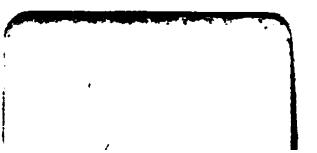

REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

SUPREME COURT

OF THE

UNITED STATES,

FEBRUARY TERM 1821.

By HENRY WHEATON,
COUNSELLOR AT LAW.

VOL. VI.

FOURTH 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.

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

} Associate Justices.

WILLIAM WIRT, Esq., Attorney-General.

Mem.—Mr. Justice WASHINGTON was absent the whole of this term from indisposition.

A TABLE

OF THE

NAMES OF THE CASES REPORTED IN THIS VOLUME.

The References are to the STAR *pages.

A TABLE

OF THE

CASES CITED IN THIS VOLUME.

The references are to the Star *pages.

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RULES AND ORDERS

OF THE

SUPREME COURT OF THE UNITED STATES.

FEBRUARY TERM, 1817.

RULE XXX.—After the present term, no cause standing for argument will be heard by the court, until the parties shall have furnished the court with a printed brief or abstract of the cause, containing the substance of all the material pleadings, facts and documents on which the parties rely, and the points of law and fact intended to be presented at the argument.

RULE XXXI.—Whenever, pending a writ of error, or appeal, in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon, the cause shall be heard and determined, as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record; and thereupon, on motion, obtain an order, that unless such representatives shall become parties, within the first ten days of the ensuing term, the party moving for such order, if defendant in error, shall be entitled to have the writ or error or appeal dismissed; and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and on hearing, have the same reversed, if it be erroneous. Provided, however, that a copy of every such order shall be printed in some newspaper, at the seat of government, in which the laws of the United States shall be printed by authority, three successive weeks, at least sixty days before the begining of the term of the supreme court then next ensuing.

RULE XXXII.—In all cases where a writ of error, or an appeal, shall be brought to this court, from any judgment or decree rendered thirty days before the term to which such writ of error or appeal shall be returnable; it shall be the duty of the plaintiff in error, or appellant, as the case may be, to docket the cause, and file the record thereof with the clerk of this court, within the first six days of the term; on failure to do which, the defendant

in error, or appellee, as the case may be, may docket the cause, and file a copy of the record with the clerk, and thereupon, the cause shall stand for trial in like manner, as if the record had been duly filed, within the first six days of the term ; or at his option, he may have the cause docketed and dismissed, upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the cause, and certifying, that such writ of error or appeal had been duly sued out and allowed.

CASES DETERMINED

IN THE

SUPREME COURT OF THE UNITED STATES.

FEBRUARY TERM, 1821.

The AMIABLE ISABELLA : MUNOS, Claimant.

Prize.—Spanish treaty.

Whether a capture is made by a duly-commissoned captor, or not, is a question between the government and the captor, with which the claimant has nothing to do.

If the capture be made by a non-commissioned captor, the government may contest the right of the captor, after a decree of condemnation, and before a distribution of the prize proceeds; and the condemnation must be to the government.

The 17th article of the Spanish treaty of 1795, so far as it purports to give any effect to passports, is imperfect and inoperative, in consequence of the omission to annex the form of passport to the treaty.[1]

Quære? Whether, if the form had been annexed, and the passport were obtained by fraud and upon false suggestions, it would have the conclusive effect attributed to it by the treaty?

Quære? Whether sailing under enemy's convoy be a substantive cause of condemnation?

By the Spanish treaty of 1795, free ships make free goods; but the form of the passport, by which the freedom of the ship was to have been conclusively established, never having been duly annexed to the treaty, the proprietary interest of the ship is to *be proved according to the ordinary rules of the prize court, and if thus shown to be Spanish, will protect the cargo on board, to whomsoever the latter may belong. [*2

By the rules of the prize court, the *onus probandi* of a neutral interest rests on the claimant.

The evidence to acquit or condemn, must come, in the first instance, from the ship's papers, and the examination of the captured persons.

Where these are not satisfactory, further proof may be admitted, if the claimant has not forfeited his right to it, by a breach of good faith.

On the production of further proof, if the neutrality of the property is not established beyond reasonable doubt, condemnation follows.

The assertion of a false claim, in whole or in part, by an agent, or in connivance with the real owner, is a substantive cause of condemnation.

APPEAL from the Circuit Court of North Carolina. This was the case of a ship and cargo, sailing under Spanish colors, and captured by the privateer Roger, Quarles, Master,(*a*) on an ostensible voyage *from [*3

(*a*) As the form of the commission issued to the privateer, in this case, is one of the points discussed in the argument, it is thought necessary to insert it.

[1] The Amistad, 15 Pet. 521.

Havana to Hamburg, but really destined for London, *or* with an alternative destination, and orders to touch in England, for information as to markets, and further instructions. The ship sailed from the Havana, on
*4] the 24th of November 1814, under *convoy of the British frigate Ister, with which she parted company on the 1st of December, the frigate having gone in chase of an American privateer; and on the 3d of December, was captured by the privateer Roger, and carried into Wilmington, North Carolina, for adjudication. The ship and cargo were condemned as prize of war, in the district court of North Carolina, and the sentence was, after the admission of further proof in the circuit court, affirmed by that court. An appeal was then allowed to this court, with permission to introduce new proof here, if this court should choose to receive it.

The original evidence consisted of the papers found on board the captured vessel, and delivered up to the captors, by the master, at the time of the capture; and of certain other documents afterwards found concealed on board, or in the possession of Rahlives, the supercargo, or of one Masuco, *alias* Burr, a passenger on board the Isabella. Some of the ship's papers were mutilated, and attempted to be destroyed, and others were thrown overboard, and spoliated.

The paper of which the following is a translation, was the only one delivered up by the master, at the time of the capture: "Don Jose Sedano,

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James Madison, President of the United States of America, to all who shall see these presents, greeting: Be it known, that in pursuance of an act of congress, passed on the 26th day of June 1812, I have commissioned, and by these presents do commission, the private armed schooner, called the Roger, of the burden of 184 tons, or thereabouts, owned by Thomas E. Gary, Hy. Gary, James B. Cogbill & Co., Brogg & Jones, Hannon & High, Robert Ritchie, Robert Birchett, John Wright, Wm. C. Boswell, Samuel Turner, John G. Heslop, Wm. & Charles Carling, Thomas Shoe, Richard B. Butte, Richard Drummond, Littlebury Estambuck, John Davis, Spencer Drummond, Peter Nestell and Roger Quarles, mounting fourteen carriage guns, and navigated by ninety men, hereby authorizing Captain ———, and John Davis, lieutenant of the said schooner Roger, and the other officers and crew thereof, to subdue, seize and take any armed or unarmed British vessel, public or private, which shall be found in the jurisdictional limits of the United States, or elsewhere, on the high seas, or within the waters of the British dominions; and such captured vessel, with her apparel, guns and appurtenances, and the goods or effects which shall be found on board the same, together with all the British persons and others, who shall be found acting on board, to bring within some port of the United States; and also to retake any vessels, goods and effects of the people of the United States, which may have been captured by any British armed vessels, in order that proceedings may be had concerning such capture or re-capture, in due form of law, and as to right and justice shall appertain. The said ——— is further authorized to detain, seize and take all vessels and effects, to whomsoever belonging, which shall be liable thereto, according to the law of nations, and the rights of the United States, as a power at war, and to bring the same within some port of the United States, in order that due proceedings may be had thereon—this commission to continue in force during the pleasure of the President of the United States, for the time being. Given under my hand, and the seal of the United States of America, at the city of Washington, the 24th day of April, in the year of our Lord 1813, and of the Independence of the said States the thirty-seventh.

