no official copies of them. There appears no reason for assigning to their certificate respecting a foreign law any higher or different degree of credit, than would be assigned to their certificates of any other fact.

It is very truly stated, that to require, respecting laws or other transactions in foreign countries, that species of testimony which their institutions and usages do not admit of, would be unjust and unreasonable. The court will never require such testimony. In this, as in all other cases, no testimony will be required, which is shown to be unattainable. But no civilized nation will be presumed to refuse those acts for authenticating instruments which are usual, and which are deemed necessary for the purposes of justice. It cannot be presumed, that an application to authenticate an edict by the seal of the nation, would be rejected, unless the fact should appear to the court. Nor can it be presumed, that any difficulty exists in obtaining a copy. Indeed, in this very case, the very testimony offered would contradict such a presumption. The paper offered to the \*court is certified [\*238 to be a copy, compared with the original. It is impossible to suppose, that this copy might not have been authenticated by the oath of the consul, as well as by his certificate. It is asked, in what manner this oath should itself have been authenticated, and it is supposed, that the consular seal must ultimately have been resorted to for this purpose. But no such necessity exists. Commissions are always granted for taking testimony abroad, and the commissioners have authority to administer oaths, and to certify the depositions by them taken. The edicts of Portugal, then, not having been proved, ought not to have been laid before the jury.

The paper offered as a true copy from the original proceedings against the Aurora, is certified, under the seal of his arms, by D. Jono de Almeida de Mello de Castro, who states himself to be the secretary of state for foreign affairs, and the consul certifies the English copy which accompanies it, to be a true translation of the Portuguese original.

Foreign judgments are authenticated, 1. By an exemplification under the great seal : 2. By a copy proved to be a true copy : 3. By the certificate of an officer authorized by law, which certificate must itself be properly authenticated. These are the usual, and appear to be the most proper, if not the only, modes of verifying foreign judgments. If they be all beyond the reach of the party, other testimony, inferior in its nature, might be received. But it does not appear that there was any insuperable impediment to the use of either of these modes, and the court cannot presume such impediment to have existed. Nor is the certificate which has been obtained, an admissible substitute for either of them.

If it be true, that the decrees of the colonies are transmitted \*to [\*239 the seat of government, and registered in the department of state, a certificate of that fact, under the great seal, with a copy of the decree, authenticated in the same manner, would be sufficient *prima facie* evidence of the verity of what was so certified ; but the certificate offered to the court is under the private seal of the person giving it which cannot be known to this court, and of consequence, can authenticate noth-

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ing. The paper, therefore, purporting to be a sequestration of the Aurora and her cargo in Para ought not to have been laid before the jury.

Admitting the originals in the Portuguese language to have been authenticated properly, yet there was error in admitting the translation to have been read, on the certificate of the consul. Interpreters are always sworn, and the translation of a consul, not on oath, can have no greater validity than that of any other respectable man.

If the court erred in admitting as testimony papers which ought not to have been received, the judgment is, of course, to be reversed and a new trial awarded. It is urged, that there is enough in the record, to induce a jury to find a verdict for the defendants, independent of the testimony objected to, and that, in saying what judgment the court below ought to have rendered, a direction to that effect might be given. If this was even true, in point of fact, the inference is not correctly drawn. There must be a new trial, and at that new trial, each party is at liberty to produce new evidence. Of consequence, this court can give no instructions respecting that evidence.

The judgment must be reversed with costs, and the cause remanded, to be again tried in the circuit court, with instructions not to permit the copies of the edicts of Portugal and the sentence in the proceedings mentioned to go the jury, unless they be authenticated according to law.(a)

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(a) In the argument of this case, a question was suggested by CHASE, J., whether a bill of exceptions would lie to a charge given by the judge to the jury, unless it be upon a point on which the opinion of the court was prayed; and doubted, whether it would, within the statute of Westminster.

MARSHALL, C. J., thought that it would, and observed, that in England, the correctness of the instruction of the judge to the jury at *nisi prius*, usually came before the court, on a motion for a new trial, and if, in this country, the question could not come up by a bill of exceptions, the party would be without remedy.<sup>1</sup>

<sup>1</sup> See *Smith v. Carrington*, 4 Cr. 62.



## \*The BLAIREAU.

WILLIAM MASON and others, libellants, v. The SHIP BLAIREAU.

*Salvage.—Deviation.—Jurisdiction.*

One-third part of the gross value of the ship and cargo allowed for salvage, and one-third of the salvage decreed to the owners of the salving ship and cargo.<sup>1</sup>

If one of the salvors embezzle part of the goods saved, he forfeits his right to salvage.<sup>2</sup>

A detention at sea, to save a vessel in distress, is such a deviation as discharges the underwriters, and the owner stands his own insurer.<sup>3</sup>

If a vessel in distress be abandoned at sea, by the master and all the crew, excepting one man who is left, either by accident or design, he is discharged from his contract as a mariner of that vessel, and entitled to salvage.

If apprentices are salvors, their masters are not entitled to their share of the salvage, but it will be paid to the apprentices themselves.

The courts of admiralty of the United States have jurisdiction, in cases where all the parties are aliens.

THIS was a libel for salvage, filed in the District Court of the United States for Maryland district, by the master, officers, crew, owner and freighters, of the British merchant ship *The Firm*, against the French ship *Le Blaireau*. The facts stated in the proceedings and evidence, were as follows :

The ship *Le Blaireau*, James Anquetil, master, on a voyage from Martinique to Bordeaux, laden with sugar, on the 30th of March 1803, at 10 o'clock at night, in lat. 35° 46' N., long. 46° west from Paris, was run down by a Spanish 64-gun ship, called the *St. Julien*, commanded by Francisco Mondragora, which struck the bow of the *Blaireau*, carried away her bowsprit and cut-water, close to the seam of the stem, started three planks of the bends, and all above them, and crushed to pieces the larboard cat-head. Before

<sup>1</sup> See note to *The Mary Ford*, 3 Dall. 191.

<sup>2</sup> Salvors are bound to the same degree of diligence, in keeping the property in their custody, that a prudent man ordinarily exercises in keeping his own. *The Mulhouse*, 22 Law Rep. 276. Whilst the law gives to salvors a reward exceeding any value of the labor bestowed, it exacts from them all diligence, and is careful to mark any relaxation of that anxious solicitude for the safety of a vessel in distress, the encouragement of which is the object of all salvage reward. *The John G. Paint*, 2 Ben. 174. A right to compensation for salvage presupposes good faith, meritorious service, complete restoration, and incorruptible vigilance, so far as the property is under the control of the salvors. *The Island City*, 1 Black 121. Negligence in taking care of the property saved diminishes the amount of salvage; gross negligence, embezzlement, or fraudulent concealment, works a forfeiture of all claims to salvage. *The Mulhouse*, *ut supra*; *The John Perkins*, 3 Ware 87. Any embezzlement, however small, incurs an entire forfeiture of all claims for salvage. *The Island City*, *ut supra*; *The Bella Corunna*, 6 Wheat. 152; *The Leander*, Bee 260; *The Rising Sun*, 1 Ware 378. But if the embezzle-

ment be secret, and purely an individual act, it will not prejudice the rights of innocent co-salvors. *The Island City*, *ut supra*; *The Boston*, 1 Sumn. 329; *The John Perkins*, *ut supra*; *Henley v. Gawley*, 2 Sawyer 7. All however, are guilty, who consent to, connive at, or conceal it; or who encourage it, or fail to prevent it when they can. *The Island City*, *ut supra*. Salvors are not only bound to strict honesty themselves, but must take all reasonable care to prevent plundering by others; negligence in this respect will diminish the amount of salvage, and if gross, work an entire forfeiture. *The John Perkins*, *ut supra*. But the innocent owner of a salvor vessel is entitled to compensation, where a valuable service has been rendered, notwithstanding the misconduct of the crew. *The Mulhouse*, *ut supra*. Where the shares of any of the salvors are forfeited for misconduct, they do not go to the co-salvors, so as to increase their shares, but are reserved for the owners of the property. *The Rising Sun*, *ut supra*; *The Island City*, 1 Cliff. 221.

<sup>3</sup> See *The Boston*, 1 Sumn. 328; *The Henry Ewbank*, Id. 401; *The Cora*, 2 W. C. C. 80; *Crocker v. Jackson*, 1 Spr. 141; *The George Nicholas*, Newb. 449.

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morning, there were three and a half feet of water in the hold, and the Spanish commander, not being able to wait for an attempt to repair the Blaireau, took her crew and passengers on board his ship, excepting one man, Thomas Toole, an Irishman, who could not be found, as it was alleged by the officers and crew of the Blaireau, in their protest, but who was, as he himself alleged, prevented by force from getting into the first boat, and afterwards, refused to go in the second boat, being determined to remain on board the Blaireau. Toole, being thus left alone, cut away, as he alleged in his libel, the anchors and the bowsprit (which had been left hanging), to lighten her bows, put her before the wind, and hoisted a signal of distress. In this situation, she was, the next day, found and boarded by the ship Firm, bound on a voyage from Lisbon to Baltimore. The persons on board of the Firm were,

Charles Christie, one of the charterers of the ship.

William Mason, master.

William Stephenson, mate, shipped at 4*l*. sterling per month.

*241]	*John Falconer, carpenter,	at	£5	5	0
	Daniel Ross, boatswain,		2	10	0
	George Glass, cook,		2	10	0
	Samuel Monk,	} mariners,			
	Martin Burk,				
	John Brown Hall,				
	John Blackford,				
	John Wilson, and				
	Mark Catlin,		2	0	0
	Joachim Daysontas, a boy,		1	1	0
	John Moat, and	} apprentices to the owners of The Firm,			
	John McMon,				
	Negro Tom, a slave of the Rev. Mr. Ireland.				

It was admitted, that the ship Firm was about the burden of 330 tons, carpenters' measure, but 500 tons could be laden on board of her; that she was of the value of \$10,000, and was owned by John Jackson, of London, but chartered to Charles B. Young and Charles Christie, who had a cargo of salt on board, of the value of \$4000. The proper complement of men to navigate the Blaireau was at least sixteen hands. She was a faster sailer than the Firm. They laid to, together, for two or three days, during the bringing in the Blaireau, for the purpose of taking out part of her cargo, and rendering assistance from the Firm. The sum of 2000*l*. sterling was insured upon the Firm, to cover her value and freight.

Upon taking possession of the Blaireau, she had about four feet of water in her hold, and could not have swam more than twelve hours longer. There was great risk and peril in taking charge of her. She was brought into the Chesapeake Bay, after a navigation of nearly 3000 miles, by six persons who went on board of her from The Firm, and the man who was found on board. Part of her cargo was taken out to lighten her forward, and put on board the Firm; and part of it shifted aft. The Blaireau was navigated by the people of the Firm, without boat or anchors. She was obliged to be pumped, in fair weather, by all hands, every two, three or four hours, half an hour at a time, and in blowing weather, every hour, a quarter of an hour at a time. Her bow was secured by coverings of leather, copper \*and

\*242] sheet lead nailed on, and pitch and turpentine in large quantities



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poured down hot between the planks and the coverings. The labor of working the Blaireau by the men on board was great and severe, and they had frequently thought of abandoning her, but fortunately persevered. She was a slight built vessel, and constructed without knees, and was very weak. The forestay was gone, and the foremast was secured by passing a large rope through the hawse-holes, and securing it to the foremast head. It was the opinion of several experienced sea captains, that the bringing in the Blaireau was a service of great risk and peril, and nearly desperate; and such as they would not have undertaken.

The persons who went on board the Blaireau from the Firm were, Charles Christie, supercargo, and one of the charterers of the Firm; William Stevenson, first mate; John Brown Hall and John Wilson, seaman; John Moat, a boy, and Negro Tom. Mason, the master, and Stevenson, the mate, were the only persons capable of taking an observation and navigating the vessels, or either of them, into port.

A claim was put in by the French consul, in behalf of the owners of the Blaireau.

It appeared in evidence that William Mason, the master of the Firm, had embezzled part of the cargo of the Blaireau, to the amount of at least \$1760.71.

On the 14th of July 1803, his Honor Judge WINCHESTER, made the following decree :

The counsel for the parties respectively intervening in this cause were heard by the court, and their argument, together with all and singular the proceedings and testimony in this cause, were by the court maturely considered: And it appearing to the court, that the circumstances of extreme danger under which the salvage of the ship Blaireau and cargo was effected, require a salvage and compensation as liberal as is consistent with precedents and legal principles; that the danger, labor and service \*of the [\*243 persons actually employed in navigating and bringing in the said ship, greatly exceeded the danger, labor and service of the persons who remained on board the ship Firm; and that their compensation should exceed, at the rate of fifty per cent., the compensation of those who remained on board the ship Firm; that among the persons on board the Blaireau, the station, trust and services of William Stevenson and Charles Christie, entitle them to a compensation exceeding that of seamen, at the rate of 50 per cent., and that the apprentices, cook and negro slave should not be classed with seamen, nor seamen with the carpenter and second mate, and there not being any general rule by which to settle the proportions of salvage among persons of those different stations, but that the same must depend upon the sound discretion of the court, applied to the circumstances of every particular case; that William Mason, captain of the said ship Firm, having fraudulently embezzled and secreted, with intent to appropriate the same to his own use, lace and other articles of a large value, which constituted a part of the cargo of the said ship Blaireau, is not entitled to any salvage or other compensation; that in strictness, the officers and crew are the only salvors; and the owners of the ship Firm and cargo, as such, can only come in for any share of salvage, upon the consideration of the risk to which their property was exposed; that upon these principles, salvage should be paid to and among the

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persons entitled thereto, at the rate of three-fifths of the net proceeds of the sales of the said ship and cargo ; and that of this sum one-ninth part of the net salvage will be a just and liberal compensation to the owners of that ship and her cargo for any hazard to which their property was exposed : It is, this 14th day of July 1803, by me, James Winchester, judge of the district court of the United States for Maryland district, and by the power and authority of this court, ordered, adjudged and decreed, that the net amount of sales of the said ship Blaireau, her tackle, apparel, and furniture and cargo (after deducting the costs in the cause, and the sum of \$388, heretofore decreed by consent to Charles Christie for expenses and disbursements relative \*244] to the said ship Blaireau and cargo), \*amounting, as stated by the clerk of this court, to the sum of \$60,272.68, shall be paid, applied and disposed of, to and among the persons, and in the manner following, to wit :

To the owners of the ship Firm and cargo, the sum of \$4018.14 $\frac{3}{4}$ , to be divided between them in the proportions of their respective interests agreeable to the admitted estimation thereof, to wit : To the owners of the ship Firm, for the value of the said ship and freight on \$18,000 ; and to the owners of the cargo of the said ship on \$4000.

To the persons on board the said ship Blaireau, as follows, to wit : To William Stevenson, the sum of \$3403.63 $\frac{1}{4}$  : to Charles Christie, the sum of \$3403.63 $\frac{1}{4}$ . To Brown Hall, John Wilson and Thomas Toole, seamen, each, the sum of \$2269.08 $\frac{3}{4}$  : to John Moat, an apprentice boy, the sum of \$1134.54 $\frac{3}{4}$ . And that there be retained a like sum of \$1134.54 $\frac{3}{4}$  in this court, to and for the benefit of such person or persons as may hereafter make title to the same, as owner or owners of the said Negro Tom.

To the persons on board the said ship Firm, as follows, to wit : \*245] \*To John Blackford, second mate, the sum of \$1890.90 $\frac{3}{4}$  : to John Falconer, carpenter, the sum of \$1890.90 $\frac{3}{4}$  : to George Glass, the cook, and John McMon, an apprentice, each the sum of \$1756.36 $\frac{3}{4}$  : to Daniel Ross, Samuel Monk, Martin Burk, Mark Catlin and Joachim Daysontas (sailors of the Firm), the sum of \$1512.73 each.

That no salvage or compensation whatever shall, for the cause above recited, be paid to the said William Mason, but that the libel in this cause filed, so far as it relates to the claim of the said Mason personally and only, shall stand and the same is hereby dismissed.

And it is by these presents further ordered, adjudged and decreed, that the residue of the proceeds of the sales aforesaid shall be deposited in the bank of Baltimore, in the name of this court, and to the credit of this cause, to the use and benefit of such person or persons as may in this court make title thereto, as owner or owners of the said ship Blaireau and cargo, or such person or persons as may be legally authorized by them to receive the same.

(Signed)

JAMES WINCHESTER, Judge Md. Dist.

From this decree, an appeal to the circuit court was prayed by William Mason, the master of the Firm ; by the owner of the Firm ; by the claimants of the Blaireau, and by the charterers of the Firm.

Upon the appeal, additional testimony was adduced in the circuit court, but it does not seem to affect the principles upon which the rates of salvage ought to be awarded.



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\*On the 27th of December 1803, the circuit court, held by his honor Judge CHASE, decreed as follows: The court having heard the parties on the appeal in this cause, by their counsel, and fully examined the evidence, exhibits and proofs, and maturely considered the same, do order, adjudge and decree, and it is hereby ordered, adjudged and decreed by the said court, that the decree of the said district court be, and hereby is, in all things affirmed (and with respect to the said Mason, with the costs of his appeal), except only so far as the said decree shall hereinafter, by this decree, be changed or altered.

And it is now further ordered, adjudged and decreed by this court as follows, to wit: That there be paid to John Jackson, of St. Paul's parish, in the county of Middlesex, in the united kingdom of Great Britain and Ireland (who appears to this court to be the owner of the ship Firm), the sum of \$2870.12 $\frac{8}{10}$ , on the amount of the value of the said ship, estimated at the sum of \$10,000. That there be paid to Charles Bedford Young and Charles Christie, jr. (who appear to this court to be the owners of the cargo on board the said ship Firm), the sum of \$1148.05, on the amount of the value of the said cargo, estimated at the sum of \$4000. That there be paid to William Stevenson, the sum of \$2269.08 $\frac{9}{10}$ .

That the salvage money adjudged by the district court, and affirmed by this court, to be paid to John Moat (who appears to this court to be an apprentice to the above-named John Jackson, owner of the ship Firm), be paid by the clerk of this court to the said John Moat, or to his proctor or attorney in fact, for the use and benefit of the said John Moat; and that the said salvage money be not paid to the said John Jackson, or to his \*attorney, [\*247 or to any other person or persons whatsoever, who shall claim the said salvage money, as owner or master of the said apprentice; and that the said salvage money remain in court, until paid according to this decree.

That the salvage money adjudged by the district court, and affirmed by this court, to be paid to John McMon (who appears to this court to be an apprentice to the above-named John Jackson), be paid by the clerk of this court to the said John McMon, or to his proctor or attorney in fact, for the use and benefit of the said John McMon; and that the said salvage money be not paid to the said John Jackson, or to his attorney, or to any other person or persons whatsoever, who shall claim the said salvage money, as owner or master of the said apprentice; and that the said salvage money remain in court, until paid according to this decree.

That the salvage money adjudged by the district court, and affirmed by this court, to be retained for the owner of Negro Tom, be paid to the Rev. John Ireland (late of this state, but now of the united kingdom of Great Britain and Ireland), who appears to this court to be the owner of the said Negro Tom, or to the Rev. Joseph G. I. Bend and Lewis Atterbury, who appear to this court to be the attorneys in fact of the said John Ireland, and who have expressed in writing to this court, that they, being duly authorized by the said John Ireland, will immediately, on the receipt of the said salvage money, manumit the said Negro Tom, according to the law of the state of Maryland, and will pay the said Negro Tom one-fifth part of the said salvage money, and have consented that the same may be retained by the clerk of this court for the use of the said Negro Tom.

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And it is further ordered, adjudged and decreed, that the appellants (except William Mason) pay no costs in this court on the appeal.

(Signed)

SAMUEL CHASE.

Upon this judgment, separate writs of error were sued out by William \*248] Mason, the master, John Jackson, \*the owner, William Stevenson, the mate, Charles Christie and Charles B. Young, the charterers of the Firm, and by the French claimants of the Blaireau.

William Mason assigned for error, that no part of the salvage was decreed to him for his own use, on account of his merits and services.

John Jackson, the owner of the Firm, assigned for error, that he was not allowed a reasonable proportion of salvage; that the whole sum allowed and decreed to the owner and freighters, ought to have been decreed to him; and that the sums decreed to the two apprentices ought not to have been ordered to be paid to themselves or their proctor only.

William Stevenson, the mate, assigned for error, that the share assigned him was inadequate to his services, merits and situation.

Christie & Young, the freighters of the Firm, alleged that the proportion allowed to the owner and freighters of the Firm was too small, in proportion to their risk; and that the proportion awarded the freighters was too small, compared with that awarded to the owner.

The case was now argued by *Harper*, for the owners of the Blaireau, for Christie & Young, and for the apprentices; by *Hollingsworth*, attorney of the United States for Maryland district, for the libellants generally; by *Martin*, attorney-general of Maryland, for Jackson, the owner, and Mason, the master, of the Firm, and for the owners of the Blaireau; and by *S. Chase, Jr.*, for the owners of the Blaireau.

As this was the case of a French ship saved by a British ship, and brought into a port of the United States, a preliminary question was suggested by *Martin*, whether a court of the United States had jurisdiction, and could condemn a part as salvage. He did not mean to urge the point, but he thought it his duty to read some authorities for the consideration of the \*249] court. He believed the question had not been finally settled; but his \*own opinion was in favor of the jurisdiction. Sir W. Scott, in the case of *The Two Friends*, 1 Rob. 234, inclined to the same opinion; which seems also to be adopted by Browne, in his View of the Civil and Admiralty Law, vol. 2, p. 278.

To carry the property saved into the ports of the salvor, or of the owner of the property, would, in many cases, be impossible, and in most cases, would be attended with great difficulty and inconvenience to the salvors, and would expose the property to risk. There seems to be no good reason why the question of salvage, which is a question of the *jus gentium*, and depending upon general principles, should not be decided by the courts of admiralty of any civilized nation.

In reply to the doubt suggested respecting the jurisdiction, it was said by *Hollingsworth*, that an admiralty court may have jurisdiction, by submission, where it may be withdrawn by protest. Here, all the parties have submitted themselves to the jurisdiction.

The claimants of the Blaireau assigned for error, 1st. That the whole



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amount of salvage was more than in equity and good conscience the salvors were entitled to, and that it ought not to have exceeded one-third of the value of the ship and cargo. 2d. That Toole having been shipped as a mariner on board the Blaireau, at certain wages, was not entitled to salvage. 3d. That William Stevenson ought not to be allowed any part of the salvage money, because he had embezzled a part of the property on board of the Blaireau, and had also concealed a part, with intent to convert it to his own use.

I. For the *claimants* of the Blaireau, it was urged, 1st, that three-fifths of the value of the ship and cargo was too great a proportion for salvage. 2d, That Mason's share of the salvage, and the reduction made by the circuit court in the amount of \*Stevenson's share, ought to go to the use of the claimants, and not to the benefit of the other salvors. 3d, That Toole ought not to have salvage. 4th, That the amount of embezzlement, over and above what was proved upon Mason, should be deducted out of the general sum allowed for salvage.

1st. That the salvage is too high, appears, 1st. from general usage; 2d, From the principles of reciprocity between the courts of this country and those of Great Britain; 3d. From analogy to cases of re-capture.

(1.) As to general usage. Vessels derelict are *droits* of the admiralty, and in these cases, the crown is liberal in its reward of the salvors. But where a claim intervenes, it becomes a question of *quantum meruit*. A vessel totally abandoned is in much more danger than when even one man only is left on board. He may hoist a signal of distress, he may cut away the anchors, or he may even stop a leak. Beawes' Lex Mer. 158. This, then, is a case less meritorious than that of derelict. One is a case of liberality, the other of justice. Yet in the case of *The Aquila*, a derelict, 1 Rob. 38, 39, only two-fifths were allowed to the salvors. And in 1 Rob. 263, in the note, Sir WILLIAM SCOTT declares the liberal principles by which he is governed in cases of salvage. If, then, Sir WM. SCOTT, acting upon these principles, allowed but two-fifths in a case of absolute derelict, in a country where it is the national policy to encourage adventurous seamen, and where the very existence of the nation depends upon its maritime spirit, surely three-fifths is too much to be allowed in a case of simple salvage. The case of *The Beaver*, in 3 Rob. 237, was more desperate, and the service more hazardous and meritorious than the present, and yet only one-fourth was allowed for salvage.

The lives of those on board of the Firm were in very little danger. They were a little to the S. W. of the \*Azores; and near the trade-winds. They might have gone to a French island, or to the Azores, without the least danger. What hazard was there to those on board the Blaireau? They were nineteen days in company with the Firm. A fact which shows what idea they had of their danger, is, that the Blaireau, being the fastest sailer, parted from the Firm for several days, when they might have shortened sail, and kept in her company.

Of late, the English courts of admiralty have inclined to diminish the rate of salvage. Formerly, one-half was allowed to England, in cases of derelict. In the time of Colbert, it was fixed by France at one-third. But in England, it has since varied, and now depends upon the particular circumstances of

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the case ; but in no case, has so high a salvage as three-fifths been allowed. In the case of *The William Beckford*, 3 Rob. 286, one-thirteenth was allowed ; and in the case of *The Franklin*, 4 Ibid. 147, only one-sixteenth. In case of re-capture, it has been fixed by statute at one-sixth, and one-twelfth. In the case of *The Mary Ford*, 3 Dall. 188, which was a derelict, only one-third was given for salvage.

(2.) The principles of reciprocity will not warrant so large a proportion as three-fifths. The salvors are British subjects ; and the courts of England adopt the rule of reciprocity. If no rule has been established by the nation of the salvor, they make a rule. What is the rule in the English courts ? Two-fifths is the greatest rate of salvage allowed by them, during the last century, and if the salvors had carried the *Blaireau* into their own country, this is the utmost they would have received. If our citizens should have a case of salvage in their courts, they will not be allowed more than two-fifths. Indeed, there is only one case where so much as one-third has been allowed, and that was a case of derelict.

(3.) The principles of analogy to cases of re-capture, will not justify so large a proportion for salvage as has been decreed by the district court. \*252] \*By the Laws of the United States, (1 U. S. Stat. 716), one-eighth only is allowed for re-captures made by a public vessel of the United States, and one-sixth if made by a private vessel. The same proportion is also adopted by England. Abbott 258.

2d Point. Mason's share of the salvage, and the reduction made by the circuit court in Stevenson's share, ought to go to the benefit of the owners of the *Blaireau*. The crime of one of the salvors ought not to inure to the benefit of the others.

3d Point. Toole is not entitled to salvage. When seamen save their own vessel, by re-capture, or otherwise, they cannot claim salvage, for the same reason that their wages are refused in case of wreck or capture. To reward them for saving their vessel from peril, would be a temptation to put her in danger. If Toole had voluntarily remained on board for the purpose of endeavoring to save the vessel, after she had been abandoned by all the rest of the crew, the case might be different. But his remaining on board was an involuntary act, and what he did was with the sole view of saving his own life. When the *Firm* approached him, he begged to be taken off from the wreck. He did only his duty, in continuing on board, after there was a chance of saving her. His services were not meritorious, inasmuch as he was bound to do everything in his power to save the vessel, and yet he is put upon a par with the seamen of the *Firm*, who were volunteers, and under no obligation to do anything towards saving the *Blaireau*. While a sailor remains on board, contending with no other enemies than the elements, he is entitled only to his wages. No case can be produced, in which he has been considered as entitled to salvage. Salvage does not consist in being saved, but in saving. Beawes' Lex Mer. 157, 158.

The reason why a seaman shall lose his wages, if the ship be lost, is, that he may be induced to use his utmost \*exertions to save it ; and this \*253] shows that he is obliged to hazard his life to the utmost for that purpose. And even if he actually loses his life, and the ship is also lost or captured, his representatives cannot recover his wages. It is upon the same principle, that a common carrier is answerable for the whole value of the goods, if



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they are taken from him by superior force of robbers, and even if he should lose his life in their defence.

When did Toole lose his character of a mariner of that vessel? It is answered, when the master and the rest of the crew deserted her. But they could not discharge him from his contract with the owners. They lose their wages, but Toole does not. The danger may possibly justify them in quitting the vessel; but because he was left alone, he did not cease to be a mariner of the ship. Suppose, the rest of the crew had died, or were so sick as to disable them, and Toole had made a signal of distress, by means of which the ship should be saved; would that have entitled him to salvage? The real truth of the case is, that Toole was saved, not a salvor. The cases cited from 19 Viner 275, 1 Ld. Raym. 393, and 2 Salk. 654, to prove that mariners are entitled to salvage, by saving their own ship, do not warrant the conclusion attempted to be drawn from them. The only exception to the general rule is the case of rescue. In that case, and that only, it is admitted, that the mariners are entitled to salvage.

4th Point. By comparing the original bill of lading, of the Blaireau with the account of sales, it appeared that there was a deficiency, over and above what was chargeable to the embezzlement of Mason, and it was contended, that as this could not be fixed upon any one of the salvors, it ought to be a charge against them all. But it did not appear, whether a part had not been taken on board of the Spanish ship.

In answer to these arguments in behalf of the owners of the Blaireau, it was said by the counsel for the salvors—

\*1. As to the general rate of salvage. That no fixed rate of salvage has yet been adopted in cases of this kind, but that it depends [254 upon the sound discretion of the court applied to the circumstances of each particular case. *McDonough v. The Mary Ford*, 3 Dall. 190-1; 3 Rob. 249. "It is a claim upon the general ground of *quantum meruit*, to be governed by a sound discretion, acting on general principles." *The Two Friends*, 1 Rob. 234-5. And in the case of *The Sarah*, 1 Rob. 263, Sir W. Scott thus expresses his opinion. "I do not think, that the exact service performed is the only proper test for the *quantum* of reward in these cases. The general interest and security of navigation is a point to which the court will also look, in fixing the reward. It is for the general interest of commerce, that a considerable reward should be held up; and as ships are made to pay largely for light-houses, even where no immediate use is derived from them, from the general convenience that there should be permanent buildings of that sort provided for all occasions, although this or that ship may derive no benefit from them, on this or that particular occasion: so, on the same principle, it is expedient, for the security of navigation, that persons of this description, ready on the water, and fearless of danger, should be encouraged to go out for the assistance of vessels in distress; and therefore, when they are to be paid at all, they should be paid liberally. It is on these general considerations, and not merely to mete out the payment for the exact service performed in the particular instance, that the rewards should be apportioned in these cases; and it is in this view, that I shall always consider them." It does not depend upon principles of re-capture, or of reciprocity; nor do the prize acts constitute any rule of salvage in cases not within those acts. 3 Rob. 249. There can be no general rate of salvage

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stated, when it is acknowledged that the only rule is a sound discretion. A rule which brings all cases to one dead level, can leave no discretion. How can we make reciprocity the rule, when every case must depend on its own circumstances? How can we compare dissimilar cases?

\*255] \*In this case, the Blaireau was in imminent danger. It is a fact admitted, that she could not have swam twelve hours longer. She must have been totally lost. She was derelict; abandoned by the master and all the crew, except Toole, whom they did not know they had left in the vessel. As they could not find him, they supposed he must have fallen overboard. The ordinance of Lewis XIV., allows one-third in cases of wreck. But there can be no wreck, according to that ordinance, if any claimant appears. So that, in cases like the present, neither France nor England has any fixed rate of salvage. *The Two Friends*, 1 Rob. 235.

None of the cases cited equals the merit of this. Here was a navigation of 3000 miles, with death constantly staring them in the face; and a great part of the time almost constantly at the pumps. In the case of *The Aquila*, and of *The Mary Ford*, the two-fifths of the one, and the one-third of the other, were of the gross value; but in the present case, the three-fifths awarded, are of the net amount of sales. It is denied, that the rates of salvage have of late been diminished. In the case of the *Dutch East Indian*, at Dunkirk, mentioned in Beawes Lex Mer. 158, one-half was given for salvage.

As to Toole, he was abandoned by his commander, and was, therefore, discharged from the service: he was no longer to be considered as a mariner belonging to the ship.

No general deduction can be made from the whole amount of salvage for any defalcation, if it be not fixed upon any one of the salvors; and in this case, the deficiency is so small, that it might have been taken on board the Spanish ship.

The next writ of error was by the owner and freighters of the Firm, who contended, that one-ninth part of the whole salvage money was too small a share, in proportion to the risk of the ship, cargo and freight, and the service rendered by the ship. \*256] \*In the case of *The Mary Ford*, 3 Dall. 191, two-thirds of the whole salvage were given to the owners of the ship George; and in the case of *The ship William Beckford*, 3 Rob. 186, 289, 50*l.* were given to the owners of the boats. In the case of *The Haase*, 1 Rob. 240, one-third of the salvage was given to the owner. In *The Amor Parentum*, Ibid. 255, something less than one-fifth of the salvage was given to the owner of the boat; and in the case of *The San Bernardo*, Ibid. 151, one-half was given to the owner.

In France, the rule is two-thirds to the owners, and one-third to the officers and crew; the same proportion which was awarded in the case of *The Mary Ford*. In 2 Valin 392, art. 33, of the French ordinances, the words are, "*S'il n'y aucun contrat de société, les deux tiers appartiendront à ceux qui auront fourni le vaisseau avec les munitions et vituailles, et l'autre aux officiers, matelots et soldats;*" and in his comments upon this article, in page 395, he says, the same rule is also laid down as to private unarmed vessels.

In behalf of the freighters of the Firm, it was urged, that their proportion of the sum to be allowed to the owner and freighters ought to be



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increased, because they became liable to the owner for the freight, even if the ship Firm had been lost. The general principle is, that the freight does not become payable, if the ship is lost, unless there has been a deviation by the freighters. But if there has been a deviation by the freighters, for their benefit, then they become liable for the freight, whether the ship arrives or not. There is the same law upon charter-parties as upon policies of insurance. In this case, the stopping on the ocean two days for the purpose of saving the Blaireau was a deviation, and this was done with the assent of the freighters, by Charles Christie, who was one of them, whereby they became the insurers of the freight to Jackson, the owner of the Firm. After the deviation, the whole risk of the freight, to the amount of \$8000, fell upon Christie & Young, and they ought to have salvage in proportion to \*that risk ; whereas, it has been allowed them only upon the amount [\*257 of the cargo, valued at \$4000.

In answer to these arguments, it was urged by the counsel for Jackson, the owner of the Firm, that he clearly risked his ship ; for the underwriters were discharged by three circumstances : 1st. By the stopping, (a) which was a deviation for the benefit of the owners. 2d. By taking in goods from on board the Blaireau, and thereby overloading the Firm ; and 3d. By diminishing the number of her crew ; both of which last circumstances increased the risk, and violated the warranty of the policy. But Jackson, the owner, not only risked his ship, but his freight also ; for if the vessel had been lost, he could not have recovered it of Christie & Young, the freighters. The assent of Christie could not bind his partner. It would have been an act in violation of the partnership. Nor could a parol agreement alter the charter-party, or dissolve the owner from the obligation of his contract. Jackson even ran the risk of the cargo as well as of the vessel and freight, and therefore, ought to have the whole share of salvage, allotted to the owner and freighters. For if Mason, who was the master of the vessel, appointed by Jackson, the owner, had departed from the terms of the charter-party, and thereby hazarded the cargo, and it had been lost, Jackson would have been liable to Christie & Young for the value of the cargo.

A stopping, if not for the purpose of the voyage, is a deviation ; and it cannot be barratry, when the act is for the benefit of the owners. To make it barratry, it must be a fraud upon the owners. Park 83 ; 1 Post. Dict. ; *Knight v. Cambridge*, 1 Str. 581 ; \* *Vallejo v. Wheeler*, Cowp. 143 ; [\*258 *Nutt v. Bourdieu*, 1 T. R. 323 ; *Seaman v. Fonereau*, 2 Str. 1183 ; Park 90, 91, 93 ; *Moss v. Byrom*, 6 T. R. 379 ; Park 299.

In *reply*, it was said, that the maxim is *volenti non fit injuria*. Christie consented to the act which amounted to a deviation, and therefore, could maintain no action against Jackson grounded upon that act. The question is, whether the freighters had not, by their own act, taken the risk of the freight upon themselves. In case of the loss of the vessel and cargo, Jackson might have recovered the freight from Christie & Young, because they

(a) The Chief Justice observed, that although it was admitted by counsel, that the stopping was a deviation, yet that was not to be considered as the opinion of the court ; it being a point upon which they had great doubt ; for if a stopping to relieve a vessel in distress would discharge the underwriters, no master would be justified in using an exertion to save a vessel in the most imminent danger of perishing.

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would have been the cause of the loss. There is a difference between an assent to criminal acts, and a mere mercantile assent. It is not necessary that the assent should be under seal. It was the act of the freighters, and not a parol contract, which would have been the ground of Jackson's defence, in any action which Christie & Young might have brought against him for the cargo, in case of a loss; and which also would have been the ground of his action against them for the freight, in the like event.

The next writ of error was that brought by William Mason, the master of the Firm; in support of which, it was alleged, that his act of embezzlement ought not to prevent a decree in his favor for a share of the salvage. It is not, as has been suggested, to reward him for his crimes, that he asks a decree in his favor. He has rendered most important services, and he claims his *quantum meruit*; a just compensation for his risk and his labor. This court cannot inquire into the fact of his crime. It is sitting here to decide questions upon the law of nations, and has no power to punish him for a crime committed after the service was rendered. He was the master of the ship, and no assistance could have been rendered to the Blaireau, without his permission.

There is no obligation upon salvors to apply to a court of admiralty. If the property saved is in their possession, they have a good right to hold it \*259] against all the \*world but the owner; and he cannot recover it from them, without tendering reasonable salvage. The salvor may convert the thing saved to his own use, and no one can prevent him but the owner, who may tender reasonable salvage, and bring his action of trover. It would not discharge the owner from the obligation of tendering salvage, to say, that the salvor had converted the thing saved to his own use; *a fortiori*, he may take a part for salvage, and it shall be deducted out of his reasonable share. But even if he took a part, with intent to conceal and embezzle it, yet this cannot deprive him of reasonable salvage. The most that can be said is, that after being the sole means of saving the ship and cargo, he did not discover all the property, but intended to appropriate a part to his own use, not amounting to one-half his share of the salvage money.

The service rendered was complete. Whatever I have justly earned upon a *quantum meruit*, is a debt due to me, for which I have a clear legal claim. If I labor for a man, and afterwards commit a crime upon him or his property, this can be no bar to my action for my wages. Suppose, I labor for a man, earn my wages, and then set upon him and beat him, I am not thereby deprived of my wages. Suppose, a wagoner employed to carry 100 barrels of flour; he carries part, and takes one barrel to his own use; can he not recover for what he carried? When it is necessary to resort to chancery, you must go with clean hands; but that is because you have not a clear legal right. The salvor has a clear legal right to retain, until salvage is paid. He does not go into a court of admiralty, as a court of chancery. He claims a legal debt, a certain right.

But Captain Mason's conduct is represented as a crime. However improper his conduct may have been, there is no law which can punish him criminally for it. When a man finds, or saves a thing and converts it to his own use, he is not punishable by the law of nations, nor by any municipal law, unless it be by some positive statute.



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\*But if he has committed a crime, he is as liable to punishment, after having been deprived of his salvage, as he was before. It is to punish him twice for the same offence. You first fine him \$3000, and then turn him over to the courts of common law to be punished. If he has not committed a crime, punishable by law, why do you impose upon him this fine of \$3000? This court is sitting here as a court of admiralty, to decide questions arising upon the law of nations, or upon facts committed on the high seas. But the offence was committed within the body of a county, and therefore, this court cannot (even incidentally) hold jurisdiction of it.

If a man refuses to give up a thing saved, on tender of salvage, the remedy is only trover or detinue; and the plaintiff can recover only the value, after deducting reasonable salvage. If the goods saved are once landed, a court of admiralty has no jurisdiction, and cannot decree salvage.

The principle that subsequent conduct shall make a man a trespasser *ab initio*, does not apply to the case of salvage. It is applicable only to those cases where a man has a particular right to go upon property for his own benefit; not where the entry is for the benefit of the other party.

To these arguments in favor of Mason, it was answered, that the principal objection to the decree, as it relates to him, is the want of jurisdiction, because the embezzlement was on land. But this does not appear to be the case. The facts stated induce a presumption that it was done at sea. But admitting that the embezzlement was on land, the court have jurisdiction of the principal object, salvage; and salvage is a claim of merit. In order to decide it, the court must judge of the demerit, as well as of the merit of the salvor. It is certainly competent for the court to ascertain *quo animo* he took the goods on board at sea. It is admitted, that he could not be indicted for it; or if he could, that this court could not try it. But if he took them, not *animo salvandi*, but *animo furandi*, it is clear, upon principles of law as well as policy, that he is not entitled to salvage. [\*261]

Salvage is grounded as well on the trust which the salvors have taken upon themselves, as on their risk and labor. Should they, after saving the thing, wantonly destroy it, or even suffer it to be lost by gross negligence, they would make themselves liable to the owner. Hence, a duty and trust is imposed upon them by the situation in which they have placed themselves; and if, regardless of that duty, and in violation of that trust, and of the principles of moral rectitude, they attempt to plunder, to rob, to embezzle the property, they lose the character of salvors, and approach towards that of robbers and pirates. In such a case, they cease to be meritorious; they forfeit whatever right they might have had, and to award them salvage would be to reward their crimes. They ought not to receive salvage upon that which they did not mean to save for the benefit of the owners, but to appropriate to their own use.

Salvage is given, upon principles of public policy, to encourage enterprise, honesty and humanity; and the same principles of public policy will refuse it, where these are wanting. The interests of society require that the line of distinction should be accurately marked between right and wrong, virtue and vice, merit and demerit. By the Laws of Oleron, if any person shall take any part of the goods from shipwrecked persons, against

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their will, and without their consent, they shall be excommunicated, and suffer the punishment of thieves. 22 Vin. Abr. 537.

In *reply*, it was said by the counsel for Mason, that the goods were taken from the Blaireau into the Firm, *animo salvandi*. It was done openly. They were sent by Mason from the Blaireau, and taken into the Firm by Stevenson, the mate. It seemed to be the expectation of all, that they were saving the whole for themselves. But their being mistaken in this respect, ought not to prejudice their claim to reasonable salvage.

The next point was, whether Jackson, the owner of the Firm, and the master of the apprentices, is not entitled to receive their shares of the salvage; and in behalf \*of the master, it was contended, that he is \*262] entitled to all the earnings of his apprentices. Harg. Co. Litt. 117 a, note 1; *Barber v. Dennis*, 6 Mod. 69; 12 Mod. 415; *Meriton v. Hornsby*, 1 Ves. 48; *Hill v. Allen*, Ibid. 83. In these cases from Vesey, it was adjudged, that the master was entitled, even in equity, to prize-money earned by the apprentice, although it was not earned in his regular business.

In England, every owner of a ship is bound by law to take a certain number of apprentices to the sea. To encourage the master, the law gives him the whole earnings of the apprentices. This was not a voluntary act of the apprentices; they were bound to obey the orders of the master. But this is a question between British subjects, not arising upon the *jus gentium*, but upon the municipal laws of England, which this court, sitting as a court of admiralty, cannot decide. The decree is, that the money shall be paid to the apprentices only, or their proctors or attorneys. But being under age, they cannot appoint a proctor to submit to the jurisdiction of this court, nor an attorney to receive their share of the salvage.

In *answer*, it was said in behalf of the *apprentices*, that the master's right attaches only to those earnings which flow from their ordinary occupation and industry, and not to anything given as a reward for an extraordinary and voluntary service rendered. When an apprentice goes on board a privateer, his business is to make prizes; it then becomes his ordinary occupation, and the master is entitled to his share of prize money.

Suppose, a gentleman riding out in his carriage; his horses take fright, and run away; an apprentice runs out of his master's shop and stops the horses, for which service the gentleman gives him \$100. Can it be contended, that the master has a right to the money? There is no difference between that case and the present. In the case of *The Beaver*, 3 Rob. 239, Sir W. Scott distinguished between the master and his apprentice, and gave a share expressly to the apprentice.

\*In the present case, it was a voluntary act on the part of the ap- \*263] prentices. The master had no right to compel them to risk their lives in this service. It was not within the course of their ordinary business. The cases cited only show that the master is entitled to what the apprentice earns in the regular course of business, whether it be that to which he was bound, or that in which he chooses to engage, in derogation of the rights of his master. But salvage is not a regular business; it is not a matter of contract. A mariner or an apprentice is bound only to do such duty as appertains to the ship, on the voyage. If the master of the apprentices



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is entitled to their share of the salvage, because they are subject to the orders of the captain, by the same rule he would be entitled to the shares of all the seamen, for they are all equally under the command of the captain.

If the master claims a compensation for the risk of the loss of the labor of his apprentices, his share of the salvage for such risk ought to be much less than the shares awarded to the apprentices, which were founded upon their services, and the hazard of their lives.

In *reply*, it was said by the counsel for Jackson, the master of the apprentices, that in the case of *The Beaver*, Sir WILLIAM SCOTT did not decide whether the master was entitled to the share of his apprentice, or not, but left that question to be determined by the laws of his country.

The case of a gratuitous gift is different from that of a right which has accrued, and which can be enforced by law ; and therefore, the case stated for illustration does not apply.

If the master has no right to send his seamen to the assistance of a vessel in distress, it can never be in his power to render a service ; and he loses all command over those who remain, because they may say, we were only bound to labor with the assistance of the others.

March 6th, 1804. MARSHALL, Ch. J., delivered the opinion of the court.—\*In this case, a preliminary question has been made by the counsel for the plaintiffs, which ought not to be disregarded. As the [\*264 parties interested, except the owners of the cargo of the Firm, are not Americans, a doubt has been suggested respecting the jurisdiction of the court, and upon a reference to the authorities, the point does not appear to have been ever settled. These doubts seem rather founded on the idea, that upon principles of general policy, this court ought not to take cognisance of a case entirely between foreigners, than from any positive incapacity to do so. On weighing the considerations drawn from public convenience, those in favor of the jurisdiction appear much to overbalance those against it, and it is the opinion of this court, that, whatever doubts may exist in a case where the jurisdiction may be objected to, there ought to be none, where the parties assent to it.

The previous question being disposed of, the court will proceed to consider the several cases which have grown out of the libel filed in the district court.

The first to be decided is that of the master of the Firm, who, by the sentence of the circuit court, was declared to have forfeited his right to salvage, by having embezzled a part of the cargo of the Blaireau. The fact is not contested, but it is contended, that the embezzlement, proved in the cause, does not affect the right of the captain to salvage. The arguments in support of this position shall very briefly be reviewed. It is insisted, that the embezzlement was made, after the vessel was brought into port, and this seems to be considered as a circumstance material to the influence which the embezzlement ought to have in the case. So far as respects the fact, the evidence is, that the articles were brought on board the Firm when the Blaireau was found at sea, and the fraud was detected in the port of Baltimore. When the concealment took place, does not appear, but it would be straining very hard to presume that it took place, after arriving in port. It

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is not, however, perceived, that this need be the subject of very minute \*265] inquiry, since the fact must have occurred before he parted with the possession acquired by the act, on the merit of which his claim for salvage is founded.

It is also stated, that this court has no jurisdiction of the crime committed by the master, and cannot notice it, even incidentally. If it was intended merely to prove that this court could not convict Captain Mason of felony, and punish him for that offence, there certainly could never have been a doubt entertained on the subject; but when it is inferred from thence, that the court can take no notice of the fact, the correctness of the conclusion is not perceived. It is believed to be universally true, that when a claim of any sort is asserted in court, all those circumstances which go to defeat the claim, and to show that the person asserting it has not a right to recover, may and ought to be considered. The real question, therefore, is, whether the claim for salvage is affected by the act of embezzlement; and if it is, the incapacity of this court to proceed criminally against the master, forms no objection to their examining a fact which goes to the very foundation of his right.