(Signed) JAMES MADISON.

By the President,

(Signed) JAMES MONROE, Secretary of State.

The Amiable Isabella

administrator-general of the royal revenues of this port of Havana, in the island of Cuba, &c., certify, that by authority and knowledge of the general-administrator of the revenues under my charge, permission has been given to ship in the Spanish ship called the Isabel, Captain Don Francisco Cacho, with destination for Hamburg, viz:

*Don Alonzo Benigno Munos, registered on the day of this date, six hundred and seventy-six boxes brown sugar, [*5
M 1 a 676 two hundred and twenty-eight boxes white ditto, and two
M + 201 a 228 hundred quintals dye-wood, which he has shipped on his
... 1 a 40 own account and risk, consigned to Don Juan Carlos Rahlives, and paid 6290; and that it may so appear, I sign the present.

(Signed) SEDANO."

Havana, 10th Nov. 1814.

Among the papers found on board, and brought into the registry, with an explanation of the circumstances under which they were discovered, were,

1. A passport or license granted by the governor and captain-general of the island of Cuba, of which the following is a translation:

Number 94. Province of the Havana.

Don Juan Ruiz de Apodaca y Eliza, president, governor, captain-general of the place of Havana, and island of Cuba, commandant-general of the naval forces of the Apostedero, &c. For want of royal passports, I dispatch this document in favor of Captain Don Francisco Cacho, inhabitant of the city of Havana, that with his Spanish *merchant ship called Amable Isabel, of the burden of 208½ tons, he may sail from this port, with [*6 cargo and register of free trade, and proceed to that of Hamburg, there to trade, and return to his port of departure, with the express condition of performing his voyage, outward and inward, directly to the fixed places of his destination, without deviating, or touching at any port, national or foreign, in the islands or continent of the Indies, unless compelled by inevitable accident.

Gratis. (Signed) APODACA.

SEBASTIAN DE LA CADENA. (a)

(a) The original of this passport or license, is as follows:

Numero 94. Provincia de la Habana.

D. Juan Ruiz de Apodaca y Eliza, presidente, gobernador, capitan generál, de la plaza de la Habana, é Isla de Cuba, y comandante-generál de marina del Apostadero, &c. Á falta de reales pasaportes expido este documento á favor del Capitan Dn. Franc. Cacho Vecino de esta Ciudad de la Habana para que con su fragata mercantile Española nombada Amable Ysabel ——— de porte de 208½ toneladas, pueda salir de este Puerto, con carga y registro del libre comercio, y transferirse al de Hamburgo ——— para comerciar en el, y restituirse al de su salida con expresá condicion, de hacer su derrota de ida y vuelta directamente á los senalados parages de su destino sin extraviarse ni hacer arribada á puertos nacionales, ó extrangeros, en islas, ó tierra firme de Indias á menos de verse obligado de accidentes de otra suerte no remediables. Habana, diez de Novembre de mil ochocientoz catorze.

Gratis. (Signed) APODACA.

SEBASTIAN DE LA CADENA.

*2. A clearance granted by Don Pedro Acevido, captain of the port of Havana, permitting the said Cacho "to proceed with the Spanish ship La Amable Isabel, from this port to England," with a muster-roll of the officers and crew annexed.

3. A letter of intructions from Munos, the claimant, to Cacho, of which the following is a translation:

"Havana, 10th Nov. 1814.

"Don Francisco Cacho.

"SIR:—Instrusted as you are with my ship La Amable Isabel, which sails bound for Hamburg, or some other port of that continent, or for those of England, I hope that you will perform your duty with the exactness you have always used, and which was my motive of making choice of you. Consequently, I will omit all further advice, particularly as there goes in the vessel the supercargo, Don Juan Rahlives, with my full power and instructions. You will observe all his directions, as if they were dictated by myself. Wishing a prosperous voyage, &c.

(Signed) MUNOS."

4. Articles of agreement between Munos and the master and crew of the ship.

5. A general procuration from Munos to one Von Harten, of London, dated at Havana, May 29th, 1812, with a substitution by the latter to Rahlives, the supercargo, executed at London.

6. A letter from one Tieson, dated London, November 4th, 1813, to his brother F. Tieson, at Rio Janeiro, introducing Rahlives, *as the con-
*8] ductor of certain commercial operations, which he had concerted with several friends, referring his correspondent to Rahlives himself for the details.

7. A letter from one Rhodes, dated London, to Messrs. Glover & Co., at Rio Janeiro, introducing Rahlives, who the writer states "goes as supercargo in the ship Isis, and acts for Mr. John Gobel, of Havana, and Mr. Von Harten, of London," &c.

8. A letter from Hawkes & Malloret, dated Liverpool, October 28th, 1803, to Brown & Co., at Rio Janeiro, introducing Rahlives as "particularly connected with our intimate and respectable friend, Mr. George Von Harten, of London, and John Gobel, of Havana, on whose behalf he will probably visit you very shortly. It is probable, Mr. Rahlives may intrust to your management some transactions for account of said friends and others, and we beg to assure you, we feel convinced every satisfaction will result from such business as he may have to conduct."

9. The following circular: "Havana, 1st May 1812. On the 15th last May, we took the liberty of addressing our friends from London, requesting their countenance to an establishment we intended to form in this city, under the firm of Von Harten, Gobel & Co. We now have the satisfaction to inform you of our complete success in organizing and consolidating the same, and that we are in every respect enabled to procure to our correspondents all those advantages which may result from intelligence, activity and the most respectable connections in this island. Political considerations, however,
*9] induce us to carry on our affairs for the future, under the sole *name and firm of Mr. John Gobel, who is permanently to reside in this country," &c.

10. An account of sales, dated Havana, November 16th, 1814, signed by J. Gobel, of the cargo of the English brig Portsea, received from Rio de Janeiro, on account of Messrs. Brown, Weston & Co., and of Rahlives, amounting to $20,313 net proceeds, leaving to the credit of Rahlives, in Gobel's hands, half of that sum.