The legal right of the salvors is insisted on, and it is said, that in trover for the ship and cargo, by the owners, salvage would be allowed to those who had rendered the service, and then openly converted them to their own use. Yet the jury, trying the action, would determine on the right to salvage, and would inquire into any fact which went to defeat that right. Whatever shape, then, may be given to the question, it still resolves itself into the inquiry, whether the embezzlement of part of the cargo does really intermingle itself with, and infect, the whole transaction, in such a manner as to destroy any claim founded on it.

The counsel for this plaintiff contends, that the merits of Captain Mason, as a salvor, are not impaired by the act charged upon him, because a crime is no offset \*266] against a debt, and the claim for salvage is in nature of a debt. This leads to an inquiry into the principles on which salvage is allowed. If the property of an individual on land be exposed to the greatest peril, and be saved by the voluntary exertions of any persons whatever; if valuable goods be rescued from a house in flames, at the imminent hazard of life by the salvor, no remuneration in the shape of salvage is allowed. The act is highly meritorious, and the service is as great as if rendered at sea. Yet the claim for salvage could not, perhaps, be supported. It is certainly not made. Let precisely the same service, at precisely the same hazard, be rendered at sea, and a very ample reward will be bestowed in the courts of justice.

If we search for the motives producing this apparent prodigality, in rewarding services rendered at sea, we shall find them in a liberal and enlarged policy. The allowance of a very ample compensation for those services (one very much exceeding the mere risk encountered, and labor employed in effecting them), is intended as an inducement to render them, which it is for the public interests, and for the general interests of humanity, to hold forth to those who navigate the ocean. It is perhaps difficult, on any other principle, to account satisfactorily for the very great difference which is made between the retribution allowed for services at sea and on land; neither



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will a fair calculation of the real hazard or labor, be a foundation for such a difference ; nor will the benefit received always account for it.

If a wise and humane policy be among the essential principles which induce a continuance in the allowance of that liberal compensation which is made for saving a vessel at sea, we must at once perceive the ground on which it is refused to the person whose conduct ought to be punished instead of being rewarded. That same policy which is so very influential in producing the very liberal allowances made by way of salvage, requires that those allowances should be withheld from persons, who avail themselves of the opportunity furnished \*them by the possession of the property of [\*267 another, to embezzle that property. While the general interests of [\*267 society require that the most powerful inducements should be held forth to men to save life and property about to perish at sea, they also require that those inducements should likewise be held forth to a fair and upright conduct with regard to the objects thus preserved. This would certainly justify the reduction of the claim to a bare compensation, on the principles of a real *quantum meruit* ; and the losses in the cargo, which may be imputed to the master, would balance that account, if, as is contended by his counsel, the court could not, on principles generally received, consider the act of embezzlement as a total forfeiture of all right to salvage.<sup>1</sup>

But the case of a mariner, who forfeits his rights to wages, by embezzling any part of the cargo, is precisely in point. That case stands on the same principles with this, and is a full authority for this, since it cannot be denied, that the right to salvage is forfeited by the same act that would forfeit the right to wages. In the case of Mr. Stevenson, the fact is not clearly ascertained. If the embezzlement was fixed upon him, he, as well as the master, ought to forfeit his salvage. But it is not fixed. Yet there are circumstances in the case, which, if he stands acquitted of the charge of unfairness, do certainly so implicate him in that of carelessness, as to destroy his pretensions to superior compensation, and reduce his claim to a level with that of a common mariner.

The decree of the circuit court being approved, so far as respects Captain Mason and Mr. Stevenson, the general rate of salvage allowed by that decree is next to be considered. There is certainly no positive rule which governs absolutely the rate of salvage. Yet in fixing it, the common usage of commercial nations, and especially of those whose subjects are interested in the particular case, ought unquestionably to be regarded. In France, it appears that a service like that rendered the owners of the \*Blaireau [\*268 would have been compensated with one-third of the value of the vessel and cargo. In England, the principle of reciprocity, if not adopted, is much respected, and to judge from the tenor of their cases on this subject, it is fairly presumable, that the salvage which would be allowed in an English court, in a case like the present, would not greatly vary from that which appears to be made by the ordinances of France.

This is unquestionably a case of great merit, and a very liberal salvage ought to be allowed. Yet that allowed both by the district and circuit courts, appears to exceed any sum which those principles, which ought to be

<sup>1</sup> See *The Minnie Miller*, 6 Ben. 117 ; *The Louisa*, 2 W. Rob. 26 ; *The John and Thomas*, 1 Hagg. 157 n.

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resorted to as guides in the case, will justify. Among the various adjudications of the courts of admiralty in England, to which country the salvors belong, no one has been found where so large an allowance has been made; and in France, the nation of the owners of the property saved, a positive ordinance is understood to regulate this subject, and to fix the salvage at one-third of the gross value of what has been preserved.

Taking the whole subject into consideration, the court is disposed to reduce the rate of salvage, and to allow about two-fifths instead of three-fifths to the salvors. The vessel and cargo will then be really charged, in consequence of the savings produced by the forfeiture of the master's claim, and the reduction of those of the mate and Mr. Christie, with not more than one-third of the gross value of the property.

In the distribution of this sum, the court does not entirely approve the decree which has been rendered in the circuit court.

The proportion allowed the owners of the Firm and her cargo, is not equal to the risk incurred, nor does it furnish an inducement to the owners of vessels to permit their masters to save those found in distress at sea, in any degree proportioned to the inducements offered to the masters and crew. The same policy ought to extend to all concerned, the same rewards for a service designed to be encouraged, and it is surely no reward to a \*269] man, made his own insurer without his own consent, \*to return him very little more than the premium he had advanced. The common course of decisions, too, has established a very different ratio for the distribution of salvage money, and the court is of opinion, that those decisions are founded on substantial considerations.

The owners of the vessel and cargo, in this case, will be allowed one-third of the whole amount of salvage decreed, which third is to be divided between them in the proportion established in the district court, it being, in our opinion, very clear, that the owner of the vessel continued to risk the freight after, as much as before, the assent of Mr. Christie to the measures necessary for saving the Blaireau. That assent could only be construed, to charge him with the hazards to be encountered by the cargo, and not to vary the contract respecting the freight.

The proportions established by the decree of the circuit court between those who navigated the Firm, and those who navigated the Blaireau, and between the individuals in each ship, are all approved with this exception. The case exhibits no peculiar merits in Mr. Christie, and therefore, his allowance is not to exceed that of a seaman on board that vessel.

On the rights of Toole and the apprentices, this court entirely concurs in opinion with the district and circuit courts. There was certainly no individual who assisted in bringing in the Blaireau, that contributed so much to her preservation as Toole. Every principle of justice, and every feeling of the heart, must arrange itself on the side of his claim. But it is contended, that the contract he had entered into bound him to continue his endeavors to bring the vessel into port, and that the principles of general policy forbid the allowance of salvage to a mariner belonging to the ship which has been preserved.

\*270] \*The claims upon him, on the ground of contract, are urged with a very ill grace indeed. It little becomes those who devoted him to the waves, to set up a title to his further services. The master, who was



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intrusted by the owner with power over the vessel and her crew, had discharged him from all further duty under his contract, so far as any act whatever could discharge him, and it is not for the owner now to revive this abandoned claim. Those principles of policy which withhold from the mariners of a ship their wages, on her being lost, and which deny them salvage for saving their ship, however great the peril may be, cannot apply to a case like this. There is no danger that a single seaman can be induced, or enabled, by the prospect of the reward given to Toole, to prevail on the officers and crew of a vessel to abandon her to the mercy of the waves, for the purpose of entitling the person who remains in her to salvage, if she should be fortunately preserved.

The claim of the master to the salvage allowed his apprentices, is one which the court feels no disposition to support, unless the law of the case be clearly with him. The authorities cited by his counsel do not come up to this case. The right of the master to the earnings of his apprentice, in the way of his business, or of any other business which is substituted for it, is different from a right to his extraordinary earnings, which do not interfere with the profits the master may legitimately derive from his service. Of this latter description is salvage. It is an extra benefit, the reception of which does not deduct from the profits the master is entitled to from his service. But the case cited from Robinson, where salvage was actually decreed to an apprentice, is in point. The counsel does not appear to the court to construe that case correctly, when he says that it does not determine the right as between the master and the apprentice. The fair understanding of the case is, that the money was decreed to the apprentice, and was to be paid for his benefit. Considering the case strictly on principle, that portion of the salvage allowed ought to be paid to the master which would compensate him for having risked the future service of his apprentice; but as this would not amount to a very considerable sum, and as a liberal salvage has \*already been decreed to the master, this further allowance will not be made in this case. [\*271

Upon these principles, the following decree is to be entered: "This cause came on to be heard, on the transcript of the record of the circuit court, and was argued by counsel, on consideration whereof, this court doth reverse the sentence of the circuit court, so far as the same is inconsistent with the principles and opinions hereinafter stated: This court is of opinion, that too large a proportion of the net proceeds of the ship Blaireau and her cargo has been allowed to the salvors, and that \$21,400 is a sufficient retribution for the service performed, which sum is decreed to the claimants (except Captain Mason, whose rights are forfeited by embezzling a part of the cargo), in full of their demands. In distributing the sum thus allowed, this court is of opinion, that the owners of the Firm and her cargo ought to receive one-third of the whole amount thereof, of which one-third, the proportion of the owner of the vessel ought to be to that of the owner of the cargo, as the value of the vessel and freight is to the value of the cargo; that is, as 18 to 4. It is further the opinion of the court, that the remaining two-thirds of the salvage allowed, ought to be divided between those who navigated both the Firm and the Blaireau (excluding Captain Mason), in the proportions directed by the circuit court, with this exception, that the sum

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to be received by Charles Christie is to be the same with that received by a seaman on board the *Blaireau*. In everything not contrary to the principles herein contained, the decree of the circuit court is affirmed, and the cause is remanded to the said circuit court to be further proceeded in, according to the directions given. The parties are to pay their own costs."

\*272] \*OGDEN, administrator of CORNELL, v. BLACKLEDGE, executor of SALTER.

*Constitutional law.—Declaratory act.—Statute of limitations.*

The 9th section of the act of assembly of North Carolina, passed in 1715, which directs that unless the creditors of deceased persons shall make their claim within seven years after the death of the debtor, they shall be barred, was repealed by the act of 1789, c. 23, notwithstanding the act of 1799, which declares the contrary.

A legislature cannot declare what the law was, but what it shall be.<sup>1</sup>

The act of limitation was suspended, as to British creditors, during the war.<sup>2</sup>

Ogden v. Witherspoon, 2 Hayw. 227, affirmed.

THIS was a case certified to this court from the Circuit Court of North Carolina, under the act of congress of 29th April 1802, § 6 (1 U. S. Stat. 159), which provides for the event of an opposition in the opinions of the two judges, who are by law to hold the circuit court. The certificate was in the following form, viz.:

United States of America : North Carolina District.

At a circuit court of the United States, begun and held at Raleigh, for the district of North Carolina, on Wednesday, the 29th of December, in the year of our Lord, one thousand eight hundred and two, and in the 27th year of American independence. Present, the Honorable John Marshall and Henry Potter, Esquires.

Robert Ogden, Administrator *de bonis non*, with the will annexed, of Samuel Cornell, v. Richard Blackledge, Executor of Robert Salter, deceased.

State of the pleadings. This is an action of debt, upon a bond given by the defendant's testator, to the testator of the plaintiff, on the 2d day of March 1775. The defendant, among other pleas, pleads in bar an act of the general assembly of the state of North Carolina, passed in the year 1715, entitled, "an act concerning proving wills and granting letters of administration, and to prevent frauds in the management of \*intestate es-  
\*273] tates," the 9th section of which was in the following words: "And be it further enacted, that creditors of any persons deceased, shall make their

<sup>1</sup> A declaratory statute cannot have the legal effect of taking away a vested right, or of changing the rule of construction as to a pre-existing law. *Salters v. Tobias*, 3 Paige 338. The legislature has no power to impair the obligation of a contract by a declaratory act. *Reiser v. Saving Fund Association*, 39 Penn. St. 137; *Haley v. Philadelphia*, 68 Id. 45. Where a statute has received a judicial construction, a remedial act will always be construed to extend only to future cases. *Lambertson v. Hogan*,

2 Id. 22. And see *Dale v. Medcalf*, 9 Id. 108; *Gordon v. Inghram*, 1 Grant 152; *Schell v. Michener*, 2 W. N. C. 224, 379.

<sup>2</sup> So, the statute does not run, during a period of civil war, as to matters of controversy between citizens of the opposing belligerents. *Hanger v. Abbott*, 6 Wall. 532; *Levy v. Stewart*, 11 Id. 244; *Stewart v. Kohn*, Id. 493; *United States v. Wiley*, Id. 508; *Brown v. Hiatt*, 15 Id. 177; *Adger v. Alston*, Id. 555; *Batesville Institute v. Kauffman*, 18 Id. 151.



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claim within seven years after the death of said debtor, otherwise such creditors shall be for ever barred."

To which plea, the plaintiff replies, in substance, that the plaintiff's testator was, at his death, a British subject, and the debt within the true intent and operation of the fourth article of the treaty of peace concluded between the King of Great Britain and the United States. To this replication, the defendant demurs, and the plaintiff joins in demurrer.

This case coming on to be argued, at this term, it occurred as a question, whether the act of assembly, recited in the plea of the defendant, was, under all the circumstances stated, and the various acts passed by the legislature of North Carolina, a bar in this action. On which question, the opinions of the judges were opposed. Whereupon, on a motion of the plaintiff, by his counsel, that the point on which the disagreement hath happened may, during the term, be stated under the direction of the judges, and certified, under the seal of the court, to the supreme court, to be finally decided : it is ordered, that the foregoing state of the pleadings and the following statement of facts, which is made under the direction of the judges, be certified, according to the request of the plaintiff, by his counsel, and the law in that case made and provided ; to wit :

1st. That Samuel Cornell, the plaintiff's testator, was, and until his death continued to be, a subject of the King of Great Britain ; and the defendant's testator was, and until his death continued to be, a citizen of North Carolina.

\*2d. That the defendant's testator died in the year one thousand seven hundred and eighty ; and the defendant, in the same year, was [\*274 qualified as executor.

3d. That the plaintiff sued out his writ in this suit, on the fifth day of October, in the year of our Lord, one thousand seven hundred and ninety-eight.

United States of America : North Carolina district.

{ Seal of Circuit Court N. Carolina. }	I William Henry Haywood, clerk of the circuit court for the district of North Carolina, do hereby certify the foregoing to be a copy from the minutes. Given under my hand and seal of office, at Raleigh, on the fifth day of January, in the year of our Lord, one thousand eight hundred and two.
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W. H. HAYWOOD, Clerk.(a)

*Harper and Martin*, for the plaintiff.—The only question in this case is, whether the plaintiff is barred by the 9th section of the act of assembly of North Carolina, passed in 1715. (Iredell's Digest of the Laws of N. Carolina, p. 30.)

1. The first inquiry involved in this general question is, whether that section was repealed, before its operation upon the present case. We contend, that it was repealed : 1st. By the act of assembly of North Carolina, passed in April 1784, c. 23, p. 492,(b) which makes a \*different provision on the same subject. Its preamble refers to the 9th section of [\*275

(a) This being the first case under the late act of congress, the certificate and statement are copied as a precedent, which may be of use in future practice.

(b) A supplemental act to an act entitled an act for proving of wills, and granting administration, and to prevent frauds in the management of intestates' estates.

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the act of 1715, and the 2d section makes the estate liable to creditors, without being subject to limitation or time," which is a negative mode of expression, and clearly repeals the former provision in the act of 1715. But even without such negative words, a statute may be repealed by a subsequent act, which makes a different provision on the same subject. 4 Bac. Abr. tit. Statute. And although the act of 1784 mentions only administrators, yet it evidently applies to executors also. Indeed, the term administrators comprehends executors, for every executor is an administrator; they both plead *plene administravit*, and the only difference between them is, that one is created by the act of law, and the other by the act of the party. Even the statute of treasons, 25 *Educ. III.*, stat. 5, c. 2, in which it is declared to be petit treason, "where a servant slayeth his master," has always been construed to comprehend a servant who kills his mistress, or his master's wife; *à fortiori*, in a remedial statute shall the term administrator include executor. If the 9th section of the act of 1715 was repealed by the act of 1784, the former was no bar to the plaintiff's action; for the seven years had not elapsed, after the death of the defendant's testator, before the repeal took place. 2d. But if the act of 1784 did not operate as a repeal, yet it is contended, that the act of 1789, c. 23 (Iredell's Digest, p. 676), clearly repealed the clause of limitation in the act of 1715. The 6th section enacts, "that \*276] all laws and parts of laws that come within the purview and meaning of this act, are hereby declared void and of no effect." The only question upon this law is, whether the 9th section of the act of 1715 comes within its purview and meaning; and to show that it does, it is only necessary to read and compare the two acts together. (a)

1. Whereas, it is enacted in the ninth section of the said act, "that creditors of any person deceased shall make their claims in seven years after the death of such debtor, otherwise, such creditor shall be for ever barred; and if it shall happen, that any sum or sums of money shall hereafter remain in the hands of any administrator, after the term of seven years shall be expired, and not recovered by any of kin to the deceased, or by any creditor in that time, the same shall be paid to the churchwardens and vestry, to and for the use of the parish where the said money shall remain." And as there are no churchwardens and vestry to make claim in such cases—

2. Be it therefore enacted, &c., that as soon as an administrator shall have finished his administration on such estates, and no creditor shall make any further demand, the residue of such estates shall be deposited in the treasury, and there remain, without interest, subject to the claim of creditors and the lawful representatives of such decedent, without being subject to limitation or time.

3. And be it further enacted, &c., that the treasurer is hereby authorized and empowered, in all such cases, to demand payment of such administrator, and on refusal or delay, to give notice in thirty days to appear and show cause why he refuses or delays payment, and on non-appearance, to enter up judgment, and thereupon proceed to execution for the purposes aforesaid.

(a) An act to amend an act entitled an act concerning proving of wills and granting letters of administration, and to prevent frauds in the management of intestates' estates.

§ 4. And be it further enacted, &c., that the creditors of any person or persons deceased, if he or they reside within this state, shall, within two years, and if they reside without the limits of this state, shall, within three years, from the qualification of the executors or administrators, exhibit and make demand of their respective accounts, debts and claims of every kind whatever, to such executors or administrators; and if any creditor or creditors shall hereafter fail to demand and bring suit for the recovery



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But the legislature of North Carolina passed a law in 1799 (c. 26), which declares, in substance, that notwithstanding the 6th section of the act of 1789, the 9th section of the act of 1715 was not repealed. This, however, cannot affect the present case, for this action was \*brought in October 1798, before the law of 1799 was passed. But even if it had been [\*277 brought after the law of 1799, that act could not alter the past law, and make that to have been law which was not law at the time. To declare what the law is, or has been, is a judicial power; to declare what the law shall be, is legislative. One of the fundamental principles of all our governments is, that the legislative power shall be separated from the judicial.

THE COURT stopped the counsel, observing that it was unnecessary to argue that point.

The act of 1789, by making a provision on the same subject, differing from that of 1715, would have repealed it, without the express clause of repeal contained in the 6th section. Should it be said, that although the 9th section of the act of 1715 may be repealed, yet the present action is within the 4th section of the act of 1789, and barred thereby; the answer is, that the defendant has not pleaded that act in bar, and the court will not notice a limitation unless pleaded.

2. The second inquiry involved in the general question is, whether, if the act of 1789 repealed the limitation of 1715, the latter had operated upon this case, before the repeal.

The defendant's testator died in 1780. The plaintiff's testator was a British subject, and his right of action was suspended, not only by the act of assembly of North Carolina, passed in 1777, c. 2, § 101 (Iredell's Digest, p. 318), (a) but by the law of nations, which prohibits an alien enemy from

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of his, her or their debt as above specified, withint he aforesaid time limited, he, she or they shall be for ever debarred from the recovery of his, her or their debt, in any court of law or equity, or before any justice of peace within this state.

There is a saving to infants, persons *non compos*, and *femes covert*, and a *proviso* that the delay shall not be a bar, if it is at the special request of the defendant.

§ 6. And be it further enacted, that all laws and parts of laws that come within the purview and meaning of this act are hereby declared void and of no effect.

An act to explain an act passed in one thousand seven hundred and eighty-nine, entitled an act to amend an act concerning the proving of wills and granting letters of administration, and to prevent frauds in the management of intestates' estates, passed in one thousand seven hundred and fifteen, and for other purposes.

Whereas, doubts have been entertained whether that part of the ninth section of the said act passed in one thousand seven hundred and fifteen, which requires the creditors of any person deceased, to make their claims within seven years after the decease of such debtor, or be for ever barred, is or is not repealed by the said act, passed in one thousand seven hundred and eighty-nine.

§ 1. Be it enacted, &c., that the said act, passed in the year one thousand seven hundred and eighty-nine, shall not be considered as a repeal of that part of the ninth section of the act passed in the year one thousand seven hundred and fifteen aforesaid; but that the same shall be deemed, held and taken to be in full force.

(a) An act for establishing courts of law, and for regulating the proceedings therein.

§ 101. Provided, that no person who hath taken, or shall take, part with the enemies of America, or who hath or shall refuse, when lawfully required thereto, to take the oath of allegiance and abjuration required by the laws of this state, or who hath or

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maintaining any \*action in the courts of the nation with whom his sovereign is at war : and his right of action was not restored until the act of assembly of 1787, c. 1 (Iredell's Digest, p. 607), declared the treaty with Great Britain to be the law of the land, and directed the courts to decide accordingly. (a)

By the 4th article of the definitive treaty of peace, creditors are to meet with no lawful impediment to the recovery of their debts. The limitation therefore, could not begin to run, before the removal of all such lawful impediments. The treaty was ratified on the 14th of January 1784, and even calculating from that date, only five years had elapsed before the repeal.

It may be remarked also, that this same Samuel Cornell is one of the persons expressly named in the act of confiscation of October 1779, c. 2 (Iredell's Digest, p. 479), and therefore, it cannot be contended, that he was not one of the persons whose rights of action were suspended by the act of 1777, c. 2. At the time of the repeal, the plaintiff was entitled to bring and maintain his action. No right had then vested in the defendant, under the act of limitations, and therefore, the principle does not apply, that the repeal shall \*279] not divest a right. \*Acts of limitation do not absolve the debt ; they only bar the remedy. *Quantock v. England*, 5 Burr. 2628. They are nothing more than legal impediments. The replication of the treaty was therefore, good.

March 6th, 1804. CUSHING, J., delivered the opinion of the court, which was entered on the minutes as follows :—This court having considered the question, whether an act of assembly recited in the plea of the defendant, was, under all the circumstances stated, and the various acts passed by the legislature of North Carolina, a bar in this action ; which question, in consequence of an opposition in the opinion of the judges of the circuit court for the district of North Carolina, was certified to this court to be finally decided, is of opinion, that the act of assembly recited in the said plea is, under all the circumstances stated, no bar to the plaintiff's action, the same having been repealed by the act of 1789, c. 23, at which time, seven years had not elapsed from the final ratification of the treaty of peace between Great Britain and the United States ; that being the period when the act of limitations began to run against debts due by citizens of the United States to British creditors.

shall remove from this state, or any of the United States, to avoid giving their assistance in repelling the invasions of the common enemy, or who hath or shall reside, or be, under the dominion of the enemies of America, other than such as are detained as prisoners of war, nor any person claiming by assignment, representation or otherwise, by or under any such person, shall have or receive any benefit of this act ; but all right of commencing and prosecuting any suit or suits, action or actions, real, personal or mixt, shall be and is hereby suspended, and shall remain suspended, until the legislature shall make further provision relative thereto.

(a) An act declaring the treaty of peace between the United States of America and the King of Great Britain, to be part of the law of the land.

1. Be it enacted, &c., that the articles of the definitive treaty between the United States of America and the King of Great Britain, are hereby declared to be part of the law of the land.

2. And be it further enacted, &c., that the courts of law and equity are hereby declared, in all causes and questions cognisable by them respecting the said treaty, to judge accordingly.



\*FEBRUARY TERM, 1805.

McILVAINE *v.* COXE's Lessee. (a)

*Citizenship.*

*Quære?* Whether a person born in the colony of New Jersey, before the war with Great Britain and who resided there until the year 1777, but who then joined the British army in Philadelphia, and afterwards went to England, where he had ever since resided, and who had always claimed to be a British subject, can now take and hold lands in the state of New Jersey, by descent from a citizen of the United States?

Whether, by the act of the state of New Jersey of 4th October 1776, he became a member of the new government against his will? Whether he could expatriate himself, after the peace? Whether, by expatriation, a man becomes an alien, to all intents and purposes?

ERROR from the Circuit Court for the district of New Jersey, to reverse a judgment given for the plaintiff below, upon a special verdict in ejectment. The material facts of the case are stated in the argument of W. Tilghman.

*W. Tilghman*, for plaintiff in error.—The question which arises in this case is of great importance, and has never been decided in this court, nor in the state of New Jersey. It is, in substance, whether a person born in the United States, while they were British colonies, and who took no part in favor of the revolution, but joined the British army, in an early stage of the war, and from that time to this, by the whole tenor of his actions and declarations, has shown his election not to be a citizen of the United States, but to adhere to the British empire, was capable of taking land in New Jersey, by descent, in the year 1802.

There is no occasion to dwell minutely on the title. The lessor of the plaintiff had good title, if Daniel Coxe, the younger, was capable of taking by descent from his aunt, Rebecca Coxe, who died in 1802, that is to say, he has title to a certain undivided part, according to the law of descents in New Jersey, concerning which there is no question.

Family disputes are always unpleasant; yet as laws regulating descent are merely of municipal creation, no one has a right to complain, if, by a change of the law, he now receives a less portion than formerly, or even if he receives no portion at all. \*By the law of New Jersey, before the [281] revolution, Daniel Coxe would have taken all the estate of his aunt Rebecca, not only to the entire exclusion of his cousins, the children of his uncle William Coxe, deceased, but of his own sister, Mrs. Kempe. As the law now stands, we suppose, he is entirely excluded.

In tracing the conduct of Daniel Coxe, from the commencement of the revolution to the year 1802, which it is necessary to do, in order to decide the cause, nothing more is intended than to bring into view those facts from which the law must arise. It is far from our minds in doing this, to pass any censure on his conduct. In revolutions, every man has a right to take his part.

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(a) Present, CUSHING, PATERSON, WASHINGTON and JOHNSON, Justices. The Chief Justice did not sit in this cause, having formed a decided opinion on the principal question, while his interest was concerned. See the opinion of the court in this case, 4 Cr. 211.

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He is excusable, if not bound in duty, to take that part which in his conscience he approves.

I will now proceed to state the facts necessary to be attended to, in order to decide the cause. The ejectment is brought for a messuage and 200 acres of land situated in Trenton, in New Jersey. Daniel Coxe, the son, conveyed to John Redman Coxe, lessor of the plaintiff, who had previous notice of the defendant's claim. The premises are part of the estate of Rebecca Coxe, deceased, and are of the value of \$5000. Rebecca Coxe died at Trenton, in 1802, seised in fee of the premises, intestate and without issue. In the year 1783, and before that time, she was a citizen of New Jersey, and so continued until her death. She left no brother or sister, but there were children of her two brothers Daniel and William, as follows, viz : 1. Her brother Daniel, who died about 47 years ago, had issue Daniel Coxe (under whom the lessor of the plaintiff claims) and Grace Kempe (widow of John Tabor Kempe, deceased), both now living. \*2. Her brother William, who died in 1801, left issue five children, viz : John, Tench, William, Daniel William, and a daughter Mary, all now living ; also the following grandchildren, viz : children of his daughter Sarah, deceased (late wife of Andrew Allen), that is to say, Margaret, wife of George Hammond, Ann, Andrew, Elizabeth, Maria, John and Thomas ; and of his daughter Rebecca McIlvaine, deceased, named Rebecca Coxe McIlvaine.

Daniel Coxe, who conveyed to the lessor of the plaintiff, was born in New Jersey, where he resided from his birth until some time in the year 1777, when he removed to the city of Philadelphia, while or shortly before it was in the possession of the British troops. From the time they took possession of the city in 1777, he has never resided in any place within the jurisdiction of the United States, but has resided in places under the actual jurisdiction and government of the King of Great Britain, and at the time of Rebecca Coxe's death, he was residing and domiciliated with his wife and four children at London. In the year 1775, and long before, he was more than twenty-one years of age, was a member of the king's council of New Jersey, and a colonel of the provincial militia. In the years 1778 and 1779, he exercised a civil office in Philadelphia, under the authority of the King of Great Britain.

When the army evacuated Philadelphia, he followed it to New York, where he remained, exercising a civil office under the king, until the final evacuation of that city by the British troops, in 1783 ; until which time, he remained possessed of his commissions and offices of member of the council and colonel of the militia, nor does it appear that he has since resigned either of them. He has never taken an oath of allegiance to the United States, or either of them, or of abjuration of the King of Great Britain, nor has he, by any *overt* act, ever exhibited himself as a citizen of the United States, or either of them. But between the signing of the definitive treaty of peace, and the death of Rebecca Coxe, he has done the following acts, viz :

\*1. He has executed diverse writings stating himself to be of Great Britain, or of some other place in the British dominions.

2. He has for several years carried on trade and commerce as a British, and not as an alien, merchant, with all the rights and privileges belonging to a British merchant, by the laws of Great Britain.



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3. He has held lands in England as a trustee.

4. Before and since the death of Rebecca Coxe, he has received a pension from the King of Great Britain, in consideration of his loyalty and attachment to the British king and government, and of his losses by reason thereof.

5. He did, soon after the treaty of peace, apply by petition to the commissioners to inquire into the losses by loyalists, &c., under certain statutes, viz: 23 Geo. III., c. 80; 25 Geo. III., c. 76; 27 Geo. III., c. 29; 28 Geo. III., c. 40; 29 Geo. III., c. 62, or some or one of them, and by the same petition he did set forth that he was a British subject, who had suffered for his adherence to the British government, and prayed compensation therefor, &c. And he did receive compensation for his losses and sufferings, and for his estates and possessions, as a loyalist of the 1st and 3d titles or classes of the statutes, or some or one of them.

6. He did in 1795, or afterwards, and before the death of the said Rebecca Coxe, apply, as a British subject, to the commissioners under the 6th article of the treaty of amity, &c., of 19th November 1794, and in his petition, styled himself "Daniel Coxe, of London, in the kingdom of Great Britain," and stated that "he then was, and from his birth ever had been, a subject of the King of Great Britain, and under the allegiance of the said king."

An inquisition was taken in the county of Hunterdon, and state of New Jersey, August 1st, 1778, by which it was found, that he did, about the 9th of April 1778, join the arms of the King of Great Britain, and did aid and abet them, by acting as a magistrate of police, &c., against the form of his allegiance to the state of New Jersey, and against the peace of the same. Final judgment was entered on the said inquisition, at October term 1778, whereby \*all his real and personal estate in the county of Hunterdon [284 was forfeited and vested in the state of New Jersey. And at February term 1779, process was ordered to be issued to the commissioners of said county for the sale of the said real estate.

Some time in 1778 or 1779, he was attainted of treason against the state of Pennsylvania, in consequence of not surrendering pursuant to a proclamation issued by the supreme executive council of that state, dated 21st July 1778, and of the said treason and attainder was pardoned, on the 6th of December 1802, by the governor of Pennsylvania.

By virtue of the said inquisition, judgment and process in New Jersey, his real estate in the county of Hunterdon was seized and sold, and is now held by the purchasers thereof under that state.

This case presents three subjects for consideration. 1. What was the situation of Daniel Coxe, with respect to his citizenship or alienage, from the commencement of the revolution to the definitive treaty of peace between the United States and Great Britain? 2. What was his situation from the time of the treaty to the death of Rebecca Coxe in 1802? 3. Supposing him to be an alien in 1802, is there anything particular in his case to exempt him from the general incapacity of aliens to inherit land?

I. What was his situation between the commencement of the revolution and the treaty of peace? He was an officer of the king's government, a member of the council, and colonel of the militia, and, without doubt, under

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a positive oath of allegiance. He never owed natural allegiance to the state of New Jersey. When the revolution was proposed, he had a right to choose his side; *Chapman's Case*, 1 Dall. 53; which was decided even in the \*285] very heat of the revolution. \*He did choose to adhere to the British. The record states that he removed to Philadelphia, before or while it was in possession of the British, and has adhered to them ever since. He never took the oath of abjuration of the King of Great Britain, or of allegiance to the United States, or any of them; nor has he by any *overt* act exhibited himself a citizen of the United States, or of either of them. His remaining in New Jersey, until he found a safe opportunity of joining the British, ought not, on general principles, to have bound him to anything more than that local allegiance to which even foreigners are subject.

But it may be objected, that inasmuch as he remained in New Jersey until the year 1777, and the act of 4th of October 1776 (2 Wilson's N. J. Laws, 4), declares, that all persons then abiding there, not only owe allegiance, but are members of the then government, it must be concluded that he was a citizen. I shall not deny the right of the state of New Jersey to take such precautions as they thought proper for the public safety; but at all events, their object was no more than to deter persons from joining the enemy, during the war, under fear of death, and loss of property. They who joined the enemy were a class of people whom they did not wish to receive again as citizens. They could have no objection to their being aliens, after the war. All such persons (provided they were convicted of treason, or had forfeited their estates) were for ever excluded from offices of trust or profit, civil and military, and from voting at elections of representatives, &c., by the act of 11th of December 1778. (2 Wils. N. J. Laws, 75, § 23.)

All these objects are answered, by preventing Daniel Coxe from choosing his side, after the 4th of October 1776. Accordingly, Daniel Coxe was proceeded against with a view to the confiscation of his property, but he was never attainted. The same proceedings might have been had against an inhabitant of New Jersey, who joined the British between the 19th of April 1775, and 4th of October 1776; or even against an inhabitant of another \*286] state who \*owned property in New Jersey. (Act of 11th December 1778; 2 Wils. N. J. Laws, p. 67, § 2, and p. 68, § 3.)

Granting, then, the most that can be asked, that Daniel Coxe could not divest himself of his allegiance, during the war, we cannot infer that the same impediment existed, after the war.

II. This brings us to the 2d consideration. What was the situation of Daniel Coxe, from the peace to the year 1802?

The act of 4th October 1776, only declares those persons to be subjects, who were then abiding there. All danger being over, by the treaty of 1783, a new æra began, when every man had a right to leave the country and transfer his allegiance where he pleased. This is a most important right; and although Daniel Coxe now disclaims it, he would then have thought its denial cruel and unjust.

Of all people, the Americans are the last who ought to call in question the right of expatriation. They have derived infinite advantage from its exercise by others who have left Europe and settled here. It is denied by the constitution of no state, nor of the United States. It is positively af-



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firmed by the constitutions of some of the states, viz., Pennsylvania, Kentucky and Vermont, and by an act of assembly of Virginia. The right is also asserted by the best writers on the laws of nature and nations. Vattel, lib. 1, c. 19, § 218, 223, 224, 225, &c. ; 1 Wyckefort (L'Embassadeur et ses Fonctions), 117, 119. The same right is also asserted by our own authors. 1 Judge Wilson's Works, 311-317 ; 1 Tucker's Bl., App. 426 (in a note) ; Id. vol. 1, part 2, App. 96. It is also recognised by our courts of justice. 3 Dall. 153. *Talbot v. Jansen*, 3 Dall. 153. And the case of *The Charming \*Betsy*, in the circuit court of Pennsylvania, 26th May 1802.(a) [\*287 It has also been recognised by our government, who have received and accredited in public characters from England, many persons who resided in the United States at the time of the revolution, viz., Sir John Temple, of Massachusetts, Phineas Bond, Esq., of Pennsylvania, T. W. Moore, Esq., and Col. T. H. Barclay, of New York. In the commissions of all these persons, they are said to be of London, or some other place in the English territories. It has also been recognised by our legislature, who, in their act of naturalization, insist on persons coming from Europe renouncing their former sovereign. It is recognised by England, where other nations are concerned. They formerly allowed naturalization in their colonies, after seven years' residence. They allowed it to officers serving four years in the Royal American regiments, and they now allow it to persons serving three years in their navy.

Supposing, then, that Daniel Coxe possessed this right of expatriation, does it appear by the record that he exercised it ? If he did not, it is impossible that any person ever can. To prove that he did, his conduct during the war is very natural. The offices he held at Philadelphia and New York show that he risked his life and fortune with the British. If he was not then a British subject, it was because the act of New Jersey of 4th October 1776, estopped him from that right. Nothing on his part was wanting. After the peace, he removed with his family, and has remained in England, openly avowing himself a British subject ever since.

\*But to be more particular. 1. He has carried on trade and commerce as a British, not an alien merchant. On this head, the British [\*288 are extremely jealous ; none but *bonâ fide* British subjects enjoy this privilege. No American *post-natus* is allowed to hold a ship under the British navigation act ; nor to trade to the British colonies, except under great restrictions ; nor to be exempt from alien duties ; nor to hold East India Stock. 2. He has been pensioned, not only for his losses, but for his loyalty and attachment to the British government. 3. He did, in 1795, or afterwards, apply as a British subject to the commissioners, under the 6th article of the treaty of 19th November 1794, and in his petition, asserted that he then was, and from his birth ever had been, a subject of the King of Great Britain, under the allegiance of the said king. This treaty agrees to make compensation on the part of the United States to British subjects, who have lost their debts by legal impediments.

Daniel Coxe might have returned to New Jersey, after the peace, and become a citizen, by taking the oaths, &c. The attainder in Pennsylvania was no hindrance, for the treaty of peace protected him from prosecution.

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(a) s. c. in this court, *ante*, p. 54.

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III. Let us now examine whether the alienage of Daniel Coxe is attended with any particular circumstances enabling him to take land by descent, contrary to the general principles of alienage.

On the execution of the definitive treaty of peace, the United States and Great Britain were separate, independent governments. In that treaty ought to have been inserted any stipulation which the two nations wished to make touching the right of property to be held by individuals. And they have made some stipulations touching debts, and property both real and personal, but they were all confined to the security of property then held. \*With regard to lands, there was to be no restitution; but \*289] congress were to recommend restitution, without condition: 1st. To real British subjects: 2d. To persons resident in districts held by the king, and who had not borne arms against the United States. As to all other persons, they were allowed to go to the United States and remain twelve months to endeavor to get back their property, and congress were to recommend restitution, they paying the possessors the *bond fide* cost. There were to be no future confiscations, nor was any person to suffer any future loss or damage, in his person, liberty or property. By the treaty of 1794, British subjects, who then held lands in the United States, were, so far as regarded such lands, not be considered as aliens; but they, their heirs and assigns, were permitted to hold, enjoy and dispose of the same, in like manner as if they were natives. The general principle, that aliens cannot hold lands, has been adopted by New Jersey; but by an act of assembly of 14th November 1785, they have made an exception in favor of mortgages.

But it is objected, that the constitution of New Jersey having adopted the common law of England, has adopted also the doctrine of *ante-nati*. The adoption of the common law was to secure the liberty and property of the citizens of New Jersey, without regard to foreign nations, and not with a view of enabling British subjects to hold lands in that state. It was not meant to adopt those parts which were inconvenient or inconsistent with our situation, such as that the king can do no wrong, personal and perpetual allegiance, &c. Besides, the constitution of New Jersey expressly excepts such parts as are inconsistent with the rights and privileges contained in that charter.

Now, that charter is at variance with the principle of *ante-nati*, which is founded on the basis that natural allegiance cannot be shaken off; whereas, the constitution of New Jersey declares that protection and allegiance are reciprocal.

\*290] \*This doctrine of *ante-nati* is founded on *Calvin's Case*, which was determined 6 Jac. I., when the ideas of the royal prerogative were extravagant and absurd. The authority of that case is much shaken by the many absurdities it contains. Some of its principles are ridiculous, some contrary to the present law of England, and some contrary to our own constitutions. As instances of the ridiculous, may be cited his 4th union, which is of the three lions of England and that of Scotland, quartered in one escutcheon; that Moses was the first reporter; that all infidels are devils, and perpetual enemies of christians. One of the doctrines contrary to the present law of England is, that natural allegiance cannot be altered by the law or constitution of man, but is something celestial—*de jure divino*. Witness the English revolution of 1688. The same doctrine is also con-



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trary to our constitutions. Witness our own revolution; the preamble to the constitution of New Jersey; and the naturalization law, which requires an oath of abjuration. Wooddeson, vol. 1, lect. 14, p. 382, says, "When the king, by treaty, ratified by act of parliament, cedes a country to another state, the inhabitants, though born under his protection, become effectually aliens, or liable to the disabilities of alienage in respect to their future concerns with this country; and similar to this I take to be the condition of the revolted Americans, since the recognition of their independent commonwealth."

An alien may take by purchase or devise, but not by descent; and this is the case even with a denizen. *Craw v. Ramsay*, Vaugh. 278.

What is the situation of the people of Louisiana? They have been transferred from England to Spain, from Spain to France, and from France to the United States. To whom do they owe allegiance?

The incapacity of aliens to hold lands is founded in public good and convenience. By suffering them to hold lands, the revenues will be transferred to strangers; population is prevented, and the state is deprived of the personal services of the landholders.

\*But it is said, we should act upon principles of reciprocity. [\*291 That the British allow us to hold lands in England, upon the principles of courtesy. If their decisions have proceeded upon those principles, it is no reason why we should allow the British to hold lands here. It may be their policy, to maintain the principle, but it is not ours. They had fifteen millions of inhabitants, we had only three. It was their interest to secure their claims on this country by mortgages and purchases of lands; but our courts cannot decide upon such principles. But if their decisions are founded in law, there was no use in the stipulation of the treaty respecting the right to hold lands. It is only by admitting that the inhabitants of the two countries were aliens to each other, that any effect can be given to the treaty.

The principle of natural allegiance does not apply as to this country. No *ante-natus* ever owed natural allegiance to the United States. There can be but one natural allegiance, and that was due to the King of Great Britain. American *ante-nati*, therefore, may hold lands in England, because they were born under the allegiance of the King of England; but English *ante-nati* cannot hold lands in America, because they were not born under the allegiance of the United States.

It is said in Tucker's Blackstone, vol. 2, App. note c, p. 54, that after the declaration of independence, according to the principles of the laws of England, which we still retained, the natives of both countries, born before the separation, retained all the rights of birth, *i. e.* of inheriting lands, &c., yet the preamble of the Virginia act concerning escheats, &c., passed May 1779, 2 Tuck. Bl., App. p. 54, asserts that on the separation of the United States from the British empire, the inhabitants of the other parts of the empire became aliens and enemies to the said states, and as such, incapable of holding the real or personal property which they had before acquired in the United States.

We say, then, upon the whole, 1st. That Daniel Coxe was always a subject of the King of Great Britain; and never was a subject or citizen of

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the state of New Jersey; and 2d. That if he was by force a subject of New \*292] Jersey, he had a right, when that force ceased to \*operate, to return to his natural allegiance, and shake off the compulsory allegiance which had been forced upon him by the state of New Jersey, and which he always refused to acknowledge; and that he has done so. And lastly, that whether he was always an alien as to the state of New Jersey, or whether he is to be considered as an expatriated citizen, he is still an alien, and therefore, incapable of taking lands by descent.

PATERSON, J.—Suppose he expatriated himself, since the peace, what is the consequence? Does he thereby become a complete alien, so as not to be capable of taking lands by descent afterwards?

W. Tilghman.—So I contend.

*Rawle*, contra.—The title of John Redman Coxe is good, unless Daniel Coxe, his father, was disabled to take by descent from his aunt Rebecca Coxe. But he was capable of taking, unless, 1. He was an alien; or, 2. Attainted of treason. The latter is not found by the jury. He was, therefore, not attainted, nor incapable by reason of any crime.

That he was not an alien, I shall endeavor to demonstrate. 1. Every inhabitant of a state became, at the declaration of independence, a citizen of such state; so far, at least, as relates to the right of holding real estate. 2. He thereby owed allegiance to such state, and acquired capacity to take and hold lands in it. 3. Of this allegiance, he could not divest himself. Of this capacity, he cannot be deprived, except in the course of punishment for crimes. If allegiance be considered as a contract, which requires the consent of both parties to make, it cannot be dissolved but by the consent of both.

\*1. The first position is laid down in a qualified manner, because it \*293] is unnecessary to take a wider scope than the nature of the question requires. It is unnecessary to consider the entire doctrine of allegiance, and its incident, treason. The fullest extent to which I shall press this first position, is, that prior to the declaration of independence, we were all British subjects, and as such, had the capacity to take and hold lands throughout the British empire. That the renunciation of allegiance, the change of government, did not divest of that right, even those individuals who in no shape recognised or adhered to the new government. 1. Because it was not implied from the nature of the revolution; and 2. Because it was necessary to its safety or success.

In the formation of a new government or society, the acts of the majority (what Rutherford, vol. 2, p. 18, calls the natural majority) bind the whole. The members comprising the major part, are citizens by choice; the minority, by force. It did not authorize the majority to seize the property of the minority. They were all members of the new state. But by the opposite argument, the immediate effect of the revolution was, to commit the grossest injustice on the minority; to deprive them of their possessions, because they differed in opinion: to render them aliens, and divest them of their lands.

Such intentions were not declared. The independence of America was a national act. The avowed object was to throw off the power of a distant



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country ; to destroy the political subjection ; to elevate ourselves from a provincial to an equal state in the great community of nations. It was, therefore, a political revolution, involving in the change all the inhabitants of America ; rendering them all members of the new society, citizens of the new states.

\*The declaration of independence was not a unanimous act. It was the act of the majority. But the general sentiment of the day was, [\*294 that it bound the minority. They were all equally considered as citizens of the United States. This principle was never questioned. The minority were never considered as aliens. Hence, the penal laws of that time, made by the states, consider some of that minority as traitors.

Such intentions were not implied. The people of the colonies were absolved from allegiance to the British crown. The political connection between the people of America and the state of Great Britain was dissolved ; and in the language of the declaration of independence, the right "to levy war, conclude peace, contract alliances, establish commerce, and do all other acts which independent states may of right do," was solemnly asserted, and publicly established. To this distinguished act in the history of man, the assent of the people was essential. That assent was implied from the assent of the majority. The assent of the people could only be known by the assent of the states. Not a state dissented. New Jersey was first. Her independent form of government was adopted on the 2d of July 1776. But the division of the people who composed the states, and the disfranchisement of any part of them, were not necessary consequences of that assent. Every inhabitant continued a member of the society : every inhabitant therefore, continued to retain his property, whether real or personal.

But each individual state had to form its own government, and establish its own rules. We must, therefore, seek for those rules in the constitution of New Jersey. The 1st, 2d and 3d articles organize the legislature (which by the 7th, is to choose the governor), the 4th and 13th expressly vest the power of choosing officers in the inhabitants, who have resided in the county for twelve months, and who have property to a certain value. Thus the inhabitants, without distinction, are made members of the society, citizens of the state. Being citizens, all the \*rights of acquiring and enjoying [\*295 property attached to them. But Daniel Coxe was then an inhabitant. Will it be denied, that he *then* was a member of the society ? that he could *then* hold lands ?

The legislature of New Jersey assembled on the 27th of August 1776, and on the 4th of October, passed a law which must remove all doubt on this part of the subject. Every person "abiding" within the state, and deriving protection from its laws, is declared to owe allegiance to it, and to be a member of it. But every man who abode within the state received protection from its laws. It is found by the special verdict, that Daniel Coxe did at that time abide within the state ; he, therefore, owed allegiance to it, and was a member of it.

The inquisitions found by the jury were founded on two acts of assembly of New Jersey. By those acts, it will appear, that the objects of such proceedings were, and only could be, persons owing allegiance to the state. The act of 5th June 1777 (Wilson's edition of New Jersey Laws, Appendix, p. 5), offers a pardon to "such subjects" of the state as had been seduced

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from their allegiance to it, and had joined the enemy ; and enacts, that if they did not return by the first of August, their personal estate should be forfeited, and that if perishable, or likely to fall into the hands of the enemy, it should be sold. The alienation of it by such persons was declared to be void. But it did not forfeit the real estate.