11. A charter-party, executed at Rio de Janeiro, May 11th, 1814, between Weston and Gobel, letting to him the Portsea, and consigning the cargo to the charterer.

12. The following letter from Munos to Rahlives: "Havana, 10th Nov. 1814. Sir—I inclose you invoice and bill of lading, showing to have shipped in my ship called La Amable Isabel, Capt. Don Francisco Cacho, 1104 boxes of sugar, and 40 half-boxes of ditto, and 200 quintals of dye-wood, the principal amount of which and charges amounts to $60,642.03, which cargo, consigned to you, you will please to take charge of, on your arrival at Hamburg or at any other port you may find convenient to go, proceeding to sell it, on the most advantageous terms you can obtain, that, with the proceeds, you may make the returns, according to the instructions I have verbally communicated to you. In like manner, I recommend to you, and place under your care, my said vessel, in order that the adventure may have the most favorable termination, to which end, I have given orders to the captain, Don Francisco Cacho, that he may observe the instructions you may communicate to him in my name. As I am so well satisfied with *your care and diligence, and the friendship my house entertains for you, I shall omit any further advice, wishing you a prosperous voyage, and that you may duly advise me of your proceedings, and communicate such instructions as you may think fit. Yours, &c." *10]

13. A bill of lading, signed by the master, Cacho, acknowledging the receipt of the cargo, and engaging to deliver it to Rahlives, at Hamburg, or at the port where his register might be verified.

14. A manifest, entitled "Manifest of the cargo of the Spanish ship La Amable Isabel, in its voyage from this port of Havana to that of London;" and signed by the master; being stated in the margin that he had signed bills of lading therefor "to Don Alonzo Benigno Munos, which he has registered on his own account and risk, and to the consignment of Horace Solly, of London."

Among the mutilated papers found on board were, 1. Various accounts between Rahlives and F. Thieson. 2. An invoice of jerked beef and tallow, shipped from Rio de Janeiro to Havana. 3. Another invoice of the same, "for account and risk of Mr. Alonzo Benigno Munos, at Havana," per brig Isis, Capt. Brenmer, amounting to $22,371. 4. Invoice of sugars, &c., shipped on board the Isis, at Havana, by order of Rahlives, signed by Gobel, and amounting to $50,671. 5. Another invoice of the same, shipped on board the Isis, "for Falmouth and a market, to the orders of G. Van Harten, Esq., in London," signed by Rahlives, and various accounts between the different parties.

*A claim was given in for the ship and cargo, as the property of Don Alonzo Benigno Munos, by Rahlives, the supercargo, as agent for the alleged owner; and the captured persons were examined on the standing interrogatories. [*11

Upon the order for further proof, the affidavits of the claimant and his

clerks, to the proprietary interest of the ship and cargo, in him, were produced, and the proceedings before the tribunal of the Consulado, at the Havana, under which, the ship, which had arrived at that port from New Providence, was sold under the bottomry bond alleged to be given for repairs, by one John Cook, to the claimant, and was naturalized as a Spanish vessel. A great mass of testimony was also produced, tending (among other things) to show that the claimant, who was father-in-law of Gobel, had not been actively engaged in trade, for many years before this shipment was made; and that Gobel, not being a Spanish subject, all his foreign business, and his transactions with the custom-house, had constantly been carried on in the name of Munos.

Gaston, for the appellant and claimant, argued: 1. That the prize allegation, in this case, ought to be dismissed, because the libellants had shown no lawful authority to make the capture in question, and therefore, condemnation could not be pronounced in favor of the captors; but even if the proprietary interest were proved to be enemy's, it must be condemned as a *droit* of admiralty to the use of the government. It is a well-established prin-
*12] ciple *of the law of prize, that the captors must show an authority to capture as prize, and exhibit their title deeds. *The Melomane*, 5 Rob. 43. Here, the commission is issued to the vessel itself, without naming the commander who is to direct her operations as a cruiser. The commander, by whom the seizure was actually made, had no commission or authority whatever, other than what was delegated to him by the owners of the vessel. The capture is, therefore, null, so far as respects the captors. On general principles, no persons can rightfully carry on war, but those who have a particular authority from the sovereign power of the state. With regard to private armed vessels, unless they have a public commission, their acts are absolutely unlawful, and all on board may be treated as pirates. Vattel, *Droit des Gens*, lib. 3, c. 15, § 226. At all events, they can derive no title under captures thus made, unless they have a commission. *In bello parta cedunt rœipublicæ;* and all the rights of prize are derived from the grant of the sovereign power. Nor can the commission be issued to the inanimate machine. It must be to the organized association of human beings who are to control and direct its force. Without a head to control and govern them, such an association would be nothing but a band of pirates. The interests of mankind will not tolerate the existence of such a monster, as a ship of war, without a lawful commander. Even when thus governed, they require to be watched with vigilance, and controlled by the government, lest they
*13] involve the nation with its allies, *or with neutrals. *The Thomas Gibbons*, 8 Cranch 421. For this purpose, it is necessary, that the government should designate and commission their officers. So strict is the doctrine of the court of admiralty on this subject, that a capture made by a public commissioned ship, the commander not being on board at the time, is regarded as if made without a commission. *The Charlotte*, 5 Rob. 251. So also, by our own law, the act declaring war, June 18th, 1812, c. 425, authorizes the president to isssue commissions or letters of marque and reprisal, in such form as he shall think proper to dictate: and in the form which he has actually prescribed, the names of the captain and lieutenant are required to be inserted. The prize act of June 26th, 1812, c. 430, imposes very strict

duties upon the commander, which he is to perform, personally, and cannot devolve upon another. He is, among other things, to give bond, and is made responsible for his own misconduct and that of the crew; is to receive and execute the president's instructions; is to keep a journal of the ship's transactions; and by his personal negligence or misconduct, may forfeit the commission, and the rights of prize derived under it. Most clearly, the government has a right to judge of the merits and qualifications of the person to be invested with a trust so high and important. But the government has not delegated it to the captors, in the present case, and therefore, they have no right to demand condemnation to their use. Nor has the government itself *interposed; nor, indeed, can it interpose, to require condemnation to its own use, until the preliminary question of prize [*14 or no prize is determined, and the court is about to distribute the proceeds. *The Thomas Gibbons*, 8 Cranch 421. No final decree of condemnation can, therefore, now be pronounced.