This law speaks of their returning to their allegiance, not as alien enemies, but as offending subjects. The first of the two oaths, required by that act, is in these words : "I, A. B., do sincerely profess and swear, that I do not hold myself bound to bear allegiance to the King of Great Britain : So help me God." The second oath is, "I, A. B., do sincerely profess and \*296] swear, that I do and will bear true faith and allegiance \*to the government established in this state, under the authority of the people : So help me God." The effect of taking these oaths was a pardon and restoration to the rights of a subject ; not a naturalization as new subjects, but restoration "to all the rights of other the good subjects of this state." The subsequent acts, prescribing the form of inquest, &c., refer to this act, and are founded upon the delinquency or treason of the offenders.

Many of the objects of that law having failed to avail themselves of its offered clemency, the act of 18th of April 1778, was passed. (Wilson's Laws of New Jersey, p. 43.) This law was founded on the last, and expressly refers to it. By this act, the real and personal estates of such persons are to be taken into possession ; the personal to be sold, and the real to be rented out. The preamble is in these words : "Whereas, many of the offenders mentioned and described in an act of free and general pardon, and for other purposes therein mentioned, have neglected to avail themselves of the benefit thereof ; therefore, be it enacted," &c.

The next act of assembly is that of 11th December 1778. By this act, the estates of such "fugitives and offenders as are in the other acts described, are forfeited." The first section relates to such fugitives and offenders, *i. e.*, to inhabitants owing allegiance, &c. The second section that every inhabitant of the state who, between the 19th of April 1775, and the 4th of October 1776, joined the enemy's army, or took refuge, or continued with them, or endeavored to aid them by counsel or otherwise, and hath not since returned and become a subject in allegiance to the present government, by taking the oaths, &c., of allegiance, is declared guilty of high treason. \*297] \*This, however, does not reach the case of Daniel Cox, who did not join the British army until the year 1777.

By the third section, every person, not an inhabitant of this state, but of some other of the United States, seised of real estate, who, since the 19th of April 1775, aided or assisted, &c., as before stated, is declared guilty of high treason against the state of New Jersey. In both cases, an inquisition finding the facts is declared to amount to a forfeiture of the offender's real and personal estate ; and in both cases, it is declared, that such conviction shall not, in any instance, affect the person of any such offender.

It is, therefore, only and uniformly in respect to allegiance, to a breach of the duties of a citizen to the state of New Jersey, or other of the United States, that the real estates are forfeited ; and no authority can be collected from any of the laws, to proceed against real estate held by an alien ; at least, it is obvious, that no such proceedings as are directed by these laws could be supported against an alien, merely as such.



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2. That as a recognised inhabitant, as a member of the civil society, and a person owing (and permanently owing) allegiance to the state, he could hold lands within it, is a position too plain to be disputed. The rule of the common law is, that all persons may hold lands, except aliens. 1 Bl. Com. 371; 2 Ibid. 249. But Daniel Coxe was not an alien. Daniel Coxe, therefore, may hold lands.

These two positions are supported by the collateral effect of the treaty of 1783. The 5th article recognises the capacity of all persons, who have been the subject of judicial proceedings, to hold lands. Congress are to recommend to the legislatures of the several states, to pass laws authorizing those persons who had adhered to the British cause, to return to America, and there remain for twelve months, to obtain restitution of their estates. In each case, therefore, the right to receive, and with it the right to retain and hold lands, are recognised; for \*it would be absurd to suppose, [\*298 that he who is to receive it, by virtue of the treaty, is immediately afterwards to have it wrested from him, as an alien. On the subject of restitution, congress were only to recommend, but on another, the treaty is peremptory. By the 6th article there were to be no future confiscations. As a part of the former proceedings, or connected with them, the treaty removes that obstacle to the plaintiff's recovery; for the inquisition could only operate on what Daniel Coxe was then seised of, or entitled to.

It is contended by the opposite counsel, that the treaty authorizes to hold only such lands as could be restored, not to hold new acquisitions. But if our own laws could recognise a person as a citizen in part, and an alien in part, yet the 6th article gives them the right to hold new acquisitions, as well as to retain what they held before. But the effect of the 9th article of the treaty of 1794 is still more extensive. It goes to exclude escheats *pro defectu sanguinis*. Neither they, nor their heirs or assigns shall be considered as aliens. If Rebecca Coxe had been a British subject, the plaintiff below could have claimed under her, by virtue of the treaty. Shall he not then inherit, because he was a citizen of the United States? By the treaty of 1793, *ante-nati* could retain lands in both countries. That of 1794 provides also for *post-nati*. *Ante-nati* may not only hold, but pass lands to *post-nati*.

3. The third position embraces two divisions. 1. Allegiance. 2. Capacity to hold and transmit lands.

1. Daniel Coxe could not, by his own act, get rid of the allegiance he owed to New Jersey.

2. He could not, except in the case of punishment for crime, be deprived of his capacity to hold. This point might be carried still further; and it may be contended, that if he had expressly endeavored to divest \*himself of a capacity to take and hold lands, yet his heirs, being [\*299 citizens of the United States, might claim under him. But this is not now necessary. It is sufficient to show, that as he denies any disclaimer of his capacity, so he cannot, by the interested views of his present opponents, be deprived of it; for the opposition is not now made by the state, but by private individuals, who endeavor to blot him out of legal existence, that they may double their portion of the inheritance.

It is a principle of the common law (which law is expressly adopted by

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the 22d section of the constitution of New Jersey) that no man can put off his allegiance. Hale's H. P. C. 68. 1 Bl. Com. 369. *Macdonald's Case*, Fost. Cr. Law 59. It is true, that Blackstone speaks of that allegiance which is coeval with birth; distinguishing it from local allegiance, arising from temporary residence. But the allegiance due from Daniel Coxe was not of the latter kind; it did not arise and terminate with his residence in New Jersey. It sprung from his inhabitancy in New Jersey, when it created itself a state, from his being then, in common with all around him, a subject of the king; from the change which those around him, in the course of successful resistance, made in the form of their political society, by acts in which the majority must compel the acquiescence of the smaller number. That the minority were bound by the acts of the majority, was decided by Ch. J. ELLSWORTH, in the circuit court in North Carolina, in the case of *Hamilton v. Eaton*.<sup>1</sup>

Birth is but evidence of allegiance. At the time of a revolution, residence is equally evidence of allegiance to the new government. Indeed, it is stronger, if the person be of mature age. It may, at least, be considered as a new birth. It was a natural allegiance; as society is natural to man, and allegiance is natural to society. But without playing on the word, it may be characterized as permanent allegiance; the opposite of temporary.

\*It is said, that he never was to be considered as a citizen of New Jersey, or if he was, that he expatriated himself. 1. That, like Chapman, he made his election before any new government was formed, and on the dissolution of the old one; and therefore, never was a subject of the state of New Jersey. But the distinction between these two cases will be wide and glaring. Chapman left Pennsylvania, the 26th of December 1776; Coxe, not until September 1777. Chapman was acquitted, because he had left the state before the 11th of February 1777, on which day the laws of the then late province were to be revived, according to an act passed on the 28th of January 1777; and on which day, the act passed, declaring what should be treason, and that all persons "now inhabiting, &c., within the limits of the state of Pennsylvania, do owe allegiance," &c. It was, therefore, declared, that he was not a subject, at the time of his quitting the state of Pennsylvania; and the attorney-general having averred that he was a subject and inhabitant of the commonwealth, it was held, that the issue was not maintained on his part. If Chapman had resided in the state, on the 11th of February 1777, he would, on the very principles of his own defence, have been liable to indictment.

But Coxe was an inhabitant of the state of New Jersey, on the 4th of October 1776, when a declaratory law, similar to that of Pennsylvania, was passed. After which, it was too late for him to attempt to change sides. He was then fixed as a subject, and liable to indictment for treason. Being thus, on the one hand, subject to the penalties resulting from his civil relation to the commonwealth, he is, on the other, entitled by natural and equal justice to the benefits of that relation.

*W. Tilghman* admitted, that by the law of New Jersey, Daniel Coxe was to be considered as a subject of New Jersey by force; and that the

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<sup>1</sup> Mart. (N. C.) 1; s. c. 1 Hughes 249.



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state had a right to make such a law. He had argued only upon the general ground, independent of the law of New Jersey.

*Rawle.*—It is admitted, then, that he could not make his election, until the peace of 1783. It was the first time he \*ever heard, that after an arduous conflict has successfully terminated, by means of the [\*301 energy and exertions of a majority of the people, each individual of the minority had a right of election, which should look back and give a new aspect to his conduct through the period of the struggle.

*W. Tilghman* stated, that he did not contend for such an election, but that all the citizens of the United States, after the peace of 1783, had a right of expatriation, and Daniel Coxe among the rest.

*Rawle.*—Let us, then, consider this supposed expatriation, this imaginary dereliction of his country and his rights, this abjuration not only of allegiance, but capacity to inherit, which is to operate against him as a political estoppel; or, like the ancient confession of villenage, is to deprive him at once of all power to take by descent or purchase. It is, perhaps, a sufficient answer, to say, that expatriation is a fact which ought to be found.

Our opponents have piled together a confused and shapeless mass of evidence, on which this court cannot act. Since, even if expatriation had been allowed by the constitution or laws of New Jersey, all the different facts put together would not amount to the technical fact of expatriation; and since, if expatriation be not allowed, they are of no more importance than finding whether Mr. Coxe wore a blue coat or a brown one.

The circumstances most relied on to prove Daniel Coxe's expatriation, is his carrying on commerce as a British subject. In this respect, there has been a liberal construction of the rights of citizens of the United States, in the British courts, even as to their navigation act. They have, for the purposes of commerce, held that a person might be a British subject, as to his duty of allegiance, and a citizen of the United States, as to his commercial character. Thus, in the case of *Marryat v. Wilson*, 1 Bos. & Pul. 430, 444, it was held, that "both characters may stand together," and so, in all cases, so far as there are no conflicting duties, a man may be a subject of many different governments, and may enjoy the benefits conferred upon him by all. The right of Daniel Coxe to hold land \*in New Jersey does not conflict with any duty which he owes as a British subject. [\*302 His becoming a subject of Great Britain, therefore, as to purposes of commerce, is not evidence that he had renounced his rights as a citizen or subject of New Jersey. Nor does it follow, because he is a British subject, that he is not also an American citizen. 1 Bl. Com. 369, 376; *Talbot v. Jansen*, 3 Dall. 169.

What, then, is expatriation? It is said to be an operation, by which a citizen is made an alien. And it is contended, that although Daniel Coxe was once a citizen of New Jersey, it was against his will, and that the moment he had it in his power, by the peace, to throw off that character, he did it, and by becoming a subject of the King of Great Britain, he became an alien to New Jersey, and therefore, not capable of taking lands by descent, in that state.

Many of the writers upon this subject have confounded expatriation with emigration; and hence has resulted great confusion. But the ideas are

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very different and distinct. Expatriation is a matter of municipal regulation. Emigration is of right. It cannot be restrained, without injustice and even violence: expatriation cannot be effected, without public consent. Expatriation dissolves the original obligation of the citizen; emigration only suspends its activity. Expatriation incapacitates from taking lands in future; emigration retains that capacity. Expatriation renders the future issue aliens; emigration does not impair the right to be received as citizens. Expatriation is an inconvenient and inflexible deprivation. \*Emigration destroys no rights, but facilitates the commerce and improvement of man. Hence, in no states, not depressed by the severest despotism, is emigration prevented. In very few, is expatriation even known.

Of the seventeen United States, one only (Virginia) has recognised or provided for it by law. In the constitutions of the other states, which have been cited, it is the right of emigration only which is protected, and not a word is said of expatriation. In the laws of Great Britain, there is no such term or idea, as expatriation: it is altogether unknown.

As soon as a man has expatriated himself, his lands would escheat, and he would be divested of all the rights of a citizen. There has been yet no case in practice where the lands of an expatriated citizen have been escheated. It is inconsistent with the nature of expatriation, that the party be permitted to retire from the community, for purposes hostile to its welfare. No citizen can expatriate himself, for the purpose of committing an act which would be treason, without such expatriation. There ought also to be some municipal regulation defining the evidence and the mode, and declaring the assent of the government. *Talbot v. Jansen*, 3 Dall. 133. If Daniel Coxe had set up this defence on an indictment for treason, it would not have availed him.

If, then, his liabilities on the one hand, and his rights on the other, remained in full force, at the time of his departure; if he took with him the capacity as well as the responsibility of a citizen; are the subsequent events of his life to act retrospectively on his departure, and tear asunder the ties which bound him in 1777? If such an effect can arise from these causes, the *quo animo*, the intention, ought to have been found, especially, as it is a recognised principle, that a man may owe allegiance to two countries at the same time, and therefore, \*may lawfully have the intention of owing allegiance to both Great Britain and New Jersey. The court cannot decide that it was with intent to expatriate. *Calvin's Case*, 7 Co. 27 a, b; 2 Tucker's Blackstone, App. 53; *Apthorp v. Backus*, Kirby 407.

The counsel for the plaintiff in error have divided their case into three questions, according to three periods of time, in the solution of which they have employed much ingenuity.

1. From the beginning of the revolution to the peace of 1783. This period seems to be nearly conceded; at least, it is admitted, that the state had a right to compel the inhabitants to become members of the new state or society. It seems to be admitted also, that there is a sufficient finding of his residence in New Jersey until 1777, to bring him within all the laws of that state. The test laws of 1778 could not have influenced his departure in 1777; nor did they give him any right to dissolve the connection; because the penalties imposed were the consequences of political offence; the punishment of treasonable flight. And to suppose that a man, by staying away to



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avoid the punishment of the law, had a right to dissolve the obligations of the citizen, is to lay down a principle tending to shelter every fugitive from justice.

It may be noticed, that incapacity to hold lands is not among the penalties annexed to his disaffection. There are two legislative declarations : 1. By making him a citizen, and thereby giving him the capacity ; 2. By imposing other penalties on the offence, but reserving this capacity.

It has been said, that the object of the New Jersey laws was merely fiscal. But the citizenship of Daniel Coxe does not depend on the inquisition, but on the act of 1776 ; *i. e.*, he would have been a citizen by virtue of that law, although no inquest had been taken against him.

\*It has also been said, that the act of 1778 includes those who had offended against other states, and had never been inhabitants of New Jersey, and therefore, the legislature did not mean to compel them to become citizens. The answer to this objection is found in the case of *Camp v. Lockwood*, 1 Dall. 393, in which the offence was decided to be an offence not only against the particular state, but against all the states. [\*305]

2. The 2d period is from the peace to the time of the descent cast in 1802. And it is contended, that in 1783, Coxe had a right to make his election and choose his country. But this position is attempted to be supported on a false basis. No such right is mentioned in the treaty. On the contrary, the 5th and 6th articles manifest a mutual understanding that the loyalists were to return home, to obtain restitution of their estates, intimating plainly, that if they could obtain restitution, they would be entitled to hold.

3. The provision of the treaty, "that there shall be no future confiscations," settles the point of a capacity to take at present, and not in future. It was the universal understanding, that a sale after the treaty, of property before confiscated, was no breach of the treaty. How, then, can there be a future confiscation, but in consequence of a future taking? And he who can take in future, is not an alien.

Daniel Coxe, who ought to know the *quo animo* of all the acts charged against him, declares, by his counsel, that he never meant to give up his capacity to take and hold lands by descent or purchase : and his counsel declare, that if such was his intention, he could not do it. These are two distinct propositions, both of which must be established by our opponents. They must prove not only the will, but the power.

But it is said to be a hardship, to deny the right of expatriation. \*The observations made upon this point apply only to emigration, and the right to emigrate is not denied. But when a man turns his arms against his native country, and ungratefully endeavors to destroy the hand which fostered and fed him, the arm of justice, though severe, is not misdirected. And if, in the decline of life, he wishes to return to the bosom of his surviving friends, and be buried in the tomb of his ancestors, is he to be received only as an alien and an outcast? as a modern citizen of the world ; a detached, rotatory, irresponsible and useless being? [\*306]

Inconsistency runs through the whole of the argument for the plaintiff in error. The counsel contend for the rigid doctrine, peculiar to feudal tenures, that an alien cannot hold land, and yet discard the more rational concomitant feudal principle, which has been engrafted into the common law, that *nemo potest exuere patriam*.

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The authorities which have been cited do not support the principles contended for by the plaintiff's counsel. All the American constitutions which have been referred to, speak only of emigration. Virginia alone has provided by law for the case of expatriation ; but that law cannot affect lands in New Jersey. Vattel speaks only of emigration. Judge Wilson uses only the same expression, and gives his opinion of what the law ought to be, not what it is. It is said, too, that he decided a case in Virginia, of a claim under Lord Fairfax, upon principles contrary to those contended for by our opponents. (a) So, in the case of *Apthorp v. Backus*, Kirby 407, the \*plaintiff was \*307] a British subject before the revolution, and yet recovered the land in the year 1788. (b) Wyckefort reasons upon general principles, on the subject of expatriation ; but expressly recognises the law to be otherwise in \*308] England. \*In the case of *Talbot v. Jansen*, the court was of opinion, that the right could not be exercised, without an act of the legislature. The case of *The Charming Betsy*, in this court, at the last term, did not decide the present question. For the question now is, whether, by becoming a subject of another sovereign, he is to all intents and purposes an alien.

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(a) WASHINGTON, J., said, that there was an appeal in that case to the supreme court, which was not decided, the state of Virginia having compromised the cause.

(b) This case was decided by the supreme court of Connecticut, before RICHARD LAW, Ch. J., OLIVER ELLSWORTH, ROGER SHERMAN and WILLIAM PITKIN, Justices, and was as follows :

An estate was mortgaged by Fitch to Stephen Apthorp, then of Bristol, in England, who died January 1st, 1773, leaving the plaintiff his only heir. It was moved in arrest of judgment, that it appears by the declaration, that the plaintiff is an alien, and therefore, cannot by law hold any real estate.

By THE COURT.—A state may exclude aliens from acquiring property within it, of any kind, as its safety or policy may direct ; as England has done with regard to real property, saving, that in favor of commerce, alien merchants may hold leases of houses and stores, and may, for recovery of their debts, extend lands, and hold them, and upon ouster, have an assize. Dyer 2, 6 ; Bac. Abr. 84. But it would be against right, that a division of a state or kingdom, should work a forfeiture of property previously acquired under its laws, and that by its own citizens ; which is the case here.

The plaintiff's title to the land accrued, while she was not an alien, nor could she be affected by the disability of an alien, but was as much a citizen of the now state of Connecticut, as any person at present within it, and her descent was cast under its laws. Her title is also secured by the treaty of peace, which stipulates that there shall be no further forfeitures or confiscations, on account of the war, upon either side. The subsequent statute of this state, declaring aliens incapable of purchasing or holding lands in this state, does not affect the plaintiff's title, otherwise than by recognising and enforcing it, for it hath a proviso, that "the act shall not be construed to work a forfeiture of any lands, which belonged to any subjects of the King of Great Britain, before the late war, or to prevent proprietors of such lands from selling and disposing of the same to any inhabitant of any of the United States." It is not indeed expressly said, that the proprietors of such lands may maintain actions for the possession of them, but this is clearly implied ; for lands, without the possession, are of no use, and whenever the law gives or admits a right, it gives or admits also everything incident thereto, as necessary to the enjoyment and exercise of that right ; and besides, they cannot sell their lands, until they first get possession of them ; for all sales of land in this state, whereof the grantor is dispossessed, except to the person in possession, are by express statute void : so that the plaintiff is not barred of her title or right of action, either at common law or by statute.



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Wooddeson probably means only *post-nati* of America, if he had any clear idea at all upon the subject.

February 18. *Stockton*, on the same side.—There is but a single objection to the title of the lessor of the plaintiff, which is, that Daniel Coxe, under whom he claims, was, before and at the time of the descent and conveyance, an alien, and therefore, could neither receive nor transmit any estate in the premises in question. This I shall deny, 1st. Because Daniel Coxe was born under the same ligeance with the other subjects of New Jersey; 2d. Because the legislature of New Jersey, after the organization of their independent government, in the exercise of constitutional powers derived from the people, by statute, declared him a subject of the new government; exacted from him the duty and submission of a subject, and punished him for a breach of his allegiance; but never deprived him of his capacity to inherit real estate; 3d. Being thus once a subject of New Jersey, by the constitution and law of that state, it was not in his power to make himself an alien; and if it had been in his power, he did not exercise the right.

1. Littleton, § 198, defines an alien to be “one born out of the ligeance of the king,” and he adds, “if he sues an action real, the tenant may say, that he was born in a country out of the king’s ligeance.” This is the universal form of pleading alienage. The defendant must show that the plaintiff was born out of the king’s ligeance, and where. The definition of Littleton, taken from writers still older than himself, has been adopted by Vaughan, Hale, Foster and Blackstone, indeed, by all the English lawyers, and has never been questioned. The form of pleading is equally ancient, and both together, present a complete criterion of the law. That the place of \*birth should determine the condition of the subject, is both reason- [309] able and natural. It is reasonable, because he there receives the protection necessary to the preservation of life, during the helpless years of infancy; an obligation which can be conferred on him by no other country; because, there it is that he is immediately invested with all the privileges derived from society and government; giving him the force of the community to protect him in his rights of personal liberty, reputation and property, and at a time when he could make no return. How reasonable is it, then, that he should owe to such a country the corresponding duty of allegiance? It is natural, because there exists in every good man, a virtuous principle of preference for that country, nay, for that spot, where he first drew his breath; where he passed his childhood; where his mind first opened to the endearing relationships of life, which nothing but the hand of death can extinguish; an *amor patriæ*, which remains in spite of rejection, persecution and punishment, and which, even amidst the conflict of the passions produced by a sense of injury, still secretly leads him to his native country as his resting-place. The common law, founded in reason and nature, therefore, proclaims that no man, born a subject, can be an alien.

But, it is said, that Daniel Coxe was not, at the time of his birth, a subject of the state of New Jersey, and therefore, may be an alien. Answer. At the time of his birth, the King of England was the common sovereign of Daniel Coxe, and the other citizens of New Jersey; and by the principles and express rules of the common law, such persons never can be aliens, though a change of sovereigns should take place, and distinct governments

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be formed ; for as, on the one hand, the duty of natural allegiance accruing at birth, adheres to him through life ; so, on the other, the corresponding privileges, among which is the capacity to take and hold lands, must remain, unless forfeited by crime. The very point of *Calvin's Case*, independently of the reasoning of Lord COKE, proves this. There the *ante-nati* of Scotland were held aliens, in England, though James was sovereign of both countries, because, at the time of their birth they were aliens. So, on the other hand, the *post-nati* were declared subjects, and it was held, that they always must be considered subjects, because they were subjects at the time of \*their birth. In 7 Co. 27 *b*, Lord COKE puts the very case : \*310] "Wherefore, to conclude this point (and to exclude all that hath been or could be objected against it), if the obedience and ligeance of the subject to his sovereign be due by the law of nature, if that law be parcel of the laws, as well of England, as of all other nations, and is immutable, and that *post-nati* and we of England are united by birthright, in obedience and ligeance (which is the true cause of natural subjection), by the law of nature, it followeth, that Calvin, the plaintiff, being born under one ligeance to one king, cannot be an alien born."

This is not, then, to be considered as one of the extra-judicial and fanciful reasons of Lord COKE, of which so much has been said, but a consequence not only clearly flowing from undoubted principles, but adopted by ancient practice, and proved by the history and law of England. Such was the condition of those provinces of France, claimed and held by the Kings of England. These were subject to continual revolutions and change of sovereigns, as the arms of either king prevailed ; but Frenchmen, born while the Kings of England were in possession, were held not to be aliens, when that possession ceased, and might hold lands in England ; 7 Co. 20 *b*, is express to this purpose, and in 2 Vin. 261, pl. 11, it will be seen, that this doctrine was considered as law by other judges. It has indeed been said, that *Calvin's Case* is not law, and his reasoning has been stated to be servile and ridiculous. That it partakes largely of the quaint pedantry of the times, is not to be denied ; but that my Lord COKE would lay down, and take such pains to prove, a false position of common law, comports not with his character, either as a lawyer or a man ; and the case of the *commendams* is, of itself, enough to rescue his character from the imputation of undue servility. Besides, the determination in *Calvin's Case* has never been overruled or questioned ; it is supported by the names of the venerable Fleta, Bracton and Britton. It received the sanction of Lord Chief Justice VAUGHAN (Vaughan's Rep. 285), of Lord HALE, as may be seen in his History of the Pleas of the Crown ; and in 4 Term Rep. 308, the same doctrine \*311] is laid down as the modern law of Westminster Hall, \*by Lord KENYON. This doctrine, that the *ante-nati* should be capable of inheriting, is founded on justice ; a right once vested ought never to be divested, unless it be for a crime. An empire is rent asunder by a revolution ; the individuals of each territory may be innocent ; if guilty, they can only suffer the punishment annexed by law to the crime ; it was impossible for Daniel Coxe to commit a crime against New Jersey, which could destroy his inheritable blood, that being saved, even on conviction of treason.

The opinion of the most celebrated jurist of our country is expressly in favor of my position. Judge Tucker, in his notes on Blackstone, not only



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considers the rule in *Calvin's Case* to be law, but applies it to the *ante-nati* Americans, who he says may hold lands in both countries. 2 Tucker's Bl., App. 53, note c.

But it is again said by our learned adversary, that this doctrine of the common law is derogatory to the feelings and character of freemen, and altogether inconsistent with our present forms of government, and political institutions; it is, however, conceived, that this doctrine contains in it no principle of the nature ascribed to it, and that its results are especially applicable to our political system. What is the injunction of the common law? not that a man shall, like the trees of our forests, be planted and affixed to the place where he was born; not that he shall be prohibited from bettering his condition elsewhere; it restrains not the right of emigration, under proper restraints and limitations: on the contrary, the subjects of this law enjoy more liberty in this respect than all the rest of Europe. It only says to them, if you do emigrate, you shall still retain the privileges and be under the restraints of your natural allegiance. What can be discovered in this, derogatory to a freeman? No, it should rather be considered as an invaluable privilege—the price of a reasonable and prudent restraint. In it, is only heard the voice of exalted patriotism, saying to her children, go gain your support, seek your happiness in fairer fields, in a more genial clime; but remember (and it is the only restraint I place you under) raise not a parricidal hand against your native land. The results of this doctrine appear to me peculiarly applicable to our political position. We are not a confederated republic. \*Our general government is com- [312 posed of a number of distinct and independent states, uniting under one head, by mutual consent, for common benefit. But an event may happen (which every good man should join with my Lord Coke, in his devout prayer, “that God of his infinite goodness and mercy may prevent!”), time may come, when this bond of union may be broken, this confederacy dissolved, and these sovereignties become altogether and completely independent. In this event, what security would a citizen of one state have for his lands held in another, but this much reprobated maxim of the common law? With it, all would be safe; we were once fellow-citizens; we owed allegiance to a common head; we never can be aliens. Without it, our lands held out of the state in which we live, would be liable to escheat on the ground of alienage. Let us not affect to be wiser than the law. Let us not, for idle theories, absurd as well as impracticable, depart from those principles which have secured to our ancestors the complete enjoyment of their liberty and property.

But supposing that this doctrine of the common law, that the place of birth does conclusively fix the character of a subject, should be considered as not applicable to the case of a revolution, by which one part of a nation is severed from the other, becomes independent, and forms a separate government. We must then search, *ex necessitate*, for some other principle, as a substitute for the common-law principle, and which shall denote who are, and who are not, members of the new community. Now, the natural, the only practicable substitute, is this, that those residing, at the time of the revolution, in the territory separating itself from the parent country, are subject to the new government, and become members of the new community, on the ground either of tacit consent, evidenced by their abiding in such territory;

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or on the principle that every individual is bound by the act of the majority. Hence, as birth, at the common law, denotes the subject, so, residence at the time of the revolution, will draw with it the same consequence. The great men who conducted the revolution in New Jersey were at no loss to discover this principle. They recognised it by their constitution and first acts of legislative power. By law they claimed all men in the situation of Daniel Coxe to be their subjects.

\*313] This brings me \*to the second point, which was, that Daniel Coxe could be no alien, because the legislature of New Jersey proclaimed him a subject, claimed his allegiance as one, and punished him as one for a breach of it, without, however, taking from him his inheritable rights. The new constitution was adopted in New Jersey, July 2d, 1776. October 4th (Wilson N. J. L. 4), the legislature, then first convened under it, passed their treason act, in which it is declared, "that all persons abiding within the state, and deriving protection from the laws thereof, do owe allegiance to the government of this state, established under the authority of the people, and are to be deemed members thereof." Then they go on and declare all such guilty of treason, who shall adhere to the King of Great Britain, saving the corruption of blood. Daniel Coxe, as the jury have found, was born in New Jersey, was living and abiding in the state at that time, and adhered to the British by joining their army more than one year afterwards. This description of who were subjects of the state of New Jersey, was always closely pursued by the legislature, and ended in the seizing and forfeiting the estates of all those who had withdrawn within the British lines, and so could not be attainted on trial, according to the course of the common law.

Wilson N. J. L. App'x 5, contains the next act; it is an act of free and general pardon. The former act had declared who were subjects, who could offend, this offers conditional pardon, on their return to their allegiance, and forfeits the personal estate of those who did not accept proffered grace. Then follow the several acts of December 8th, 1778, App'x 8; of April 18th, 1778, Wilson's N. J. L. 43; of 11th December 1778, in which the same description of subjects, given in the first act, is confirmed; provisions made to punish them, if they persist in their rebellion to the state, which ends, and in this case did end, in the entire confiscation of the real and personal estate of the offending subject.

It was observed on these acts, that they appeared to be rather of a fiscal nature than any other, and were not so much designed to prescribe duties, and punish transgressions, as to bring money into the treasury. Such an object would have been unjust and pitiful, and was never contemplated, at the time they were enacted. No, the patriots of that day had a more sublime \*314] object. \*Their great object was independence. By these acts, they meant to legitimate the revolution, by the supreme power of the people. They proclaim their new and republican government. They declare whom they consider as the members composing this new community. They proceed to impose the duties arising out of their new condition, and to enforce the performance of these duties, by the sanction of adequate punishment for their violation. They did not, it is true, pass attainder acts, affecting the person of the offender, because such acts were deemed inconsistent with their avowed principles. Such acts go to take the life of a man, with-



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out trial by jury ; to convict him of personal offences in his absence, against a maxim of the law. These obstacles did not exist in so strong a degree in proceedings *in rem*, which ended in punishment by loss of property. Fiscal considerations then had nothing more to do with this subject, than they have with all other cases of crimes punished by forfeiture or pecuniary mulcts. They are but consequences of the crime, not objects of the law. The 2d section of the last act which punishes treasonable acts between the 19th of April 1775, when the civil war first broke out, and the 4th of October 1776, when the treason act passed, it was said, was particularly subject to this objection ; for it was urged, as this related to a period prior to the establishment of the new government, and before there was a treason act, there could be no other ground for the provision. I conceive the learned gentlemen equally mistaken in this suggestion. It is well known, in New Jersey, that government did not cease between these days. The people governed themselves in their primitive capacity, by committees of safety in each county, and by a provincial congress. This congress did, in fact, pass an ordinance of treason, soon after the war commenced, containing the same provisions with the treason act of the 4th October 1776. This section then referred to this notorious fact, and was designed to give the sanction of the legislature to the provisions of that ordinance. And both this ordinance and this section of the act, contained in them nothing more than the principle acted on throughout the war, that Americans could at no period legally act against this country, but were bound to take its part, from the first hour the sword was drawn.

What, then, is the fair result of all these provisions ? We see an old government dissolved, and a new one created. The people, at first, and their representatives, afterwards, declare \*by law, all men abiding within their territory subjects of the new government. They pass treason [\*315 acts, define allegiance, and enforce its duties by the accustomed sanctions of the law. These laws operated on Daniel Coxe. He was an abider within their territory : they claim him as a subject, and punish him for refusing to yield obedience. Shall, then, this same government, which with a voice of thunder proclaimed him a subject, and punished him as one, or shall an individual under its laws, now say to him, you are an alien ? Shall he be declared a subject, to punish him, and an alien, to punish him ? A subject, to take all he has, and an alien, to prevent his acquiring any in future ? Shall he be made poor by citizenship, and be kept poor for want of it ? No, I apprehend not. The government, and all claiming through its laws, are estopped to say he is an alien, and no act of his, as I shall directly show, would alter his condition. The legislature never meant to adopt such inconsistent and repugnant principles. They carried through their work correctly, on their own plan. It is, by pursuing now an opposite one, on a scheme of private interest, that the incongruity is produced. They had a right to declare the colonists members of the new government, on the clear republican principle, that the minority must yield to the majority. But they had no intention of going further, by illegally taking from them their birth-right, their capacity to inherit lands. These laws also destroy at once the fanciful doctrine of election, in case of civil wars. It may, for aught I know, be just enough to give men a free election, in such cases, to adhere to the old, or to join the new government. But then was the time to have acted

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on this magnanimous principle. The legislature abjured it ; they declared by their treason act, that no Jerseyman had an election to join against his country.

The learned counsel seemed to yield to the force of this conclusion, so far as respected the period from the commencement of the war to the treaty of peace ; but at the æra of the peace, he says, Mr. Coxe had a right to continue a British subject, which he did, and so has become an alien. But we have shown him to have once been a subject of the state of New Jersey by their own concession ; that is to say, from the commencement of the war to the treaty of 1783. This, then, opens to me the last point I propose to treat.

\*316] \*3. Daniel Coxe having once been a subject of New Jersey, it was not in his power, without the concurrence of New Jersey, expressed by legislative act, to become an alien. And if he possessed the power, he never exercised it. The modern theory of expatriation has been relied on ; nay, our adversaries seem to place their cause on it ; a narrow point indeed, whereon, in a common-law court, to defend an ejection ! and what becomes of it, when we reflect that the common law expressly prohibits this supposed right of expatriation ; that the constitution of New Jersey expressly adopts this common law ; and that the legislature have, by particular act, enacted and incorporated into their system the common-law doctrine of allegiance ?

1st. By the common law, expatriation is not barely not permitted, but it is distinctly prohibited. The maxim of that law is, *nemo potest exuere patriam*. By the common law, allegiance is perpetual. Bracton, Coke, Hale, Foster and Blackstone consider this as a fundamental principle of that law. Mr. Swift, 1 vol. L. C. 164, very properly observes, that this is the law of such of the United States as have adopted the common law, without altering this principle.

2d. The 22d section of the constitution of New Jersey adopts the common law of England, generally, except such parts as are inconsistent with the rights and privileges of that charter. The gentlemen have relied on this exception ; and the only question must be, whether this doctrine of the common law is inconsistent with the rights and privileges of that constitution. Now, I am at a loss to discover how perpetual allegiance to the government established in New Jersey under the authority of the people, can be inconsistent with the rights of that character which created and set in motion that very government. What is the true meaning of this exception in the 22d section ? what are the rights secured by that charter ? The principal are—a republican form of government ; legislative council and general assembly ; annual election ; freedom of conscience in matters of religion ; trial by jury, &c. These are the rights alluded to ; and it is easy to see, that all those parts of the common law which grow out of the monarchy of England were inconsistent with these rights. But not so is that principle \*317] which would transfer the sacred duty of \*allegiance, formerly due to the king, with equal force and effect to the new sovereign, the people themselves.

It was further stated, that the preamble of the constitution asserts fundamental principles, which are inconsistent with this common-law notion of allegiance ; such as that all power is derived from the people ; that protection and allegiance are reciprocal ; that when a prince violates the funda-



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mental laws, he abdicates and dissolves the government, and remits the people to their primitive rights. This is all very true ; but it is equally true, in England, by the common law, as here: it leaves the doctrine of allegiance where it was ; but on great occasions transfers the duty of that allegiance from one man to another; or from one form of government to another. These principles were all recognised and acted upon in England, in the revolution of 1688. But did that revolution change the doctrine of perpetual allegiance? No, it transferred it from James to William, but the law remained the same. The same turn was attempted to be given to this event, in *Macdonald's Case*, Foster's C. L. 60, but it was repelled by the court, not only as unfounded in law, but even as bringing a reproach on that glorious revolution. Then, not being within the exception, it stands on the broad basis of the common law, which the people of New Jersey have thought proper to adopt, and which, I trust, they will not be soon persuaded to throw away.

3d. But the common-law doctrine of allegiance has been expressly enacted into our code, by the legislature of New Jersey. (Wilson's N. J. L. 4.) The treason act adopts the common-law definition and division of allegiance, in its very language and terms: "whereas, all persons abiding within this state, &c., do owe allegiance to the government of this state, and are to be deemed members thereof," and "all persons passing through, &c., owe temporary allegiance." Here, then, we have an exact common-law description of permanent and local allegiance. Afterwards, the act proceeds to define the crime of treason, in which it pursues the provisions, and uses the very words (*mutatis mutandis*) of the statute of Edward III. Now, what is the conclusion? The people, in their very constitution, adopt the common law ; the legislature take up the common-law idea and division of allegiance, and pursue even the English statute of treasons, so far as it was in any manner applicable.

\*The common-law import of the term allegiance being settled, it follows, conclusively, that the words must receive the same interpretation, when introduced into the statute. That common-law expressions must receive the common-law exposition, is too clear to admit of doubt. Hence, we find, that the advocates of the doctrine of expatriation have endeavored, by all means, to get rid of them. It is matter of curiosity, to look into 3 Dall. 141, to see the pains the learned gentleman who then first broached this doctrine, took to get rid of expressions having a fixed meaning by the common law. The terms allegiance and subject were thought to contain sounds discordant to the ears of a freeman : obedience and citizenship were to be substituted. Allegiance was feudal ; it denoted only the submission of a slave to his master. It was monarchical ; unworthy a republican, who ought not to owe allegiance even to the people themselves. In short, it could not exist in a free country. The term subject was also disgraceful : a subject must have a master ; that master must be a tyrant, and of course, the appellation was only fit for slaves. But citizen was a name worthy of a freeman, and the true name by which a republican was to be known. The gentlemen show their discretion in trying to get rid of terms of known signification and import, and substitute in their stead the most uncertain and vague. But, unfortunately for the argument in this case, the plain men who formed the constitution of New Jersey were not carried away by such refinements. They supposed (perhaps weakly), that

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allegiance might be due to the people as well as to the king, and that even a republican might be called, without offence, a subject, provided his master was the law. Therefore, they adopted these terms of known signification; and these expressions must be explained according to their known and established legal import at the common law.

But even if the common law and the constitution and law of New Jersey did admit this idea of expatriation, it might be safely contended that Daniel Coxe never exercised the supposed right. An act of this kind, to work such important consequences, should be unequivocal, and certainly intended by the person to produce the effect. If it might exist consistently with the continuance of his former connections, it shall not be construed to dissolve them. Now, his removal to England and remaining there ever since, is no act of expatriation. Having traded as a British merchant, is not inconsistent with our position. \*It has been determined in Westminster Hall, \*319] that a British subject naturalized here, is an American merchant, within the treaty of 1774, and may, as such, trade to the East Indies, against the charter to that company. Neither can the fact of receiving compensation from the British government for losses during the war, be considered as an expatriation. That was common to all the royalists; yet those who returned have always been received as subjects, on taking the oaths of allegiance. Much less can the circumstance of his calling himself a British subject, alter his condition. If he had called himself an American citizen, without right, it would not make him such; so, if he is really a subject of New Jersey, in the contemplation of the law of the state, his calling himself a subject of Great Britain, would not make him an alien to New Jersey. But Mr. Coxe was correct in calling himself so; he was born such, and is such; but the state of New Jersey, by declaring him a subject, and punishing him as such, have also taken him as their subject; and by law, have only done what is commonly produced by the act of the party; that is to say, created a kind of double allegiance; a matter which happens here every day, in the case of the naturalized Englishmen.

The course I have pursued relieves me from the task of following the gentlemen through the general research they have made to support the right of expatriation. If the common law prohibits it; if the people of New Jersey have adopted that common law, and the legislature enacted its provisions, it matters little what foreign jurists think of this question. I will make but a few very general remarks.

1st. If the known maxims of the common law are to be disregarded, and titles to land tested by the reasoning of modern writers, and by general principles of abstract right, the learned counsel against us have overlooked a very important point. They should have examined their own objection, and tried how that would comport with the theory of modern times. The reasons on which the disability of an alien to hold lands is founded, may be truly said to be more unsatisfactory than those on which the doctrine of allegiance is founded; and the policy of the United States, with such an immense wilderness to subdue, seems to \*point out the propriety of \*320] inviting foreigners, by all the inducements which a clear right to hold lands brings with it, to populate that wilderness. The reasons for the exclusion were partly feudal, and all such have ceased to exist with that system; and partly political, and those rendered by my Lord COKE are of



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little weight, and doubtful policy, since the extension of trade and the increase of money. But the gentlemen are reduced to the necessity again of being inconsistent; they adhere with inflexibility to one maxim, to exclude our title, and repudiate another more important, clear and settled, to effect the same purpose.

2d. If this thing called expatriation really exists as a right, it can only be founded on mutual consent. Not only the party who gives up his allegiance, but the state must accede to it. This public consent can be expressed only in one way, by law: hence, it follows, that if the right, strictly speaking, exists, it must be dormant, until put in motion by law. This law will regulate the forms, settle the terms, and determine the consequences of expatriation. As it is now contended for, it is without any such restrictions. A man may shake off his allegiance one year, and put it on again the next; it may go and come, as often as whim and caprice shall dictate. The state of New Jersey have never recognised by law this right; much less have they regulated it: until they have, it must remain useless and inoperative. No state in the union but Virginia has passed an act recognising and regulating the right of expatriation.

3d, and lastly. The treaties between the United States and Great Britain which have also been used against us, so far from aiding the gentlemen, are against them. That of 1783 stipulates that no future loss shall happen on account of the part taken by those in the situation of Mr. Coxe, during the war. But if his right to inherit lands is taken from him for that reason, he has sustained a future loss. The only fair and liberal construction of this treaty is, that the royalists were by it restored to all rights which they possessed before, not actually divested and gone at the time of that treaty. The treaty of 1794 recognises the idea, that the *ante-nati* might hold lands, and stipulates that their heirs may do the same. Both together, we apprehend, fully protect the right of Mr. Coxe. It could not be denied, but that if Miss Coxe, the intestate, had been herself \*a British sub-  
ject, that Mr. Coxe might, within the very letter of that treaty, have  
claimed as her heir. It would be harsh indeed, to put him in a worse condition, because she was a subject. On the whole, it is submitted, that the judgment below ought to be affirmed. [321

*Ingersoll*, in reply.—The doctrines advanced upon the present occasion, are, to me, novel, strange and alarming. That the *post-nati*, against whom we have no cause of complaint, should be excluded, while the *ante-nati* are preferred, who injured us. That the French who aided us are called aliens, while the British loyalist refugee may hold lands as a citizen, is a language I do not understand. If the law is so, it is strange, and I must abandon an idea I have always cherished, that the rules of law were founded in sound sense.

Daniel Coxe, being more than twenty-one years of age at the commencement of the revolution, adheres uniformly to the British interest in attempting to reduce the United States to submission to British claims. The attempt failing, at the conclusion of the war, he quits this country, settles in England, claims to be a British subject, and is so acknowledged by that government from 1777 to 1805. In 1802, a relative dies in New Jersey, to whom Daniel Coxe is next of blood, and claims to succeed by right of de-

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scent, as an American citizen. The next of blood, who is a citizen of the United States, excepts to him as an alien, and claims in her own right.

I make two questions in this cause. 1. Did Daniel Coxe expatriate himself? This question is naturally subdivided into two others, viz: Had he a right so to do? and has he exercised that right? 2. Did such expatriation incur the disability of alienage? and is he thereby prevented from taking lands by descent in the United States?

I ask (and it is a question of magnitude), could Daniel Coxe, and has he expatriated himself and become a subject of the King of Great Britain?

\*322] \*This is a new case in the history of nations, to which the little case of *Calvin*, the Scotchman, bears no proportion.

The revolution which dismembered the mighty empire of Britain, is a subject of curious, of interesting, and, as introductory on this occasion, of profitable contemplation. Its leading principle was the reverse of what has been stated by the opposite counsel, or I am ignorant of its origin and design. I insist, that when the authority of the mother country, as it was called, was rejected, the inhabitants of the former colonies were so far in a state of nature, that each man was at liberty to choose his side; remain a subject, or become a citizen. This interval of election continued, until new systems of government were formed, adopted and organized, after which period (not previously), residence was an implied assent to share the fortunes and the destinies of the United States. In Pennsylvania, the rule was practically exemplified in the memorable case of *Chapman*, the British light-horseman, charged with treason. 1 Dall. 53.

When government is regularly established, a majority, with propriety, governs the minority; to institute it legally, individual assent is necessary, or it deserves the name of usurpation, and ought to be execrated as tyranny. (1 Wilson's Works 316, 317.) New Jersey proceeds in a temperate, mild and correct course. The constitution of the 2d of July 1776, offers the right of suffrage, without imposing its exercise on all the inhabitants. Constitution of New Jersey, §§ 2, 3, 4, 13. In perfect conformity to the principle for which I contend, treason could not be committed, even by joining an invading army, until after the 4th of October 1776. (Wilson's New Jersey Laws, p. 4.) The period is, in effect, extended by the provisions of the act of the 5th of June 1777, offering to restore to the rights of freemen all who would return and comply with certain conditions by the 1st of August then next.

\*323] \*In 1777, Daniel Coxe joins the enemy, as a fugitive and offender; and in August of the same year, an inquisition is held to forfeit his real estate, for treason supposed to be committed about the 9th of April preceding, and judgment was rendered thereon in February 1779.

The counsel opposed to us exultingly say, Daniel Coxe is by this means recognised as a citizen, charged with the crimes incident to that character only, and entitled in return to the privilege of holding land, and cite authorities in support of the position. 1 Bl. Com. 371; 2 Ibid. 249. We admit that he could take lands; so might an alien, but he could not hold in either capacity. In high treason, the forfeiture of lands accrues, not from the time of conviction, but from the date of the offence.

If the right of election had passed, the right of expatriation succeeded. I am told, at the commencement of the argument, that I misunderstand and



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misapply terms, and consider as synonymous, what are entirely distinct, if not of opposite meaning, expatriation and emigration. That the last is of natural right, the former of municipal regulation. That emigration cannot be restrained, but expatriation requires the consent of the government. Emigration only suspends the activity of allegiance; expatriation dissolves it, precludes from taking lands, and renders the issue aliens. This suggestion accords perfectly well with the views of my learned antagonist; but does he show any authority in support of his explanation? None, it is the offspring of his own creative imagination.

It is credible, that the conventions of Pennsylvania, Kentucky and Vermont thought it necessary to restrain their legislatures from preventing temporary absences of their citizens, retaining their political connections within their respective states.

\*A train of reasoning is unnecessary on this point; I find the text and the comment together. 1 Wilson's Works 311; Tucker's Blackstone, vol. 1, part 2, App. p. 96. Has a state the right to prohibit the emigration of its members? May a citizen dissolve the connection between him and his country? Judge Tucker considers expatriation and emigration of the same import. In Judge Wilson's works, the word expatriation is not used in the whole lecture. The 9th article and 25th section of the constitution of Pennsylvania is introduced, and the whole course of argument shows the word emigration is to be understood as co-extensive with expatriation. [\*324]

Taking the word emigration, then, in its most extensive sense, is the right of expatriation, as has been represented, the mere whim of modern, fanciful, theoretical writers? I say, it is as ancient as the society of man. It is only by establishing the converse of the proposition, the common-law idea, that the natural-born subject of one prince cannot, by swearing allegiance to another, or by any other act, discharge himself from his allegiance to the former, that the principle of emigration can be made a matter of doubt. 1 Tuck. Bl. part 2, App. p. 90. I deny, that this common-law principle is founded in, or consonant to, the divine law, the law of nature, the law of nations, or the constitution of the state of New Jersey. The Bible is the most venerable book of antiquity; there we find expatriation practised, approved and never restrained. The family of Jacob became subjects to the Egyptian monarch. Moses abandoned Egypt, his native land, and David left Saul, his prince. The law of nature, abstractedly considered, knows neither prince nor subject. From this source, therefore, the common-law principle cannot be derived.