2. The testimony furnished by the papers found on board the captured vessel, is such, as, according to the treaty between the United States and Spain of 1795, is conclusive on the question, and entitles the claimant to immediate restitution. This treaty forms a coventional law on the subject of neutral commerce, essentially different from the general law on the same subject.(*a*) By the 15th article, it is stipulated, that the ships of either nation may sail from any port, to those of a country which may be at war with either or both nations, and may go to neutral places, or to other enemy ports; and that every article on board, except contraband, to whomsoever belonging, shall be free. In order to carry into effect this stipulation for the unlimited liberty of commerce, and that free ships shall make free goods, it is provided by the 17th article, that the vessel shall be furnished with a passport, expressing her national character, and with certificates to show that the cargo is not contraband. To this passport, a conclusive effect is attributed. It establishes the national character of the ship; and that being proved, *renders it immaterial to inquire respecting the cargo, except so far as to ascertain by the certificate, that it is not [*15 contraband. The 18th article requires the cruisers of either party, meeting the merchant vessels of the other, upon the high seas, to remain out of cannon-shot, and only authorizes them to send on board two or three men, and if the passport be exhibited, the vessel is not to be molested; and by the 17th article, if the prescribed documents are not exhibited, she may be sent in for adjudication, and condemned as prize, unless testimony, entirely equivalent, shall be produced. The ship now in question, was furnished with such a passport and certificate as the treaty prescribes.

It is true, that the form of passport, intended to have been annexed to the treaty, never was, in fact, annexed by the negotiators, owing to accident or negligence, or some other cause which we cannot now explain. We are not, however, without the means of ascertaining what will satisfy the requisitions of the treaty. A passport, or a sea-letter, is a well known document, in the usage of maritime commerce, and is defined to be a permission from a neutral state to the master of a ship, to proceed on his proposed voyage, usually containing his name and residence, and the name, property, tonnage

(*a*) For the provisions of this [illegible] Appendix, Note I.

and destination of the ship. Marsh. on Ins. 406. Although it evidences the permission of the state to navigate the seas, yet it does not, therefore, follow, that it must issue directly from the supreme power *of the state; and some authority ought to be shown to support such a position. This erroneous notion, probably, arises from the practice of our own country, which is different from that of all other nations. Previous to the year 1793, no other documents were furnished to the merchant vessels of the United States but the certificate of registry and clearance; but the depredations upon our commerce having commenced with the European war which broke out in that year, a form of sea-letter was devised, and to give it greater effect, was signed by the president. On the 28th of November 1795, a treaty was made with Algiers, by which a passport was to protect our vessels from capture by Algerine cruisers. By the act of the 1st of June 1796, c. 339, congress authorized the secretary of state to prepare a form, which, when approved by the president, should be the form of the passport. Neither the treaty nor the law required the president's signature, but the form prepared was signed by the president, as the sea-letter had been. But this, our peculiar practice, forms no rule of conduct obligatory on others; and will not authorize us to give a more restricted meaning to the term used in a treaty, than the general usage of nations will warrant. The word passport,(*a*) thus used, is taken from the same word, signifying a permission given to individuals to remove from one *place to another, and the documents are analogous. Vattel states, that, "like every other act of supreme cognisance, all safe-conducts or passports flow from the sovereign authority; but the prince may delegate to his officers the power of furnishing them, and with this they are invested, either by express commission, or in consequence of the nature of their functions. A general of an army, from the nature of his post, can grant them; and as they are derived, though mediately, from the same prince, all his generals are bound to respect them." Vattel, *Droit des Gens*, lib. 3, c. 17, § 265, *et seq.* So also, Blackstone speaks of the offence of violating passports, or safe-conducts, granted by the king or his ambassadors." 4 Bl. Com. 68. It is, then, incidental to the commission of an admiral or general, or public minister, to issue these documents of protection for persons or property. Wheat. Capt. 59. By the usage of all commercial countries, they are issued by the superior officers superintending the marine affairs of the kingdom, province, city or colony, where granted, and as representing the sovereign in those places. In France, they have always been issued by the admiral of France, except during the revolution, when they were issued by the minister of marine.(*b*) *In the king of Prussia's ordinance of neutrality, passports and sea-letters are spoken of as issuing from admiralties, maritime colleges, or magistrates of cities.(*c*) And in the celebrated answer to the Prussian

*16]

*17]

*18]

(*a*) "*Passaporte.* Passport. Lettre ou brevet d'un prince ou d'un commandant pour donner la liberté de voyager, d'entrer et de sortir librement de ses terres. *Fides publica.*" Sobrino, Nouv. Dict. Espagnol, Français et Latin.

(*b*) "Passeport. C'est une permission de l'Amiral pour voyager en sureté et être reconnue par tout. C'est sur ce passeport que les bâtimens de commerce naviguent." Encyclop. Meth. art. Marine.

(*c*) 2 Azuni, App'x, No. 9, p. 401, Johnson's Transl.

Exposition des Motifs, it is said, that until the year 1746, the usual document was a certificate from the admiralty that the ship was Prussian. Afterwards, a pass under the royal seal of the regency of Pomerania, at Stettin, was used.(*a*) In our treaty with Holland, the form of a sea-letter is given, which is in the name of the burgomasters and regents of the city, acting under an ordinance of the States-General. In England, such documents are issued by the lords commissioners of the admiralty, as is shown by the papers in the case of *The Nereide*, in this court, 9 Cranch 388: and on foreign stations, they may be issued by the admirals commanding those stations. In the famous Black Book of the Admiralty, we find it laid down, that all intercourse with the enemy is prohibited, unless under a special license from the king or his admiral.(*b*) In the case of *The Ships taken at Genoa*, 4 Rob. 317, Sir W. Scott declares, that Lord Keith, as admiral commanding the expedition, had a right to grant passports to protect the ships sailing under them. And in this court, the licenses issued by Admiral Sawyer, and counter-signed by a *British consul, were determined to be passports, which would protect against British capture. *The Julia*, [*19 8 Cranch 181; *The Aurora*, Ibid. 203; *The Hiram*, Ibid. 444; *The Ariadne*, 2 Wheat. 143. At Gibraltar, these documents are issued in the name of, and signed by, the commissioners of the admiralty at that place. Reeves on Ship. app'x, No. 9, *in fin.* As to the usage of Spain, it appears, by a royal passport, found on board the Isabella, and issued for another ship called the Clara, to be usually issued at home by the secretary of marine, in the king's name; but it also appears by an indorsement on this very paper, that the Spanish commandants of foreign stations, or Apostaderos, may alter such passports, and grant liberty to change the course of the voyage. And they may also issue original passports, in their own name, where there is a deficiency of royal passports, and the vessel has not been previously documented. Such is the passport which was issued to the Isabella in the present case. The power to issue such documents of protection, is necessarily incident to the vast authorities conferred on the Spanish colonial governors; and the case of the British ship of war Eliza, which was compelled to enter the port of Havana in distress, in time of war, and to which the Captain-General, after relieving her wants, gave a passport to protect her from capture, is an example of the exercise of the power in question, highly honorable to the generosity of the Spanish character. Raynal's Hist. tom. 7, p. 455.