Particular nations have prohibited their people from migrating to another country, but the prohibition did not arise from the practice of nations towards each other. At Athens, after a man examined the laws of the republic, if he did not approve of them, he was at liberty to quit the country with his effects. By the constitution of the Roman commonwealth, no citizen could be forced to leave it, or not to leave it, when made a member of another which he preferred. Even under the emperors, as long as any remains of liberty continued, it was a rule, that each one might choose the state of which he wished to be a subject or citizen. Where did the Romans get their laws? From the Grecians. Where did the Grecians get their laws? From the eastern nations; the aborigines of the earth. [\*325]

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The right of expatriation, therefore, so far as we can trace it, has been recognised in the most remote antiquity. Among modern nations, the practice is various ; the Muscovites forbid it ; in Switzerland, it is permitted : some princes consider their subjects as riches, as flocks and herds, and their edicts correspond to these false notions. Vattel, lib. 1, c. 19, § 225. Consult jurists, Grotius, Puffendorf, Burlamaqui, Vattel ; they are of opinion, that every man has a natural right to migrate, unless restrained by laws, and that these cannot restrain the right, but under special circumstances, and to a limited degree. The strong and masculine understanding of Mr. Locke revolted at the illiberal ideas of English jurisprudence in this particular ; he examined the right claimed to prohibit emigration, and declares that examples of emigration are frequent in history, profane and sacred, and that it has been the practice, from the beginning of the world, to the time he wrote. Wykefort has a section, the title of which is, the prince may employ foreigners in his embassies, even in their own country. Wykefort, p. 116, 119. After a narrative, in which he shows that this had been the practice of Europe, he proceeds to consider its propriety, which he infers from the right of expatriation. Mr. Rawle has read as cited, that passage to which Mr. Tilghman did not refer, and omitted to answer what Mr. Tilghman did read.

Lastly, the constitution of New Jersey is founded on sentiments which repel the idea of perpetual allegiance, and imply and include the right of expatriation.

\*326] Whatever diversity there may have been in the sentiments \*of writers, and in the laws and practices of states, on the subject of emigration in general, there never has been a doubt, in this country, but that when a civil war takes place, each member of the society has a right to choose his side.

The first view we have of New Jersey and Daniel Coxe, is in a state of enmity ; the state treating him as a refugee ; Daniel Coxe declaring himself a British subject, acting in concert with an invading army. Trace the circumstances distinctly, and we shall find the right of election between the two governments restored to him, and that he expatriates himself, with the consent of, if not propelled thereto, by the state of New Jersey. On the 11th of December 1778, the legislature of New Jersey passed an act whereby they disfranchise all persons who were of the character, and had pursued the conduct, of Daniel Coxe. At the treaty of peace, his treason was cancelled, forgiven, buried in oblivion, or at least remembered only to prevent restitution of his forfeited estates. The disfranchising act continued in full operation, unrepealed and unaffected by the restoration of harmony between the two countries. Under these circumstances, he had his choice ; he might have returned to New Jersey, or to any other state. The principles of the constitution justified him in becoming a British subject, within the rules of expatriation, as stated by the opposite counsel. That he made his choice is proved by unequivocal evidence, that leaves no room for doubt or controversy as to the fact.

Mr. Rawle has himself enumerated eight heads, under which the evidence of his expatriating himself, and becoming a British subject may be classed : 1. Joining the British army in 1777 ; 2. Voluntary residence with them at Philadelphia and New York ; 3. Holding civil offices under the



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king ; 4. Trading as a British merchant ; 5. Holding lands as a trustee ; 6. Receiving pensions and rewards as a British subject ; 7. Describing himself as such ; 8. Having never taken an oath of allegiance to the state of New Jersey.

\*A case was cited (*Marryat v. Wilson*, 1 Bos. & Pul. 430) to show that the exercise of trade as a citizen of one country is compatible [\*327 with a continuance of allegiance to another. It was the case of John Collet, who was under the supposed tie, not only of permanent but perpetual allegiance from birth. But Daniel Coxe was not born in the allegiance of the state of New Jersey, nor ever voluntarily took upon himself that obligation. The principle of that decision is consonant to British ideas, but in direct hostility with those which led to the American revolution, gave birth to our constitutions, and without which our brightest patriots were rebels.

It is impossible to doubt, from what appears on the record, that he is under repeated positive oaths of allegiance to the King of Great Britain. According to the sound reasoning of Wyckefort, these were sufficient to sever the strongest connection between the United States and a citizen, much more such a relation as was subsisting (if any) between the state of New Jersey and Daniel Coxe ; involuntary, disclaimed, and inconsistent with the duties imposed upon him by his engagements to another country.

The naturalization law of congress is full proof that, in the estimation of the people of the United States, an oath of allegiance to one country is an expatriation from a former ; and that whoever becomes a citizen here, ceases, *ipso facto*, to be a subject elsewhere. If this is not the meaning of our law, we encourage the unhappy victims to sacrifice themselves at the shrine of perjury. Characters such as Mr. Coxe are considered by the same law as expatriated, as aliens, and being no longer citizens ; he having been attainted of treason by the state of Pennsylvania in the year 1778.

By the naturalization act of April 14th, 1802, § 4 (2 U. S. Stat. 155), attainted loyalists, and such as have been legally convicted for having joined the army of Great Britain, during the late war, cannot be naturalized, without the consent of the legislature of the state in which such persons were proscribed. All the courts of the United States, therefore, \*could [\*328 not naturalize Daniel Coxe, without the consent of the states of New Jersey and Pennsylvania, in both of which he has been proscribed.

From all these considerations, it is inferred, that Daniel Coxe did expatriate himself ; that he had a right so to do ; that he has legally exercised that right, and has thereby become a British subject, and is not an American citizen.

Did such expatriation induce the disability of alienage, and is Daniel Coxe thereby incapacitated from taking lands in the United States by descent ? We are charged with inconsistency, that while we endeavor to exclude the liberal sentiments of the common law as applied to *ante-nati*, we insist on the rigid rule of the same law, in preventing aliens from holding lands in the United States. This charge will be effectually repelled by a single passage, from an authority cited by the opposite counsel for a different purpose. 1 Tucker's Bl. part 2, p. 371. If an alien could acquire a permanent property in lands, he must owe an allegiance, equally permanent with that property, to the King of England, inconsistent perhaps with former allegiance, and productive of many other inconveniences. By the civil law, a

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contract for land by an alien is void. The forfeiture to the prince is peculiar to England, or, at least, to countries where the feudal system has prevailed. 1 Bl. Com. 371; Cod. l. 11, tit. 55.

Was it from deference to the common law, that the objections urged against the treaty of London were, that it paved the way for British influence, by enabling aliens of that country to hold lands in the United States? If the natural and primitive allegiance may be put off, without the consent or concurrent act of the prince to whom it was first due, expatriation must \*329] induce alienage. Virginia has recognised the right, and considers the \*person who has exercised it as no longer a citizen. 1 Tuck. Bl. part 2, p. 360, 361.

If expatriation be a right, when legally exercised, it must induce alienage, and the revolution is a case in point, to show that a man is not obliged to continue the subject of that prince under whose dominion he was born; otherwise, contrary to a position contended for by Mr. Rawle, we must admit that America was not independent, until the king of Great Britain acknowledged her independence; and that it was the consequence of, and not antecedent to, the treaty of peace.

Expatriation is substantially a putting off or change of allegiance. As to the removal from one country to another, it is a mere immaterial, accidental circumstance. It will be agreed, that if it can be done in the country, it can, by going out of the country. Nations may shake off their allegiance, says Mr. Rawle, but individuals may not. Grotius said just the contrary; and surely, as Judge Tucker observes, if all might, any one might, with the same reason.

Granting for a moment that the common law of England is as barbarous as the case of *Macdonald* (Foster 59) would induce us to suppose, how has it been translated to the United States, to be in active operation, slandering the principles of our revolution. I consider the case of *Talbot v. Jansen* as establishing the proposition that expatriation was a right, the fair exercise of which produced alienage with its respective rights and disabilities. 3 Dall. 133, 152, 164.

Of *Hamilton v. Eaton*, I know nothing. *Lord Fairfax's Case* is not in print, but from what fell from his honor Judge WASHINGTON, I presume it went on similar grounds to that of *Calvin*. I throw into the opposite scale as at least an equal weight, the decision in the case of *The Charming Betsy*, where expatriation was expressly recognised, and as operating the extinguishment of the previous character of citizen of the United States. It is in point as to both particulars.

\*I conceive the general rule, at least so far as it is necessary in the instance of Daniel Coxe, is fully established, and that expatriation is a right, which, when fairly exercised, changes the allegiance; and that it has been so exercised, by which he ceased to be an American citizen, became an alien, and as such incapable of holding lands by purchase, or taking by descent, unless there be an exception out of the rule in his favor, as an *ante-natus*.

The burden of the argument devolves upon our antagonists. Let them show when, and by what means, the exception in favor of the *ante-natus*, derived from the principle of perpetual allegiance by birth, has been adopted among us. Because, say the counsel for the defendant in error, the constitution of New Jersey adopted the common law, of which this is a part, there-



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fore, the rule is imperative on this occasion. What ! all the common law of England ? that which respects the royal prerogative, the hierarchy, the idea that allegiance is personal to the king from the subject, not duty on the part of the citizen to the state ? The common law of England, say Judge Tucker and Judge Wilson, was only so far adopted in the states, as it was proper and applicable to the situation and the circumstance of the colonies, and was different in different colonies. The adoption by New Jersey is guardedly expressed. "The common and statute law of England, as have been heretofore practised in this colony, not repugnant to the rights contained in this charter, shall be in force."

Two questions arise for the consideration of the opposite counsel. Was the principle for which they contend in previous practice in New Jersey ? Is it not repugnant to the privileges contained in that charter ? A double task devolves on our opponents. They must show that what they ask was in practice in the \*colony of New Jersey, before the formation of [331 the constitution. This is impossible ; the case could not occur ; it could not, in the nature of things, be in contemplation of the convention. The expression had reference to the mere detail of municipal law. Here, then, our antagonists must fail. Can they succeed better in the other part of the proposition ? Is not a claim, founded on the idea of perpetual allegiance by birth, repugnant to the rights and privileges contained in that charter ? They say, on the contrary, that allegiance and protection are reciprocal ties, and claim, as a right and privilege, to refuse the former when the latter is withdrawn. Three, out of seventeen states, says Mr. Rawle, have declared emigration a right not to be restrained by the legislatures. I say, it is the principle of the revolution ; it pervades each and every constitution, without which the whole proceeding is crime, rebellion and treason.

If the common law, introduced through the constitution, fails, what is the next prop by which it is attempted to support a claim in opposition to the language of our revolution ? We are told, that the capacity of British subjects to hold lands in the United States is recognised by the treaties of 1783 and 1794, and that surely it was not meant to encourage them to purchase that we might escheat. This part of the argument is introduced by a reference to Judge Tucker for the distinction between aliens by birth and aliens by election. 1 Tuck. Bl. part 2, p. 102, § 2. I acknowledge, that Judge Tucker does state that, by the treaty of peace, the common-law principle that the *ante-nati* of both countries were natural-born to both, and, as such, capable of holding, or inheriting, seems to be revived. So far as respects authority, I oppose to Judge Tucker the Virginia assembly, who expressly declare that all persons not being citizens of the United States are aliens. 1 Tuck. Bl. part 2, p. 55. Judge Tucker founds himself, as to the common-law principle, upon Bracton, and *Calvin's Case*, not adverting to the difference in point of fact, that the British who claim, as in this instance, never were in allegiance to our states. \*Further, he does not observe, that the whole reasoning is founded [332 upon the false hypothesis that allegiance by birth is perpetual. He acknowledges, that by the declaration of independence, the colonies became a separate nation from Great Britain ; yet, according to the laws of England, which we still retained, the natives of both countries, born before the separation, retained all the rights of birth. War makes aliens, enemies. They were enemies, then aliens.

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With the New Jersey convention, I understand the matter differently ; and that the law of England ceased until revived ; and was revived only as heretofore practised. On this mistaken ground it is, as I shall endeavor to show, that he infers that American natives were capable of inheriting lands in England, and the natives of England of inheriting lands in America. If this doctrine is founded upon the idea of perpetual allegiance by birth, it must stand or fall with its principal. Commentators, it is said, often find in Homer, what Homer never thought. It appears to me, that the same observation applies to the commentaries we have heard upon the treaties of 1783 and 1794.

Let it be recollected, that congress, on the 27th of November 1777, earnestly recommended it to the several states to confiscate and make sale of all the real and personal estate of such of their inhabitants, and other persons, as had forfeited the same. The legislatures did confiscate the lands of *ante-nati*, as escheated, and it was never suggested to be a violation of the common law of the land. In order, however, to vest the property in lands of an alien in the commonwealth, offices of entitling, and of instruction, were necessary in some states.

In some states, acts of assembly declared that the estates of the persons proceeded against should be vested and adjudged to be in the actual possession of the commonwealth, without any other office or inquisition. In others, real property belonging to British subjects, loyalists and others, had been \*333] only sequestered, not confiscated, \*and the profits appropriated during the war ; the estate to wait the disposal of the legislative provision, on the return of peace. In some instances, the lands of loyalists and others had not been actually seized and taken into the possession of the states, respectively, where situated, and therefore, the forfeitures and confiscations were not considered as completed. In these several ways, real property remained to loyalists and others, which was considered as not yet confiscated. This is the key to unlock the secrets of the provision in the treaty.

I contend, therefore, that the 6th article of the treaty of 3d September 1783, so far as respects property, is confined in its letter, spirit and meaning, to the preservation of estates owned antecedently to the war, which had not been actually confiscated and seized ; and to the consequences of an active part taken during that period. This construction is perfectly warranted by the case decided in Connecticut (Kirby's Reports), and by the principles as laid down by that very eminent English lawyer, Wooddeson.

The distinction of *ante-nati* and *post-nati*, the security of future acquisition, or the operation of general principles arising from political situations, not the penal consequences of an active part taken in the war, were not then in contemplation. Twelve millions of rich aliens allowed to purchase lands in a country owned by two or three millions of people comparatively poor : would it not have been thought madness ! I conceive, that this clause is precisely co-extensive as to its objects in guarding against injury to the person and to the property. It preserves from injury to their property the same persons who were to be secured in their personal liberty.

In the first place, this comprehended many who were considered as citizens of the United States, but who had committed crimes against their \*334] country. \*Was the property to be restored to them at one moment, says Mr. Rawle, for the purpose of being taken from them the next ?



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By no means. The stipulations extend to preclude any criminal proceedings for what had been done during the war. The effect of alienage was left to considerations of policy. Our commissioners, I trust, would not have suffered any interference by the British on that head.

This article was intended to prevent punishment, not to secure reward. If the loyalist is put upon the same footing as the ally in the war, he has no cause of complaint. There must be no future loss ; no damage by reason of the part which any have taken during the war. It is not asked. If Daniel Coxé had fought under General Washington, and at the peace, expatriated himself, and become a British subject, the rule for which we contend would have been equally applicable. Many of the people came back, and were naturalized under acts of assembly, and of course, hold their lands ; such as Mr. Gordon, in Pennsylvania, and others.

The construction of the treaty attempted by our opponents, can only be maintained by reference to the common-law doctrine, that natives of Great Britain were constructively born in America.

The 5th article assists in the construction of the 6th, and is recommendatory where the confiscation laws had been actually carried into effect. The 9th article of the treaty of the 19th November 1794, is in perfect unison with the ideas I submitted to the consideration of the court. Different ideas had been entertained in the different states as to the policy of permitting aliens to hold lands. It was always a matter of state regulation. In Pennsylvania, they might purchase ; now they may take by descent. The treaty, therefore, so far from looking to future acquisitions by purchase, is confined to those who now hold.

\*It is observable, that Judge Tucker does not express himself decidedly. He uses the qualified and guarded expression that the treaty [335 seems to have revived the common-law principle that the *ante-nati* of both countries were natural-born to both. He qualifies his argument still further, by saying, British subjects born since the separation are aliens ; but such of them as were born before the definitive treaty of peace took place seem to be entitled to the benefits thereof, so far as they had, or might be presumed to have, any interest in lands in the United States. All others appear to be aliens, in the strictest sense of the word, except as their cases may have been remedied by the late treaty of the 19th November 1794.

Daniel Coxé had no interest in lands in the United States, and could not be presumed to have, on the 3d of September 1783.

It is curious to observe, the unreasonable consequences to which this doctrine of *ante-natus* leads. If the loyalist died, and left an unoffending infant, his lands escheat. If he leaves an *ante-natus* who had waged war against us, he succeeds to the possession.

Say, with Judge Tucker, that under the equity of the treaty of peace, giving it the most liberal construction, all rights of British subjects, actually vested, not divested, were protected ; and that when such rights relate to lands, the persons having such right, if not then citizens, had their whole lifetime to become citizens ; which, if they neglected to do, their lands, at their deaths, would be equally subject to escheat as those of any alien naturalized, and dying without heirs, other than aliens. How is this reconcilable with his doctrine of *ante-nati* being entitled to purchase, take by descent, and every other mode of acquisition ? Or, with his argument that the common-

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law principle, from which this doctrine of *ante-nati* flows, that of perpetual allegiance by birth, has never been translated as a part of the common law \*336] into the United States? How can he reconcile it to his censure \*and strictures upon the determination of Judge ELLSWORTH in *Williams's Case*? He himself acknowledges that after the 28th of October 1795, no British subject can purchase lands within the United States, so as to be protected by that treaty.

If once this whimsical doctrine of *ante-natus* be admitted, it will give rise to an infinity of perplexing questions. An attainted loyalist, if he retains his citizenship, may return and be immediately eligible as a member of the house of representatives or the senate. After fourteen years' residence, though he cannot be naturalized without the consent of the state in which he was proscribed, yet he may be President of the United States.

I infer from all these considerations, that the expatriation of Daniel Coxe induced the forfeiture of alienage, and that he is thereby precluded from taking lands by descent in the United States of America.

*Cur. ad. vult.*<sup>1</sup>

ADAMS, *qui tam*, v. WOODS.

*Statute of limitations.—Penal actions.*

The act of 30th April 1790, limiting prosecutions upon penal statutes, extends as well to penalties created after, as before, that act, and to actions of debt, as well as to informations and indictments.<sup>2</sup>

THIS was a case certified from the Circuit Court of the United States for the Massachusetts district, in which the opinions of the judges of that court were opposed.

It was an action of debt for the penalty of \$2000, under the 2d section of the act of congress of 22d March 1794, "to prohibit the carrying on the slave trade from the United States to any foreign place or country." (1 U. S. Stat. 347.) The words of the act are, "shall forfeit and pay the sum of two thousand dollars; one moiety thereof to the use of the United States, and the other moiety thereof to the use of him or her who shall sue for and prosecute the same."

\*337] The defendant pleaded, "that the cause of action, set forth in the plaintiff's writ and declaration, did not accrue within two years next before the date and issuing forth of the writ in this case against him, in manner and form as the plaintiff hath declared, and this he is ready to verify: wherefore," &c. To which plea, there was a general demurrer and joinder. The question was, whether the plea was a good bar to the action.

The plea was grounded upon the 32d section of the act of congress of April 30th, 1790 (1 U. S. Stat. 119), which is in these words: "That no person or person shall be prosecuted, tried or punished for treason or other capital offence aforesaid, wilful murder or forgery excepted, unless the indictment for the same shall be found by a grand jury within three years next after the treason or capital offence aforesaid shall be done or committed; nor

<sup>1</sup> After a re-argument, in February term 1807, the court affirmed the judgment, holding that Daniel Coxe had a right to take lands, in New

Jersey, by descent. 4 Cr. 209.

<sup>2</sup> United States v. Mayo, 1 Gallis. 397.



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shall any person be prosecuted, tried or punished for any offence not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offence, or incurring the fine or forfeiture aforesaid : provided, that nothing herein contained shall extend to any person or persons fleeing from justice." This cause was argued at February term 1804.

*Lincoln*, Attorney-General, for the plaintiff.—The offences described in the act of congress upon which the defendant relies are *mala in se*. They were crimes originally.

Informations are of two sorts : those in behalf of the United States and the informer ; and those in behalf of the United States alone. They are considered as criminal process. The act describes only such offences as are to be prosecuted by indictment or information ; for the words are, "unless the indictment or information for the same shall be found or instituted," &c. \*Hence, it is apparent, that the legislature meant to limit only prosecutions of that kind. [\*338]

An action of debt *qui tam*, is a civil, and not a criminal process. The act of congress on which the defendant relies is entitled, "an act for the punishment of certain crimes against the United States." The limitation it contains is intended to be a limitation of criminal prosecution. Lord MANSFIELD, in the case of *Atcheson v. Everitt*, Cowp. 391, says, "now, there is no distinction better known than the distinction between civil and criminal law ; or between criminal prosecutions and civil actions. Mr. Justice Blackstone and all modern and ancient writers upon the subject distinguish between them. Penal actions were never yet put under the head of criminal law, or crimes. The construction of the statute must be extended by equity, to make this a criminal cause. It is as much a civil action as an action for money had and received."

But even supposing that the act of congress meant to include actions of debt, under the terms indictment or information ; yet it refers only to penal statutes, or offences then existing, and cannot extend to offences created by subsequent statutes. This may be inferred from the force of the terms used. "Any penal statute," must mean any existing penal statute. A similar construction is put upon the statute of 21 Jac. I., c. 4, by the judges in England. The words of that statute are "any penal statute," yet the court held that those words referred only to penal statutes then existing, and not those subsequently enacted. *Cunningham's Law Dict.* tit. Limitation ; *Rex v. Gaul*, 5 Mod. 425 ; 1 Salk. 372 ; *Hicks's Case*, Ibid. 373. If the legislature meant the act to apply to all future penalties, they would have said, any penal statute now existing or which shall hereafter be enacted.

The legislature could not suppose that the term of two years would be a proper limitation of all penal actions. In the present case, it goes to a total annihilation of the penalties of the act. No vessel engaged in the slave trade can ever be subjected to condemnation ; for the voyage is always circuitous, and generally takes up more \*than two years to perform it. It is generally from the United States to the West Indies, from thence to Africa, thence back to the West Indies or South America, and thence home. It is scarcely possible, that all this should be accomplished in two years. [\*339]

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I have lately seen a set of papers sent from our consul in England to the secretary of state, in which orders were given to the master to go to the West Indies, and from thence to Africa, and to continue the trade, until the vessel should be no longer fit for a voyage.

In the act of 2d March 1799, to regulate the duties upon imports and tonnage, § 89 (1 U. S. Stat. 695), is the following clause: "That no action or prosecution shall be maintained, in any case under this act, unless the same shall have been commenced within three years next after the penalty or forfeiture was incurred;" which shows that the legislature did not consider the act of 1790 as applying to any offences subsequently created; otherwise, they would not have inserted a new limitation; or if they meant to extend the right of action to three years, they would have used affirmative words, and said, that actions for penalties under that act might be prosecuted at any time within three years, the act of 1790 notwithstanding.

*Swann, contra.*—It is immaterial, whether this is to be considered as a criminal or a civil process. The act of limitation is a general law, applying to offences subsequently created as well as to those already existing. The cases cited from Cunningham's Law Dict. are grounded upon the peculiar words of the statute of James, and do not apply to those of the act of congress. There may be a little obscurity in the words of the act, but there is none as to the intention of the legislature. They meant to make a provision which should extend to all prosecutions upon penal statutes. The action *qui tam* is a common-law remedy, and existed as a mode of prosecution, at the time of passing the act of 1790; and although it does not expressly limit an action of debt for the penalty, yet it expressly limits all prosecution for the penalty, \*340] not the prosecution in a particular mode. The words are, "nor \*shall any person be prosecuted, tried or punished." But if the opposite construction is correct, the United States would be barred from prosecuting, but an individual would not.

The court took time to consider; and now, at this term, February 18th, 1805—

MARSHALL, Ch. J., delivered the opinion of the court.—This is an action of debt brought to recover a penalty imposed by the act, entitled "an act to prohibit the carrying on the slave-trade from the United States to any foreign place or country." It was pleaded in bar of the action, that the offence was not committed within two years previous to the institution of the suit. To this plea, the plaintiff demurred, and the circuit court being divided on its sufficiency, the point has been certified to this court.

In the argument, the plaintiff has rested his case on two points. He contends, 1st. That the act of congress, pleaded by the defendant, is no bar to an action of debt. 2d. That if it be a bar, it applied only to the recovery of penalties given by acts which existed at the time of its passage.

The words of the act are, "nor shall any person be prosecuted," &c. (1 U. S. Stat. 119.) It is contended, that the prosecutions limited by this law, are those only which are carried on in the form of an indictment or information, and not those where the penalty is demanded by an action of debt.

But if the words of the act be examined, they will be found to apply, \*341] not to any particular mode of proceeding, but generally to any prosecution, trial or punishment \*for the offence. It is not declared, that



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no indictment shall be found, or information filed, for any offence not capital, or for any fine or forfeiture under any penal statute, unless the same be instituted within two years after the commission of the offence. In that case, the act would be pleadable only in bar of the particular action. But it is declared, that "no person shall be prosecuted, tried or punished;" words which show an intention, not merely to limit any particular form of action, but to limit any prosecution whatever.

It is true, that general expressions may be restrained by subsequent particular words, which show that, in the intention of the legislature, those general expressions are used in a particular sense: and the argument is a strong one, which contends that the latter words describing the remedy, imply a restriction on those which precede them. Most frequently, they would do so. But in the statute under consideration, a distinct member of the sentence, describing one entire class of offences, would be rendered almost totally useless, by the construction insisted on by the attorney for the United States. Almost every fine or forfeiture under a penal statute, may be recovered by an action of debt, as well as by information; and to declare that the information was barred, while the action of debt was left without limitation, would be to attribute a capriciousness on this subject to the legislature, which could not be accounted for; and to declare that the law did not apply to cases on which an action of debt is maintainable, would be to overrule express words, and to give the statute almost the same construction which it would receive, if one distinct member of the sentence was expunged from it. In this particular case, the statute which creates the forfeiture does not prescribe the mode of demanding it; consequently, either debt or information would lie. It would be singular, if the one remedy should be barred and the other left unrestrained.

In support of the opinion that an act of limitations to criminal prosecutions can only be used as a bar, in cases declared by law to be criminal at the time the act of limitations was passed, unless there be express words extending it to crimes to be created in future, Cunningham's Law Dict. has been cited. \*The case in Cunningham is reported in 1 Salk. and 5 Mod., [342 and seems to be founded on the peculiar phraseology of the statute of the 21 Jac. I., directing informations to be filed in the county in which the offences were committed. That statute was expounded to extend only to offences which, at the time of its passage, were punishable by law. But the words of the act of congress plainly apply to all fines and forfeitures, under any penal act, whenever that act might pass. They are the stronger, because not many penal acts were at that time in the code.

In expounding this law, it deserves some consideration, that if it does not limit actions of debt for penalties, those actions might, in many cases, be brought at any distance of time. This would be utterly repugnant to the genius of our laws. In a country where not even treason can be prosecuted, after a lapse of three years, it could scarcely be supposed, that an individual would remain for ever liable to a pecuniary forfeiture.

The court is of opinion, that it be certified to the circuit court for the district of Massachusetts, that the issue in law joined in this case, ought to be decided in favor of the defendant.

## WINCHESTER v. HACKLEY. (a)

*Set-off.*

A creditor upon open account, who has assigned his claim to a third person, with the assent of the debtor, is still competent to maintain an action at law in his own name, against the debtor, for the use of the assignee; but the debtor is allowed to set off his claims against the assignee. The defendant cannot set off a claim for bad debts, made by the misconduct of the plaintiff, in selling the defendant's goods as factor, the plaintiff not having guarantied those debts. But such misconduct is properly to be inquired into, in a suit for that purpose.<sup>1</sup>

ERROR to the Circuit Court for the district of Virginia. The declaration was for money paid and advanced by the defendant in error, for the use of the plaintiff in error.

Upon trial of the issue of *non assumpsit*, two bills of exception were taken by the original defendant. The verdict was for plaintiff, \$4155 damages.

The first bill of exceptions stated, that the plaintiff below offered in evidence sundry bills of exchange, drawn \*by the defendant upon the plaintiff, to an amount equal to the balance demanded by the plaintiff of the defendant. And also several accounts-current between the defendant, and the mercantile firm of Richard S. Hackley & Co., of the city of New York; of which the plaintiff and Seth B. Wigginton were two; that the said bills of exchange were debited to the defendant in the said accounts, as being due from him to the said Richard S. Hackley & Co., and that the said accounts contained various other articles of debit and credit, to a considerable amount, commenced on the ——— day of ———, and continued until the ——— day of ———, when the firm of Richard S. Hackley was changed into that of Richard S. Hackley & Co., and concluded on the ——— day of ———.

That in these accounts, the balance stated to be due from the defendant to the said Richard S. Hackley, on the ——— day of ———, is transferred, with the consent of the said Richard S. Hackley, to the said Richard S. Hackley & Co., and that the account in which the said balance is so transferred to the said Richard S. Hackley & Co., and the formation of that firm, were communicated by the said Richard S. Hackley himself to the defendant, before the institution of this suit; and that the defendant thereafter made to the said Richard S. Hackley & Co. several remittances in money and commodities, towards the discharge of the said balance, and addressed to them several letters concerning the same, which remittances and letters came to the hands of the said Richard S. Hackley & Co. Whereupon, the defendant moved the court to instruct the jury, that if the balance aforesaid was transferred as aforesaid to Richard S. Hackley & Co., it was not a subsisting debt from the defendant to the plaintiff alone, at the commencement of this suit. But the court (consisting of MARSHALL, Ch. J., and GRIFFIN, District Judge) overruled the motion, being of opinion, that though the debt was in equity transferred to Richard S. Hackley & Co., yet the suit

(a) Present, MARSHALL, Ch. J., CUSHING, PATERSON and WASHINGTON, Justices.

<sup>1</sup> A claim for unliquidated damages, arising out of another transaction, is not the subject of set-off. *Armstrong v. Brown*, 1 W. C. C. 43; *Roberts v. Gallagher*, Id. 156; *De Tastet v.*

*Crousillat*, 2 Id. 132; *Thomas v. McConnell*, 3 McLean 381; *United States v. Williams*, 5 Id. 133; *Palmer v. Burnside*, 1 Woods 179.



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was maintainable for their benefit, in the name of Richard S. Hackley. At the same time, the defendant was permitted to give in evidence any dis- counts which he might claim against Richard S. Hackley & Co.

The second bill of exceptions stated, that the plaintiff, to support his action, gave in evidence sundry accounts \*current between himself and the defendant, in which the plaintiff had credited the defendant, [\*344 as being in the plaintiff's hands for collection, for the proceeds of a certain quantity of flour, which he had sold for the defendant, but had afterwards charged to the defendant several sums on account of the alleged insolvency of some of the purchasers of the said flour. It also appeared, that in the account-current, and accounts of sales, the proceeds of sale of the said flour were stated to be outstanding, subject to collection, and the plaintiff did not undertake to guaranty the debts. Whereupon, the defendant, in order to repel that evidence, offered to prove that the sums so charged to the defendant were lost by the mismanagement and misconduct of the plaintiff, in having made the sales to persons known by him to be unworthy of credit; but the court refused to permit such proof to be made to the jury in this action, being of opinion, that such misconduct was properly to be inquired into in a suit for that purpose.

This case being submitted without argument, the judgment was affirmed, with costs.

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REILY, appellant, v. LAMAR, BEALL and SMITH, appellees.

*Citizenship.—Insolvency.—Citation.*

The inhabitants of the District of Columbia, by its separation from the states of Virginia and Maryland, ceased to be citizens of those states respectively.

By the insolvent law of Maryland, of the 3d of January 1800, the chancellor of Maryland could not discharge a citizen of Maryland, who resided in the District of Columbia, at the time of its separation from Maryland, unless the person had complied with all requisites of the insolvent law, so as to entitle himself to a discharge, before that separation.

*Quære?* Whether a person who has neglected at law to plead his discharge under an insolvent act, can avail himself of it in equity.

A citation is not necessary, when the appeal is prayed and allowed in open court.<sup>1</sup>

THIS was an appeal by Reily from a decree of the Circuit Court of the district of Columbia, which dismissed his bill in equity, with costs.

The defendant, Beall, some time in the year 1789 or 1790, had brought suit, in the name of Lamar, for the use of Beall, by Robert Smith, his attorney-at-law, against Reily, the appellant, upon a note for \$400, and recovered judgment in the general court of Maryland.

The bill stated, that during the pendency of that suit, the complainant Reily, supposing that Smith was fully authorized to receive payment of the debt in any manuer he should think proper, sold him a tract of 4600 acres of land, in the state of Georgia, for the sum of \$1533, for the express purpose of discharging that debt and some others which Reily owed in Baltimore. That in settling with Smith for the purchase-money of the land, the amount \*of that debt was deducted and left in the hands of Smith, to [\*345 be paid to Beall, under a promise from Smith, that he would have the

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<sup>1</sup> Brackett v. Brackett, 2 How. 238. And see United States v. Gomez, 1 Wall. 690.

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entry made upon the records of the court, that the debt was satisfied. And after deducting also the amount of other debts which Smith undertook to pay for Reily, Smith paid him the balance by a check on the bank, being about \$17. That thus the matter rested, until the year 1799 or 1800, when being called on by Beall for payment, Reilly applied to Smith, to know why the debt had not been paid, who replied, that it had been delayed, in consequence of a dispute between one John Lynn, to whom the note had been indorsed, and the said Beall, as to which of them was entitled to the money; but that it had been settled by reference, that Beall should have it; and that Reily might remain easy, for he should not be called on again for payment. That Reily informed Beall, that he had paid the amount to Smith, and that Beall had acknowledged to several persons, that he was satisfied the fact was so, and had employed counsel to bring suit against Smith for the money. That Smith had charged Reily with the said debt in his books, and that Reily had seen the entry in Smith's own handwriting, and prayed that the book might be produced.

That after the said judgment was rendered, viz., on the 3d of January 1800, the legislature of Maryland passed an insolvent law in favor of Reily and others, and on the 23d of December 1800, he conveyed all his estate to a trustee, agreeable to the law, for the use of all his creditors; and that on the 4th of April 1801, the chancellor of Maryland granted him a certificate of discharge (a copy of which was made part of the bill), whereby it was adjudged and ordered, that he should be discharged from all debts, covenants, contracts, promises and agreements, due from, or owing, or contracted by him, before the aforesaid 23d day of December 1800; provided, that any property which he had acquired, since the execution of the said deed, or should acquire by descent, or in his own right, by bequest, devise or in a course of distribution, should be liable for the payment of his said debts. That a writ of *scire facias* having issued, some time in the year 1800, to revive the said judgment, Reily instructed his attorney-at-law to plead the said discharge in bar thereof, which he neglected to do, without any default on the part of Reily. That all the property he possessed was duly delivered up \*346] to the \*trustee, at the time of executing the deed of trust, and that all the property then in his possession was a devise, or the proceeds of a devise, to his wife. That execution having, upon the *scire facias* aforesaid, been awarded by the general court of Maryland, an exemplification of that judgment had been, by the said Beall, filed in the clerk's office of the circuit court of the district of Columbia, for the county of Alexandria, and execution issued thereon, with intent to levy the same upon the goods and effects held by Reily, in the right of his wife, to stay which, and all other proceedings at law, the bill prayed an injunction, &c.

Beall, in his answer, stated, that he had never received any part of the money, either from Reily or Smith, who, he admitted, was his attorney in the suit against Reily. That Smith denied that Reily had ever paid him the money, and that Beall had no knowledge, otherwise than by the information of Reily, that the same had been so paid. But that some time after the original judgment was obtained against Reily, Smith told Beall, that if he would make to him, the said Smith, a handsome discount upon the said judgment, he would pay him the money for the same, which Beall refused to do. He admitted, that for some time, he did believe, and had declared his belief,



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that Reily had paid the money to Smith, and under that impression, had given instructions to an attorney, to examine into the business, and bring suit against Smith or Reily, as he should judge best ; but he never positively admitted the fact to be so, nor had he intimated such an opinion, since he had seen Smith's answer. He did not admit that Reily had ever regularly and legally obtained the benefit of any insolvent law of Maryland, nor that he instructed his attorney to plead his discharge, but that, if he did, the attorney was able to pay any damages which Reily might sustain by his negligence. That the plea would be a good plea at law, and therefore, the complainant could not resort to equity for that benefit which he had lost by his negligence. He admitted, that it appeared by the proceedings, that the deed from Reily to his trustee, under the insolvent law, for the benefit of his creditors, was dated on the 23d of December 1800, and his discharge on the 4th of April 1801, during all the which time, Reily lived either in the city of Washington, or town of Alexandria, and contended that, as the court below had determined that the jurisdiction of Maryland and Virginia over the ceded territory \*ceased on the 1st Monday of December 1800, the legisla-  
 ture or chancellor of Maryland had no power to pass such law, or give [\*347 such discharge to the said Reily. He did not admit that property then held by Reily was held in right of his wife.

The answer of the defendant Smith admitted that, as attorney for Beall, he brought the suit against Reily, and that he purchased of him, as he then imagined, a certain parcel of land, consisting of 4600 acres, represented by Reily to be in the state of Georgia, at the price of two shillings and six pence, current money of Maryland, per acre, amounting for the whole to the sum of \$1533.33 ; but denied, that in making that purchase, he undertook or assumed for Reily, to pay the debt to Beall, and that Reily ever left in his hands any money for that purpose, and that he (Smith) ever promised to have an entry made on the records, that the debt was satisfied. The answer then averred, that Smith had availed himself of all the means in his power to obtain satisfactory information respecting the title, and even of the existence of the Georgia land, and that, falling in all his various attempts, he had reason to believe, and did believe, that he did not acquire any title. He denied that he ever told Reily, that the payment of the debt by him (Smith) had been delayed, in consequence of any dispute, and that he gave Reily any ground to believe or imagine, that he (Smith) intended to pay the said debt, or any part of it. That he never charged Reily, in any account against him, with the amount of any part of the debt, and that no part of the purchase-money was ever deducted to pay the debt. It averred also, that Smith, in the years 1790, 1791 and 1792, did not keep any book of money accounts whatever, except a bank-book, nor any kind of book of accounts, wherein such an entry could with propriety have been made, and that there never was in his possession, or kept by him, such a book of accounts as the said Reily had alleged. The answer did not state that Smith had in any manner, paid Reily for the lands.

The copy of the chancellor's certificate of discharge, referred to in Reily's bill, stated the date of the deed from Reily to his trustee, to be the 23d of March 1801, and not the 23d of December 1800, as alleged in the bill, and admitted in Beall's answer.

\*The deed from Reily to Smith, for the Georgia lands, and also a deed of quit-claim from Cobbs (from whom Reily purchased them) to [\*348

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Smith, and the surveyor's plat and certificate of survey, were produced in evidence. The depositions tended to prove, that Smith had received from Georgia very favorable accounts of the Georgia land, and of the goodness of the title ; and that the lands were worth a dollar per acre. That he had said, as late as June or July 1801, that at the time of his purchase from Reily, it was understood, that any debts due from Reily, which Smith should satisfy, were to be admitted as payment for the land ; that believing, at that time, that he had made a valuable purchase, he did pay some debts, and offered to pay others, if the creditors would make abatements. That by the contract, he was at full liberty to settle any debt due from Reily, in the easiest and most advantageous way to himself ; that he denied, that he had engaged to pay any particular debt, but that he was to discharge the purchase-money, by purchasing or satisfying claims against Reily, in any way he found best. That he offered to pay Beall, the debt Reily owed him, if Beall would allow a handsome discount, but that Beall had refused to do so, and the conversation ceased. That he had not received any satisfactory information respecting the Georgia lands, and feared, he had made an incautious purchase, and that the lands did not exist. He regretted, that he had paid anything ; and said, that he had offered Reily the lands again, upon receiving what he had paid, which Reily declined. That he only wanted to be satisfied, that there was such land as he had bought of Reily, and that he had title, and the business should be settled immediately with him ; but that the business between Reily and Beall was out of the question between him and Reily.

The evidence as to Beall, only went to prove that he had several times expressed a belief, that Reily had settled the debt with Smith.

At February term 1804, a preliminary question was suggested by *Mason*, for the appellees, whether a citation was not necessary, in cases of appeals, as well as in cases of writs of error, under the 22d section of the judiciary act of 1789. (1 U. S. Stat. 84.)

\*349] \*MARSHALL, Ch. J.—The question turns upon the construction of the act of March 3d, 1803. (2 U. S. Stat. 244.) The words are, “and that such appeals shall be subject to the same rules, regulations and restrictions as are prescribed in law in case of writs of error.”

*E. J. Lee*, for the appellant.—The reason for a citation in cases of writs of error, does not apply to cases of appeal. Where the appeal is prayed and granted in the court below, the parties are bound to take notice of it.

*Mason*, in answer to a question from the Chief Justice, stated, that he conceived that an appeal might be allowed, at any time within five years, in the same manner as writs of error. The words of the last act of congress upon the subject are peremptory, “appeals shall be subject,” &c. If there is no citation, the appeal cannot be a *supersedeas*, but perhaps, the want of a citation is not a sufficient ground to dismiss the appeal.

On a subsequent day in the same term, the Chief Justice stated it to be the opinion of the court, that the appeal having been prayed, pending the court below, a citation was not necessary ; and therefore, the case was properly before the court.



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February 6th, 1805. The case was now argued by *E. J. Lee* and *C. Lee*, for the appellant, and by *Mason*, for the appellees. (a)

*E. J. Lee*.—If the plaintiff's attorney-at-law make a contract with the defendant, by which the plaintiff's demand is satisfied, it binds his client. So, he may leave the matter to reference, and the client will be bound by the award. The answers of Smith and Beall \*are contradicted in a [\*350 material point, and the rule in equity is, that if the defendant's answer is false in a material point, it shall not be taken to be true in the residue. Mr. Smith's answer states that he has availed himself of all opportunities of ascertaining the title, nay, the existence of the land. Robert Long's deposition shows this to be incorrect. Beall's answer states that he never did aver that Reily had paid the money to Smith. This is contradicted by Lloyd Beall's deposition.

Another ground of equity on the part of the appellant, is his discharge under the insolvent act of Maryland. He is not precluded from setting it up in equity, because his attorney neglected to plead it at law. No fraud is alleged or suggested in obtaining it; but it is stated, that the discharge was after the district of Columbia was separated from Maryland, and that upon that separation, Reily, living in the city of Washington, ceased to be a citizen of Maryland; and that, as the act directs that the chancellor shall be satisfied that the person applying to him for a discharge was, and is, a citizen of Maryland, and as the legislature could not authorize the discharge of a person from his debts, who should not be, at the time of the discharge, a citizen of Maryland, the discharge was not valid and regular.

But the act of Maryland was passed before the change of jurisdiction, and the discharge was only a consequence of what was begun, while the legislature had jurisdiction. By the act of cession by Maryland, and the act of acceptance by congress, it is provided, that the operation of the laws of the state should not cease or be affected by the acceptance, until the time fixed for the removal of the government, and until congress should otherwise by law provide.

The time appointed for the removal of the government was the first Monday of December 1800, but congress did not provide by law for the government of the district of Columbia, until the 27th of February 1801. The insolvent act passed on the 3d of January 1800. \*On the 15th [\*351 of April 1800, the chancellor passed an order that Reily give notice to his creditors to appear on the 3d of November 1800, on which day, notice having been given, the oath of an insolvent debtor was administered to Reily by the chancellor, and a trustee appointed. On the 23d of December 1800, Reily conveyed all his property to the trustee, who, on the same day, gave bond for the faithful performance of the trust, and a receipt for the effects. Thus, everything was done by Reily on his part, to entitle him to a discharge, before the operation of the law of Maryland ceased. The chan-

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(a) *E. J. Lee*, being asked by the court for a statement of the case, agreeable to the rule of court, alleged that it was not in his power to make a statement, as it was a question as to the weight of testimony, on contradictory evidence.

MARSHALL, Ch. J.—The court require a statement of the case, even though the question is a question of fact; at least, the substance of the bill and answer, and the facts which are in contest, might be stated.

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cellor, therefore, having the cause before him, and having once had jurisdiction, could not be deprived of it, by the separation of the territory.

If a crime has been committed within the district of Columbia, before the 27th of February 1801, it must have been punished according to the state law of that part of the district in which it was committed.

Besides, it is worth consideration, whether, as the debt was due to Beall, who always remained a citizen of Maryland, it might not be barred by an act of the legislature of Maryland, notwithstanding the debtor had ceased to be a citizen. The words of the insolvent act (November session, 1799), c. 88, passed January 3d, 1800, § 3, are—

"§ 3. And be it enacted, that no person hereinbefore mentioned shall be entitled to the benefit of any of the provisions of this act, unless the chancellor shall be satisfied, by competent testimony, that he is, and at the time of passing this act was, a citizen of the United States, and of this state, and unless, at the time of presenting his petition as aforesaid, he shall produce to the chancellor the assent in writing of so many of his creditors, as have due to them the amount of two-thirds of the debts due by him at the time of the passing of this act; provided, that foreign creditors, not residing in the United States, and not having agents or attorneys residing therein, duly empowered to act in their behalf, shall not be considered within the intent and meaning of this clause; and provided also, that the chancellor may, without the assent of \*the creditors as aforesaid, from \*352] time to time, order to be discharged from custody, any of the said petitioners, who may be in actual confinement, in virtue of any process issued, or that may be issued, in pursuance of any debt, at this time due and owing by him, which discharge is hereby declared to be a release only of the person of such debtor, but not of his property, unless the assent in writing of two-thirds in value of the creditors as aforesaid be obtained."

It was only necessary that the chancellor should be satisfied, that Reily was a citizen of Maryland, at the time of passing the act, and at the time of his application to the chancellor for its benefit; and these facts are not denied.

*Mason, contrà.*—There are only two questions in this cause. 1. Has Reily any equity, on the ground of having paid the judgment? 2. Has he any equity on the ground of being released by the act of assembly?

1. It is admitted, that he has an equity, if all the facts stated in the bill are true. But the bill itself is not evidence. The answers of Smith and Beall deny all the equitable facts, and there is no evidence to prove them.

The controversy is really between Reily and Smith, for it is not alleged, that Beall has been satisfied, unless the payment to Smith is proved, and binds Beall. But as the evidence does not prove a payment to Smith, there is an end of the first point.

2. As to the discharge under the insolvent law. It is a principle, that if a man has a defence at law, and waives it, he shall, not avail himself of it in equity. This is a defence which peculiarly requires that it should \*353] have \*been pleaded at law. The plea would have embraced all the facts which were necessary to show that he was regularly discharged, any of which the plaintiff might have traversed and put in issue. The bill alleges he was regularly discharged. The answer denies it, and puts him upon the



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proof. How has he proved it? By the chancellor's certificate only ; and that was made on the 10th of April 1801, when, according to the allegations in the bill, he was not a citizen of Maryland, but of the district of Columbia.

The bill states, that the property on which the *fieri facias* was levied, was a devise to his wife, or the proceeds thereof. The answer denies it, and there is no proof.

The bill charges that he directed his attorney-at-law to plead the discharge. The answer denies it, and there is no proof, although the attorney himself was examined as a witness for the complainant.