The treaty under which *protection is now claimed, was conceived [*20 in the spirit of that benevolent policy so long cherished by the United States, and which Spain has reciprocated. It has for its object to limit the range of warfare on the high seas, and to extend the immunities of the neutral flag. In this spirit, it ought to be construed. A comparison of its provisions with those of other conventions for the same object, will show the correctness of the interpretation for which we contend. In the French treaty of 1778,(*c*) which was the forerunner of the armed neutrality of 1780, a passport or sea-letter in a certain form is provided, to protect the

(*a*) Wheat. Capt. App'x, No. I., p. 334; Report of Sir George Lee, &c. See Appendix, Note II.

(*b*) Wheat. Capt. 159.

(*c*) For the provisions of this treaty, see Appendix, Note III.

ship. But there is nothing from which it can be inferred, that this document is to issue from the supreme executive of the respective nations. To show how subordinate a consideration was that of form, it is deserving of remark, that the form actually annexed to the treaty, omits a circumstance which the text of the treaty, expressly requires—"the place of residence of the master." So that a passport precisely corresponding with the form annexed, was adjudged by the court of K. B., in England, who had not seen the annexed form, to be substantially defective in this respect, and thus to falsify the warranty of neutrality in a policy of insurance. *Baring* v. *Christie*, 5 East 398. So, the treaty with Holland of 1782,(*a*) contains analogous stipulations with those of the Spanish treaty. It gives the form
*21] *of a passport, and of a sea-letter, which are afterwards spoken of as the same, or at least, as equipollent documents. The passport does not show by whom it is to be signed; but it shows, that it may be issued by individuals signing their own names, and affixing their own private seals, and that it was not thought necessary, that it should issue in the name of the chief magistrate; and the sea-letter is unequivocally to be issued by an authority less than the supreme power of the state. The treaty of 1783, with Sweden,(*b*) repeats the same stipulations of the unlimited liberty of commerce, and that free ships should make free goods; and to prevent disputes, a passport, or sea-letter is to be furnished, showing that the vessel belongs to a subject, which is to protect from all further inquiry, and is to be made out in "good form." Here, the form is avowedly left to the exercise of an honest discretion on each side. In the treaty with Prussia, of 1785,(*c*) the same conclusive effect is attributed to the sea-letter or passport, the form of which was to be subsequently concerted by the contracting parties. From these, the treaty with Spain was copied, whose government gloried in being the first among the southern powers of Europe that acceded to the principles of the armed neutrality.(*d*) One of the leading principles
*22] asserted by that confederacy, went to exclude *from the jurisdiction of the belligerent prize courts, whatever was done under the neutral flag, and to render it matter of negotiation between state and state. A national contract made to carry into effect this principle, is to be construed according to its intention and spirit, which meant to rely upon the justice and honor of both nations, that neither would impart to enemy vessels the immunities which were intended to be confined to neutral property. Enlightened views of interest would induce the neutral state not to permit any but its own subjects to avail themselves of the concession; and though every possible abuse might not be prevented, yet cases of fraud would rarely occur, and the evils produced would be far outweighed by the immense importance of the general security of commerce, and the consequent mitigation of the evils of war. The authority of the Spanish government to issue a passport certifying the proprietary interest in the vessels of its own subjects is unquestionable, and the local law and usage must determine its form, and the authority by which it is to be issued.

3. But supposing the passport produced not to be precisely such as the

(*a*) For the provisions of this treaty, see Appendix, Note III.
(*b*) For the provisions of this treaty, see Appendix, Note III.
(*c*) For its provisions, see Appendix, Ibid.
(*d*) 2 Azuni, Appendix, No. 31.

treaty intended, yet it is insisted, that, with the other documents, it furnishes testimony "entirely equivalent," according to the expression used in the 17th article. It is important, to fix the precise meaning of the last clause of that article. The preceding clauses stipulated, that the ship shall have a passport to show that she belongs to the neutral state, and a certificate to show that her cargo *(to whomsoever belonging) is not contraband. [*23 By the 18th article, if she is furnished with these documents, she is to be exempt from all detention or molestation. If not furnished with them, she may be carried in for adjudication, and then must account for the omission, and furnish other testimony, which, considering all the circumstances, shall be of equal value with that omitted. Suppose, the omission satisfactorily accounted for, what is the equivalent testimony required by the treaty? Most certainly, it is that which completely proves the same facts which the omitted documents would have proved. Even a passport, in due form, does not prove that the ship is, in fact, neutral. With whatever formal solemnities it may be clothed, it must issue from the custom-house of the power by whom it is granted. It may be issued improperly; the officers authorized to issue it, may be deceived by fraud and perjury. The possession of the document only proves the fact, that the property of the ship has been decided to be neutral, by the competent authorities, by those to whom the sovereign power of the state has intrusted the examination of the question. Their determinations are made conclusive by the treaty, and import absolute verity, in the same manner as the solemn judgments of the courts of justice. If, then, this document cannot be had, but its absence is accounted for, and other papers are produced, which however inferior in formal solemnity, unequivocally prove such a decision by the competent authority of the neutral state, then, this secondary evidence is completely equivalent to the passport and certificate *provided for in the treaty. [*24 This exposition is the only one consistent with the spirit of the treaty, and is in furtherance of its avowed object, which was, that the flag should protect the property sailing under it, if used by authority of the neutral nation. This exposition is conformable to the English version of the treaty, but is absolutely required by the Spanish; and even if there were any difference of meaning, we are bound, in honor and good faith, to adopt the latter, since Spain has always acted upon it, and has seldom or never thought it necessary to document her ships, according to the literal requisitions of the treaty. Unless this exposition is admitted, the whole of the clause in question is nugatory. By the universal law and usage of nations, every captured vessel is at liberty to account for the want of formal documents. *The Pizarro*, 2 Wheat. 244. It would, therefore, have been superfluous, to insert a provision in the treaty of this effect. Something more must have been intended by the use of terms, which are to be found in no other treaty. In the case now before the court, the omission of the required document is fully accounted for, by the actual state of the mother country at the time, and by the declaration of the colonial governor, when he granted the substituted document. This ought to be considered as equivalent proof, because it is next in dignity, and approaches very nearly to a level with the royal passport itself. It is issued by an officer who is only not king; who would have been charged with the delivery and control of royal passports; who expressly declares, that it was issued in *lieu of such; and certifies every [*25

fact which would have been stated in a royal passport. The other documents are superadded to that which would alone have been required, had the formal requisitions of the treaty been complied with, and are abundantly sufficient to establish the proprietary interest in the ship. They are supported by the depositions of the captured crew, who are required, by the navigation laws of Spain, to be Spanish subjects, and whose national character conforms to this requisition.

4. Again, if there be no passport, such as is required by the treaty, and no such equivalent testimony as the treaty provides, still, the claim to the ship is established by evidence such as the law of nations require to establish it; and if the property of the ship is shown to be Spanish, that is sufficient to protect the cargo to whomsoever belonging. *The Pizarro*, 2 Wheat. 227. She is furnished with all the usual documents, and none are of a suspicious or irregular character. They are supported by the testimony of all the witnesses, except one; and he was improperly examined, not being produced in his regular order, but kept back, until other witnesses had been examined, contrary to the well-known rule of the prize court, which requires the captors to introduce all the witnesses in succession. *The Speculation*, 2 Rob. 242; *The William & Mary*, 4 Ibid. 312. Even if the proprietary interest in the cargo should be thought doubtful, that being included in the same claim with the ship, will not necessarily involve both in condemnation; for an attempt *to conceal enemy's property only affects the right to further proof. *The Madonna del Burso*, 4 Rob. 138. But we insist, that further proof is not required in this case; and if the national character of the ship be established by the original evidence, the conventional law entitles us to restitution of the cargo, as a matter of course. *The Pizarro*, 2 Wheat. 227.

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5. Lastly, supposing the original evidence in the cause insufficient to entitle the claimant to restitution, either according to the provisions of the traaty, or by the general law of nations, it is insisted, that all the difficulties of the case are removed by the further proof produced, which establishes the proprietary interest of both ship and cargo as claimed.

Wheaton, for the captors and respondents.—1. Answered the objection taken by the claimant's counsel to the validity of the commission under which the capture was made. This is exclusively a question between the captors and the United States. The claimant has no *persona standi in judicio*, to assert the rights of the United States, and is it not until after the determination of the principal question of prize or no prize, that the claim of the government can be interposed. *The Dos Hermanos*, 2 Wheat. 94. This is not only our own practice, but is the prize law of France and England, and of the whole maritime world. 2 Bro. Civ. & Adm. Law 524; 2 Wooddes. 432; 3 Bulst. 27; 4 Inst. 152, 154; Zouch. Adm. Juris. c. 4, p. 101; Comyn's Dig., tit. Admiralty, E, 3; *The Georgiana*, 1 Dodson 397; *The Diligentia*, Ibid. 403; Valin, Com. lib. 3, tit. 9, *des Prises*, art. 1; Pothier, *de Propriété*, No. 93; Casaregis, Disc. 24; Consolato del Mare, c. 287. Even, *if the present capture be a *droit* of admiralty, as taken by non-commissioned captors, that will not invalidate the capture, if it be of enemy's property. This is to be determined, after a general decree of condemnation is entered, and before a final distribution of the prize pro-

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ceeds. If the government shall interpose a claim, at that stage of the proceedings, it will then be time enough to consider a question in which the foreign claimant has no interest or right to interfere.

2. The vessel and cargo in this case are liable to condemnation as prize of war, having left the Havana with a false destination. The claim sets up an alternative destination, to an enemy's or a neutral port; but it is contradicted by the documentary evidence and the depositions of the captured persons. This false destination is not excusable, on the ground of the necessity of deceiving an enemy, by clearing out for a neutral port. Spain was at that time at peace with all the world, except her revolted colonies; and both London and Hamburg were equally neutral ports, in respect to the South American cruisers. A false destination, under such circumstances, is damnatory, if the case be so infirm as to require further proof; because it could only be intended to conceal enemy interests, and if alternative, it ought to appear to be such on the face of the papers, in order that captors may not be misled. *The Juffrouw Anna*, 1 Rob. 125; *The Welvaart*, Ibid. 122; *The Nancy*, 3 Rob. 125; *The Mars*, 6 Ibid. 79, 86; *The Vrouw Hermina*, 1 Ibid. 164.

*3. The proofs of proprietary interest, upon the original evidence, are not such as to entitle the claimant to restitution, without further proof. As to the ship, there is no doubt, that if *bonâ fide* Spanish property, and documented according to the treaty, she must not only be restored, but the cargo also must be included in the restitution, even if proved to be enemy's property. But it is insisted, that the treaty does not extend to a fraudulent use of the Spanish flag, to cover enemy's property in the ship as well as the cargo. *The Minerva*, 1 Marriott 235; *The Citade de Lisboa*, 6 Rob. 358; *The Eendraught*, Ibid. note *a*; *The Erstern*, 2 Dall. 36. The passport, even supposing it to be such as the treaty requires, is falsified by the muster-roll and other documents; and it was not produced, as the treaty requires, to the captors, but found on board, after the capture. Fraud will vitiate even a judgment, and the most solemn instruments and assurances. This is a principle of universal law, and it would be indecent, to suppose that Spain countenances such an improper use of her flag and pass. Is there, then, that equivalent testimony which the treaty substitutes for the formal passports? The law very properly requires the bill of sale to be on board, where the vessel is transferred from the original proprietor. *The Welvaart*, 1 Rob. 122. Even Hubner, the great champion of neutral rights, admits this to be the rule. De la Sais. des Battim. Neutr. part 1, c. 3, § 10. But here, the vessel is not Spanish built; yet no bill of sale is found on *board, and the circumstances strongly point to the previous existence of enemy interests in the vessel, which, it appears, came from New Providence. The purchase of enemy's vessels by neutrals is entirely prohibited by the ordinances of some countries; and our law regards it as suspicious. *The Bernon*, 1 Rob. 102; *The Sechs Gedchwistern*, Ibid. 100; *The Argo*, Ibid. 153. If still continued to be employed in the enemy's trade, or under the control of an enemy, this is deemed a badge of fraud, and conclusive evidence that there has been no *bonâ fide* transfer. *The Jemmy*, 4 Rob. 31; *The Omnibus*, 6 Ibid. 71. The ship then is not documented *bonâ fide*, as the treaty requires, nor is the substituted proof equivalent to that for which it is substituted. The ship, therefore, will not protect the

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cargo, nor is the latter so documented as to protect itself, or avoid being involved in the same fate with the vessel. To be sure, there are the usual formal documents, and so there are in every case. But they contradict each other; and being fraudulently blended in the same false claim with the ship, they must be included in the same condemnation. Both being alleged to belong to the same claimant, and he having attempted to assert a false claim to the ship, the entire claim must be rejected as a penalty for his fraudulent conduct. *The St. Nicholas*, 1 Wheat. 417; *The Fortuna*, 3 Ibid. 236.