Having removed from the city of Washington to Alexandria, which is subject to different laws, the discharge could not avail him there. There is no evidence that Beall was a citizen of Maryland, and therefore, the argument that the legislature of Maryland might bar him from a recovery of the debt, although Reily should not appear to be a citizen, does not apply.

CHASE, J.—Would not the proper remedy be, by motion, to discharge the property taken on the *fieri facias*, if it appeared to be property which came to the wife by devise?

E. J. Lee.—Although that might be done, yet it is not the only remedy. It might be too late, on the return of the execution, when the property might be sold.

MARSHALL, Ch. J.—Could the court have gone on to decree Smith to pay the money to Reily, and dismiss the bill as to Beall? Was the cause in such a state, that this could be done? [\*334]

C. Lee and Mason admitted, that they might.

CHASE, J.—Can an attorney-at-law, by a contract for the purchase of land to himself, bind his client?

C. Lee, in reply.—We do not contend for the principle, to that extent ; but if Beall assented to the payment to the attorney, in that way, it would bind him in equity. So, if the attorney has the money of the debtor in his hands, and upon a settlement with the debtor, the attorney retains the debt of his client, and gives the debtor a check for the balance, the client is bound. If Smith did undertake to settle this debt, it binds Beall. But if not, yet Reily has a claim against Smith, and the court below ought not to have dismissed the bill as against him. There is no doubt of Reily's equity as to Smith. He does not even allege that he ever paid Reily for the lands. He has not produced the bank-book, as he was required to do, which would have shown the check of \$17.

As to the discharge under the insolvent act ; if it was good in Maryland, it was good in every part of the United States. That it was obtained fairly, legally and regularly, appears from the certificate itself ; which is, at least, *primâ facie* evidence of those circumstances ; and the contrary must be proved, if alleged. *Millar v. Hall*, 1 Dall. 229. The present case is stronger than that of *Millar v. Hall* ; because here both parties were citizens of Maryland, but in that, Millar was a citizen of Pennsylvania.

There is certainly an error in the copy of the certificate of discharge, filed in this case, in stating the deed of Reily to his trustee to be dated the

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23d of March, instead of the 23d of December; for the certificate of the trustee, by which he acknowledges the receipt of all the effects of Reily, is dated on the 23d of December, and so is the trustee's bond. If the deed was executed on the 23d of December, the case is clear of all doubt, for the inhabitants of that part of the district of Columbia which was ceded by Maryland, \*remained citizens of Maryland, and subject to all her \*355] laws, until the 27th of February 1801, when congress first provided by law for the government of the district. (1 U. S. Stat. 130.) Resolve of Maryland, 1788; Laws of Maryland, November 1791, c. 45, § 2. (2 U. S. Stat. 103.)

The words of the insolvent act are, that the chancellor shall be satisfied that the petitioner "is and was," at the time of passing the act, a citizen of the state of Maryland. If the chancellor is satisfied that he was, at the time of passing the act, and is, at the time the petition is presented to him, a citizen of Maryland, it is sufficient. But it is not necessary in this case to confine the time to the presenting the petition: we may admit the proper time to be the date of the deed to his trustee. The discharge has relation to that time. So, in the case of bankrupts, the certificate relates to the time of doing the act of bankruptcy; although the granting of it may be deferred for a long time. The insolvent law of Maryland is to be considered as a bankrupt law. So says Judge McKEAN, in the case of *Millar v. Hall*.

The 4th article of the constitution of the United States 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 "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Reily being, for aught that appears to the contrary, a natural-born citizen of Maryland, could not be deprived of his right of citizenship, by the transfer of jurisdiction. He might cease to be an inhabitant, but could not cease to be a citizen.

The situation of Reily is unhappy, indeed, if he is not protected by his discharge. He cannot recall the deed which he made of all his effects, to the use of his creditors. His property is gone. And if the insolvent laws of the several states are not to be respected, perpetual imprisonment may be the consequence.

The court below ought to have continued the injunction as to all the property of Reily, except such as came to him in his own right by devise, bequest or in the course of \*distribution. But if Reily has paid \*356] Smith, and that payment can be applied to Beall, then the injunction ought to be general and perpetual. At any rate, a general dissolution of the injunction was erroneous.

*Mason, contra.*—If Reily has been discharged under the insolvent act, and has transferred all his estate and effects to his trustee, the court below could not have decreed Smith to pay the money to Reily. The right of action was not in him, but in the trustee.

The insolvent law, in the present case, is a special law for the benefit of certain persons by name, and Reily must show that he has complied with all the requisites of the act, in as full a manner as if he had pleaded at law.

There is no clause in the act making the chancellor's certificate *prima*



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*facie* evidence of a compliance with all those requisites, and there is no such rule of the common law. It is only made *prima facie* evidence to authorize a discharge from arrest. The laws of Maryland cannot apply. The opposite counsel take that for granted, which is the point in dispute.

There is no mistake in the certificate respecting the date of the deed, but if there is, there is no evidence before the court by which it can be rectified.

MARSHALL, Ch. J., delivered the opinion of the court, to the following effect :—In this case, the court has attentively considered the record, proceedings and evidence. The only equity of the complainant's bill, as to Lamar and Beall, arises out of the transactions between him and the defendant, Smith, and the court is of opinion, that that equity is not supported ; and that the material allegations of the bill as to the defendant, Smith, and which are denied by his answer, are also unsupported by the evidence. Nor are the allegations of the complainant, respecting his certificate of discharge, sufficiently proved.

By the separation of the district of Columbia from \*the state of Maryland, the complainant ceased to be a citizen of that state, his residence being in the city of Washington, at the time of that separation. [\*357]

As the complainant was entitled to a discharge, upon executing the deed of assignment of all his effects to the trustee appointed by the chancellor, his certificate would relate back to the date of the deed. It has been said, that the true date of that deed was the 23d of December 1800, and that the certificate of the chancellor, which states the date to be the 23d day of March 1801, is incorrect. But the certificate of the chancellor is the only evidence before the court as to that subject, and we must take it to be true. It is, therefore, not material to inquire, whether the inhabitants of the city of Washington ceased to be citizens of Maryland on the 27th of February 1801, or on the first Monday of December 1800, as it is not contended, that they were under the jurisdiction of Maryland, so late as the 23d of March 1801.

The complainant, therefore, not being a citizen of Maryland at the time of executing the deed, did not bring himself within the provisions of the insolvent law, under which he claims relief.

I was inclined, at first, to think, that an account might have been directed between the complainant and the defendant, Smith, but the court is of opinion, that if he has any remedy against Smith, it is at law, and not in equity. The bill must be dismissed with costs, but without prejudice.

UNITED STATES *v.* FISHER *et al.*, assignees of BLIGHT, a bankrupt. (*a*)

*Priority of the United States.*

In all cases of insolvency or bankruptcy of a debtor of the United States, they are entitled to priority of payment out of his effects. It extends to debts of every kind, such as the indorsement of a bill of exchange, of which the government is the holder.<sup>1</sup>

The statute conferring such priority is a valid exercise of the powers conferred on congress by the constitution.

United States *v.* Fisher, 1 W. C. C. 4, reversed.

ERROR from the Circuit Court for the district of Pennsylvania. The action was instituted to try two questions, all the necessary facts being conceded, to bring the law before the court. The questions were—

1. Whether an attachment laid by the United States, on property of the bankrupt, in the hands of the collector of Newport, in Rhode Island, after the commission of bankruptcy had issued, is available against the assignees?

2. Whether the United States are entitled to be first paid and satisfied, in preference to the private creditors, a debt due to the United States, by Peter Blight, as indorser of a foreign bill of exchange, out of the estate of the bankrupt, in the hands of his assignees?

The opinion of the court below was in favor of the defendants, upon both points, and a bill of exceptions was taken by the United States.

*Dallas* (Attorney of the United States for the district of Pennsylvania), for the plaintiffs in error.—

I. As to the particular right of the United States under the attachment. The title of the assignees is good against all who are bound by the bankrupt act; but we say the United States are not bound by that act. This exemption is not claimed as matter of prerogative, as in England, but by reason of an express legislative exception.<sup>2</sup> By the 62d section of the Bankrupt Law of 4th April 1800 (2 U. S. Stat. 36), it is enacted, “that nothing contained in

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(*a*) Present, MARSHALL, Ch. J., CUSHING, PATERSON, WASHINGTON and JOHNSON, Justices.

<sup>1</sup> The priority of the United States, in cases of insolvency, extends as well to equitable, as to legal debts. *Howe v. Sheppard*, 2 Sumn. 133. And to a penalty incurred for a violation of the revenue laws. *Ex parte Rosey*, 5 Ben. 507. The laws giving such priority are of general application, and if a debtor be accepted out of the general rule, it is incumbent on him to show it. *United States v. Duncan*, 4 McLean 607. To bring a debtor within the operation of the statute, there must be a legal insolvency, not a mere failure or inability to pay. *Prince v. Bartlett*, 8 Cr. 431; *Thelusson v. Smith*, 2 Wheat. 396; *Conard v. Atlantic Ins. Co.*, 1 Pet. 386; *Conard v. Nicoll*, 4 Id. 308; *Beaston v. Farmers' Bank*, 12 Id. 102; *United States v. Clarke*, 1 Paine 629. There must exist a state of notorious insolvency, or the debtor must execute a voluntary assignment of all his property. *United States v. Hooe*, 3 Cr. 73; *United States v. Mott*, 1 Paine 188; *Thelusson v.*

*Smith*, Pet. C. C. 195. A partial assignment is not enough. *United States v. Hooe*, *ut supra*; *Conard v. Atlantic Ins. Co.*, *ut supra*; *Conard v. Nicoll*, *ut supra*; *United States v. Langton*, 5 Mason 280; *United States v. Munroe*, Id. 572; *United States v. Clark*, *ut supra*. The right of priority, however, is not in the nature of a lien. *United States v. Hooe*, *ut supra*; *Beaston v. Farmers' Bank*, *ut supra*; *United States v. Mechanics' Bank*, Gilp. 51. The government has no preference over the claim of a lien creditor. *The Thomas Scattergood*, Gilp. 1. Nor to the sum allowed, under a state law, to the widow of an insolvent debtor. *Postmaster-General v. Robbins*, 1 Ware 165.

<sup>2</sup> The claim of the United States to priority of payment, does not stand upon any sovereign prerogative, but is exclusively founded on the provisions of the statutes. *United States v. Bank of North Carolina*, 6 Pet. 29; *United States v. Canal Bank*, 3 Story 79.



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this law shall in any manner affect the right of preference to prior satisfaction of debts due to the United States, as secured or provided by any law heretofore \*passed, nor shall be construed to lessen or impair any right to, or security for, money due to the United States, or to any of [359 them."

Congress had a right to declare that the act should not affect a public debt. Have they done it? The words contemplate: 1. The right of preference existing by prior laws: 2. The general right to, or security for, any money due to the United States. The effect of this section is, that the bankrupt act shall in no manner affect the right of the United States to recover any money due to them. To say, then, that the commission of bankruptcy should prevent the United States from attaching the effects of the bankrupt, is in direct repugnance to the section. This exception in favor of the United States, was not necessary to prevent the certificate from being a bar to their claim, nor to protect a lien actually existing, as a mortgage, &c.; because the United States not being named in the body of the act, are not bound by it. Thus, in England, upon the same principle, the king is not barred by the certificate. Such were also the decisions upon the Pennsylvania bankrupt law, in the courts of that state, by which it was uniformly adjudged, that the state was not bound. A mortgage, or other specific lien, was sufficient to protect itself. The section, therefore, could have no use, but that of declaring expressly that so far as relates to the debt due to the United States, the right, the security and the remedy, should all remain unimpaired by anything contained in that law. This principle was decided by the circuit court, in the case of *United States v. King*, Wall. C. C. 13, in which the court held, that in the case of a legal bankruptcy, the right of the United States remained unimpaired. So far as the claim of the United States was concerned, the assignment under the commission of bankruptcy did not transfer the property. If the claim of the United States was by matter of record, the assignees were bound to take notice of it, and if the effects came to their hands, they held in trust for the United States, until the claim was discharged; so, if the claim was by matter *en pais*, if the assignees had notice, they were bound by it, and could not distribute, until the claim was satisfied.

\*The whole title of the assignees depends upon the statute; if, then, [360 the assignment under the statute is set up to prevent the United States from getting the money, it is in direct violation of the 62d section.

II. As to the general right of the United States to priority of payment in all cases. The United States are bound to maintain the public credit, and to pay all their debts, as well those due before, as since the present constitution. They must have all necessary powers incident to that duty; among these is the authority to purchase bills, and to enter into negotiations for making remittances to foreign countries. They are not bound to freight a ship with specie. Every fiscal system ought to have two objects; certainty in the collection of the revenue, and fidelity in its expenditure. Hence, the necessity of priority in collecting the public debts; of surety for the conduct of public officers; and of a guard against the failure of the public debtors. With this view, it is enacted by the act of July 11th, 1798, § 12 (1 U. S. Stat. 593), that the supervisors, inspectors and collectors should give bond with surety, for the faithful performance of their duty. And by the 15th section

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of the same act, the amount of all debts due to the United States by any supervisor, or other officer of the revenue, is declared to be a lien upon his lands and those of his surety, from the time when a suit shall be instituted for the recovery of the same.

The debtors of the United States may be arranged in three classes. 1. Debtors on credit for public dues. 2. On receipt of public money. 3. On purchases or contracts.

1. Debtors on credit for public dues, were : 1. For import duties : 2. For internal taxes. \*By the act of 31st July 1789, § 21 (1 U. S. Stat. 42) \*361] it is provided, that "in all cases of insolvency, or where any estate in the hands of executors or administrators shall be insufficient to pay all the debts due from the deceased, the debt due to the United States on any such bond (*i. e.*, for the payment of duties) shall be first satisfied." The act of August 4th, 1790, § 45 (*Ibid.* 169), has the same provision. By the act of 2d of May 1792, § 18 (*Ibid.* 263), in cases of insolvency, the surety who pays the debt due to the United States, on any bond given for duties on goods imported, shall have the same priority of payment out of the effects of the insolvent, as the United States would have had by virtue of the 44th (45th) section of the act of 4th of August 1790. And it is further declared, "that the cases of insolvency in the said 44th (45th) section mentioned, shall be deemed to extend as well to cases in which a debtor, not having sufficient property to pay all his or her debts, shall have made a voluntary assignment thereof, for the benefit of his or her creditors, or in which the estate and effects of an absconding, concealed, or absent debtor shall have been attached by process of law, as to cases in which an act of legal bankruptcy shall have been committed."

Thus, as early as 1792, the priority in the case of bonds given for duties on goods imported was complete. The only addition afterwards made was by the 65th section of the act of March 2d, 1799 (1 U. S. Stat. 676), which makes executors and administrators personally liable, if they pay away the assets, without first satisfying the debt due to the United States.

2. As to debtors for internal taxes. The duties on distilled spirits are to be secured by bond. March 3d, 1791, § 17 (1 U. S. Stat. 203). But this act gave no priority on such bonds. The duties on snuff and sugar were also to be secured by bond. June 5th, 1794, § 11 (*Ibid.* 387), but no pri- \*362] ority is given by this act. \*It is difficult to conceive why the United States should have made this distinction between debts due for duties on goods imported, and on spirits distilled, &c. There certainly was no reason for it.

The legislature saw the defect, and in 1797, passed the act upon which the present question depends, and which gives the United States a priority of payment in all cases whatsoever. The 5th section of the act of 3d of March 1797 (1 U. S. Stat. 515), is that on which we rely. It is in these words: "And be it further enacted, that where any revenue officer, or other person, hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all the debts, due from the deceased, the debt due to the United States shall be first satisfied; and the priority hereby established shall be deemed to extend as well to cases in which a debtor, not having sufficient property



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to pay all his debts, shall make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor, shall be attached by process of law, as to cases in which an act of legal bankruptcy shall be committed."

Before this act was passed, the only preference existing was in the case of a custom-house bond. The cases not provided for, were; 1. Revenue officers; 2. Accountable agents; 3. Debts on bond, or contract. The act of 1797 embraces them all. It includes all persons who should thereafter become indebted to the United States, by bond, or otherwise, and who should become insolvent.

Peter Blight, after the date of the act, did become indebted to the United States, otherwise than by bond, and has become insolvent. He is, therefore, within the plain and express words of the act. No language can make the case clearer. There is nothing doubtful in the words themselves, nothing ambiguous, nothing to be explained, and therefore, no room for construction. But the gentlemen have chosen to resort to other parts of the act, and even to other acts, not to explain what was \*ambiguous, but to render ambiguous what was plain; not to remove, but to [\*363 create a doubt; not to illustrate what was obscure, but to darken what was clear.

The title of the act has led to the whole opposition in this case. It is "an act to provide more effectually for the settlement of accounts between the United States and receivers of public money." It is true, that it only professes to relate to the settlement of accounts, and conveys no idea of priority. But then it speaks of receivers of public money, not revenue officers and accountable agents only, not those who receive it by collection, any more than those who receive it by contract. The first section relates exclusively to revenue officers, and accountable agents, but every other section takes a larger scope.

If the body of the act is to be the slave of the title, how are we to account for the general provisions it contains? But the case comes within the very words of the title. Who are receivers of public money? We say, a person who indorses and sells a bill of exchange to the United States, is a receiver of public money. He is accountable for it, upon a contingency. If the bill is not duly honored, he contracts to refund the money. Hence, then, our opponents are obliged to restrict even the title itself. If Mr. Blight had received the money, to carry to Holland, he certainly would have been a receiver of public money. But he has received it here, under an engagement to pay it there. What is the difference?

The account has been settled with the treasury, and the balance ascertained, in which account he has been charged with the public money. The act of September 2d, 1789, § 3, 5 (1 U. S. Stat. 66), provides for the settlement of all accounts, and the recovery of all debts. The act of March 3d, 1795 (Ibid. 441), obliges all accountable agents to render and settle their accounts at the treasury.

\*The act of 1797 (1 U. S. Stat. 512), provides for the recovery of the debt by suit, after final settlement of the accounts of a receiver [\*364 of public money. Having in the four first sections expounded the provisions of the law respecting the pre-existing cases of adjusted accounts, the subsequent sections take a larger range, and provide for new cases.

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The first section applies exclusively to receivers of public money and accountable agents. The second speaks of delinquency, and is thereby connected with the first. It also makes copies of bonds or other papers relating to the settlement of any account between the United States and an individual, as good evidence as the original. Here the phraseology is altered: the subject is enlarged and by no means limited by the title: the word "delinquent" is dropped, and the expression is general, *any* account between the United States and an individual. The suit directed to be brought in the first section is always founded on the account settled, whatever may have been the original cause of action; whether a bond, note, covenant, contract or open account.

The third section, by the words "as aforesaid," refers to such suit upon the adjustment of the account, and admits the defendant to set up equitable credits which had been submitted to the accounting officers of the treasury, and rejected, previous to the commencement of the suit. But no new voucher is to be admitted. In the fourth section, the word of reference is omitted. The subject of suits, in general, between the United States and individuals is taken up. The word "delinquents" is not used. It would have been improper. It is not a term applicable to mere debtors, but to *defaulters*, persons who have misapplied public money. The words of the fifth section are general, and there is nothing either in the title or preceding sections which can restrict them. It is not, like some of the former sections restricted to adjusted accounts, nor to accountable agents, nor to collectors of public money, nor to persons who receive the public money to distribute. \*365] And \*yet we find, that when the legislature meant to restrict the subject of legislation, restrictive words were not wanting. By not using words of restriction in the fifth section, after having used them in the preceding sections, they have shown a manifest intention of making a general provision upon the subject of priority in all cases. The sixth section is also general in its terms. It embraces all writs of execution upon any judgment obtained for the use of the United States. The seventh section saves all the remedies which the United States before had for the recovery of debts.

The general right of priority is recognised by subsequent statutes. Thus, in the act for the relief of persons imprisoned for debts due to the United States, June 6th, 1798 (1 U. S. Stat. 561), the provision is general, "that any person imprisoned upon execution issuing from any court of the United States, for a debt due to the United States, may apply," &c.; and the secretary of the treasury being satisfied that such debtor is unable to pay the debt, and that he has not concealed or made any conveyance of his estate in trust for himself, or with an intent "to defraud the United States, or deprive them of their *legal priority*," &c., may order him to be discharged from custody. From the force of these expressions, as applied to the subject matter, it is evident, that a general priority was contemplated. So, in the 62d section of the bankrupt law of April 4th, 1800 (2 U. S. Stat. 36), the words "the right of preference to prior satisfaction of debts due to the United States, as secured or provided by any law heretofore passed." There is no priority given in case of bonds with pecuniary penalty, other than custom-house bonds, unless it be given by the act of 1797; yet by the act of 2d March 1799, § 65 (1 Ibid. 676), if the surety in any bond with **penalty** shall pay the



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debt, he shall enjoy the like priority and preference as are reserved and secured to the United States.

The title of a law is no part of the law. In England, it is prefixed by the clerk, and is never passed upon by parliament. In congress, it is never read but once. Jefferson's \*Manual, § 42; 6 Bac. Abr. (Gwillim) 369; Carrington on Statutes, 449; *Coleman v. Cook*, Willes 394; *Mace* [\*366 v. *Cadell*, Cowp. 232; *Swaine v. De Mattos*, 2 Str. 1211; 3 Wilson 271; *Pattison v. Bankes*, Cowp. 540; *Cox v. Liotard*, Doug. 166.

The title of the act of 2d March 1799 (1 U. S. Stat. 627) is, "an act to regulate the collection of duties on imports and tonnage," yet the 62d section, p. 673, prescribes the form of bonds to be taken to the United States in all cases. And the 65th section, p. 676, directs bail to be taken in all cases of pecuniary penalties. No argument, therefore, can be drawn from the title.

As to the argument *ab inconvenienti*. It amounts merely to this, that one merchant cannot know when he is safe in trusting his neighbor, because he does not know what bills he has indorsed to the United States, or what bills with his indorsements may get into their hands. The same objection may be made as to sureties in custom-house bonds, and receivers of public money; cases in which the priority is acknowledged. The act has done no more than the debtor himself has a right to do. Independent of the bankrupt law, a debtor may convey all his property to one of his creditors, in exclusion of all the rest, and the conveyance will be good. So, a foreign attachment may come and sweep away the whole estate. But if the words of the law are clear and positive, it cannot be altered by the consideration of its inconvenience. That would be a subject for legislative, not judicial inquiry.

*Harper, contra*.—The ground of prerogative seems to be abandoned. The few observations I shall make, will be confined to the case of an indorser of a bill of exchange which gets into the hands of the United States.

\*The argument is rested on statutory provisions only. It is contended, that the priority extends to all debtors. On the other side, it [\*367 is confined to fiscal debts, of which there are only two kinds: bonds for duties, and debts due from accountable agents. The general words of the act extend to all cases; but we contend, that those general words are restricted by the spirit of the act, and by the intention of the legislature. The general observations which have been made, tending to show that it would have been prudent in congress to extend the priority to all cases, do not show that they have done it.

But it is said, that the 62d section of the bankrupt law restricts the general operation of the act, so that none of the provisions shall affect the right of the United States. This is admitted. Then we are brought back to the question, what rights had the United States before that act? If they had no priority before, that act did not give it to them. It is admitted, that a voluntary assignment, before the act, and since its repeal, would deprive the other creditors of their right to the property. If, then, the United States are to be considered as a common, and not as a privileged creditor, the voluntary assignments made by Blight, before the bankrupt law, would bar the United States as well as any other creditor. The bankrupt act neither gives nor takes away the right of priority; so that the question again returns, what was their former right?

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"The words, "or other person," and "or otherwise," in the 5th section of the act of 1797, it is said, give this clause a general operation in all cases. The word "hereafter" has also furnished an argument for the plaintiffs in error. It is said, that the priority was to apply *instantly* to the case of a revenue officer, but in other cases, it was to apply only to such debts as should be thereafter contracted. But there is no such distinction. The printer has committed an error in placing a comma after the words "revenue officer," whereas, the words "hereafter becoming indebted," apply as well to "revenue officer" as to "other person."

\*368] "We admit, that neither a title nor preamble can control the express words of the enacting clauses ; but if these are ambiguous, you may resort to the title or preamble to elucidate them. It is said, that Blight was a receiver of public money, and therefore, within the title of the act. But that appellation is not more applicable to him, than it would be to a man who receives payment for timber furnished for the use of the United States. No account against him can be opened in the books of the treasury. He merely sold the bill and received payment. He received it as his own money, not that of the United States. And although he might, by matter *ex post facto*, become indebted, yet when he received it, he did not receive it as public money for which he was to account. The right of action of the United States did not accrue upon his receipt of the money, but upon the breach of his contract. The indorser of a bill engages that it shall be duly honored. When the bill was dishonored, and not before, the claim of the United States accrued. When he received the money, it depended upon a contingency, whether he should ever become indebted to the United States: and if they should not take all the steps of due diligence, notice, &c., he never would be indebted.

It is said, that the evil to be remedied by the act of 1797 was, that the collectors of the internal revenue were not subject to the priority. The case of the collectors of the external revenue had been provided for before. We admit the rule, that every part of the act is to have effect, but it does not require, that the words should be extended to an indorser of a bill of exchange. There are other persons upon whom the whole effect of the section may operate. There are accountable agents, that is, agents who receive the public money to distribute. These are indebted to the United States "otherwise" than by bond : these are the other persons than revenue officers, to whom the act alludes. Those two classes of persons, revenue officers, and accountable agents, are sufficient to satisfy all the expression of the section.

Innumerable inconveniences and embarrassments will follow a further extension of the words ; and if there is no necessity of extending them further, those inconveniences \*will furnish a sufficient ground to suppose  
\*369] that the legislature did not mean so to extend them.

When a man gives a bond for duties, or a revenue officer for the faithful discharge of his office, the bond is of record ; all the world has notice. A public agent also is charged of record on the books of the treasury. His neighbors who deal with him are aware of his situation ; they know the extent of his responsibility, and can exercise their judgment in trusting him. But in the case of an indorser of a bill of exchange, no one can have notice. A man may have indorsed a hundred bills, and he may not himself know



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how many of them have been purchased by the United States. His creditors trust him, without notice; they believe that if any accident should happen to him, they will share an equal fate with his other creditors. If they had known, as in the case of a collector, that the United States might come in and seize the whole of his effects, they would not have given him credit. Such a construction ought to be supported by the strongest reasons.

The distinction between revenue officers and other persons, runs through the whole act; and you may as well extend the 2d section to all cases, as the 5th, and say, that every debtor of the United States shall be at the mercy of the officers of the treasury department. But the 2d section is evidently restricted, and we have as good a right to restrict the 5th, by connecting it with the 2d, as they would have to extend the 2d, by relation to the 5th. The words "as aforesaid," in the 2d section, restrict its operation to certain fiscal debts, and show the subject-matter of the act to be debts, which, in the usual course, are to be adjusted at the treasury.

The 6th section is relied on, to show that the title is not to control the enacting clauses. But this is because an entirely new subject-matter is introduced, and by no possibility can its words be satisfied, by restricting them to the cases mentioned in the other sections.

The provision of the act of 1799, § 65 (1 U. S. Stat. 676), which makes executors and administrators liable, if they \*pay away the assets without first satisfying the debt due to the United States, applies exclusively to custom-house bonds. This may be just, because the executor can always go to the records and know whether his testator was so indebted. But this furnishes no ground to suppose, that congress meant to apply the same provision to the executor of an indorser of a bill, who could not be supposed to know that his testator was so indebted, and who may have paid away the assets without such knowledge. (a)

*Ingersoll*, on the same side.—A claim of preference, which, in monarchies, is boldly avowed by the name of prerogative, presents itself in republics under the milder and more insinuating appellation of privilege. The preference insisted upon for the United States, in the present instance, exceeds that which is considered as incident to the supremacy of any king, emperor or other sovereign in Europe, under similar circumstances.

The United States, by their agent (but who did not declare himself to be such), purchased a bill of exchange, which was returned protested for non-payment. In doing this, they acted the merchant, and ought to be content with preserving a consistency of character. The drawer and indorser became bankrupt; voluntary and provisional, and absolute assignments were made. No public property is specifically identified and traced to the hands of the defendant's assignor. The debtors were not revenue officers, agents of the United States, either general or special; nor did they receive public money to be accountable, nor even know that the purchase was for the use of the United States. They not only were not themselves agents, but they did not know that they were dealing with an agent of the United States.

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(a) Mr. Harper apologized here for closing his argument; being engaged as one of the counsel, upon the impeachment then pending before the Senate of the United States.

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Subsequent to those assignments, the United States attached the property assigned, as belonging to Peter Blight, the assignor.

\*371] \*We contend; 1. That the laws of the United States do not give the preference claimed. 2. That the attachment, having issued and been laid subsequent to the assignment under the commission of bankruptcy, is an immaterial incident, which cannot affect the general principle. 3. That if the act of congress gives the preference to the extent claimed, it is unconstitutional, and not a law.

1st. Does the law of the United States give the preference claimed, on general grounds, considered abstractedly from the proceedings by attachment.

Particular and secret liens, indiscreetly multiplied, occasion doubtful titles; render an intercourse in business dangerous, and destroy credit, the life of commerce. The claim of priority, as now urged, is accompanied with all the mischief and inconvenience, if it does not fall under the express denomination of a secret lien. For a literal construction of the law, it is scarcely possible, that any man will contend. The counsel for the United States shrink from the conclusion to which such an interpretation would necessarily lead. Property, real or personal, would not be a means of obtaining credit. No lender could secure himself by mortgage, pledge or otherwise, against loss by the insolvency of the borrower. The unfortunate incident, to guard against the consequences of which the security was taken, would itself cause the disappointment and loss. The argument of the opposite counsel recoils upon themselves. Although they disavow the interference with specific liens, yet they must take the principle altogether; and if it lead to these absurd results, it must be unsound in its source.

Their qualified position, however, authorizes the conclusion, that there are supposable cases, in which the United States will not be entitled to \*372] priority, on the insolvency of \*their debtors, and repels conclusively an adherence to the letter of the law.

If, instead of confining ourselves to particular expressions, we consider the mischief and the remedy, and take the general scope and design of the act into view, we may, with confidence, anticipate the conclusion. Every statute consists of the letter and the spirit; or, in the quaint but strong language of ancient law-writers, of the shell and the kernel; and, by comparing the different parts with each other, from the title to the last sentence, it is found to be its own best expositor. 4 Inst. 424. I am authorized by one of the greatest lawyers that ever lived, to say, that general words in statutes have, at all times, from a variety of considerations, received a particular and restricted interpretation. 4 Inst. 330, 334, 335. The key to unlock the secrets of the law, we admit, is not so much the title (although it is one of many considerations to be taken into view) as the motive, the cause, the principle, that induced the legislature to pass the act. The counsel for the United States has stated this motive to be to put the internal revenue upon the same footing as the import duties; and to that proposition we accede. Let the law cease, where the reason ceases, and we are safe.

It may be useful, to consider the prerogative of the kings of England in this particular, at the least liberal period of its juridical history, when unreasonable preferences of the sovereign over the subject fill and deform its every page. By the statute of 33 Hen. VIII., c. 39, § 74, "his debt shall,



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in suing out execution, be preferred to that of every other creditor who hath not obtained judgment, before the king commenced his suit." 3 Bl. Com. 420. This only makes the commencement of the king's suit equivalent to a judgment in favor of a subject. "The king's judgment also affects all lands which the king's debtor hath at or after the time of contracting his debt." 3 Bl. Com. 420. This relates to lands only. The personal estate, at least, escapes the royal grasp. \*Even there, the distinction for which we contend has always been observed. The preference in favor of the [\*373 king is principally confined to cases where public moneys have been received by an accountable officer to public use. It does not extend to transactions of a common nature. By the statute of 13 Eliz., c. 4, the lands and tenements, goods and chattels, of tellers, receivers, collectors, &c., and other officers of the revenue, are made liable to the payment of their debts.

These are the models which the act of congress was intended to imitate. The lands of such revenue officers are liable to process under the king's judgment, even in the hands of a *bonâ fide* purchaser; though the debt due to the king was contracted by the vendor, many years after the alienation. 3 Bl. Com. 420. Here, the distinction is still kept up between revenue officers and others. If goods are taken on a *fi. fa.* against the king's debtor, and before they are sold, an *extent* come at the king's suit, *tested* after the delivery of the *fi. fa.* to the sheriff, these goods cannot be taken upon the *extent*, but the execution upon the *fi. fa.* shall be completed. *Rorke v. Dayrell*, 4 T. R. 402. Even Queen Elizabeth, with all the supremacy of absolute sway, did not carry her prerogative claims to the extent now urged for a federative republic, and representative democracy. With the several exceptions already stated, and which are confined principally to revenue officers, the king of England has no priority in the recovery of his debts, over the meanest peasant of his dominions.

When we advert to the title of the act, we find in its pointed expressions, a direct contradiction by the legislature itself to the present claim of the United States. The words are, "an act to provide more effectually for the settlement of accounts between the United States and receivers of public money," not between the United States and individuals indebted by bond, contract or otherwise. It is substantially in imitation of the English statutes, respecting \*tellers, collectors and receivers, who are answerable in the receipt of the exchequer. The act is "more effectually" to provide, &c., alluding to a former provision upon the same subject. That former provision is contained in the act of March 3d, 1795, which, with a title less restricted than that of 1797, is confined, in its enacting part, to persons who have received moneys for which they are accountable to the United States.

We do not contend, that the title can control the plain words of the enacting clause; but where a construction of an enacting clause would lead to unjust, oppressive, and iniquitous consequences, which will be avoided by a construction consistent with the title, a strong argument arises in favor of the latter interpretation. When, in the act of 1795, we find the legislature confining itself throughout to provisions for the settlement of the accounts of accountable receivers of public money; and when, in that of 1797, they declare that their object is to do the same thing more effectually, we naturally infer, that their views are confined to persons of the same description.

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We are told by the counsel for the United States, that acts *in pari materia* are to be taken together. We adopt the same rule ; and by comparing the two acts together, section by section, the inference will be, that both are confined to revenue officers and accountable agents.

The first section of the former law is confined to notifying the accountable officer to render his accounts to the auditor of the treasury ; and in default thereof, the comptroller is authorized to order suit. By the first section of the act of 1797, it is made the duty of the comptroller, to institute such suits against delinquent revenue officers, and other persons accountable for public money. The delinquent is to forfeit his commissions, and pay six per cent. interest from the time of receiving the money. No person was to be sued under this act, who was not entitled to commissions for receiving and paying away money ; \*because, in all cases of delinquency, such \*375] commissions were to be forfeited. The whole act is employed in stating who shall be sued, who shall sue them, when the cause shall be tried, the evidence to be received on the trial, the mode of defence, the judgment, and execution. Congress had been in the habit of preserving a priority in a limited way, and in certain cases. It was tracing the public money, specifically, in the character of the receiver.

The act of July 31st, 1789, confined the priority to custom-house bonds. That of 4th August 1790, on more full consideration, limited it in the same manner. That of 2d May 1792, which places the surety on the same footing with the United States, shows the same restricted construction. The present act comes next in order of time. Its title and its first section are confined in the same manner. It does not, of itself, authorize the settlement or adjustment of any accounts ; it only determines what proceedings may be had on such settlements and adjustments as are made under the act of 3d March 1795, which does not authorize the settlement or adjustment of any accounts, but those of persons who have received public money, for which they are accountable to the United States.

An alternative here presents itself. Either the officers of the treasury department had a right to settle definitively and exclusively the demand of the plaintiffs for this bill of exchange, or, the second section is restricted in its operation to revenue officers and accountable agents. We are told, that the first part of the second section is so restricted, but that the second part of it includes all debtors to the United States.

In the first part, which we agree is restricted, a transcript from the treasury books is made evidence. The second part is merely supplementary to the first, providing that copies of any papers connected with the settlement of any account, authenticated in a prescribed form, shall be as good evidence as the originals. Of course, as to those persons against whom the originals are not evidence, under the first part of the section, the copies are not evidence, under the second.

\*376] \*The very words of the clause, as well as the general scope and design of the act, preclude any further extension of the provision. The legislature evidently consider it as implied, that the provisions will be understood in a restricted sense, although they use general expressions, without a relative term in the whole sentence. The term individuals, in the 2d section, must, for the reasons just stated, mean officers and agents who have received public money, to be accountable. If, then, the legislature, in



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that section, leave general words to be restricted in construction by the subject-matter, without relative words, it will be strange, if they are not understood as intending to do the same, when they use general expressions in the subsequent sections.

My argument is, that general expressions, in every subsequent section, are to be understood in a sense limited by the views of the legislature, as explained in the first clause. I contend, that all persons comprised in any part of the act, are included in the first section; because all persons to whom the act refers, were to be sued upon default. If, then, I ascertain, who were to be sued upon default, I show the extent of the act, as to the persons against whom it was to operate.

No persons were to be sued, but receivers of public money; for in every instance, the defendant was to forfeit his commissions, and pay interest from the time he received the money, until repaid into the treasury. Such a construction is warranted by authorities, American as well as British. 1 Bl. Com. 60, 61. 4 Tuck. Bl. 372, 373, 374, n. 4. The law of Virginia of December 15th, 1796, usually termed the Penitentiary Act (Randolph's Abridgment, p. 359), in the first section, enacts, that "no crime whatsoever, committed by any free person against this commonwealth (except murder of the first degree) shall be punished with death." In all the subsequent sections, the word free is omitted, and no word of reference used so as to connect them with the first section, and yet it has been uniformly held, that all \*the provisions of that law relate to free persons only; that the [377 subsequent sections, although the words are general, shall be restricted by the first, and by the general intention of the legislature indicated in that section.

The 3d section of the act of 1797, by using the words "as aforesaid," expressly refers to the description of debtors in the 1st section. The 4th section shows that the legislature meant to leave the general expression, "individuals," to be limited by the subject-matter. It is still speaking of the suits mentioned in the 1st section, and yet it used a general expression. It provides, in terms, that in suits between the United States and individuals, no claim for a credit shall be admitted upon trial, but such as shall have been presented to the officers of the treasury, and by them disallowed. If Peter Blight had paid a part of this debt, and a suit had been brought against him, is any man so extravagant, as to contend, that he could not prove that partial payment, without showing that he had accounted at the treasury department? Those officers had no power to call him to an account with them; no right to allow or disallow his credits. Such a law would have been unconstitutional. It would deprive him of his right of trial by jury, without his consent. The agents who receive money to be accountable may, perhaps, be considered as having named the accounting officers as their referees, and to have assented to that mode of settlement when they received the money.

We have shown, that the present case is not within the first four sections of the act, and we contend, that as the legislature have in those sections relied on the subject-matter, to give a proper restriction to the general expressions therein contained, we are justified in saying, that they meant that the general expressions in the subsequent section should also be limited within the same bounds.

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It is remarkable, that the 5th section begins with the words of the 1st, as if it was intended to be an exact copy, in respect to the description of persons. By inadvertence, as it often happens, the relative word "such," or \*378] the additional words "accountable for public money," \*are omitted; or the legislature thought them unnecessary, as the subject-matter was in itself sufficient to qualify the generality of the terms. If this section was intended to be general, why this useless profusion of words? Why specify revenue officers? Why say, by bond? Why drop the general word "individuals," used in the 4th section? Why not say, any person becoming indebted to the United States? It begins as if congress meant to make a specific description of persons, as in the first section. Why this sudden change of the subject of legislation? Why use words of description which can only tend to mislead? How strange and improbable is it, that congress should give the United States a preference so much exceeding the royal prerogative of England?

Unless such a construction be absolutely necessary, the inconveniences attending it will, undoubtedly, prevent its adoption. Besides the destruction of private credit, and the ruin of individuals, it would repeal all the state laws of distribution of intestate estates; it would prostrate all state priority, which, in those cases, has been long established. It would produce a collision between the prerogative of the states and of the United States. Suppose, the treasurer of a state should become indebted to the United States, the latter would take his whole property, in opposition to any law of the state which had passed, to secure herself against the default of her officers.

2d. The attachment having issued subsequently to the assignment under the commission of bankruptcy, leaves the question to be decided on the general principle. The statutory is always accompanied by a personal assignment that transfers the property. The king of England, although not within the provisions of the bankrupt law of that country, is barred by the actual assignment. There was not, at that time, any property of Peter Blight to be attached, and if the United States are entitled, it must be under some \*379] of the acts which give them \*a priority. It cannot be under the bankrupt law, unless they had some right prior to the assignment. The attachment gave them no right, because it was subsequent.

3d. If the act is to have the extended construction contended for on the part of the United States, and the 5th section is to be considered as including every debtor to the United States, and if the settlement of the account at the treasury is to be conclusive, the act is unconstitutional and void. If liens, general or specific, if judgments and mortgages are to be set aside, by the prerogative of the United States, it will be to impair the obligation of contracts, by an *ex post facto* law.

Under what clause of the constitution is such a power given to congress? Is it under the general power to make all laws necessary and proper for carrying into execution the particular powers specified? If so, where is the necessity, or where the propriety, of such a provision? and to the exercise of what other power, is it necessary? But it is in direct violation of the constitution, inasmuch as it deprives the debtor of his trial by jury, without his consent.



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JOHNSON, J.—Do you admit the law respecting the final adjustment of accounts at the treasury to be constitutional, as to revenue officers?

*Ingersoll*.—We neither admit nor deny it, as to them; but we deny the power of congress to give the United States a preference, in all cases of persons who may become indebted to them, in every possible manner.

PATERSON, J.—Do you contend, that by the 5th section, the priority of the United States will avoid even a mortgage to an individual?

*Ingersoll*.—I say, that the opposite construction leads to that.

*Lewis*, on the same side, \*in addition to the arguments urged by *Harper* and *Ingersoll*, contended, that the act of 1797 was repealed [\*380 by that of March 2d, 1799, inasmuch as the former was within the purview of the latter, the 65th section of which took up the case of priority, and made a different provision on the subject; and the 112th section of which expressly repeals all former laws which came within the purview of that act. Everything is within the purview, which is within the same evil, and which comprehends the same subject.

*C. Lee*, on the same side, contended, that the priority of the United States is confined to debts of record, or for which suit is brought, and that it attaches only from the time of the commencement of the suit. That the act of 1797 is explained by the act of 11th July 1798 (1 U. S. Stat. 594), which creates a lien upon the lands of revenue officers, from the time of the suit brought. If the United States had a general lien by the former law, whether suit was brought or not, why did the legislature, in a subsequent law, create the special lien, and limit its commencement to the time of instituting the suit, and confine it to revenue officers?

The prerogative of the United States cannot be construed to exceed that of the king of England. He is bound by an actual assignment, because the property is thereby transferred. The title of the subject, if prior and complete, shall be preferred to that of the king. *The King v. Cotton, Parker*, 126.

PATERSON, J.—Do you consider the doctrine of prerogative as extended to this country? are the United States not bound by a law, unless named in it?

*Lee*.—It has been so contended, by some persons in this country. I believe it has been so decided in Pennsylvania, under the insolvent act of the United States. Judge PETERS made some such report to congress, who passed a law specially respecting the debtors of the United States.

\**Dallas*, in reply.—The questions to be decided are: 1. What has congress done? 2. Had congress a right to do it? [\*381

The ground now taken is essentially different from that relied upon in the circuit court. Each of the four gentlemen opposed to me has taken a different position. The first admits the intent of the law to be, to place the internal revenue on the same footing with the external. The second admits not only the officers of the internal revenue to be included in the law, but also accountable agents. The third declares the law to be unconstitutional,

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and also to be repealed by the act of 1797. The fourth admits that the law extends to all debts, but says the priority does not attach until suit brought. All have conceded that the case was within the words of the act. What do we claim?

1st. Negatively, we do not contend, that the priority attaches with the creation of the debt, or with the acceptance of the office, nor while the debtor remains master of his own property. Nor that it extends to purchasers for valuable considerations, or to a mortgagee or pawnee, before insolvency; nor to a purchaser from the assignees; nor that it will be valid against a creditor of more merit or vigilance.

2d. Affirmatively, we claim an exemption from the operation of the bankrupt law, as to our right, our remedy, and our security. \*We claim  
\*382] a preference in all cases of actual, notorious insolvency or bankruptcy, whether the debtor be alive or dead. We claim a preference, when the property has passed out of the debtor, and he has, by his own act, attempted to give a preference to others. We claim it also, where the law assumes the disposal of his property, and directs a distribution among his creditors. We say, that the priority attaches from the moment the insolvency is testified by any *overt* act. Independently of the bankrupt law, a debtor had a right to give a preference. At the moment of Blight's voluntarily assignment (whatever may have been its ultimate fate, or legal invalidity on account of fraud), his property was liable to the claim of the United States. This voluntary assignment was after the act of 1797, and before the existence of the bankrupt law.

Does the act of 1797 bear a resemblance to royal prerogative? At common law, the king can take the body, lands and goods of his debtor in execution, at the same time. His execution is preferred, if his suit was commenced, before a judgment in favor of a subject, although his judgment be subsequent. The lands of his debtor are bound, from the date of the debt, and as to the officers mentioned in 13 Eliz. c. 4, their lands are bound from the time of their entering into office. And all this, whether the debtor remain solvent or not. He has also a priority in all cases of legal distribution. 2 Bl. Com. 511.

The act of 1797 has done nothing more than the greater part, if not all the states have done. They have long claimed the priority in case of distribution of the estates of their deceased debtors. And what reason can be  
\*383] given for a distinction between the dead and the \*living insolvent. The laws have even extended the priority to an executor who has a right to retain for his own claims against all other private creditors. Such a right was necessary to protect the United States from fraud. They could not exercise the same degree of vigilance as individuals. Their debtors were making voluntary assignments to elude the demands of the United States. The several states had their insolvent laws, their attachment laws, and their state priorities. Without such a power, the United States would stand no chance in the general scramble. Was it not politic, was it not necessary, that the United States should guard against those evils?

Against the plain words of the act, what is opposed? 1. The inconvenience and impolicy of the provision. 2. Its unconstitutionality.

1. The inconvenience or impolicy of a law are not arguments to a judicial tribunal, if the words of the law are plain and express. Such arguments



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must be reserved for legislative consideration. But the inconvenience is the same in the case of a priority in the distribution of the estate of a deceased, as of a living debtor. If it be allowed in the one case, why not in the other? The creditor knows not how soon his debtor may die, and he know that if he dies insolvent, the United States, or the individual state, may sweep the whole.

It is said, that the act of 1797 is repealed by that of 1799, the former being within the purview of the latter. \*But this is not the case. [\*384 The 5th section of the act of 1797 is not within the purview of the act of 1799. The subjects are different. The act of 1799 speaks only of custom-house bonds. But when it provides that the surety shall have the same priority as the United States, it implies that there are other cases of priority already existing, but it neither gives nor takes away such priority.

2. As to the question of constitutionality. The constitution is the supreme law of the land, and not only this court, but every court in the Union is bound to decide the question of constitutionality. They are bound to decide an act to be unconstitutional, if the case is clear of doubt; but not on the ground of inconvenience, inexpediency or impolicy. It must be a case in which the act and the constitution are in plain conflict with each other. If the question be doubtful, the court will presume that the legislature has not exceeded its powers. *Hylton v. United States*, 3 Dall. 173, 175.

Congress have duties and powers expressly given, and a right to make all laws necessary to enable them to perform those duties, and to exercise those powers. They have a power to borrow money, and it is their duty to provide for its payment. For this purpose, they must raise a revenue, and, to protect that revenue from frauds, a power is necessary to claim a priority of payment.

There is no case under the act of 1797 in which the trial by jury is excluded. It is true, that no credits are to be admitted on the trial (except under particular circumstances) but such as have been submitted to the accounting officers of the treasury, and by them disallowed in whole or in part. But this does not abridge the power of the jury. It is only establishing an inferior tribunal, and saying, that no new evidence shall be admitted on the appeal, unless in the excepted cases. All claims against the United States, whether urged as independent claims, or by way of offset, must pass the \*ordeal of the accounting officers of the treasury. If they reject [\*385 them, there is an appeal, except in the case of one class of debtors. The decision of the comptroller is final and conclusive only as to the credits claimed by "a person who has received moneys for which" (that is, for the expenditure of which) "he is accountable to the United States," and this not by the act of 1797, but by that of 1795. (1 U. S. Stat. 441.)

MARSHALL, Ch. J., delivered the opinion of the court.—The question in this case is, whether the United States, as holders of a protested bill of exchange, which has been negotiated in the ordinary course of trade, are entitled to be preferred to the general creditors, where the debtor becomes bankrupt? The claim to this preference is founded on the 5th section of the act, entitled "an act to provide more effectually for the settlement of accounts between the United States and receivers of public money." (1 U. S. Stat. 515.)

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The section is in these words: "And be it further enacted, that where any revenue officer, or other person, hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied; and the priority hereby established shall be deemed to extend, as well to cases in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor shall be attached by process of law, as to cases in which an act of legal bankruptcy shall be committed."

That these words, taken in their natural and usual sense, would embrace the case before the court, seems not to be controverted. "Any revenue officer, or other person, hereafter becoming indebted to the United States by bond or otherwise," is a description of persons, which, if neither explained nor restricted by other words or circumstances, would comprehend every debtor of the public, however his debt might have been contracted.

\*386] \*But other parts of the act involve this question in much embarrassment. It is undoubtedly a well-established principle in the exposition of statutes, that every part is to be considered, and the intention of the legislature to be extracted from the whole. It is also true, that where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain; in which case it must be obeyed. On the abstract principles which govern courts in construing legislative acts, no difference of opinion can exist. It is only in the application of those principles, that the difference discovers itself.

As the enacting clause in this case would plainly give the United States the preference they claim, it is incumbent on those who oppose that preference, to show an intent varying from that which the words import. In doing this, the whole act has been critically examined; and it has been contended, with great ingenuity, that every part of it demonstrates the legislative mind to have been directed towards a class of debtors, entirely different from those who become so by drawing or indorsing bills, in the ordinary course of business.

The first part which has been resorted to is the title. On the influence which the title ought to have in construing the enacting clauses, much has been said; and yet it is not easy to discern the point of difference between the opposing counsel in this respect. Neither party contends, that the title of an act can control plain words in the body of the statute; and neither denies that, taken with other parts, it may assist in removing ambiguities. Where the intent is plain, nothing is left to construction. Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; and in such case, the title claims a degree of notice, and will have its due share of consideration.<sup>1</sup>

\*387] The title of the act is unquestionably limited to "receivers \*of public money;" a term which, undoubtedly, excludes the defendants

<sup>1</sup> United States v. Palmer, 3 Wheat. 631; Haz. Pa. Reg. 129; United States v. McArdle, Smythe v. Fiske, 23 Wall. 380; Ogden v. 2 Sawyer 367.  
Strong, 2 Paine 584; Baring v. Erdman, 14



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in the present case. The counsel for the defendants have also completely succeeded in demonstrating, that the first four sections of this act relate only to particular classes of debtors, among whom the drawer and indorser of a protested bill of exchange would not be comprehended. Wherever general words have been used in these sections, they are restrained by the subject to which they relate, and by other words, frequently in the same sentence, to particular objects, so as to make it apparent, that they were employed by the legislature in a limited sense. Hence, it has been argued, with great strength of reasoning, that the same restricted interpretation ought to be given to the fifth section likewise.

If the same reason for that interpretation exists ; if the words of the act, generally, or the particular provisions of this section, afford the same reason for limiting its operation, which is afforded with respect to those which precede it, then, its operation must be limited to the same objects.

The 5th section relates entirely to the priority claimed by the United States in the payment of debts. On the phraseology of this act, it has been observed, that there is a circuity of expression, which would not have been used, if the intention of the legislature had been to establish its priority in all cases whatever. Instead of saying, "any revenue officer, or other person hereafter becoming indebted to the United States," the natural mode of expressing such an intent would have been, "any person indebted to the United States ;" and hence it has been inferred, that debtors of a particular description only were in the mind of the legislature. It is true, the mode of expression which has been suggested, is at least as appropriate as that which has been used ; but between the two, there is no difference of meaning, and it cannot be pretended, that the natural sense of words is to be disregarded, because that which they import might have been better, or more directly expressed.

\*As a branch of this argument, it has also been said, that the description commences with the very words which are used in the beginning of the first section ; and from that circumstance, it has been inferred, that the same class of cases was still in view. The commencing words of each section are, "Any revenue officer, or other person." But the argument drawn from this source, if the subject be pursued further, seems to operate against the defendants. In the first section, the words are, "any revenue officer, or other person accountable for public money." With this expression completely in view, and having used it in part, the description would probably have been adopted throughout, had it been the intention of the legislature to describe the same class of debtors. But it is immediately dropped, and more comprehensive words are employed. For persons "accountable for public money," persons "hereafter becoming indebted to the United States, by bond or otherwise" are substituted. This change of language strongly implies an intent to change the object of legislation.

But the great effort on the part of the defendants is to connect the fifth with the four preceding sections ; and to prove that as the general words in those sections are restricted to debtors of a particular description, the general words of the 5th section ought also to be restricted to debtors of the same description. On this point, lies the stress of the cause.

In the analysis of the foregoing parts of the act, the counsel for the defendants have shown, that the general terms which have been used are uni-

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formly connected with other words in the same section, and frequently in the same sentence, which necessarily restrict them. They have also shown, that the provisions of those parts of the act are of such a nature that the words, taking the natural import of the whole sentence together, plainly form provisions only adapted to a class of cases which those words describe, if used in a limited sense. It may be added, that the first four sections of the act are connected with each other, and plainly contain provisions on the same subject. They all relate to the \*mode of proceeding on suits  
 \*389] instituted in courts, and each section regulates a particular branch of that proceeding. Where the class of suits is described in the first section, it is natural to suppose, that the subsequent regulations respecting suits apply to those which have been described.

The first section directs that suits shall be instituted against revenue officers, and other persons accountable for public money, and imposes a penalty on delinquents, where a suit shall be commenced and prosecuted to judgment. The second section directs that certain testimony shall be admitted at the trial of the cause. The third section prescribes the condition under which a continuance may be granted : and the fourth section respects the testimony which may be produced by the defendant. These are all parts of the same subject ; and there is strong reason, independent of the language of the act, to suppose that the provisions respecting them were designed to be co-extensive with each other.

But the fifth section is totally unconnected with those which precede it. Regulations of a suit in court no longer employ the mind of the legislature. The preference of the United States to other creditors becomes the subject of legislation ; and as this subject is unconnected with that which had been disposed of in the foregoing sections, so is the language employed upon it, without reference to that which had been previously used. If this language was ambiguous, all the means recommended by the counsel for the defendants would be resorted to, in order to remove the ambiguity. But it appears, to the majority of the court, to be too explicit to require the application of those principles which are useful in doubtful cases.

The mischiefs to result from the construction on which the United States insist, have been stated as strong motives for overruling that construction.  
 \*390] That the consequences \*are to be considered in expounding laws, where the intent is doubtful, is a principle not to be controverted ; but it is also true, that it is a principle which must be applied with caution, and which has a degree of influence dependent on the nature of the case to which it is applied. Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness, to induce a court of justice to suppose a design to effect such objects. But where only a political regulation is made, which is inconvenient, if the intention of the legislature be expressed in terms which are sufficiently intelligible, to leave no doubt in the mind, when the words are taken in their ordinary sense, it would be going a great way, to say that a constrained interpretation must be put upon them, to avoid an inconvenience which ought to have been contemplated in the legislature, when the act was passed, and which, in their opinion, was probably overbalanced by the particular advantages it was calculated to produce.



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Of the latter description of inconveniences are those occasioned by the act in question. It is for the legislature to appreciate them. They are not of such magnitude as to induce an opinion, that the legislature could not intend to expose the citizens of the United States to them, when words are used which manifest that intent.

On this subject, it is to be remarked, that no lien is created by this law. No *bonâ fide* transfer of property, in the ordinary course of business, is overreached. It is only a priority in payment, which, under different modifications, is a regulation in common use ; and this priority is limited to a particular state of things, when the debtor is living ; though it takes effect, generally, if he be dead. (a)

Passing from a consideration of the act itself, and the consequences which flow from it, the counsel on each side have sought to strengthen their construction by other acts *in pari materia*. \*The act of the 3d of March 1797, has been supposed to be a continuation of legislative proceeding [\*391 on the subject which was commenced on the 3d of March 1795 (1 U. S. Stat. 441), by the act "for the more effectual recovery of debts due from individuals to the United States," which relates exclusively to the receivers of public money. Admitting the opinion, that the act of 1797 was particularly designed to supply the defects of that of 1795, to be correct, it does not seem to follow, that a substantive and independent section, having no connection with the provisions made in 1795, should be restricted by it.

The act of 1795 contains nothing relative to the priority of the United States, and therefore, will not explain the 5th section of the act of 1797, which relates exclusively to that subject. But the act of 1797, neither in its title nor its enacting clauses, contains any words of reference to the act of 1795. The words which are supposed to imply this reference are, "to provide more effectually." But these words have relation to the existing state of the law, on all the subjects to which the act of 1797 relates, not to those alone which are comprehended in the act of 1795. The title of the act of 1795 is also, "for the more effectual recovery of debts," and consequently, refers to certain pre-existing laws. The act of 1797, therefore, may be supposed to have in view the act of 1795, when providing for the objects contemplated in that act ; but must be supposed to have other acts in view, when providing for objects not contemplated in that act. As, therefore, the act of 1795 contains nothing respecting the priority of the United States, but is limited to provisions respecting suits in court, the act of 1797 may be considered in connection with that act, while on the subject of suits in court, but when on the subject of preference, must be considered in connection with acts which relate to the preference of the United States.

The first act on this subject passed on the 31st of July 1789, § 21, and gave the United States a preference only in the case of bonds for duties. \*On the 4th of August 1790 (1 U. S. Stat. 169), an act was passed [\*392 on the same subject with that of 1789, which repeals all former acts, and re-enacts, in substance, the 21st section, relative to the priority of the

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(a) The Chief Justice, in delivering the opinion, observed as follows: "I only say for myself, as the point has not been submitted to the court, that it does not appear to me to create a *devastavit* in the administration of effects, and would require notice, in order to bind the executor, or administrator or assignee."

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United States. On the 2d of May 1792 (Ibid. 263), the priority previously given to the United States is transferred to the sureties on duty bonds, who shall themselves pay the debt; and the cases of insolvency, in which this priority is to take place, are explained to comprehend the case of a voluntary assignment, and the attached effects of an absconding, concealed or absent debtor.

Such was the title of the United States to a preference in the payment of debts, previous to the passage of the act of 1797. It was limited to bonds for the payment of duties on imported goods, and on the tonnage of vessels. An internal revenue had been established, and extensive transactions had taken place; in the course of which, many persons had necessarily become indebted to the United States. But no attempt to give them a preference in the collection of such debts had been made.

This subject is taken up in the 5th section of the act of 1797. The term "revenue officer," which is used in that act, would certainly comprehend any persons employed in the collection of the internal revenue; yet it may be well doubted, whether those persons are contemplated in the foregoing sections of the act. They relate to a suit in court, and are perhaps restricted to those receivers of public money who have accounts on the books of the treasury. The head of the department, in each state, most probably accounts with the treasury, and the sub-collectors account with him. If this be correct, a class of debtors would be introduced into the 5th section, by the term "revenue officer," who are indeed within the title, but not within the preceding enacting clauses of the law.

But passing over this term, the succeeding words seem, to the majority of the court, certainly to produce this effect. They are, "or other person hereafter becoming indebted to the United States, by bond or otherwise."

\*393] If this section was designed to place the collection of the internal revenue on the same footing of security with the external revenue, as has been argued by one of the counsel for the defendants, a design so reasonable, that it would naturally be attributed to the legislature, then the debtors for excise duties would be comprehended within it; yet those debtors cannot be brought within the title, or the previous enacting clauses of the bill. The 5th section, then, would introduce a new class of debtors, and if it does so, in any case, the act furnishes no principle which shall restrain the words of that section to every case to which they apply.

Three acts of congress have passed, subsequent to that under particular consideration, which have been supposed to bear upon the case. The first passed on the 11th of July 1798, and is entitled "an act to regulate and fix the compensation of the officers employed in collecting the internal revenues of the United States, and to insure more effectually the settlement of their accounts." The 13th section of this act (1 U. S. Stat. 593) refers expressly to the provisions of the act of March 1797, on the subject of suits to be instituted on the bonds given by the officers collecting the internal revenue, and shows conclusively, that in the opinion of the legislature, the first four sections of that act did not extend to the case of those officers; consequently, if the 5th section extends to them, it introduces a class of debtors distinct from those contemplated in the clauses which respect suits in court. The 15th section of this act takes up the subject which is supposed to be contemplated by the 5th section of the act of 1797, and declares the debt



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due from these revenue officers to the United States to be a lien on their real estates, and on the real estates of their sureties, from the institution of suit thereon. It can scarcely be supposed, that the legislature would have given a lien on the real estate, without providing for a preference out of the personal estate, especially, where there was no real estate, unless that preference was understood to be secured by a previous law.

The same observation applies to a subsequent act of the same session, for laying a direct tax. A lien is reserved \*on the real estate of the collector, without mentioning any claim to preference out of his personal estate. [\*394

The last law which contains any provision on the subject of preference passed on the 2d of March 1799. The 65th section of that act has been considered as repealing the 5th section of the act of 1797, or of manifesting the limited sense in which it is to be understood. It must be admitted, that this section involves the subject in additional perplexity; but it is the opinion of the court, that on fair construction, it can apply only to bonds taken for those duties on imports and tonnage, which are the subject of the act. From the first law passed on this subject, every act respecting the collection of those duties, had contained a section giving a preference to the United States, in case of the insolvency of the collectors of them.

The act of 1797, if construed as the United States would construe it, would extend to those collectors, if there was no other provision in any other act giving a priority to the United States in these cases. As there was such a previous act, it might be supposed, that its repeal by a subsequent law, would create a doubt whether the act of 1797 would comprehend the case, and therefore, from abundant caution, it might be deemed necessary still to retain the section in the new act, respecting those duties. The general repealing clause of the act of 1799 cannot be construed to repeal the act of 1797, unless it provides for the cases to which that act extends.

It has also been argued, that the bankrupt law itself affords ground for the opinion, that the United States do not claim a general preference. (2 U. S. Stat. 36.) The words of the 62d section of that law apply to debts generally, as secured by prior acts. But as that section was not upon the subject of preference, but was merely designed to retain the right of the United States in their existing situation, whatever that situation might be, the question may well be supposed not to have been investigated at that time, and the expressions of the section were probably not considered with a view to any influence they might have on those rights.

\*After maturely considering this doubtful statute, and comparing it with other acts *in pari materia*, it is the opinion of the majority of the court, that the preference given to the United States by the 5th section, is not confined to revenue officers and persons accountable for public money, but extends to debtors generally. [\*395

Supposing this distinction not to exist, it is contended, that this priority of the United States cannot take effect in any case where suit has not been instituted; and in support of this opinion, several decisions of the English judges, with respect to the prerogative of the crown, have been quoted. To this argument, the express words of the act of congress seem to be opposed. The legislature has declared the time when this priority shall have its commencement; and the court think those words conclusive on the point. The

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cases certainly show that a *bonâ fide* alienation of property, before the right of priority attaches, will be good, but that does not affect the present case.

From the decisions on this subject, a very ingenious argument was drawn by the counsel who made this point. The bankrupt law, he says, does not bind the king, because he is not named in it; yet it has been adjudged, that the effects of a bankrupt are placed beyond the reach of the king, by the assignment made under that law, unless they shall have been previously bound. He argues, that according to the understanding of the legislature, as proved by their acts relative to insolvent debtors, and according to the decisions in some of the inferior courts, the bankrupt law would not bind the United States, although the 62d section had not been inserted. That section, therefore, is only an expression of what would be law without it, and consequently, is an immaterial section; as the king, though not bound by the bankrupt law, is bound by the assignment made under it; so, he contended, that the United States, though not bound by the law, are bound by the assignment.

But the assignment is made under and by the direction of the law; and a proviso that nothing contained in the law shall affect the right of preference claimed by the United States, is equivalent to a proviso that the assignment shall not affect the right of preference claimed by the United States.

\*396] \*If the act has attempted to give the United States a preference in the case before the court, it remains to inquire, whether the constitution obstructs its operation. To the general observations made on this subject, it will only be observed, that as the court can never be unmindful of the solemn duty imposed on the judicial department, when a claim is supported by an act which conflicts with the constitution, so the court can never be unmindful of its duty to obey laws which are authorized by that instrument. In the case at bar, the preference claimed by the United States is not prohibited; but it has been truly said, that under a constitution conferring specific powers, the power contended for must be granted, or it cannot be exercised. It is claimed, under the authority to make all laws which shall be necessary and proper to carry into execution the powers vested by the constitution in the government of the United States, or in any department or officer thereof. In construing this clause, it would be incorrect, and would produce endless difficulties, if the opinion should be maintained, that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose, it might be said, with respect to each, that it was not necessary, because the end might be obtained by other means. Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution. The government is to pay the debt of the Union, and must be authorized to use the means which appear to itself most eligible to effect that object. It has, consequently, a right to make remittances, by bills or otherwise, and to take those precautions which will render the transaction safe.

\*397] This claim of priority on the part of the United States \*will, it has been said, interfere with the right of the state sovereignties, respecting the dignity of debts, and will defeat the measures they have a right



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to adopt, to secure themselves against delinquencies on the part of their own revenue officers. But this is an objection to the constitution itself. The mischief suggested, so far as it can really happen, is the necessary consequence of the supremacy of the laws of the United States on all subjects to which the legislative power of congress extends.

As the opinion given in the court below was, that the plaintiffs did not maintain their action, on the whole testimony exhibited, it is necessary to examine that testimony. It appears, that the plaintiffs have proceeded on the transcripts from the books of the treasury, under the idea, that this suit is maintainable under the act of 1797. The court does not mean to sanction that opinion; but as no objection was taken to the testimony, it is understood to have been admitted. It is also understood, that there is no question to be made respecting notice; but that the existence of the debt is admitted, and the right of the United States to priority of payment is the only real point in the cause.

The majority of this court is of opinion, that the United States are entitled to that priority, and therefore, the judgment of the circuit court is to be reversed, and the cause to be remanded for further proceedings.

Judgment reversed.

WASHINGTON, J.—Although I take no part in the decision of this cause, I feel myself justified by the importance of the question, in declaring the reasons which induced the circuit court of Pennsylvania to pronounce the opinion which is to be re-examined here. In any instance where I am so unfortunate as to differ with this court, I cannot fail to doubt the correctness of my own opinion. But if I cannot feel convinced of the \*error, [\*398 I owe it, in some measure, to myself, and to those who may be injured by the expense and delay to which they have been exposed, to show, at least, that the opinion was not hastily or inconsiderately given.

The question is, have the United States a right, in all cases whatever, to claim a preference of other creditors in the payment of debts. At the circuit court, the counsel for the United States disclaimed all idea of founding this right upon prerogative principles, and yet, if I am not greatly mistaken, the doctrine contended for places this right upon ground, at least as broad as would have been asserted in an English court.

The whole question must turn upon the construction of acts of congress, and particularly that of the 3d of March 1797. The title of the law is, “an act to provide more effectually for the settlement of accounts between the United States and receivers of public money.” The first section describes more specially the persons who are the objects of the law; points out the particular officer whose duty it shall be to institute suits against those public delinquents thus marked out; declares the rate of interest to be recovered upon balances due to the United States, and imposes a forfeiture of commissions on the delinquent. The 2d section defines the kind of evidence to be admitted on the part of the United States, in the trial of suits in all cases of delinquency. The 3d section gives to the United States, in such actions, a preference of all other suitors in court, by directing the trial of such causes to take place, at the return-term, upon motion, unless the defendant will make oath that he is entitled to credits which have been submitted to the consideration of the accounting officers of the treasury, and rejected. The 4th

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section takes up the case of the defendant, and declares under what circumstances he shall be entitled to the benefit of off-sets.

\*399] \*The 5th section brings us to an important part of the trial, and furnishes a rule to govern the court in the judgment it is to render, in cases where the claim of the United States might, by reason of the insolvency of the debtor, go unsatisfied, unless preferred to that of a private citizen. The 6th section is general in its terms, and relates to executions where the defendant or his property is to be found in any district other than that in which the judgment was rendered. This is a concise view of the different parts of this act, and I shall now examine more particularly the expressions of the 5th section, taken in connection with those which precede it.

The words are, "that where any revenue officer, or other person, hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, the debt due to the United States shall be first satisfied," &c. It is conceded, that the words "or other person" are broad enough to comprehend every possible case of debts due to the United States, and therefore, a literal interpretation is contended for by those who advocate the interest of the United States. On the other side, a limitation of those expressions is said to be more consonant with the obvious meaning of the legislature, which contemplates those debtors only who are accountable for public money.

Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently, no room is left for construction. But if, from a view of the whole law, or from other laws *in pari materia*, the evident intention is different from the literal import of the terms employed to express it, in a particular part of the law, that intention should prevail, for that, in fact, is the will of the legislature.

\*400] \*If a section be introduced, which is a stranger to, and unconnected with, the purview of the act, it must nevertheless take effect according to its obvious meaning, independent of all influence from other parts of the law. Nay, if it be a part of the same subject, and either enlarges or restrains the expressions used in other parts of the same act, it must be interpreted according to the import of the words used, if nothing can be gathered from such other parts of the law to change the meaning. But if, in this latter case, general words are used, which import more than seems to have been within the purview of the law, or of the other parts of the law, and those expressions can be restrained by others used in the same law, or in any other upon the same subject, they ought, in my opinion, to be restrained. So, if the literal expressions of the law would lead to absurd, unjust or inconvenient consequences, such a construction should be given as to avoid such consequences, if, from the whole purview of the law, and giving effect to the words used, it may fairly be done. These rules are not merely artificial; they are as clearly founded in plain sense, as they are certainly warranted by the principles of the common law.

The subject intended to be legislated upon is sometimes stated in a preamble, sometimes, in the title to the law, and is, sometimes, I admit, misstated, or not fully stated. The preamble of an act of parliament is said to be a key to the knowledge of it, and to open the intent of the law-makers: and so I say, as to the title of a law of congress, which being the deliberate



act of those who make the law, is not less to be respected as an expression of their intention, than if it preceded the enacting clause in the form of a preamble. But neither the title nor preamble can be resorted to, for the purpose of controlling the enacting clauses, except in cases of ambiguity, or where general expressions are used inconsistent or unconnected with the scope and purview of the whole law. They are to be deemed true, unless contradicted by the enacting clauses, and it is fair, in the cases I have stated, to argue from them.

\*The object of this law, then, as declared by the title, is to provide for the effectual settlement of debts due to the United States, from receivers of public money. To effect this, suits are directed, the species of evidence to support the claim on the part of the plaintiff is pointed out, and a speedy trial provided; on the part of the defendant, a limited right to oppose the claim by off-sets is provided, and the claim of the United States is to have a preference of other creditors, where the debtor is unable to satisfy the whole. Here, then, is one entire connected subject, the different provisions of the law constituting the links of the same chain, the members of the same body. It will not, I presume, be denied, that the first three sections of the law apply to those only who are declared by the title to be the objects of its provisions. The 4th section is the first which uses general expressions, without a reference to those who had before been spoken of; and yet, I think, it will hardly be contended, that this section is not closely and intimately connected with the same subject. When we come to the 5th section, the reference to the first three sections is again resumed, with the addition of the words "or any other person." So that, instead of the words "revenue officers, or other persons accountable for public money," used in the first section, this section uses the words "revenue officers, or other persons indebted to the United States."

Now, it is obvious, that these expressions may have precisely the same meaning, so as to comprehend the same persons, although the latter may be construed to include persons not within the meaning of the first section. For persons accountable for public money, are also other persons than revenue officers indebted to the United States; and the latter may, by a construction conformable to the other parts of the law, mean persons accountable for public money; and by an extended construction, they may comprehend others, who in no sense of the expressions used, can be said to be accountable for public money.

It is, then, to be inquired, is the court bound, by any known rules of law, to give to the words thus used in the 5th section, a meaning extensive enough to comprehend persons never contemplated by the title of the law, and most \*sedulously excluded by the first three sections? Does justice to the public, or convenience to individuals demand it? Is such a construction necessary, in order to give effect to any one expression used by the legislature? Shall we violate the manifest intention of the legislature, if we stop short of the point to which we are invited to go, in the construction of this section? To all these questions, I think myself warranted in answering in the negative.

1. As to the first. Do the principles of equity, or of strict justice, discriminate between individuals standing *in equali jure*, and claiming debts of equal dignity?

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The nature of the debt may well warrant a discrimination ; but not so, if the privilege be merely of a personal nature. The sovereign may, in the exercise of his powers, secure to himself this exclusive privilege of being preferred to the citizens, but this is no evidence, that the claim is sanctioned by the principles of immutable justice. If this right is asserted, individuals must submit ; but I do not find it in my conscience, to go further in advancement of the claim, than the words of the law, fairly interpreted, in relation to the whole law, compel me. But I do not think, that congress meant to exercise their power to the extent contended for. First, because in every other section of the law they have declared a different intent ; and secondly, because it would not only be productive of the most cruel injustice to individuals, but would tend to destroy, more than any other act I can imagine, all confidence between man and man. The preference claimed is not only unequal in respect to private citizens, but is of a nature against which the most prudent man cannot guard himself. As to public officers, and receivers of public money of all descriptions, they are, or may be known as such ; and any person dealing with them, does it at the peril of being postponed to any debts his debtor may owe to the United States, should he become unfortunate. He acts with his eyes open, and has it in his power to calculate the risk he is willing to run. But if this preference exists in every possible case of contracts between the United States and an individual, \*403] \*there is no means by which any man can be apprised of his danger in dealing with the same person.

2. Is this broad construction necessary, in order to give effect to the expressions of the law ? I have endeavored to show, that all accountable agents are other persons than revenue officers indebted to the United States. The words, then, " other persons," are satisfied by comprehending all those persons to whom the first section extends.

3. Is this construction rendered necessary, to fulfill the manifest intent of the legislature ? So far from it, that to my mind, it is in direct opposition to an intention plainly expressed by all the other parts of the law. To prove this, I again refer to the title of the law ; to the first three sections, which are in strict conformity with it, and that too, by express words ; and to the fourth section, which is so plainly a part of the same subject, that it cannot be construed to go farther than those which precede it. Is the fifth section a stranger to the others ; unnaturally placed there, without having a connection with the other sections ? If this be the case, I have already admitted rules of construction strong enough to condemn the opinion I hold. But let us examine this point.

The object of the first four sections is to enforce by suit, where necessary, the payment of debts due to the United States from a particular class of debtors. It points out the officer who is to order the suit, declares at what term the cause shall be tried, lays down rules of evidence to be regarded in support of the action, extends to the defendant the benefit of making offsets, under certain qualifications ; and then most naturally, as I conceive, comes the fifth section, relating to the judgment which the court is to render, in case a contest should ensue between the United States and individual creditors, on account of inability in the debtor to satisfy the whole. What if an individual creditor should attach the property of the debtor, before the



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United States had taken steps to recover their debt? Or if the debtor should assign away his property, or it should be claimed \*by assignees, under a commission of bankruptcy? or the defendant, being an executor, should plead fully administered, except so much as would be sufficient to satisfy judgments, bond debts, or other debts superior in dignity to that of the United States? This section establishes a plain rule by which the court must proceed in rendering its judgment, whenever those cases occur. What would have signified all the other provisions of the law, unless a rule of decision had been prescribed, in cases where, otherwise, the United States might never obtain the fruit of those steps which their officers were pursuing? [\*404]

Can a section in a law which professes to afford a remedy in a particular case, by process of law, be said not to belong to the law, when it leads to the point of a judgment, which is the consummation of the proceedings in the case? I think not; and therefore, I cannot acquiesce in the opinion that the 5th section is unconnected with the other parts of the law.

I have before observed, that the 4th section is the first which uses general expressions, without reference to those which had before been particularly mentioned; but that when we come to the 5th section, the reference is again taken up, with the addition of those words which produce the difficulty of the case.

Now, I ask, in the first place, what necessity was there for departing from the mode of expression used in the 4th section, which, for the first time, is general, without particular reference to any of the persons before described. Would it not have been as well, in the 5th as in the 4th section, to say "that where any individual becoming indebted to the United States shall become insolvent," &c.? What reason can be assigned for the specification of revenue officers, one class of persons mentioned expressly in the 1st section, intended in the 2d and 3d, by plain words of reference, and clearly meant in the 4th, when it must be admitted that the words used in the 4th section, or the words "other persons," in the 5th, would have comprehended revenue officers, if they were broad enough to include every description of persons indebted to the United States? \*Unless they are construed to limit and restrain the generality of the words "other persons," they are absolutely without any use or meaning whatever. If the preceding sections had applied only to revenue officers, then, from necessity, we must have construed the words "other persons" as broad as their natural import would warrant, because, otherwise, they would have been nugatory, and we would have found no rule in the law itself, by which to limit the generality of the expression. [\*405]

But when the law professes, in its title, to relate to all accountable agents besides revenue officers, and the first section specifies, amongst these agents, "revenue officers," we have a rule by which to restrain the sweeping expressions in the 5th section, viz., "or other person accountable, or indebted as aforesaid." This construction renders the law uniform throughout, and consistent with what it professes in every other section.

In confirmation of this construction, the 62d section of the bankrupt law does, in my opinion, deserve attention. If the United States were, at the time that law passed, entitled to a preference in every possible case, by virtue of the general expressions in the law I have just been considering, what

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necessity was there for limiting the saving of the right of preference to debts due to the United States, "as secured or provided by any law heretofore passed." This mode of expression leads me to conclude, that the legislature supposed, there were some cases where this preference had not been provided for by law. If not, it would certainly have been sufficient to declare, that the bankrupt law should not extend to, or affect, the right of preference to prior satisfaction of debts due the United States.

\*406]

\*THE SCHOONER SALLY.

UNITED STATES v. THE SCHOONER SALLY.

*Admiralty jurisdiction.*

The question of forfeiture of a vessel, under the act of congress against the slave trade, is of admiralty and maritime jurisdiction.

THIS was a libel in the District Court of the United States for Maryland district, against the schooner Sally, of Norfolk, and cargo, Elias De Butts, claimant, seized by the collector of the port of Nottingham, as forfeited under the act of congress prohibiting the slave trade. (1 U. S. Stat. 347.)

In the district court, the vessel and cargo were acquitted on the merits, which decree was, on appeal, affirmed in the circuit court; whereupon, the United States sued out the present writ of error. The error assigned was, that the cause was of common-law, and not of admiralty and maritime jurisdiction. But—

THE COURT, upon the authority of the case of the *United States v. La Vengeance*, 3 Dall. 297, without argument, affirmed the decree.

BAILIFF v. TIPPING.

*Citation.*

*Quære?* Whether the courts of the United States have jurisdiction, in cases between aliens?<sup>1</sup>  
 A citation must accompany the writ of error.

THE only question in this case would have been, whether one alien could sue another alien, in the courts of the United States. The Circuit Court for the Kentucky district was of opinion, that they had no jurisdiction in such a case. But the writ of error was dismissed for want of a citation.

See *ante*, p. 263, the opinion of the court, in the case of *Mason v. The Ship Blaireau*.

<sup>1</sup> Where both parties are aliens, the federal courts have no jurisdiction, by reason of the character of the parties. *Montalet v. Murray*, 4 Cr. 46; *Hinckley v. Byrne*, 1 Deady 224.



\**TELFAIR et al.*, executors of *RAE* and *SOMMERVILLE*, v. *STEAD*'s executors.

*Decedents' estates.*

The lands of a deceased debtor, in Georgia, are liable in equity for the payment of his debts, with out making the heir a party to the suit.

THIS was a writ of error to reverse a decree in chancery of the Circuit Court for the district of Georgia, rendered in favor of the defendants in error

The bill alleged that John Rae and John Sommerville, as copartners in merchandise, were, on the first day of January 1775, indebted to Stead, a British creditor, in the sum of 3864*l.* sterling, on account. That Rae & Sommerville, in their lifetime, made a division of their supposed profits in trade, and drew out considerable proportions of the partnership funds, which they ought not to have done, before payment of their debts, and that each invested part of those funds in purchase of lands and negroes, as their own separate property. That Rae died in 1772 or 1773, intestate, and that Sommerville, the surviving partner, died in 1773, having made Edward Telfair his executor, and having a large real and personal estate. That the said John Sommerville, Samuel Elbert and Robert Rae administered upon the estate of John Rae. That a considerable part of his personal estate was purchased with moneys improperly drawn out of the joint funds. That he left personal estate to the amount of 9014*l.* 5*s.* sterling, which came to their hands. That the said administrators of Rae were all dead. That Belfair, as executor of Sommerville, who was administrator of Rae, became possessed of a considerable part of his estate, part of which had been purchased with the joint funds. That on the death of Robert Rae, his wife, Rebecca, then wife of Samuel Hammond, claiming as executrix of Robert Rae, became possessed of a considerable part of the estate of John Rae, senior, which had been purchased with the joint funds. That on the death of Samuel Elbert, the last surviving administrator of Robert Rae, Elbert's executors, viz., Elizabeth Elbert, William Stephens and Joseph Habersham, also became possessed of part of the estate of John Rae, senior, which had been purchased with the joint funds. That Habersham, as legatee of Jane Sommerville, [\*408 daughter \*of John Rae, senior, became possessed of a large personal estate, liable to the claims of the complainants. That administration *de bonis non* of the estate of John Rae, senior, was (after the death of Sommerville, Robert Rae and Elbert) granted to John Cobbison and Ann, his wife, and a part of the estate of the said John Rae, senior (purchased with the joint funds), came to their hands. That James Rae, deceased, as legatee of Jane Sommerville, became also possessed of an estate liable to the claim of the complainants, which had come to the hands of his administrators, Cobbison and wife. The complainants charged, that the defendants had wasted or misapplied the property which was liable to their claim, and sought a discovery against each of the defendants, of assets and funds, but did not ask for any specific relief.

The answer of Cobbison and wife admitted that they were in possession of 600 acres of land, part of the estate of John Rae, senior, "but whether it was purchased with moneys drawn from the funds of Rae & Sommerville was a fact which had not come to their knowledge." They also admitted personal estate to the value of 348*l.* 2*s.* 4*d.*

Telfair v. Stead's Executors.

Hammond and wife, Habersham, and Stephens demurred to the bill. 1st. Because the complainants stated themselves to be executors, but did not show where the will was proved, nor whether letters testamentary were ever granted, nor whether they had taken upon themselves the execution of the will. 2d. That the bill contained no matter of equity.

The same defendants also pleaded in bar, a recovery at law, in the year 1775, by Stead, in his lifetime, against Telfair, executor of Sommerville, surviving partner of Rae & Sommerville, for the same debt for which the complainants were now seeking relief upon the original *assumpsit*, which is merged in the judgment.

Habersham and Stephens denied all knowledge of ever having had in their hands any part of the estate of John Rae, senior, under Elbert's will; \*409] but Stephens stated, that \*in the lifetime of Mrs. Elbert, she delivered to him, as an attorney-at-law, a bond of Rae, Whitefield & Rae, to John Rae, senior, for 1637*l*. 0*s*. 4*d*., which bond he was ready to deliver up to any person entitled to receive it.

Rebecca Hammond admitted, that her former husband, Robert Rae, as devisee of Jane Sommerville, came to the possession of two tracts of land, a family of negroes, called Boston's family, and some plate, but did not admit that they were part of the property of John Rae, or came from the funds of Rae & Sommerville. She stated, that one of the tracts of land, viz., Rae's Hall, had been sold for taxes.

Joseph Habersham admitted, that in right of his wife, a legatee of Jane Sommerville, he received negroes, valued at 300*l*. which had once belonged to John Rae, senior.

Telfair demurred to so much of the bill as sought a discovery from him of the amount due to the complainant's testator from the estate of John Sommerville, or from Rae & Sommerville, or either of them, at the time of their deaths, or to compel the payment thereof from this defendant, for want of equity, there being an adequate remedy at law; and answered as to the residue of the bill.

His answer stated that, before the war, he had fully administered on the estate of John Sommerville, in his own right, and as surviving partner of Rae & Sommerville, so far as had come to his hands; and had returned an account of his administration, on oath, to the satisfaction of the creditors. He did not admit that any division of profits was made by Rae & Sommerville in their lifetime, nor that they drew out any of the joint funds and invested them in lands, &c., as their, or either of their, separate property.

He admitted, that there were several real estates, and that he received assets to a considerable amount, a part of which were sold for paper money, which perished on his hands; and the books and papers of Rae & Sommerville, and his own accounts of payments and receipts, &c., were lost or destroyed by the British, while in possession of Georgia. He claimed also a right to retain for debts due to himself.

\*410] \*On the 30th of April 1794, the demurrers were, on argument, overruled by Judges IREDELL and PENDLETON.

To the plea in bar of Hammond and wife, Habersham and Stephens, the complainants replied, that there was no such record; the issue upon which



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being joined, was adjudged for the complainants, on the 15th of November 1794, by the Judges WILSON and PENDLETON.

At the same term, auditors were appointed to ascertain the sum due to the complainants, but their report appeared to have been set aside, and the clerk was directed to ascertain the balance, and an issue was directed to ascertain the damages, upon the verdict for which, the following decree was made by Judge BLAIR, on the 5th of May 1795.

"The bill and answers in this cause being read and heard, it is ordered and decreed by the court as follows:—That the sum of 3634*l.* 14*s.* 7*d.* sterling, together with the interest accrued thereon, at the rate of five per cent. per annum, from the 1st of January 1774, to this day, deducting interest from the 19th of April 1775, to the 3d of September 1783, be paid to the complainants, together with five per centum on the amount of the said principal and interest, as a compensation for the expenses of remitting the said amount to Great Britain, where it was contracted to be paid; and that the partnership property, admitted by the defendants to be in their hands, be, in the first instance, applied towards the discharge of the complainants' demand. And that the several tracts and lots of land belonging to John Rae, or John Sommerville, deceased, referred to in the answers of the several defendants (and the title deeds whereof, admitted to be in their possession) be sold by the marshal of this court, on the first Monday of January next, for cash, giving two months' notice of such sale in the Gazettes of Savannah and Augusta; and the net proceeds of such sale be appropriated towards the payment and satisfaction of this decree. And that the title deeds, in the hands of the several defendants of such lands, be delivered over into the hands of the clerk of this court, in three months after notice given to the defendants for that purpose."

\*Sundry sales having been made under this decree, and the clerk [\*411 having reported the balance remaining due on the 4th of January 1796, to be \$11,196.77½—The following decree was made, on the 15th of November 1796, by Judge PATERSON.—

"It appearing from the report of the clerk, that on the 4th of January 1796, \$11,196.77½ remained due to the complainants, upon motion of Mr. Gibbons, solicitor for the complainants, and by consent of Mr. Telfair, executor of Sommerville, it is further ordered and decreed, that in regard to the defendant Edward Telfair, the executor of John Sommerville, who was the surviving partner of John Rae, that the copartnership property, if any, which now is in the hands and possession of the said Edward, as executor as aforesaid, be sold by the marshal of this court, he giving sixty days' notice in the public gazettes of such sale. And the judgments, bonds, notes and other evidences of debts due the said copartnership be delivered over to his attorney or solicitor, under a general assignment by deed, in order to sue the same, if the assets acknowledged or proven to be in the hands of the defendants should not be sufficient to discharge the amount of the said decree. That after payment and satisfaction of a prior judgment obtained by Matthew Clarke, in the county of Richmond, against the said Edward Telfair, executor of the said John Sommerville, for the sum of 826*l.* 10*s.*, with interest from the 17th of March 1794, the balance of the property of the said John Sommerville, if any, in the hands of the said Edward Telfair, executor

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as last aforesaid, agreeable to his answer, be sold as first aforesaid. And the bonds, notes and other evidences of debts remaining in this defendant's hands be delivered over and assigned as aforesaid, subject to the further order of this court, after deducting all lawful commissions, and paying costs and charges for administering and conducting the business of the said estate, and that the said Edward Telfair be discharged from the same, on complying with this order.

"It is further ordered, that the bond admitted by William Stephens, one of the defendants, to be in his hands, given by Rae, Whitefield & Rae, to \*<sup>412</sup> John Rae, senior, dated the 1st of June 1782, conditioned for the \*payment of 1637*l.* 0*s.* 4*d.*, with lawful interest from the date, be delivered over to the complainants, or their agents, to be sued for and recovered, and that the sum so recovered be applied to the extinguishment of the complainants' demand.

"It is further decreed, that the following negroes, that is to say, Boston, Jenny, Phillis, Boy Boston, Molly, Peter, Sally and Ned, charged to be in the hands of the defendants, Samuel and Rebecca Hammond, and not denied by the said defendants, be sold at public sale, by the marshal of this court, first giving sixty days' notice thereof, and that the proceeds be applied to the discharge of the complainants' debt.

"It is further ordered and decreed, that the following negroes, Cuffey, Bet, with her issue and children, Nelly, Peter, Nancy, Toney, Mary, Jenny, Sucky and Doll, admitted by the defendant, Joseph Habersham, to be in his hands, be sold by the marshal, in manner aforesaid, and the net proceeds be applied to the payment of the complainants' demand."

On the 2d of May 1797, before Judge CHASE, leave was given to the complainants to add Elizabeth Course, executrix of Daniel Course, deceased, as a defendant to the bill.

On the 17th of November 1797, Judge WILSON decreed a number of tracts of land belonging to the estate of John Rae, senior, to be sold.

On the 2d of May 1799, ELLSWORTH, Ch. J., on the circuit, made the following decree, viz :

"This cause came on to be heard on a decree made at November term 1796, by which it is ascertained and stated, that on the 4th of January 1796, the sum of \$11,196.77½ remained due to the complainants ; and upon a supplemental bill against Elizabeth Course, which charges that a certain tract of land, containing 450 acres, on Savannah river, known by the name of Rae's Hall, is a part of the estate of John Rae, senior, deceased, and subject to the complainants' decree, and upon the answer of the said Elizabeth Course, by which it is ascertained, that the said defendant claims the said \*<sup>413</sup> tract of \*land, under a deed of conveyance executed by Francis Courvoisie, tax-collector of Chatham county, to Daniel Course, deceased, late husband of the said defendant, bearing date the fifth of May 1792, for the consideration of 128*l.* 19*s.* 4*d.* sterling. And the cause being heard, and argued by counsel on the said decree, and the said bill and answer, together with the proofs and exhibits produced by the parties respectively :

"Whereupon, it is ordered, adjudged and decreed, that the said pretended conveyance be set aside and held as void ; and that the said tract of land



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and premises be sold at public auction, by the marshal, first giving forty days' notice, in one of the Savannah newspapers, of the time and place of such sale. And it is further ordered, adjudged and decreed, that the following negroes in the possession of William Stephens and Joseph Habersham, executors of Samuel Elbert, to wit, Young Sambo, Billy, Chance, Oronoko, Fanny, Diana and Nero, be sold by the marshal, at public auction, giving forty days' notice of the time and place of sale as aforesaid. And it is further ordered, that the marshal shall pay to the complainants, or their solicitor, the proceeds of such sales above ordered and decreed, towards satisfaction of the balance due to the complainants on this day, being \$9,157.90."<sup>1</sup>

On the 28th of April 1800, Judge MOORE made the following decree :—  
 "This cause came on to be heard on the bill, answers and replications, and on decree made in this cause in the term of April 1799 ; and it appearing by the answer of Ann Cobbison, one of the defendants, that she hath assets in her hands amounting to the sum of 348*l.* 2*s.* 4*d.*, equal in value to \$1491.90 : Whereupon, it is ordered, adjudged and decreed, that the said Ann Cobbison do, within ninety days, pay over to the complainants, or their solicitor, the said sum of \$1491.90."

From these decrees, the defendants appealed, and assigned for error,  
 \*1st. That there was not sufficient equity in the bill.

2d. That the decree of the 5th of May 1795, is vague and un- [\*414  
 certain as to the amount directed to be paid by the defendants, it being expressed in pounds, shillings and pence, which are of no fixed value, whereas, it ought to have been in dollars and parts of dollars.

3d. That the sum decreed to be paid ought to have been apportioned among the several defendants (they not being the original debtors), in proportion to the amount of assets by them severally acknowledged, or proved to be in their hands respectively.

4th. That a court of chancery has no power to order the sale of real estate, especially, as the heirs-at-law are not parties to the suit : and inasmuch as the title to the real estate was not the subject-matter of the bill and proceedings.

5th. That the decree does not state to whom (whether to Rae or Somerville) the lands belonged, which were ordered to be sold.

6th. That the private property of the partners was decreed to be sold, before it was ascertained whether the joint property (which had before been decreed to be sold) was not sufficient to satisfy the claim, or how far it would go towards satisfaction.

7th. That the decree of 15th November 1795, is founded only on the consent of one of the defendants, and yet materially affects some of the other defendants.

8th. That it directs the sale and application of individual funds, while it shows the existence of large copartnership funds, not previously applied by the complainants to the extinguishment of their demands, as directed by the decree of 5th May 1795.

9th. That it orders the sale of negroes, not specifically claimed by the

<sup>1</sup> See *Course v. Stead*, 4 Dall. 22.

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complainants, and especially, the negroes inferred to be in the then possession of Samuel and Rebecca Hammond, although not by them, or either of them, admitted so to be.

\*10th. The decree of the 17th of November 1797, is liable to the \*415] objections stated in the 4th error.

11th. That the said decrees are not personal against each defendant, and apportioned according to the different amounts of assets in the hands of each.

12th. The decree of 28th of April 1800, is erroneous, in ordering Ann Cobbison to pay the full amount of assets admitted by her, while a *feme covert*, to be in her, or her then husband's hands, without her being called on, since becoming *sole*, to show whether her husband left the said assets, or any, and what part thereof.

13th. The decrees are against the real and personal estate, and not personally against the defendants, or either of them.

14th. That by the decree of May 1799, certain negroes are said to be in the hands of Habersham and Stephens, executors of Elbert, whereas, it was denied, that the said negroes were in their possession, but in the possession of the children of Elbert, in right of their mother, or otherwise, which negroes, by the said decree, are ordered to be sold, without proof of their being in the possession of Habersham and Stephens, and without the said children (many of whom are under age) being made parties.

This cause was argued in this court, at February term 1803, by *Key* for the original complainants, no counsel appearing on the other side.

By the decisions of the courts of Georgia, on the statute of 5 Geo. II., making lands liable to a *feri facias*, it is not necessary that the heirs should be made parties. The lands are assets, until all the debts are paid. The executor of an administrator is not, as such, liable to a suit, on account of the original intestate; but is liable in equity for the property of the original intestate which has come to his hands.

The record contains a special demurrer to the bill, which was very properly overruled. The causes for demurrer were, \*1st. That it did \*416] not appear in the bill, by whom, or where, the letters testamentary were granted. 2d. That there was a complete remedy at law.

As to the first, it was not necessary for the complainants to make *profert* of their letters testamentary. It was sufficient for them to state that they were executors. At law, the defendants might crave *oyer*; but in equity they must petition that the will and letters testamentary may be produced. It is no cause of demurrer, that they are not set forth in the bill. As to the second cause of demurrer, a court of equity will sustain a bill against executors, because they are considered as trustees for the creditors and representatives of the deceased, and are liable to account; especially, where they are executors of several copartners; and because the court may compel an equitable distribution.