4. But the passport in this case, even supposing it not to have been fraudulently obtained and used, is not such as the treaty requires, being issued by an authority incompetent to grant such a document of *protection. It is insisted, that nothing less than the solemnly pledged faith of the supreme power of the neutral state, to the verity of the facts stated in the passport, can possibly satisfy the belligerent. The terms used in the treaty are "sea-letters *or* passports." One of the contracting parties might understand it as intending a document in the nature of a permanent muniment of the title to the ship. Our laws recognise no other such document, than one signed by the president. The presumption, therefore, is, that our vessels were to be furnished with a sea-letter thus signed, and the Spanish vessels, with a royal passport, signed by the king. The cases cited on the other side, to show that such a document of protection may be granted by an authority inferior to the supreme power of the state, are not in point. In the British license cases, although this court condemned our vessels sailing under them, yet the British prize courts denied the authority of their admirals and consuls to issue them, and condemned the vessels taken by British cruisers, although sailing under these licenses. *The Hope*, 1 Dods. 226; Ibid. app'x, D. All the other cases cited are of passports issued by the lord high admirals of England or France, acting as the immediate delegates of the royal prerogative, and as the ministers of the crown. There is no doubt, that admirals and generals, commanding fleets or armies, have the power of issuing passports for the temporary protection of persons or property, within the limits of their command. But this arises from the necessity of the case, and is incidental to the performance of *their official duties. But it is not incidental to any official duty of the governer and captain-general of the Island of Cuba, that he should have the power of naturalizing foreign ships, giving them all the privileges of Spanish-built vessels, and grant passports to protect them against belligerent scrutiny: *non ei rei præponitur*. It is highly improbable, that the government of this country would have agreed to a stipulation so improvident, under which the whole navigation of our enemy might be screened from capture, by a mere fictitious adoption, fraudulently or corruptly obtained for this purpose. The *form* of this important document being omitted, either from accident or design, there is the more necessity of looking to the *substance* of the contract; since, if the form had been annexed, there is no doubt, that it would have required the highest authority of the state to grant a document so conclusive. The passport or sea-letter provided by this treaty is not a mere ordinary license or safe-conduct, given by a general or admiral, for a temporary purpose, and within the limits of his command. It is the supreme power of the neutral state, solemnly pledging itself to the belliger-

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ent, that the property of the ship is truly and *bonâ fide* neutral. The doctrine contended for on the part of the claimant, would go the length of entirely abolishing maritime captures; since the passport may be issued by any authority, however inferior, and however remote his functions may be from such a duty. The treaty provides, that the certificates which are required relative to the cargo, shall be issued by the officer of the place *whence the vessel sails, and the same proviso would have been made as to the [*32 *passport*, had it been intended to intrust the local magistrates with the power of granting it. Neither does an examination of the forms of similar documents, annexed to other treaties, containing the same stipulation, that free ships shall make free goods, justify the inference, that they may be issued by any authority less than the highest. So also, the celebrated convention of 1801, between Great Britian and Russia, though it does not contain such a stipulation, but on the contrary, snbjects enemy's property in neutral vessels to capture, yet it provides for similar documents of protection, and in the *formula* annexed, it is stated, that they are "to be delivered in the respective admiralties of the two high contracting parties."(*a*) But the question has already been determined in this court, in the case of *The Pizarro*, 2 Wheat. 244. In that case, the court say, "it is certainly true, that the vessel was not furnished with such a sea-letter, &c., as are described in the 17th article." But she had on board the proceedings under which she was naturalized in East Florida, and a certificate from the Spanish consul at Liverpool, certifying, that "Captain Don Antonio Martinez, commanding the Spanish ship called the Pizarro, of the burden of 273 tons, registered at the port of St. Augustine de la Florida, which came to this port, from the Island of Amelia, with a cargo, now sails for the port of Corunna, in *Spain." Here, [*33 then, was a certificate, stating the name, burden and property of the ship, and the name of the master, and issued by an authority as competent as the governor of Cuba. Yet the court held it not to be a compliance with the terms of the treaty, and required further proof of the proprietary interest.

5. Supposing, however, this vessel and cargo to be documented as the treaty requires, it is insisted, that they are liable to condemnation for sailing under the protection of enemy's convoy. It is true, that the Isabella parted company with the convoying ship, before the capture; but it was a mere temporary separation, the latter having gone in pursuit of one of our privateers. Although the court has determined, in the cases of *The Nereide*, 9 Cranch 388, and *The Atalanta*, 3 Wheat. 409, that a neutral may lawfully put his goods on board an armed enemy's vessel, yet it has not determined that he may put his vessel and goods under convoy of the enemy's fleet. The distinction between the two classes of cases is stated by one of the learned judges of this court, in delivering his opinion in *The Atalanta*:(*b*) and the Lords of Appeal, in England, have held the offence of sailing under the protection of enemy's convoy, to be a conclusive cause of condemnation. *The Sampson*, cited by STORY, J., in note to *The Nereide*, 9 Cranch 442. So also, where certain merchant ships, belonging to the Hanse towns, had [*34 put themselves under *the protection of Swedish convoy, the latter

(*a*) For the provisions of this treaty, see Appendix, Note IV.

(*b*) *Per* Mr. Justice Johnson, 3 Wheat. 423.

having assumed a hostile character, for the purpose of resisting the right of search, they were equally held liable to confiscation. *The Elsebe*, 5 Rob. 173. Such also is the law of Denmark, a state that has always professed to maintain the mildest principles of prize law. 4 Hall's L. J. 267, Ord. of 1810. In his correspondence with the Danish government, Mr. Erving, our minister, admits the extreme difficulty of upholding the contrary doctrine; and only seeks to escape from it, by contending that the rule could not extend to vessels forced into the convoy, or accidently involved in the enemy's fleet: and this may readily be admitted, without at all weakening the force of the general rule.

6. This is an aggravated case of spoliation and concealment of papers. Were this Spaniard to be tried by his own law, he would be instantly condemned. By the law of the whole world, except that of the United States and Great Britain, spoliation of papers is *per se* a cause of confiscation: and by our law, it is all but damnatory. If the spoliation is unexplained, or the explanation is unsatisfactory; if the cause labors under heavy suspicions or gross prevarications, further proof is denied, and condemnation inevitably follows. *The Pizarro*, 2 Wheat. 241; *The Rising Sun*, 2 Rob. 106; *The Hunter*, 1 Dods. 486. And it is a relaxation of the rules of the prize court, to allow further proof, even where there has been a mere concealment of
*35] *papers. *The Fortuna*, 3 Wheat. 245. But here are both suppression and spoliation; and a case which escapes from this imputation (to use the emphatic language of Sir W. SCOTT), "is saved as by fire." *The Hunter*, 1 Dods. 4. In the present case, the spoliation and concealment are not only unexplained, but inflame the other circumstances of suspicion. The acts of the supercargo, in this respect, bind the owners, because he is their confidential agent; and the ship-owner is always bound by the misconduct of the master in all respects. *The Rising Sun*, 2 Rob. 108; *The Vrow Judith*, 1 Ibid. 150; *The Adonis*, 5 Ibid. 256; *The Imina*, 3 Ibid. 176; *The Mars*, 6 Ibid. 792; Valin, Com. 253; 1 Emerigon, *des Assur.* 449; So also, the act of the master binds the owner of the cargo, if he is also the owner of the ship (*The Rosalie and Betty*, 2 Rob. 243; *The Alexander*, 4 Ibid. 93; *The Elsebe*, 5 Ibid. 173); and according to a decision of the Lords of Appeal, whether he is owner of the ship or not. *The Franklin*, 2 Acton 106. The act of the agent or consignee of the cargo is conclusive upon the owner of the cargo. *The St. Nicholas*, 1 Wheat. 417; *The Vrow Judith*, 1 Rob. 150; *The Baltic*, 1 Acton 14; 2 Binn. 308; 15 East 78. And if the case be such as to require further proof, it is to be granted or denied, under the Spanish treaty, precisely in the same circumstances in which it would be granted or denied by the pre-existing law of nations. *The Pizarro*, 2
*36] Wheat. 242. But by the general law, this is a case in *which it would be refused, and therefore, it is an exception to the immunity secured by the treaty.