They are fourteen errors assigned in the record. 1st. That there is no equity in the bill. This has been considered and answered. 2d. That the decree, being in pounds, shillings and pence, is vague and uncertain. The relative value of dollars to the currency of Georgia is well known, and if the decree can be rendered certain, it is sufficient.



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3d. The decree ought to be proportioned to the assets. This is done by applying the decree to the assets themselves. The object of the bill was not to enforce a responsibility further than assets should appear; it was not against the persons, but the property, that the bill sought relief; its object was to follow the assets. It does not appear, that the whole assets were sufficient to satisfy the claim, and therefore, there was no necessity to apportion the decree to the assets in the hands of each defendant.

\*4th. The heirs-at-law were not made parties. By the practice [417 and law of Georgia, the lands are assets, and therefore, the executor is the representative of the testator as to lands, as well as to the personal estate, until the debts are paid, and is the proper person to defend them against the claims of creditors.

5th. The decree does not state whether the lands belonged to the estate of Rae, or of Sommerville. The answer to this is, that the fact is not so.

6th. That the private property was decreed to be sold before it was ascertained that the joint property was not sufficient. The answer to this is, that it did not appear that the joint funds were sufficient. And it is to be presumed, that they were not, until the contrary appears. No error is to be presumed, until it is shown.

7th. That the decree is founded on the consent of Telfair alone, but affects some of the other defendants. The decree is founded on the consent of Telfair, so far only as respects him. It was not necessary for the court to insert in the decree, the grounds on which it was founded, so far as it affected the other defendants. If the court had sufficient grounds to justify the decree against the others, it is enough. The objection is, that the court did not state the grounds, not that they did not exist.

8th. This objection is the same as the 6th, only applying it to another decree; and is liable to the same answer.

9th. That the negroes, ordered to be sold, were not specifically claimed by the complainants. It is true, that the complainants did not specifically claim those negroes; but they were seeking for assets generally, and the defendant admitted that the negroes came to her hands, as executrix of Robert Rae. The court, having adjudged them to be liable to the complainants' demand, decreed them to be sold. Whether they were then in her actual \*possession or not, was immaterial; they had been [418 traced to her hands, and she must account for them.

10th. This objection is the same as the 4th, and liable to the same answer. 11th. This is the same as the 3d. 12th. That the defendant became sole, since her answer, and before the decree. Neither the complainants nor the court were bound to take notice of that fact until it was shown. If the assets did not remain in her hands, after the death of her husband, it was for her to show it. The court was not bound to make the inquiry.

13th. The decrees are not against the defendants personally. This is no error. The complainants were following the property of their debtor, not the persons of his representatives. 14th. The answer to this objection is, that the facts do not appear in the record to be as alleged in this exception.

On a subsequent day, the court expressed a doubt, whether the heirs ought not to have been made parties to the bill, and continued the cause to ascertain what construction the courts of Georgia had given to the statute of 5 Geo. II.

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MARSHALL, Ch. J.—The only doubt which the court had, was, whether, by the laws of Georgia, the land could be made liable, unless the heir was a party to the suit. We have received information as to the construction given by the courts of Georgia, to the statute of 5 Geo. II., making lands in the colonies liable for debts, and are satisfied, that they are considered as chargeable, without making the heir a party.

Decrees affirmed.<sup>1</sup>

\*419] \*GRAVES & BARNEWALL v. BOSTON MARINE INSURANCE  
COMPANY. (a)

*Marine insurance.—Reformation of policy.*

A policy in the name of one joint-owner, "as property may appear" (without the clause stating the insurance to be for the benefit of all concerned), does not cover the interest of another joint-owner.<sup>2</sup>

The interest of a copartnership cannot be given in evidence, on an averment of individual interest, nor an averment of the interest of a company be supported, by a special contract relating to the interest of an individual.

The evidence of the knowledge of the underwriters of the intention of the insured, at the time of making the policy, ought to be very clear, to justify a court of equity in conforming the policy to that intention.<sup>3</sup>

THIS was an appeal from the Circuit Court for the district of Massachusetts, on a decree in chancery, dismissing the plaintiffs' bill; the object of which was to charge the defendants upon a policy of insurance, and to obtain relief against a mistake alleged to have been made, by inserting only the name of Graves in the policy, whereas, the interest of both Graves & Barnewall was intended to have been insured.

The bill stated that Graves & Barnewall were equally and jointly interested in the ship Northern Liberties and her cargo; and that various sums of money were, by each of the partners, and at different places, procured to be insured upon the ship and cargo, from New York to Teneriffe, as well as from thence to La Vera Cruz, but in every instance, for their joint and equal benefit. That among other applications for insurance thereon, Graves, on the 24th of April 1800, wrote to Messrs. E. Sigourney & Sons, of Boston, inquiring of them at what rate of premium, insurance could be there obtained upon that risk, and therein describing himself as one of the parties interested in the property to be insured. Upon receiving their answer, he wrote again on the 5th of May 1800, saying, "Your office ask too high a premium for the risk I was inquiring after; the vessel cannot be out of time, as she sailed from hence for Teneriffe, in February, where we have not learned that she had arrived; less so, that she had sailed; but as it is my principle to run no risks, where I can help it, I have prevailed upon my co-partner to anticipate her arrival and sailing again to Vera Cruz. To give you a perfect idea of the nature of the risk to be insured, you will find a

(a) Present, MARSHALL, Ch. J., PATERSON, WASHINGTON, CUSHING and JOHNSON, Justices.

<sup>1</sup> For a further decision on the tax-title of Elizabeth Course, see 4 Cr. 408.

<sup>2</sup> Turner v. Barrows, 5 Wend. 541; 8 Id. 144.

<sup>3</sup> See Snell v. Insurance Co., 98 U. S. 85.



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copy on the other side of the application, to our offices, who took a good deal at seventeen and a half per cent. ; we may be induced to give one or two per cent. more, to complete the business, and wish you to say, whether it could not be effected with you at seventeen and a half per cent. or near that ; if so, and we have not insured elsewhere, before a return of your answer, I may likely give you an order to effect twenty or twenty-five thousand dollars.

\*The copy of the application annexed to the letter, stated, that [ \*420 "on the 20th of February last, the ship Northern Liberties sailed from this for Teneriffe, commanded by Frederick King, a man of courage and good conduct ; she mounted sixteen six pounders, and had a crew of thirty in number. No vessel could have been more completely fitted ; is copper sheathed, and by the report of the pilot who carried her out to sea, sails remarkably fast. Upon this vessel's cargo, we want insurance at and from Teneriffe to La Vera Cruz. The ship and cargo really and truly belong to American citizens." That the said letter and copy of the application were, by E. Sigourney & Sons, as agents of the complainants, laid before the President and Directors of the Boston Marine Insurance Company, who, thereupon, offered to become insurers upon the property therein mentioned at a certain rate of premium then mentioned to the said E. Sigourney & Sons, which they communicated to Graves, who, by letter of 15th May 1800, with the concurrence of Barnewall, directed insurance to be made upon the cargo, to the amount of \$16,000 upon the best terms, within certain limits, which could be obtained. Whereupon, and in pursuance of such directions, E. Sigourney & Sons did cause such insurance to be made, and among others, the Boston Marine Insurance Company did, by policy of insurance, dated June 14th, 1800, become assurers in the sum of \$10,000 upon the cargo of the said ship, for the voyage mentioned in the said letter.

That previous to the date of the said policy, an alteration was made by the company in the common form of marine policies used in this country, by which alteration, the ordinary clause importing the insurance to be made as well for the benefit of the persons named in the policy, as for the benefit of all concerned, was omitted, and that such altered form was used by the company, in making the insurance for the complainants ; and that neither the complainants, nor their agents, the said E. Sigourney & Sons, had any notice or knowledge of such alteration.

That the said letter of Graves, and the copy of the application, were shown to the president and directors of the company, as the order for the said insurance, and were received and acted upon by them as the basis upon which such insurance was made. And that it was well understood, \*as [ \*421 well on the part of the said president and directors of the said company, as also on the part of the complainants, and their said agents, E. Sigourney & Sons, that the property intended to be insured by the said policy was the joint property of a certain company or copartnership, of which Graves was a member, and not his separate or individual property ; and that the object and intent of the said insurance was, to cover the interest of the concerned therein in general, and not his particular and separate interest. But that owing to ignorance on the part of the complainants, and of their agents, of such alteration or omission in the form of the printed policies used by the said company, and to inadvertence and mistake on the part of

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the company, or their president or secretary, in filling up the same, the name of Graves only was inserted.

That in the prosecution of the voyage insured, the ship and cargo were totally lost by the perils of the sea.

The answer of the company, by their president, under the corporate seal, admitted the execution of the policy, and that Graves had some interest in the property insured, but they did not know to what amount; that upon due proof of loss, they were bound, and were ready, to pay him the amount of loss which he had sustained. It admitted, that E. Sigourney, in the beginning of May, applied for insurance, but denied, that either of the letters of the 24th of April, or 5th of May, was shown to him, or left with the president or secretary of the company, or any other person, for their use. It admitted, that the copy of the application to the New York offices was left with the president, but averred, that the premium required was higher than E. Sigourney & Sons would give, and that no bargain or contract was, at that time, made, but the application was withdrawn. That no insurance was made by them, in pursuance of the letter of the 15th of May, or any other letter from Graves, and no further application was made, until the 14th of June, when Andrew Sigourney applied for the insurance of \$10,000 on the cargo of the ship Northern Liberties; whereupon, the policy was made for and on account of John Boonen Graves, and for account of no other person whatsoever. It denied, that before or at the time of making and subscribing the policy, it was mentioned by the said Sigourney & Sons, or either of them, or known or understood, or suspected, by the defendants, \*422] that the property \*proposed to be insured was the joint property of Graves & Barnewall, or of any company or copartnership of which Graves was a member, or that it was the object and intent of the said insurance to cover the interest of the concerned therein, in general, but only the separate and particular interest of Graves.

It denied all mistake or misunderstanding in inserting the name of Graves alone; but insisted, that his name alone was inserted, because the interest of no other person was intended to be insured. It averred, that after the policy was prepared and filled up, it was delivered to Andrew Sigourney, of the house of E. Sigourney & Sons, and by him read and approved, and that he thereupon gave his promissory note for the premium. It denied, that any alteration or omission in the form of policies had been made or adopted by the president and directors, subsequent to the form first adopted and agreed upon by them, after their incorporation, and averred, that the form, in the present case, was the same which was then adopted, and which was settled by the president and directors, upon mature advice and deliberation, and with the express intent, that the president and directors might know the nature, character, quality and condition of every person whose interest they might insure, and to protect themselves from all responsibility and hazard, on account of the interest of any person or persons not named in the policy; and that the said printed form had been openly and continually used by the company, of which all persons procuring insurance to be done at their office had notice; and that a like form had been used at the other offices in Boston, for more than a year before the 14th June 1800.

The deposition of Elisha Sigourney stated, that about the 12th of May 1800, he showed Graves's letter of 5th May, to a person writing as clerk in



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the office of the defendants, and left it with him, until the next morning, when the clerk informed him the terms on which the president and directors would insure. That at the time of effecting the insurance, he did not know that the form adopted by that insurance company \*differed from the usual form; but supposed the interest of all concerned was insured. [\*423

The deposition of Andrew Sigourney stated, that on the 14th of June, when he made application for insurance, he showed to Mr. May, the secretary of the company, only the instructions on the back of the letter of the 5th of May, and a memorandum to insert the words "as property may appear." That he did not read any but the written part of the policy, before he took it from the office. That at the time of making the application, he did not mention the name of any person as interested in that insurance, except the name of John Boonen Graves. He only showed the instructions. That he knew by the letter of Graves, that he had partners, but he did not know the name of any of them: he supposed, that the policy covered the interest of all concerned, and had no notice of any variation from the customary form of policies.

The deposition of Mr. May, the secretary of the company, stated, that the only paper which A. Sigourney showed him, on the 14th of June, when he applied for insurance, was a copy of a proposal made to some other offices, for insurance on the same risk; and that he did not leave it, but only showed it to the deponent. That he, the secretary, filled the policy; and understood the insurance was for Graves, and for no one else, as the policy purports. That he was not sensible of any error in the filling it; that he filled it, as he understood the intention of the parties in the contract. That A. Sigourney read it over deliberately, before he gave the premium note; and after reading it, went away. He afterwards returned, and requested the secretary to add to it the words "as property may appear," which, by permission of the president, were interlined. That the first policy written by the company was dated the 3d of April 1799. That the president and directors had made no alteration in the printed form of policies from their first commencing business, until the 14th of June 1800.

On the 9th of May, E. Sigourney & Sons, in answer to Graves's letter of the 5th, say, that the gentlemen will not insure under 20 per cent. premium. \*On the 15th of May, Graves, in answer, requested insurance to be made "for \$21,000 on the ship, valued at that sum; and \$16,000 on the cargo, as interest shall appear. The latter completes the sum intended to insure on the cargo. Your policy, therefore, being the last dated, it is understood that short interest (if any should appear) is to be settled with your underwriters." [\*424

On the 3d of June, E. Sigourney & Sons write to Graves that "\$5900 is done on your policy on the cargo. It goes on very heavily." Graves, in answer, on the 10th of June, says, "with much reluctance do I learn the little progress you have made in insuring the cargo. I hope by offering 2½ per cent. more, you may induce the companies, or solid individuals, to fill up the remainder. At any rate, it will not answer my purpose, to have the risk unaccomplished; you, therefore, on receiving these presents, will please to ascertain whether there is a prospect of succeeding. If not, give me immediate notice in order to propose it elsewhere."

The material words of the policy were, "This policy of assurance wit-

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nesseth, that the president and directors of the Boston Marine Insurance Company do, by these presents, cause John Boonen Graves to be assured, lost or not lost, ten thousand dollars on property on board the ship Northern Liberties, as property may appear, at and from Teneriffe to Vera Cruz."

"And it is hereby agreed, that if the assured shall have made any other assurance upon the property aforesaid, prior in date to this policy, then the said insurance company shall be answerable only for so much as the amount of such prior assurance may be deficient towards fully covering the property at risk. And the said insurance company shall return the premium (excepting half per cent.) upon so much of the sum by them assured, as they shall be exonerated from by such prior assurance. And in case of any assurance upon said property, subsequent in date to this policy, the said insurance company shall nevertheless be answerable to the full extent of the sum by them herein assured, without right to claim contribution from such subsequent \*425] quent \*assurers, and shall, accordingly, be entitled to retain the premium by them received, in the same manner as if no such subsequent assurance had been made."

It was fully proved, that Graves & Barnewall were jointly and equally interested in the ship and cargo. And the representation to the New York offices stated that fact. Four other policies, upon the same ship and cargo, and for the same voyage, were exhibited by the complainants, all of which had the usual clause, "as well in his own name, as for and in the name and names of every other person or persons to whom the same doth, may, or shall appertain, in part or in whole." Three of them were in the name of Graves, and one in the name of Barnewall. There was full proof of a total loss of ship and cargo.

A suit at law had been brought by Graves & Barnewall, upon the present policy, in which judgment was rendered against them, which judgment was affirmed in this court, at December term 1801.

This cause was argued, at February term 1804, by *Stockton*, of New Jersey, and *Martin*, of Maryland, for the appellants, and by *Harper*, of Maryland, and *Key*, of the district of Columbia, for the appellees; and at this term, by *Stockton*, for the appellants, and *Harper* and *Ingersoll*, of Pennsylvania, for the appellees.

*Stockton*, for the appellants, made three points: 1st. That Graves is to be considered either as a joint partner, having sufficient interest in the whole property to charge the defendants to the amount of their subscription: or 1. As insuring in his own right so far as his interest extended; and 2. As trustee for his partner for the residue of the interest; and that it is competent for him to charge the defendants on this policy, to the amount of his own interest, and also to the amount of the interest of him for whom he was agent or trustee. 2d. That at the time this policy was effected, it was the \*426] intention of both parties to insure the entire interest \*of both Graves and Barnewall; and if such is not the literal construction of the policy, the words whereby the policy is confined to the interest of Graves shall be considered as having been inserted by mistake. 3d. That if the intent of both parties cannot be said to be sufficiently manifest, still there is full proof of mistake on one side, and such conduct on the other as will prove



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the defendants to have acted *malá fide*; and they are chargeable on that ground.

I. That the entire property of Graves and Barnewall is covered by the policy, 1st. Because each has an insurable interest in the whole; and 2d. Because Graves had power to act for himself, and as agent for Barnewall. (a)

1. It is not necessary that the names of all concerned should be inserted in the policy: and such was the law in England, until the year 1785, when the statute of 25 Geo. III. was enacted, which rendered it necessary to insert the names of every person interested; but this was repealed by the statute of 28 Geo. III., which only makes it necessary to insert the name of one of the parties insured, or his agent. Nor is it necessary that the insured should have the absolute ownership of the thing. A mortgagor and mortgagee may both insure. Seamen on board the king's ships may insure their prize-money. A general property is one thing, an insurable interest, another. 1 Marsh. 212-14. A joint partner has an insurable interest in the whole mass of partnership property. He has a general right and authority over the whole, whether the partnership be general or special. They are jointly seized, *per my et per tout*. The joint effects and duties survive. The executor of a deceased partner has only a right to compel the survivor to account, and to recover the balance. \*Each has a power singly to dispose of the whole partnership effects. *Fox v. Hanbury*, Cowp. 445, 448. [\*427]

The case of *Page v. Fry*, 2 Bos. & Pul. 240, is in point. There, the averment was, that Hyde & Hobbs were interested in the cargo insured, to the amount of all the money insured thereon; and although it was proved, that other persons had an undivided share of the cargo, yet it was held, that the averment was supported. Lord ELDON, Ch. J., was of opinion, that the plaintiff had a sufficient interest throughout the entirety of the cargo; and HEATH, J., said, he did not see why a joint-tenant, or tenant in common, has not such an interest in the entirety as will enable him to insure.

A French author is referred to, but the book has not been produced that we might see the contents, the limitation annexed to the opinion, and its bearing upon the present case. Perhaps it may be explained in 1 Marshall 212. At the time of Emerigon, it was the custom to execute blank policies. If the insured chose to insert only the name of one of the persons interested, perhaps, it might be considered, as estopping him from saying that others were concerned.

A policy is a contract of indemnity. It is not to enable the insured to make gain, but to avoid loss. One partner is not only formally, but substantially, owner of the whole, especially as to strangers. If it be said, that he cannot be damaged in the whole, we answer that one partner has only a right to the balance of account. Suppose, Graves had advanced the whole outfit, the whole joint effects are his security, and he will be entitled to hold, if Barnewall should become insolvent. A creditor partner has a specific lien, on the whole. The loss of Graves, therefore, might extend to the whole

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(a) *Ingersoll* referred to Emerigon, as an authority, that in such a policy as this neither the joint property of both, nor the share of either in the joint property, is insured; but that it covers only the separate property of Graves. But the book was not produced.

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amount insured. *West v. Skip*, 1 Ves. 242 ; *Jackey v. Butler*, 2 Ld. Raym. 871 ; *Fox v. Hanbury*, Cowp. 449.

Suppose, the interest of both to be \$10,000. The defendants say, that Graves has only the benefit of his share, say \$5000. But Graves and Barnewall were to share in all cases. \$5000 are lost, so that, in fact, Graves would \*428] be insured only \$2500. \*There is no case where a joint partner has been held to be insured for his share only. How can the contract be limited to half the amount stipulated ? If it should be said, that the other partner might have insured elsewhere, the answer is, that it would only be the common case of a double insurance, and so a contribution.

But 2d. Graves might insure personally for his own share, and as agent for Barnewall as to his share. A general agent may insure, without orders. 1 Marshall 218. It is not necessary that it should appear on the face of the policy, that the principal was interested ; but the policy may be in the name of the agent, and the interest of the principal may be averred and proved ; even under the statute of 28 Geo. III. 1 Marshall 219. One partner is a general agent for the whole. Especially, in a court of equity, where one person may be considered as trustee for another, if the justice of the case requires it.

II. There is sufficient evidence, to prove that it was the intent of both parties, that the joint interest of Graves and Barnewall should be insured, and if the policy is not so expressed, it is a mistake, and ought to be so construed. The form of the policy was framed in old times. It is imperfect and incoherent. It is not a specialty, and is always construed according to the intention of the parties. The joint property is proved, and therefore, it is natural to suppose, that it was intended by Graves as a joint insurance. The conduct of Graves and Barnewall also proves such to be the intent on their part. There were four other policies, in all of which their joint interest is \*429] est is \*insured. The letter of the 5th of May, and the representation annexed, show a plurality of owners.

The words "as interest may appear" were inserted by desire of E. Sigourney, the agent of Graves. For what reason ? It was not necessary for Graves to insert them, to oblige himself to prove his interest. They are part of the usual clause which had been omitted in this policy, and by which the benefit of the insurance is usually extended to all concerned. The insertion of those words shows the intention of Graves to insure for those in whom the interest should appear to be. This intent was known to the underwriters. The letter of the 5th of May was left a whole day in the office. If they did know it, they must either be presumed to have assented to that intention, or are chargeable with fraud in not explaining themselves. It was not important to them, who were the owners. It was sufficient to them, to have a warranty that the property was neutral. Whether it belonged to one or to twenty persons, was not of the least importance. They were willing to insure \$10,000 upon that risk, and all that they could require was, that property to that amount should be actually exposed to the risk.

There is a variance between the representation made to the New York offices and that made to the Boston office. In the former, the property is said to belong to Graves & Barnewall ; in the latter, to citizens of the United States. If any argument should be attempted from this circumstance, the answer is, that at New York, Graves & Barnewall were known to be citizens



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of the United States ; at Boston, they were not. The risk or contract was not in the least varied. If the assured had intended to impose names upon the underwriters, they would have used that of Barnewall and not Graves. The former was well known in Boston as a man of great respectability of character, and as president of an insurance company in New York. The latter was scarcely known at all, being a naturalized Dutch merchant.

\*If, then, it was the intention of both parties, to insure the joint interest of Graves & Barnewall ; or, which amounts to the same thing, [430 if such was the intent of one of the parties, and that intent was known to the other, who did not object, nor explain himself, then, it is but the common case of a mistake in using inapt words to express the meaning of the parties, which is one of the most usual grounds of equitable jurisdiction. *Joynes v. Statham*, 3 Atk. 388 ; *Langley v. Brown*, 2 Ibid. 203 ; *Simpson v. Vaughan*, Ibid. 31 ; *Baker v. Paine*, 1 Ves. 456 ; *Motteux v. London Assurance Company*, 1 Atk. 545.

It is objected, that no application was made to rectify this mistake, until the loss had happened. The answer is, that Graves did not know of the mistake. The policy remained in the hands of Sigourney, who swears, he did not know it ; and the loss happened before the premium note became due.

III. That if the intent of both parties cannot be said to be sufficiently manifest, still there is full proof of mistake on one side, and such conduct on the other, as will show that the defendants have acted *malâ fide* ; and they are chargeable on that ground. To maintain this ground, we rely on the following facts which appear in evidence.

1. The knowledge the defendants had of the intention of Graves to insure the joint interest of Graves & Barnewall. The company's departing from the common form of policies which cover the real interest of all concerned, without having intimated this circumstance to the plaintiffs' agent ; and without giving any public notice ; but keeping it secret even from their own stockholders.

This notice of our intentions, and of the mistake we labored under, and their silence ; this deviation from the accustomed forms of business, without notice or explanation, though they saw the complainants acting under a delusion, is such a notice of our understanding of \*the business, and such a concealment of theirs, as will amount to fraud in point of law. [431 What ought to have been their conduct, knowing our intentions and their own? They should have said, you speak of your copartner ; name him. You mean to cover the whole ; disclose who are the owners. We have departed from the accustomed form of policies, and the interest of no person will be covered whose name is not inserted in the policy ; but all was silence.

When an insuring company depart from the accustomed form, and the principles universally adopted in this business, they should give notice. Otherwise, every man has a right to deal with them, on the presumption that they do business in the same manner as others, and in the old and established forms. And when they see, that he is evidently acting upon this principle, it is due to good faith, to apprise him of his mistake. To withhold information, to suffer him to proceed in his mistake, and pay his money under delusion, when a word would have saved him, has every ingredient of deceit. It is *suppressio veri* ; it is, by silence and concealment, to draw a man to conclude an agreement contrary to his intent.

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They who demand good faith, should practise it. He who exacts equity, should do it. The underwriter demands and receives it, at the peril of the premium. The insured shall enforce it against him, by obliging him to execute the contract as he had a right to understand it. Each ought to know all. *Seaman v. Fonereau*, 2 Str. 1183 ; Park 200, 201 ; *Ibbottson v. Rhodes*, 2 Vern. 554 ; Park 208, 213 ; *Maanss v. Henderson*, 1 East 335 ; *Carter v. Boehm*, 3 Burr. 1905.

If an explanation had taken place, it would have made no alteration of the risk or the premium ; for Barnewall is also an American citizen. If they had disclosed their secret regulations and intentions, it would have added a name to the policy. What, then, is it but treasuring up an unimportant circumstance until the event happens, taking the premium, and yet defeating the very contract of which it was the price. 1 Marshall 216.

\*432] It is, therefore, contended, that if the intention of both parties has not been fully proved, the defendants are chargeable on the ground of fraud. This gives the court full jurisdiction ; and this court will enforce the contract against them, as it ought to have been fulfilled. It will consider Graves as acting for both, and the restriction as happening by mistake or fraud.

*Harper*, contra, considered, 1st. The law upon which the plaintiffs rely. 2d. The equity of the case.

1. As to the law. It is *res judicata*. This very case has been decided at law.

MARSHALL, Ch. J.—The case at law was decided on a defect in the declaration.

*Harper*.—That gives them no equity. They were bound to make out their case at law ; they ought to have made a good declaration.

Why is this court applied to? To cure some defect or mistake in the policy. But for this there was a remedy at law. A court of law will construe the policy according to the intent. If they are not estopped from proceeding at law, by the judgment at law, let them begin again. But if they are barred by the judgment at law, and this is a question to which a court of law is competent, they have no remedy in equity.

But let us consider the law which has been urged. A partner has a right to use the partnership name for joint purposes ; but he cannot bind the firm in his own name. He cannot, in his own name, transfer the joint property. His interest is different from his power. If he make a will, nothing but his share of the joint property passes. He may, in his own name, insure his individual share of the joint property. Perhaps, his partners do not choose to insure their interest. Shall he, in his own name, bind them to pay the premium? Individual partners often underwrite upon the risks of their own house.

\*433] There is good reason why the names of all the owners ought to be known to the underwriters. If a man has been detected in a covered trade, the risk is greater, than if he had always been known to carry on a fair trade. One of the secret partners may, perhaps, be a subject of a beligerent power.

This is not a case of general partnership. It is a particular adventure.



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It is not such a partnership as is mentioned in the books. One joint-tenant, or tenant in common, cannot dispose of the interest of the co-tenant. There are joint-tenants of ships as well as of land. In a particular transaction of this kind, one cannot sell the whole ship. As agent, he could not do it, without a special power. One partner cannot, as agent, without a special power, sign any paper to bind his copartner, nor can he contract as agent. He can only use the name of the firm.

The words "as interest shall appear," are said to be tantamount to the whole omitted clause. But they only make the difference between an open and a valued policy. The statute of 25 Geo. III. says, the names of all concerned shall be inserted in the policy, and yet, after that statute, the words "as interest shall appear," were still used.

2. As to the equity of the case. We admit, that a policy is a contract of indemnity, and that what the parties meant at the time, ought to be carried into effect ; and that *suppressio veri* will avoid it. All this results from the nature of contracts, which requires the assent of two minds. We admit also, that it may have been the intent of Graves to insure the joint interest of Graves & Barnewall. But was that intent known to us? *Hic labor, hoc opus*. It is true, they acted as joint-owners, to each other, and to their agent; and in some cases, they made insurances jointly, but not in this case.

\*Why is there a variance between the representation made to the New York offices, and that made to the Boston office? Why is the name of Barnewall omitted in the latter? Why, in the letter of the 5th of May, is it not said, who were meant by the expressions "we," "partners," "citizens of the United States?"

The letter of the 5th of May is only an application to know the premium, not a request to make insurance. It states his *maximum*, and therefore, it is not probable that Sigourney would make it known. He is probably mistaken in his deposition. He might, and probably did, give a copy of the representation. But the original representation is on the back of the same leaf on which the letter of the 5th of May was written. The letter of the 15th of May requests Sigourney to have insurance made on \$21,000, as interest shall appear. This shows that he did not mean absolutely to insure and pay the premium for \$21,000, but only so much thereof as his uncovered interest should amount to. This explains also the meaning of the words "I request," &c.

As to the alteration of the form of the policy. The answer states, that they never had used any other. Sigourney ought to have read it, before he agreed to it. It was his own folly, that he did not. It was not, therefore, *suppressio veri*.

*Ingersoll*, on the same side.—If there was a mistake on the side of the insured, yet the written policy is superior to parol testimony. If the knowledge of that intent cannot be brought home to the insurers, the parol testimony is of no avail. Here is a written instrument, and if it is not in itself doubtful, you cannot resort to parol testimony. You cannot resort to extraneous circumstances, to create a doubt, when the instrument itself is clear and explicit. All persons have a right to make such contracts as they please ; and they will be bound by them, unless they are contrary to law ; or unless fraud can be shown.

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\*If double insurance is made, the insured may resort to either policy. The forms of policies, as to the necessity of naming all the persons concerned, and as to double insurance, are often varied. Here, Graves agrees that if double insurance should have been made before, he will resort to this policy for so much only as shall remain uncovered by other policies; and it is to be "as interest shall appear." It contains also several other special agreements.

From the time of the incorporation of the Boston Marine Insurance Company, by the form of policies which they adopted, they declared to the world the terms of their contract. They say, we will not insure the interest of persons not named; we will not contribute with prior underwriters on the same risk; we will be answerable only for so much as shall be uncovered by preceding policies. By the terms of this policy, the interest of Graves only is insured. By accepting the policy, he agreed to it, and is bound, as if he had signed it.

The policy is also altered from the old form in other respects. It relinquishes the right of contribution in case of subsequent double insurance. Graves would have held them to this stipulation; and if they were bound by the alterations, he must be bound by them too. The number of this policy is 649; in so many instances, therefore, they had declared to the world their terms of insurance.

If the policy does cover Barnewall, the remedy of the plaintiffs is at law. If it does not, then Barnewall is excluded, unless they can show a different intent of the parties. 1. On general principles, does insurance by one partner, in his own name only, cover the joint interest of both? 2. If not, do the particular circumstances of this case form an exception to the general rule?

\*1. One part-owner cannot insure the share of the other part-owner, without special authority. If not concerned in the sale of the cargo, they are not joint partners, but joint-owners. 5 Burr. 2729. One joint partner can insure only his share. The others may choose to insure elsewhere. The insurance company had a right to say they would not insure a person not named. If, by law, the insurance by one covers both, there is no remedy in equity.

2. The whole extent of Elisha Sigourney's powers, by the letter of 5th of May, was to inquire the rate of the premium. He never made any application for insurance. The only application for insurance was made by Andrew Sigourney, on the 14th of June (not grounded on the letter of the 5th of May), and after insurance had been made at other offices. The insurance was made on a copy of instructions for insurance at other offices, which contained the name of no person to be insured but Graves. This is a sealed instrument, and yet it is attempted to set it aside, on the ground of mistake, in the omission of a name, when the only name given by the plaintiffs' agent was inserted. It appears by May's deposition, that Andrew Sigourney read the policy deliberately, before he gave the premium note. But if he did not read it, it was his own neglect. He says, he did read the written part. But the name of Graves was written, and he must have seen that his name alone was inserted.

The case of *Page v. Fry*, 2 Bos. & Pul. 240, was a valued policy. It was, therefore, sufficient, if any interest appeared. The only object was to



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show it not to be a wagering policy. The legal property was in the plaintiffs, and it appeared that the house of Hacks had only a beneficial interest, so that the averment in the declaration was not falsified by the evidence.

The only effect of the words "as interest may appear," was, to make it an open policy. They do not refer to the persons concerned who are not named. The meaning is, that the underwriters will insure the whole interest which Graves shall prove he had at risk, provided it did not exceed \$10,000.

\*If they could be construed to mean the interest of all persons concerned, whether named or not, they would open the door to all the frauds intended to be guarded against by the terms of the policy. [\*437]

The case cited from Park 3, does not show the power of a court to modify a policy, according to the recollection of witnesses, as to what passed six weeks before the policy was agreed upon. On the contrary, Lord HARDWICKE, in Park 2, says, that to show that a policy, which is a contract in writing, has been framed contrary to the intent and real agreement, requires the "strongest proof possible."

*Stockton*, in reply.—We admit, that if we have a clear remedy at law, we have none in equity. But this objection does not apply to our second point, which considers Graves as a trustee or agent for his partner.

It is said, that in the case of joint-tenants there is a difference between their power and their interest. But joint-tenants are seized *per my et per tout*. The interest of each extends over the whole, and in chattels the power is equally extensive. A distinction is also taken between joint partners and joint-owners. But there is no difference. So far as the partnership extends, it is governed by all the principles of a general partnership. Each part-owner is possessed *per my et per tout*. Watson 78.

The presumption, however, is, that Graves & Barnewall were general joint partners. There is no evidence to the contrary. It is in evidence, that in many cases respecting this ship and cargo, Graves acted for Barnewall, as well as for himself, and that Barnewall assented to such acts, and never questioned the authority. \*It seems to be admitted, that it was the intention of Graves to insure for his partner as well as for himself. And we say, that the evidence is strong, that his intention was known to the underwriters. The question of fraud depends upon their knowledge of our intention, and not informing us of the alteration in their policy. The general practice of that office was not in itself notice; and there is no evidence of actual notice.(a) [\*438]

MARSHALL, Ch. J., delivered the opinion of the court.—The points made by the plaintiffs in this case, are, 1st. That the policy does really insure their joint property on board the ship Northern Liberties, so far as the same was at the time uncovered by prior assurances. 2d. That if the property be not insured at law, yet it was intended to be insured, and this court will relieve against the mistake in the agreement.

1st. That the policy does really insure the joint property of Graves &

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(a) This case was argued at February term 1804, by *Stockton* and *Martin*, for the plaintiffs in error, and by *Harper* and *Key*, for the defendants; but as the arguments did not essentially vary from those urged at the present term, it has been thought unnecessary to report them.

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Barnewall. The words are, "the President and Directors of the Boston Marine Insurance Company, do, by these presents, cause John Boonen Graves to be assured \$10,000, on property on board the ship Northern Liberties, as property may appear." These words, it is contended by the counsel for the plaintiffs, insure the joint property of Graves & Barnewall, so as to cover the interest of each.

The operation of the words themselves, taken in their ordinary sense, would certainly not extend beyond the interest held by Graves in the cargo. \*439] The words "as property may appear," seem to restrict the general terms of the policy to the interest of the person named in it. Admitting this to be true, it is still contended, that the interest of each partner in the whole partnership stock is an insurable interest; and as it was obviously the intention of Graves, to insure for his partner as well as for himself, the policy ought to receive a construction which will effect this intent. The reasoning in support of the power of each partner to insure the joint property, if certainly strong and well founded. But the doubt in this case is, not whether Graves could have insured the interest of his partner, but whether he has insured it.

It is true, that Barnewall need not have been named in the policy; but the contract ought to have been so expressed (since it is an open policy) as to show that the interest of some other person than Graves was secured, if such was to be the effect of the instrument. It is a good general principle, that written agreements ought to be expounded by themselves. But if the same words are to be considered as insuring the interest of Graves only, or the interest of Graves & Barnewall, according to extrinsic circumstances, the certainty expected from a written agreement will be very much impaired. The interest of Barnewall, therefore, cannot be considered as insured by this policy, under the power of one partner to insure the share of his copartner. If it is insured, it must be as the interest of Graves.

Several cases have been stated, in which Graves might sustain a loss by the loss of Barnewall's part of the cargo, and therefore, it has been contended that he may be indemnified against that risk, in a policy professing to cover only his own interest. The case put is, that Graves might have paid for the whole cargo, and have retained a lien upon it for his reimbursement. But in that case, his interest would not be the result of his character as a partner, but would be in the nature of a mortgage. The question would not be, generally, whether the interest of a copartner may be said to comprehend all the partnership effects, but whether a mortgagee, or other person having a lien upon property, may be said to have an interest in the whole of it. As \*440] a claim so founded would rest, not on the general principles of partnership, but on the particular circumstances of the case, those circumstances ought to be made out, in order to entitle the plaintiffs to avail themselves of the argument. Not being made out, they do not belong to the case.

If a suit at law had been brought on this policy, it would only have been brought in the name of Graves, and he must have averred property on board the vessel. He could only have been entitled to recover to the amount of property uninsured. Would it have been sufficient, under such an averment, to have shown, that the interest of his partners and himself amounted to the sum he claimed, or if he had averred property in himself and another to the



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amount of \$10,000, would such an averment have entitled him to a judgment for the whole sum. In ordinary transactions, the plaintiff would certainly fail in an attempt founded on similar principles.

A policy, though construed liberally, is still a special contract, and under no rule for proceedings on a special contract, could the interest of a copartnership be given in evidence, on an averment of individual interest, nor an averment of the interest of a company be supported, by a special contract relating in its terms to the interest of an individual.

But it is contended, that an insurable interest is distinct from interest, in the ordinary acceptation of the word ; and several cases have been cited in support of this doctrine. Those cases generally appear to be answered, by a distinction taken by the defendants' counsel, between the interest and the power of a copartner. But the case of *Page v. Fry*, reported in 2 Bos. & Pul. 240, certainly countenances the doctrine maintained by the plaintiffs, and ought to be particularly considered. But before that case is adverted to, it may be proper to mention, what appeared to be the opinion of Judge BULLER, in the case of *Perchard v. Whitmore*, reported in the same book, in page 155. In that case, it appears to have been considered as a clear principle, that if, in an action on a policy, and on an averment of interest in the plaintiffs, it should appear, that the plaintiffs and another were interested, the action would not be maintainable. That opinion would apply to the case at bar ; but as the question \*was not directly decided, and [\*441 was the opinion of a single judge, it may be supposed to yield to the case of *Page v. Fry*, where it is said, that question came directly before the court.

The case of *Page v. Fry* was an action brought by an agent, on a policy signed by himself, and in the declaration, he averred an interest in the whole cargo insured, in Messrs. Hyde & Hobbs. It appeared in evidence, that after the purchase of the cargo, and before the insurance was made, a house by the name of Hacks had taken an interest in it, and for this variance between the averment and the proof, the defendants moved for a nonsuit. It is worthy of remark, that no doubt was entertained of the right of the plaintiffs to recover the whole sum, had the declaration stated the truth of the case. And that the counsel in support of the action did not allege that the interest of Hacks was insured as the interest of Hyde & Hobbs, or that on an averment of a particular interest, a joint interest might be given in evidence ; but that the averment was immaterial, under the acts of parliament, and being alleged under a *scilicet*, would not vitiate. The invoices having been made out in the name of Hyde & Hobbs, who paid for the cargo, he also contended, that the *prima facie* right was in them, and that Hacks had only an equitable interest. The argument goes upon the admission that the variance, under the circumstances which attend the case at bar, would be fatal. The same remark applies to the argument in support of the nonsuit. This deserves consideration, since it certainly warrants an opinion, that previous to that case, the law was generally understood to require that the averment of interest in an action on a policy, should be supported by testimony corresponding with that interest, according to the general acceptation of the term.

Lord ELDON certainly states his opinion in favor of the action, to be founded on the interest of the plaintiffs in the entirety of the cargo. But

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in examining that opinion, \*it does not appear to be supported by the authorities he cites, and the words he uses in the conclusion, would seem to imply that, contrary to his reasoning, he paid some respect to the circumstances, under which Hacks had become concerned. "I think," says his lordship, "the plaintiff had a sufficient interest in the entirety of this cargo, notwithstanding other persons had a beneficial interest in a part." The word "beneficial" seems to imply something distinct from a legal interest, and to correspond with the terms equitable interest, which had been used by the plaintiffs' counsel. The opinions of Justices HEATH and CHAMBERE seem to be founded on this being a valued policy, and on the plaintiff's having such an interest as would entitle him to insure under the act of parliament, and that the substance of the averment was nothing more than that the plaintiffs had an interest in the cargo, which would satisfy the act. The opinion of Judge ROOKE is accompanied with no explanation whatever. This case, even was the decision an authority, is too imperfectly reported, to be permitted to overthrow a system which was previously established.

It is the opinion of the court, that, on the legal construction of this policy, John Boonen Graves is insured to the extent of his own interest in the cargo, but that the interest of his copartner is not insured. Were it otherwise, the remedy would be complete at law, and of consequence, the plaintiffs could not maintain their bill in a court of equity.

2d. It remains to inquire, whether, under the circumstances of the case, a court of equity will relieve the plaintiffs against the mistake alleged to exist in the contract, and extend the insurance to the whole partnership interest. That Graves intended to insure the whole, is proved in a manner which is perfectly satisfactory. That the company believed themselves to be insuring the property of Graves only, is probable. Certainly, such is the evidence in the cause. There is no ground for imputing to the company a knowledge that the policy did not correspond with the intentions of the insured.

\*If, then, the relief which they ask should be granted to the  
\*443] plaintiffs, it must be on the principle, that the information laid before the insurance company was sufficient to apprise them of the fact, and to require that, on the principles of good faith, they should suggest to the agent of the plaintiffs the departure of their policy from the ancient form.

This information is in writing, and is contained in the letter of the 5th of May, and in the representation of the risk which accompanied it. The letter must be considered as having been seen by the officers of the company; but as it was shown, not for the purpose of commencing a contract, but of inquiring into the terms on which a contract might probably be made, it is reasonable to suppose, that the nature of the risk was the only subject of consideration, and that the question whether the property belonged to one or more persons, never occurred. A month elapsed before a second application was made, and as the description of the risk was again laid before the president, it could not be required from him, to retain in his mind a circumstance casually suggested in a letter seen so long before, to which circumstance there was nothing to direct his particular attention.

It is, then, on the representation of the risk, and on the verbal communications of Andrew Sigourney, that the case must depend. The representation contains an averment that "the ship and cargo really and truly



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belong to citizens of the United States." But as only a small part of the cargo was insured by the Boston company, this averment contains no information that any other than John Boonen Graves was interested in the particular policy then to be entered into. In the letter, there is another expression which has been much relied on. It is, "on this vessel's cargo *we* want insurance." This expression has been considered as sufficiently indicating that the application was made in behalf of more than one person; and this expression has produced the principal difficulty of the case; \*but on reflection, it has been thought too ambiguous, to authorize [ \*444 a change in the legal import of a written contract.

The description obviously relates to the whole cargo; but the application for insurance was only for a part of it. If that application was made, in the name of Graves only, it was no unreasonable supposition, that the other parties concerned might be separately insured, and that the policy then required was designed to cover Graves only. That the application was so made, must be inferred from the circumstance, that the policy was so framed, at a time when there could be no motive for varying it from the insurance applied for; and that Sigourney does not allege himself to have made any communications to the president, indicating a wish to insure others than Graves.

These grounds are too equivocal, to warrant the court in varying a written contract, in a case attended with the circumstances which appear in the present. The policy was in the possession of the agent for the plaintiffs, and ought to have been understood by him, before it was executed; he retained it in his possession for several months, before a mistake was alleged. Under such circumstances, the information given to the insurance company ought to be very clear, to justify a court of equity in conforming the policy to the intention of one of the parties, which was not communicated to the other, until the loss had happened.

Under the circumstances of the case, a court of equity cannot relieve against the mistake which has been committed; and as the remedy of the plaintiff, Graves, on the policy, to the extent of his interest, is complete at law, the decree of the circuit court, dismissing his bill, must be affirmed.

Judgment affirmed.

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*Jurisdiction.—Citizenship.*

A citizen of the District of Columbia cannot maintain an action against a citizen of Virginia, in the circuit court for the Virginia district. A citizen of the District of Columbia is not a citizen of a state, within the meaning of the constitution.<sup>1</sup>

THIS was a question certified from the Circuit Court for the fifth circuit, holden in the Virginia district, on which the opinions of the judges of that court were opposed. (2 U. S. Stat. 159, § 6.)

(a) Present, MARSHALL, Ch. J., CUSHING, PATERSON, CHASE and WASHINGTON, Justices.

<sup>1</sup> Wescott v. Fairfield Township, Pet. C. C. citizen of a territory. New Orleans v. Winter, 45; Vane v. Miffin, 4 W. C. C. 519. Nor the 1 Wheat. 91.

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The certificate set forth that "in this cause it occurred as a question, whether Hepburn & Dundas, the plaintiffs in this cause, who are citizens and residents of the district of Columbia, and are so stated in the pleadings, can maintain an action in this court against the defendant, who is a citizen and inhabitant of the commonwealth of Virginia, and is also stated so to be in the pleadings, or whether, for want of jurisdiction, the said suit ought not to be dismissed."

*E. J. Lee*, for the plaintiffs.—This question arises under the 2d section of the 3d article of the constitution of the United States, which defines the jurisdiction of the courts of the United States. The particular words of the section which apply to the question, are those declaring that the jurisdiction of the courts of the United States shall extend "to controversies between citizens of different states." If such words are used in the constitution as, according to their literal meaning, will give jurisdiction to the court, it is all that is necessary to be established.

It is essential, in determining this question, to ascertain the import of the term "states," which, in itself, is a vague expression. It will sometimes mean an extent of country within certain limits, within which the authority of the neighboring country cannot be lawfully exercised. It sometimes means the government which is established in separate parts of a territory occupied by a political society. It may also be said to be a society by which \*446] a multitude of people unite together under \*the dependence of a superior power for protection. 2 Burlemaqui 21. And sometimes, it means a multitude of people united by a communion of interest and by common laws. This is the definition given by Cicero.

Either of the above definitions will bring the district within the meaning of the constitution. It is certainly such an extent of country as excludes from within its limits the force and operation of the laws of the governments which adjoin it. There exists within it a political society, with a government over it. That government, for all general concerns of the society, is the congress and President of the United States. And as to its local concerns, there are subordinate authorities acting under the superintendence of the national government. This political society is dependent upon the superior power of the United States.

It is not essential to the formation of a state, that the members of it should have the power, in all cases, of electing their own officers; but it is sufficient that there are certain rules laid down either by themselves, or those by whom they have submitted to be governed, for their conduct.

The people of the district are governed by a power to which they have freely submitted. They do not possess, in as great degree, the rights of sovereignty, as those people who inhabit the states. And if the free exercise of all the rights of sovereignty, uncontrolled by any other power, is essential in the formation of a state, none of those sections of the country which form the United States are entitled strictly to the appellation of a "state;" for there are certain rights of sovereignty which they cannot exercise in their state capacity, such as regulating commerce, making peace and war, &c.

The term "states," as used in the constitution, may, according to the subject-matter, be understood in either of the above senses. It has been understood by a majority of the judges of this court, in the case of *Chis-*



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*holm's Executors v. State of Georgia*, 2 Dall. 457, to mean the government.

\*The idea, that those territories which are under the exclusive government of the United States, are to be considered in some respects as included in the term "states," as used in the constitution, is supported by the acts of congress. In the 2d paragraph of the 2d section of the 4th article of the constitution, it is declared, that "a person charged in any state with treason, felony or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime." It is also declared in the same article of the constitution, that "no person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due." [\*447]

Congress, in prescribing the mode of executing the powers contained in these clauses of the constitution, passed a law, dated February 12th, 1793, c. 7, § 1 (1 U. S. Stat. 302), which declares, "that whenever the executive authority of any state in the union, or of either of the territories northwest or south of the river Ohio, shall demand any person as a fugitive from justice, of the executive authority of any such state or territory to which such person shall have fled," and shall produce such evidence of the fact as is prescribed by the act, the person so escaping shall be surrendered, &c. A similar provision, with respect to persons held to labor or service under the laws of the states or territories, is contained in the same act of congress.

If these territories are not, as to some purposes, included in the term "states," used in the above clauses of the constitution, congress could not constitutionally pass a law making it the duty of the executive of a state to comply with such a requisition of the executive of one of those territories. If they are thus included, why may they not also be included in that part of the constitution which uses the same term, "states," in defining the jurisdiction of the courts? The citizens of the territories are subject to the same evil, if they are obliged to resort to the state courts, which was intended to be remedied by that clause of the constitution which authorizes citizens of different states to resort to the federal courts. And if, being within the same evil, authorized congress to give a latitude to the term "states," in one part of the constitution, the same reason will authorize the same construction of the same term in another part. [\*448]

The words of the constitution only authorize such a requisition to be made by the executive of a state, upon the executive of another state. It must, therefore, be acknowledged, either that the territories are included in the term states, or that the act of congress is unconstitutional. As a further proof of the same construction of the word state, congress, by the 6th section of the act supplementary to the act concerning the district of Columbia, have enacted, that in all cases where the constitution or laws of the United States provide that criminals and fugitives from justice, or persons held to labor in any state, escaping into another state, shall be delivered up, the chief justice of the said district shall be, and he is hereby required to cause to be apprehended and delivered up such criminal, &c., who shall be found within the district.

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Independently of these considerations, it seems to be agreeable to the first principles of government, that all persons who are under the peculiar and exclusive government and protection of a particular power, have, as it were, a natural claim upon that power for protection and redress of wrongs. And that the courts of the United States are the most proper tribunals to which the people of the District of Columbia can apply for redress, in all cases where the aggressor can be found within the jurisdiction of those courts. It seems to be a denial of that protection which the United States are bound to afford to those who reside under their exclusive jurisdiction, to say, that because you may sue your debtor in a foreign tribunal (if I may use the expression), therefore, you shall not resort to our own courts, although your debtor may be found within our jurisdiction. The framers of the constitution could never have supposed it necessary to declare, in express terms, that the courts of the United States should have power to hear and decide on the complaints of one of the citizens of those districts that \*449] were under the exclusive government and care of the \*United States, to whom alone allegiance was due. They could not have intended to deny to that part of the citizens of the United States who inhabit the territories, the privileges which were granted to citizens of particular states, and even to foreigners; especially, the right of resorting to an impartial tribunal of justice. When they permitted aliens to resort either to the state or to the federal courts, they could not mean to confine one of their own exclusive citizens to a remedy in the state courts alone. It would be strange, that those citizens who owe no allegiance but to the United States, should be debarred from going into the courts of the United States for redress, when that privilege is granted to others, in like circumstances, who owe allegiance to a foreign, or to a state government.

*C. Lee, contra.*—This is a new question, which has arisen in consequence of the cession of the district of Columbia, by the states of Virginia and Maryland, to the United States.

The words of the constitution do not take in the case, and the act of congress is also too narrow. The constitution is a limited grant of power. Nothing is to be presumed but what is expressed.

It is contended, that a citizen of the district of Columbia is a citizen of a state. It is said, that he is a citizen of the United States, and not being a citizen of the same state with the defendant, he must be a citizen of a different state. But there may be a citizen of the United States, who is not a citizen of any one of the states. The expression a citizen of a state, has a constitutional meaning. The states are not absolutely sovereigns, but (if I may use the expression) they are demi-sovereigns. The word state has a meaning peculiar to the United States. It means, a certain political society forming a constituent part of the union. There can be no state, unless it be entitled to a representation in the senate. It must have its separate executive, legislative and judicial powers. The term may also comprehend a number of other ideas.

Even if the constitution of the United States authorizes a more enlarged jurisdiction than the judiciary act of 1789 \*has given, yet \*450] the court can take no jurisdiction which is not given by the act. I, therefore, call for the law which gives a jurisdiction in this case. The



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jurisdiction given to the federal courts, in cases between citizens of different states, was, at the time of the adoption of the constitution, supposed to be of very little importance to the people. See the Debates in the Virginia Convention, p. 109, 122, 128.

In no case from any one of the territories has this court ever considered itself as having jurisdiction; and in that of *Clark v. Bazadone* (1 Cr. 212), the writ of error was quashed, because the act of congress had not given this court appellate jurisdiction in cases from the territories.

This is not a case between citizens of different states, within the meaning of the constitution. And in the case of *Bingham v. Cabot*, 3 Dall. 382, it was decided by this court, that the courts of the United States were courts of limited jurisdiction, and that it must appear upon the record, that the parties were citizens of different states, in order to support the jurisdiction.

*E. J. Lee*, in reply.—A law was not necessary to give the federal courts that jurisdiction which is provided for by the constitution. It was only necessary to limit the amount of the claims which should come before the different inferior courts. If a demand should be made by the executive power of the district of Columbia, upon the executive of a state to deliver up a fugitive from justice, the constitution would apply, and oblige the state executive to respect the demand. If the term *state* is to have the limited construction contended for by the opposite counsel, the citizens of Columbia will be deprived of the general rights of citizens of the United States. They will be in a worse condition than aliens.

By the 4th article of the constitution of the United States, § 1, "Full faith and credit shall be given, in \*each state, to the public acts, records and judicial proceedings of every other state." If the district of Columbia is not to be considered as a state for this purpose, there is no obligation upon the states to give faith or credit to the records or judicial proceedings of this district. But congress, in carrying into effect this provision of the constitution, by the act of March 27th, 1804 (2 U. S. Stat. 298), has expressly declared, that it "shall apply as well to the public acts," &c., "of the respective territories of the United States, and countries subject to the jurisdiction of the United States, as to the public acts," &c., "of the several states," thereby giving another clear legislative construction to the word *states*, conformable to that for which we contend.

Again, by the 9th section of the 1st article of the constitution of the United States, "no tax or duty shall be laid on articles exported from any state." Can congress lay a tax or duty on articles exported from the district of Columbia, without a violation of the constitution? By the same section, "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another." Can congress constitutionally give a preference to the ports of the district of Columbia over those of any of the states? The same section says, "nor shall vessels bound to or from one state be obliged to enter, clear or pay duties in another." Can vessels sailing to or from the district of Columbia be obliged to enter, clear or pay duties in Maryland or Virginia? Yet all this may be done, if the rigid construction contended for, be given to the word *state*.

It is true, that the citizens of Columbia are not entitled to the elective

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franchise, in as full a manner as the citizens of states. They have no vote in the choice of president, vice-president, senators and representatives in congress. But in this, they are not singular. More than seven-eighths of the free white inhabitants of Virginia are in the same situation. Of the white population of Virginia, one-half are females ; half of the males probably are under age ; and not more than one-half of the residue are freeholders, and entitled to vote at elections. The same case happens in some degree \*452] in all the states. A great majority \*are not entitled to vote. But in every other respect, the citizens of Columbia are entitled to all the privileges and immunities of citizens of the United States.

MARSHALL, Ch. J., delivered the opinion of the court.—The question in this case is, whether the plaintiffs, as residents of the district of Columbia, can maintain an action in the circuit court of the United States for the district of Virginia. This depends on the act of congress describing the jurisdiction of that court. That act gives jurisdiction to the circuit courts in cases between a citizen of the state in which the suit is brought, and a citizen of another state. To support the jurisdiction in this case, therefore, it must appear that Columbia is a state.

On the part of the plaintiffs, it has been urged, that Columbia is a distinct political society; and is, therefore, “a state,” according to the definitions of writers on general law. This is true. But as the act of congress obviously uses the word “state” in reference to that term as used in the constitution, it becomes necessary to inquire whether Columbia is a state in the sense of that instrument. The result of that examination is a conviction that the members of the American confederacy only are the states contemplated in the constitution.

The house of representatives is to be composed of members chosen by the people of the several states; and each state shall have at least one representative. The senate of the United States shall be composed of two senators from each state. Each state shall appoint, for the election of the executive, a number of electors equal to its whole number of senators and representatives. These clauses show that the word state is used in the constitution \*453] as designating a member of the union, and excludes \*from the term the signification attached to it by writers on the law of nations. When the same term which has been used plainly in this limited sense, in the articles respecting the legislative and executive departments, is also employed in that which respects the judicial department, it must be understood as retaining the sense originally given to it.

Other passages from the constitution have been cited by the plaintiffs, to show that the term state is sometimes used in its more enlarged sense. But on examining the passages quoted, they do not prove what was to be shown by them.

It is true, that as citizens of the United States, and of that particular district which is subject to the jurisdiction of congress, it is extraordinary, that the courts of the United States, which are open to aliens, and to the citizens of every state in the union, should be closed upon them. But this is a subject for legislative, not for judicial consideration.

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3. The certificate of a consul of the United States, under his seal, is not evidence of a foreign law.....*Id.*
4. The proceedings of a Portuguese court, under the seal of a person who states himself to be secretary of foreign affairs in Portugal, is not evidence.....*Id.*
5. If the decrees of the courts in the Portuguese colonies are transmitted to the seat of the Portuguese government, and registered in the department of state of that government, a certificate of that fact, under the great seal of Portugal, with a copy of the decree, authenticated in the same manner, would be sufficient *prima facie* evidence. *Id.*

#### EXECUTORS.

1. It is not necessary, in a bill in equity by executors, that they should set forth their letters testamentary. *Telfair v. Stead*....\*408

#### EXPATRIATION.

1. An American citizen, residing in a foreign country, may acquire the commercial privileges attached to his domicile, and by making himself the subject of a foreign power, he places himself out of the protection of the United States, while within the territory of the sovereign to whom he has sworn allegiance. *The Charming Betsy*.....\*64
2. *Quere?* Whether a citizen of the United States can divest himself of that character,



- otherwise than in such manner as may be prescribed by law. *Id.*; *McIlwaine v. Coxe's Lessee*. . . . . \*280
3. Whether, by becoming the subject of a foreign power, he is freed from punishment for a crime against the United States. . . . . *Id.*
4. Whether, by expatriation, he becomes an alien, so that he cannot take and hold lands by descent from a citizen of the United States? . . . . . *Id.*

FACTOR.

1. The defendant cannot set off bad debts made by the misconduct of the plaintiff, in selling the defendant's goods as factor; the plaintiff not having guaranteed those debts; but such misconduct is properly to be inquired into, in a suit for that purpose. *Winchester v. Hackley*. . . . . \*342

FOREIGN LAWS.

1. Foreign laws must be proved as facts. *Church v. Hubbard*. . . . . \*187, 236
2. The certificate of a consul of the United States, under his seal, is not evidence of foreign laws. . . . . *Id.*

FORTHCOMING BOND.

See BOND, FORTHCOMING.

GEORGIA.

1. Lands of a deceased debtor, in Georgia, are liable in equity for his debts, without making the heir a party. *Telfair v. Stead*. . . . . \*407

ILLICIT TRADE.

1. The right of a nation to seize vessels attempting an illicit trade, is not confined to their harbors, or to the range of their batteries. *Church v. Hubbard*. . . . . \*187

INSOLVENCY.

1. By the insolvent law of Maryland of 3d January 1800, the chancellor of Maryland could not discharge an insolvent citizen of Maryland, named in that law, and who resided in the District of Columbia, at the time of its separation from Maryland, unless the insolvent had complied with all the requisites of the insolvent law, so as to entitle himself to a discharge, before the separation. *Reily v. Lamar*. . . . . \*344
2. *Querre?* Whether an insolvent, who has neglected at law to plead his discharge, can avail himself of it in equity? . . . . . *Id.*

3. A certificate of discharge, under the insolvent act of Maryland of 3d January 1800, relates back to the date of the deed of trust, and the applicant must show himself to be a citizen of Maryland on that day. . . . *Id.* \*349
4. In all cases of insolvency of their debtor, the United States are entitled to priority of payment out of his effects. *United States v. Fisher*. . . . . \*358

INSTRUCTIONS.

1. The instructions of the President of the United States to a commanding officer of a United States ship of war, if not warranted by law, will not justify the officer. *Little v. Barreme*. . . . . \*170

INSURANCE.

1. If the insured make a proposition to the underwriters, to cancel a policy, which they reject, and afterwards assent to; but before information of such assent reaches the insured, they hear of the loss of their vessel, such proposition and assent do not, in law, amount to an agreement to cancel the policy. *Head v. Providence Insurance Company*. . . . . \*127
2. If it be inserted in a policy, that "the insurers are not liable for seizure by the Portuguese for illicit trade," and the vessel be seized and condemned by the Portuguese, for an attempt to trade illicitly, the underwriters are not liable for the loss. *Church v. Hubbard*. . . . . \*187
3. An exclusion of the risk of seizure for illicit trade, means of a lawful seizure. . . . *Id.* \*236
4. A detention at sea, to save a vessel in distress, is such a deviation as discharges the underwriters. *The Blaireau*. . . . . \*268, 269
5. A policy in the name of one joint-owner "as property may appear" (without the clause stating the insurance to be for the benefit of all concerned), does not cover the interest of another joint-owner. *Graves v. Boston Marine Insurance Company*. . . . . \*419
6. The interest of a copartnership cannot be given in evidence, on an averment of individual interest, nor will the averment of copartnership interest, be supported by a special contract relating to the interest of an individual. . . . . *Id.*
7. The evidence of the knowledge the underwriters had of the intention of the insured, at the time of making the policy, ought to be very clear, to justify a court of equity in conforming the policy to that intention. . . . . *Id.*

JOINT-OWNER.

See INSURANCE, 5, 6: PARTNERS, 1, 2.

## JURISDICTION.

1. The courts of the United States have no jurisdiction between citizens of the United States, unless the record expressly states them to be citizens of different states. *Wood v. Wagon*, \*9; *Capron v. Van Noor-den*.....\*126
2. A plaintiff may assign for error, the want of jurisdiction in that court to which he has chosen to resort. *Capron v. Van Noor-den*.....\*126
3. The courts of admiralty of the United States have jurisdiction in cases of salvage, where all the parties are aliens, if the jurisdiction is not objected to. *The Blaireau*.....\*240
4. *Quære?* Whether the common-law courts of the United States have jurisdiction, where all the parties are aliens? *Bailiff v. Typ-ping*.....\*406
5. The question of forfeiture of a vessel, under the act of congress against the slave trade, is a question of admiralty and maritime jurisdiction. *The Schooner Sally*.....\*406
6. A citizen of the District of Columbia cannot maintain an action against a citizen of Virginia in the circuit court of the United States for the Virginia district. *Hepburn v. El-zey*.....\*445

## LANDS.

See GEORGIA: NEW JERSEY.

## LAW.

See LEGISLATIVE POWER.

## LAWS, FOREIGN.

See FOREIGN LAWS.

## LEGISLATIVE POWER.

1. The legislature cannot declare what the law was, or is, but what it shall be. *Ogden v. Blackledge*.....\*272

## LIMITATIONS.

1. The 9th section of the act of assembly of North Carolina, passed in 1715, which directs that unless the creditors of deceased persons shall make their claims within seven years after the death of the debtor, they shall be barred, was repealed by the act of 1789, c. 23, notwithstanding the act of 1799, which declares the contrary. *Ogden v. Blackledge*.....\*272
2. The act of limitations of North Carolina was suspended, as to British creditors, during the war.....*Id.*
3. The act of congress of 30th of April 1790,

limiting the prosecutions upon penal statutes, extends as well to penalties created after, as before that act, and to actions of debt for penalties as well as to informations and indictments. *Adams v. Woods*.....\*336

## MARINER.

1. If a vessel in distress be abandoned at sea by the master and all the crew, except one man, who is left, either by design or accident, he is discharged from his contract as mariner of that vessel, and entitled to salvage. *The Blaireau*.....\*240
2. If a mariner embezzle a part of the goods saved, he forfeits his salvage.....*Id.*

## MARYLAND.

See INSOLVENT, 1, 3.

## MONEY.

1. It is no error, that a decree is for pounds, shillings and pence sterling. *Telfair v. Stead*.....\*414
2. On a deed made in 1779, of land in Virginia, rendering an annual rent of 26l., current money, for ever, the rents are not to be reduced by the scale of depreciation, but the actual annual value of the land at the date of the contract, in specie, or other money equivalent thereto, is to be ascertained by a jury. *Faw v. Marsteller*.....\*10

## NAVY OF UNITED STATES.

1. If there was no reasonable ground of suspicion, that a vessel was trading contrary to law, the commander of a United States ship of war, who seizes and sends her in, is liable for damages. *The Charming Betsy*.\*64
2. *Quære?* What degree of arming constitutes an armed vessel?.....*Id.*
3. A commanding officer of a ship of war of the United States is not justified by the instructions of the president of the United States, if those instructions are not warranted by law; but is answerable in damages to any person injured by his execution of those instructions. *Little v. Barreme*.....\*170

## NEW JERSEY.

1. *Quære?* Whether a person born in the colony of New Jersey, before the revolution, and who resided there until the year 1777, but who then joined the British army in Philadelphia, and afterwards went to England, where he had ever since resided, and who had always claimed to be a British subject, can take and hold lands in the state of New



Jersey, by descent from a citizen of the United States? Whether by the act of the state of New Jersey, of October 4th, 1776, he became a member of the new government, against his will? Whether he could expatriate himself, after the peace? And, if expatriated, whether he became thereby completely an alien to all intents and purposes? *McIlwaine v. Coze's Lessee*. . . . . \*280

NON-INTERCOURSE.

See ADMIRALTY, 1, 5.

NORTH CAROLINA.

See LIMITATIONS, 1, 2.

PARTNERS.

1. A policy in the name of one joint-owner, "as property may appear" (without the clause stating the insurance to be for the benefit of all concerned), does not cover the interest of another joint-owner. *Graves v. Boston Marine Insurance Company*. . . . . \*419
2. The interest of a copartnership cannot be given in evidence, on an averment of individual interest, nor will the averment of copartnership interest be supported by a special contract relating to the interest of an individual. . . . . *Id.*

PAYMENT.

1. The principle upon which the presumption of payment arises from the lapse of time, is a reasonable principle, and the presumption may be rebutted by any facts which destroy the reason of the rule. *Dunlop v. Ball*. . \*180

See EVIDENCE, 1.

PENAL STATUTES.

See LIMITATIONS, 3.

PLEADINGS.

1. It is not a good plea in bar, to a bill in equity, that the complainant has recovered a judgment at law against the executor of the debtor. *Telfair v. Stead*. . . . . \*408
2. It is no cause of demurrer to a bill in equity, against an executor, seeking a discovery of assets, that the complainant had a right of action at law. . . . . *Id.*

POLICY.

See INSURANCE, 1, 2, 3, 5, 7.

PRACTICE.

1. In Virginia, a forthcoming bond which misrecites the amount of costs on the execution, is not thereby vitiated, if the aggregate of debt and costs be truly stated; but will support a judgment, on motion. *Williams v. Lyles*. . . . . \*9
2. The court will require a statement of the points of a case, before argument. *Faw v. Marsteller* \*10; *Reily v. Lamar*. . . . . \*349
3. If a question upon which the judges below differ in opinion, be certified to this court, and be here decided, the parties are not precluded from a writ of error, where the whole cause is before the court. *Ogle v. Lec*. . \*83
4. Upon a case certified, this court can only consider the point upon which the judges below differed. . . . . *Id.*
5. The report of assessors, appointed by the court of admiralty, to assess damages, ought to state the principles on which it is founded, and not a gross sum without explanation. *The Charming Betsy*. . . . . \*64
6. If an appeal is prayed in the court below, at the same term in which the decree is rendered, a citation is not necessary. *Reily v. Lamar*. . . . . \*349
7. A citation must accompany the writ of error, or it will be dismissed. *Bailiff v. Tippling*. . . . . \*406
8. In a bill in equity, by executors, it is not necessary to set forth their letters testamentary. *Telfair v. Stead*. . . . . \*408

PRESIDENT OF UNITED STATES.

1. The instructions of the President of the United States, if not warranted by law, will not justify the commander of a ship of war of the United States in executing them. *Little v. Barreme*. . . . . \*170

PRESUMPTION.

See EVIDENCE, 1; PAYMENT, 1.

PRIORITY.

1. In all cases of insolvency or bankruptcy of their debtor, the United States are entitled to priority of payment out of his effects. *United States v. Fisher*. . . . . \*358

PROBABLE CAUSE.

1. *Quære?* Whether probable cause will excuse from damages? *Little v. Barreme*. . . . . \*176

See ADMIRALTY, 2.

## PROSECUTIONS.

See LIMITATIONS, 3.

## RENTS.

See DEPRECIATION, 1: MONEY, 2.

## SALVAGE.

See ADMIRALTY, 7, 8, 9, 10, 11.

## SEIZURE.

See ADMIRALTY, 1, 2, 5, 6: INSURANCE, 3,

## SET-OFF.

1. If a suit be brought by the assignor of an open account, in his own name, for the use of the assignee, the defendant may set off his claims against the assignee. *Winchester v. Hackley*.....\*342
2. The defendant cannot set off bad debts made by the misconduct of the plaintiff in selling the defendant's goods as factor.....*Id.*

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## SLAVE TRADE.

1. Prosecutions under the act of congress against the slave trade must be commenced within two years after the offence committed. *Adams v. Woods*.....\*336
2. The question of forfeiture of the vessel, under the act of congress against the slave trade, is a question of admiralty and maritime jurisdiction. *The Schooner Sally*..\*406

## STATE.

See COLUMBIA, 3, 4.

## SUGAR.

See DUTIES.

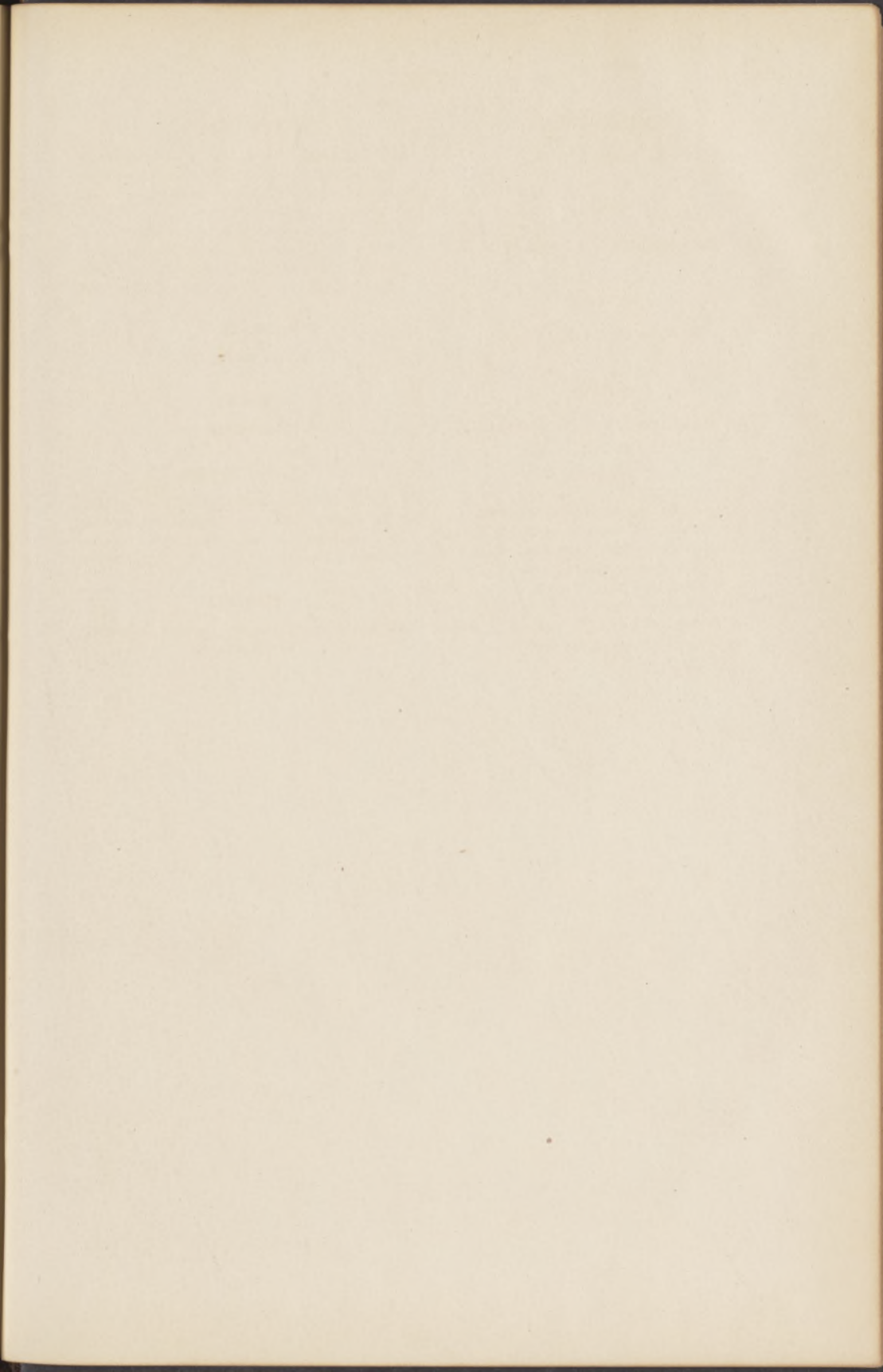
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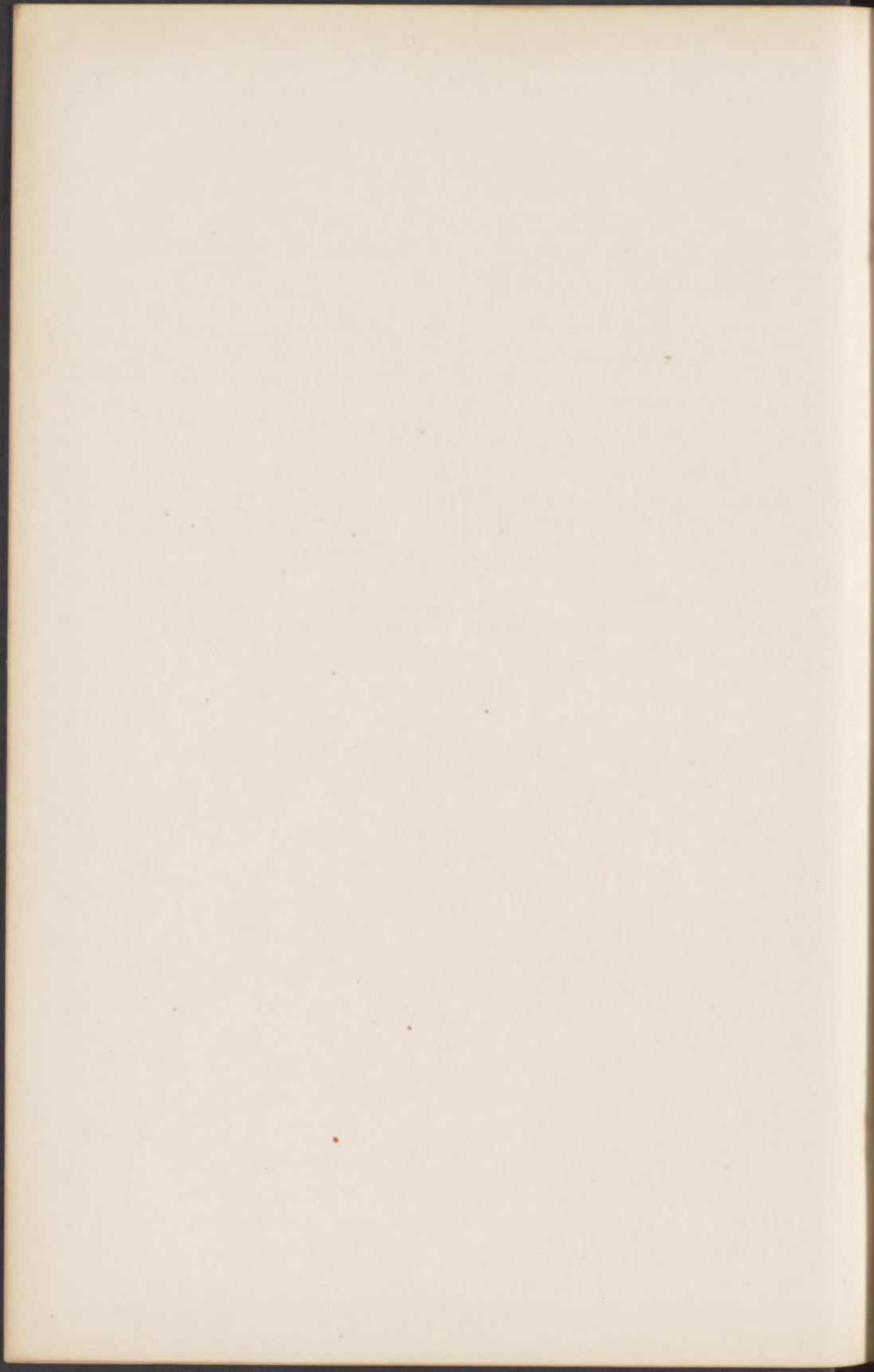
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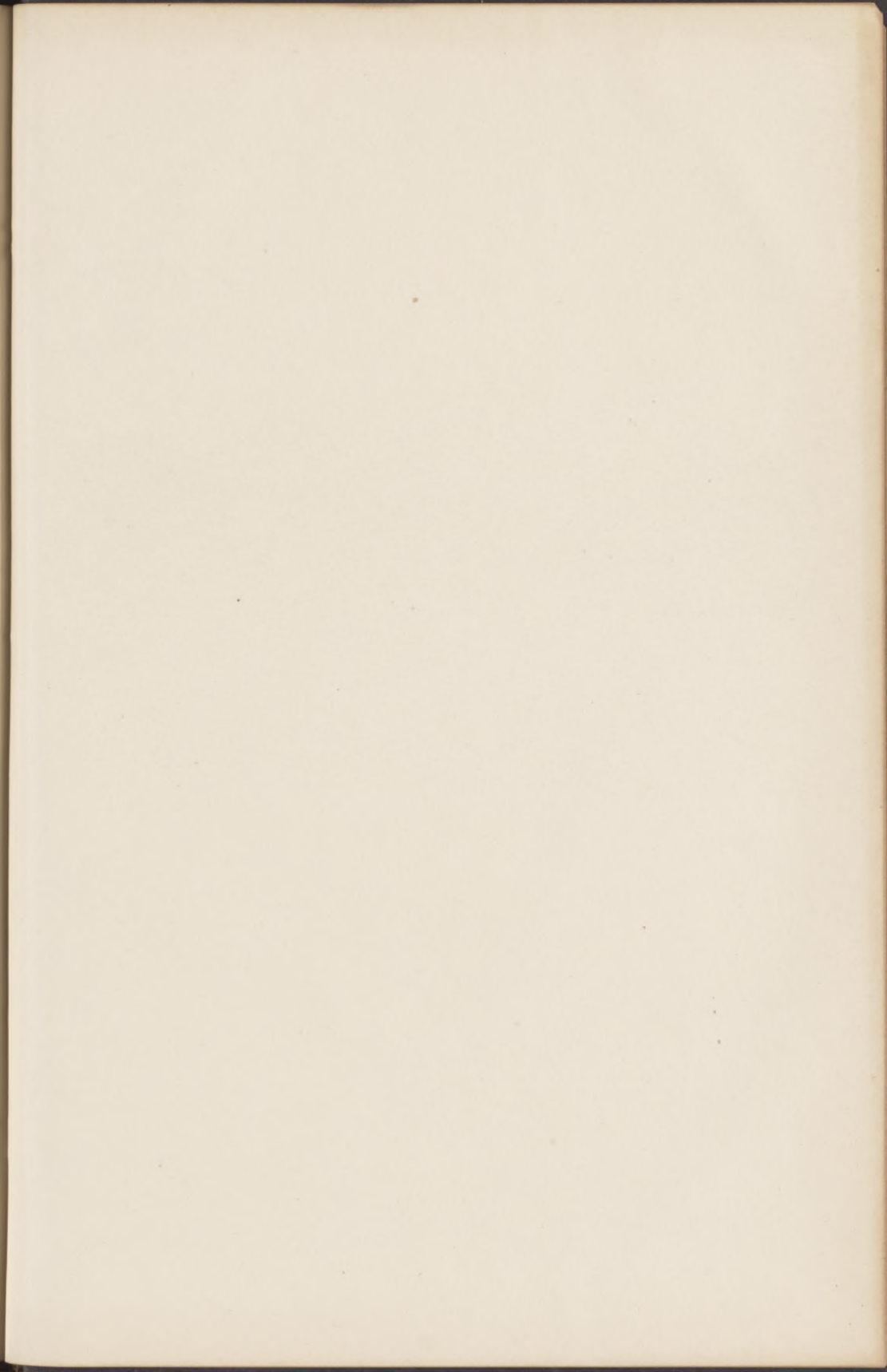
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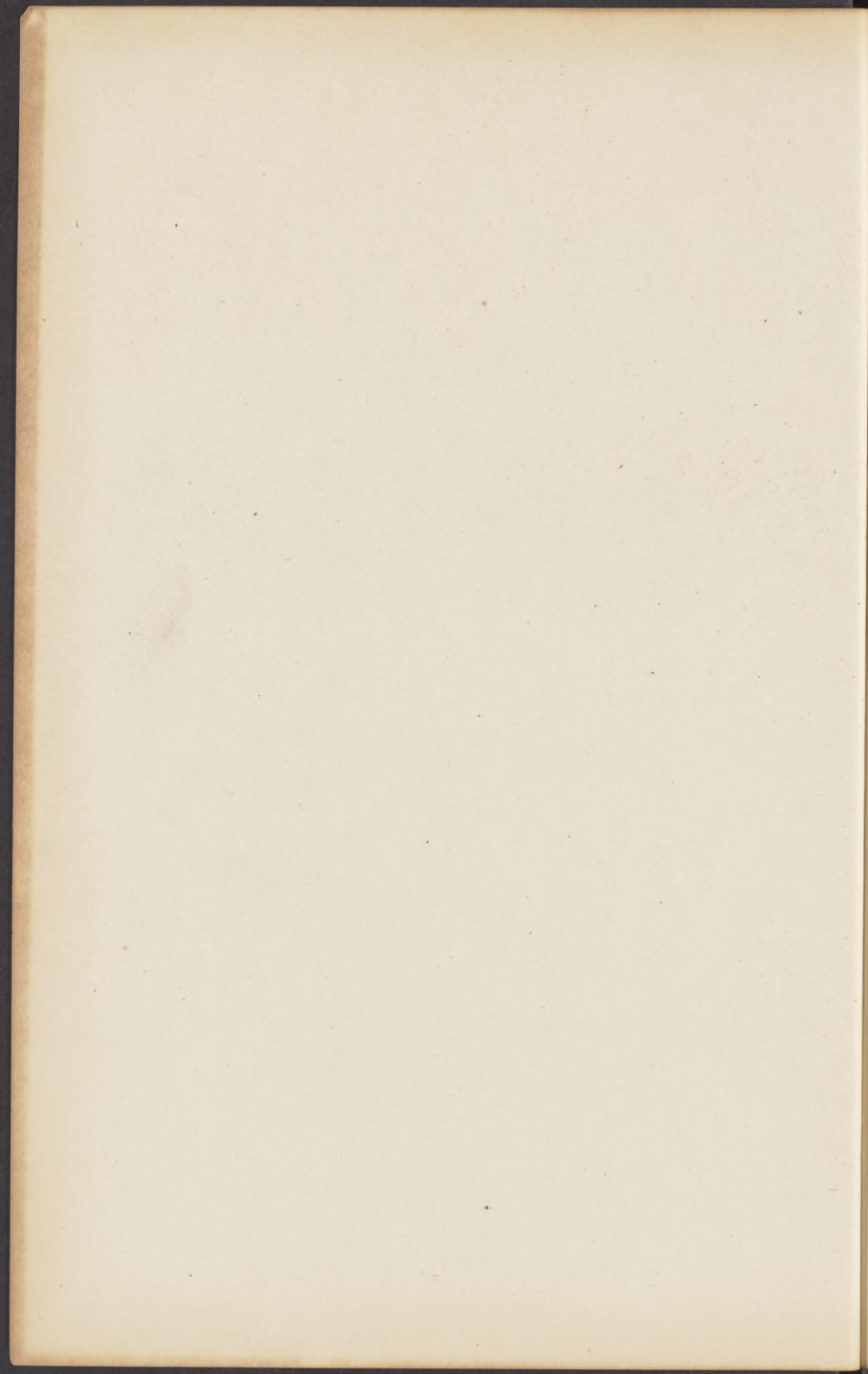




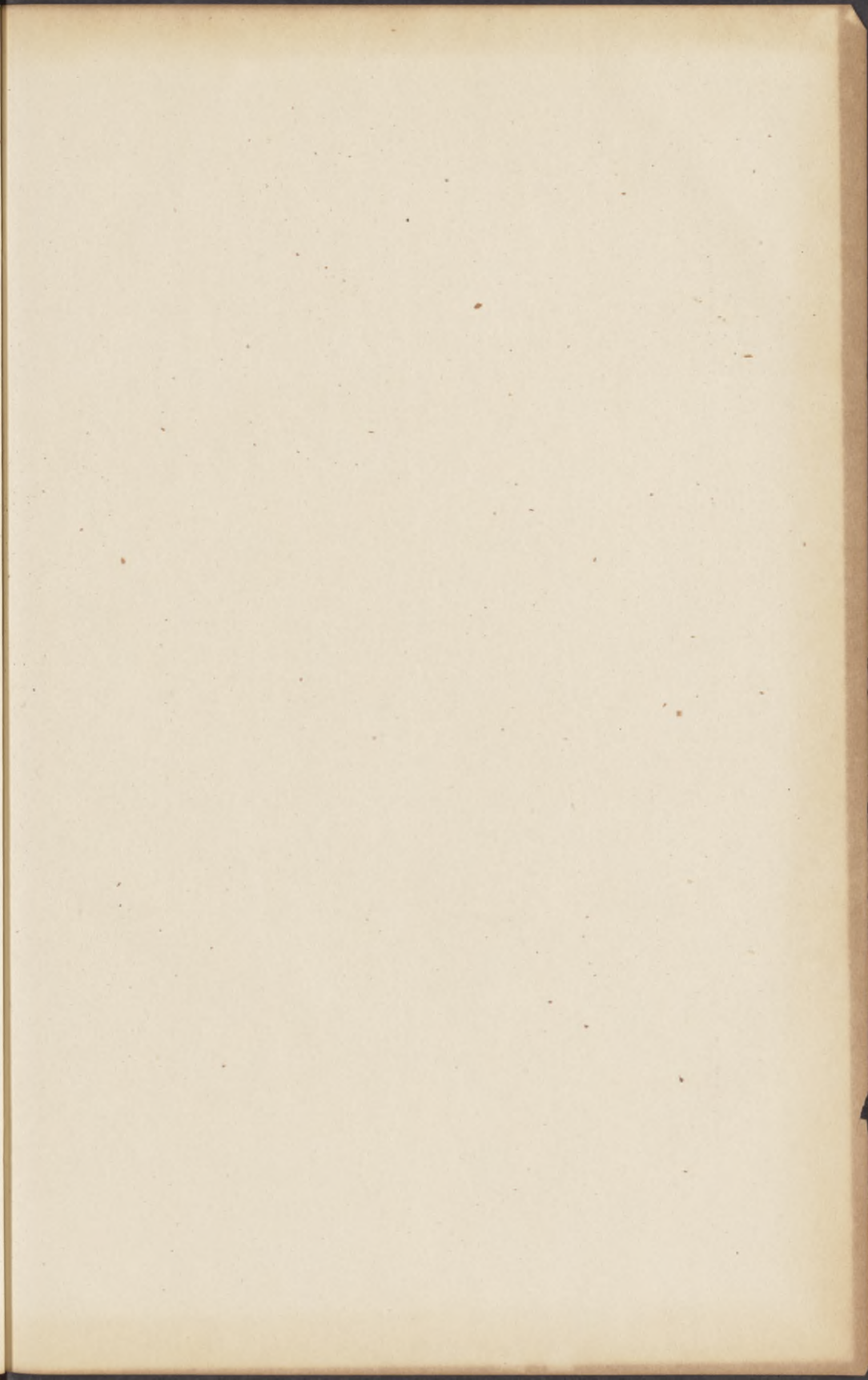


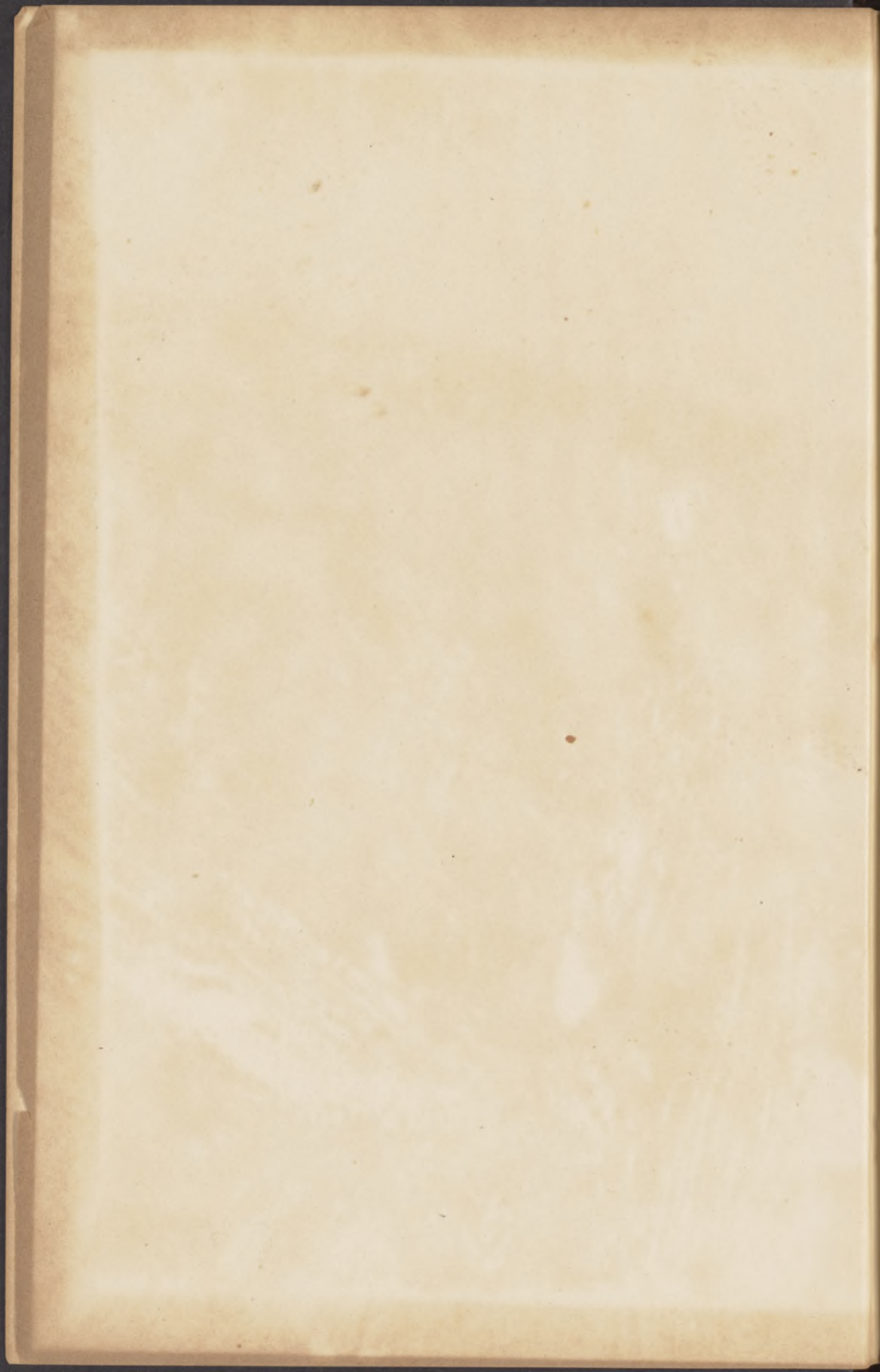




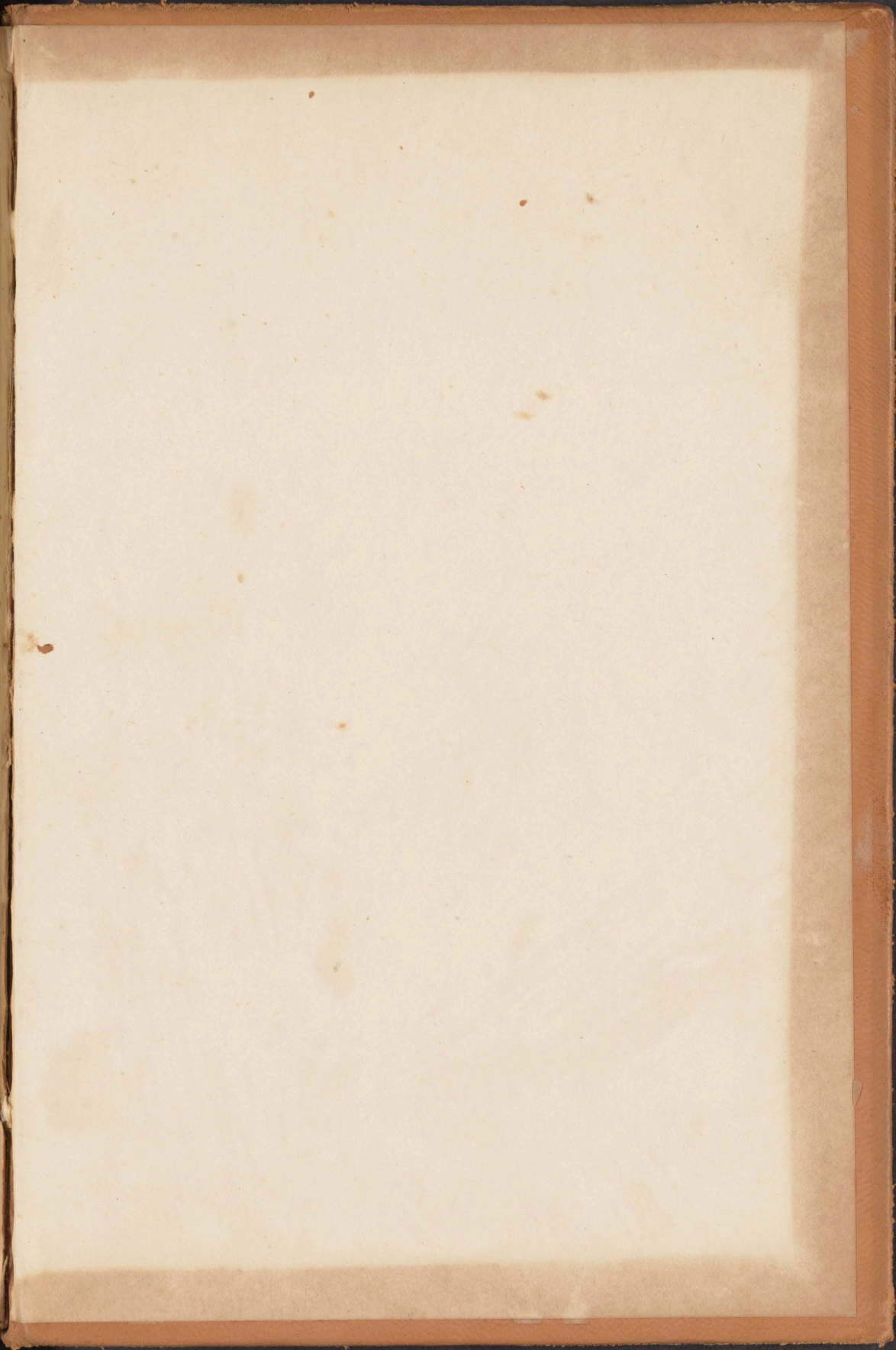












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