7. Finally, even if further proof were admissible, the further proof produced does not establish the proprietary interest in a satisfactory manner. It is not incumbent on the captors to show to whom the property really belongs. It is sufficient, that it does not belong as claimed. *The Odin*, 1 Rob. 227; *The Neptunus*, 4 Ibid. 68.

The *Attorney-General*, on the same side, insisted, that the case was not

within the protection of the treaty, because the vessel was not documented according to its provisions, and the only paper which could possibly answer to the description of the sea-letter or passport, required by the 17th article, was concealed, and not shown by the master to the captors, as provided by the 18th; so that they had a right to detain and send in the vessel for adjudication. Being thus subjected to the ordinary jurisdiction of the prize court, she is to be tried by the ordinary rules of the prize law, independent of the treaty. This court has already determined, in another case, that the equivalent testimony, required by the 17th article, is to be such as the prize court would require, independent of the stipulations of the treaty. *The Pizarro*, 2 Wheat. 242. No other testimony could give the "legal satisfaction" which the treaty demands. In a case requiring further proof, the equivalent testimony is that further proof: and the grant or denial of this *must rest upon the ordinary rules of the court. Ibid. But here the claimant has forfeited his right to further proof, by his own aggravated misconduct, in concealing the destination, and spoliating and suppressing the ship's papers, which it was his duty, both by the treaty and the general law of nations, to exhibit to the captors, voluntarily and fairly. But supposing the passport to have been delivered to the captors, at the time of the seizure, as it ought to have been, and suppose the usage of Spain to supply the omission of the form being annexed to the treaty, still, the document produced is not such a passport as that usage requires. This is shown by the very terms of the document produced, which state it to have been issued "for want of royal passports." It is said, that this is justified by the local usages of the colony; but we are not bound to know those usages, nor to admit that this governor had the authority to substitute his passport for one signed by the king. The document required by the treaty, then, not being found on board, the parties are to give "legal satisfaction of their property, by testimony entirely equivalent." This testimony is to be, according to the course of the prize court, the papers found on board, and the examinations *in præparatorio*. But these papers and depositions, so far from satisfying the conscience of the court, increase the suspicions excited by the want of the documents required by the treaty; documents so easily procured, where the property is really Spanish, and the vessel *fairly entitled to the privileges of a Spanish ship, that it is incredible, any such vessel should want them. The *onus probandi* is on the claimant, in such a case, under the treaty, precisely as it would be by the general law of nations, independent of the special provisions of the treaty; and the question of proprietary interest is to be determined, just as that question would be in any other case of prize. The investigation in the prize court is substituted in lieu of the investigation by the captors at sea, which last was to be entirely concluded by the treaty documents, if the ship was furnished with them; if not, she was liable to be brought in to ascertain the character of the ship, which, if adjudged to be Spanish, the same consequence of protection to the cargo will follow, as if the ship had been regularly documented according to the treaty. It is not the possession of papers equivalent, in formal effect, to those required by the treaty, which will protect her from further inquiry, but she must have papers which will produce the effect of giving satisfactory evidence of the proprietary interest, according to the ordinary rules of the prize court. If the substituted documents were fraud-

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ulently obtained and used, would that be satisfactory evidence? The spirit and intention of a treaty is always to be regarded in its interpretation. Vattel, *Droit des Gens*, lib. 2, c. 17, §§ 268–70, 274–82. Every object of such a treaty would be entirely defeated, by permitting an enemy to avail himself of provisions contained in it, and intended for the exclusive benefit
*39] of a friend; and even if a *Spanish subject, by perpetrating a fraud upon his own government, lends the protection of its flag to a foreigner, that Spaniard becomes himself an enemy, and cannot justly complain, if he suffers the fate of an enemy. It is no disrespect to Spain, or disregard of her national rights, to refuse the benefit of her flag and pass, where they have been obtained by practising an imposition upon her officers. She can claim no greater respect for their acts, than is conceded to the judgments of the highest courts of justice. But even these are vitiated by fraud, according to the law of every country. Great Britain so understands the effect of a similar treaty stipulation. In the case of *The Citade de Lisboa*, 6 Rob. 358, which was determined under the British treaty with Portugal, containing the principle of free ships, free goods, though the vessel had the Portuguese flag and pass, she was condemned, because a box of papers was found on board, falsifying the claim, and showing the property to be enemy's; and to give more solemnity to the judgment of the court, the Portuguese consul was called in to witness it, and admonished to advise his government, to be more vigilant over the conduct of its officers in this respect. So also, our own court of appeals in prize causes, during the war of the revolution, held the general maxim of free ships, free goods, which had been temporarily recognised in an ordinance of congress, not to extend to a case of fraudulent combination between the enemy and neutrals, to defeat the belligerent rights of the United States and her ally. *Darby* v.
*40] *The Ersteru*, 2 Dall. 35. In that case, the court observed, *that congress had not said, that a violated neutrality should protect; and the mention of some exceptions to the general immunity (such as contraband, &c.) does not exclude others, equally flagrant, though not mentioned. So, in this case, the exceptions of blockade and contraband, do not exclude other cases of unneutral conduct; and some implied exceptions there must be, or how could the court engraft the exceptions of the property of citizens of the United States, trading with the enemy, or of Spanish subjects, not actually domiciled within the dominions of Spain, both of which cases are excluded from the general operation of the treaty, according to the opinion of this court in *The Pizarro*, 2 Wheat. 24–56.

If, then, the case is not within the protection of the treaty, does either the original evidence, or the further proof, satisfy the court of the property of the ship and cargo being as claimed? This inquiry cannot be limited to the ship, because if that was really Spanish, it would be sufficient to protect the cargo also: but both are included in the same claim, which is given for the same person; and if the claim for the cargo be false, that will also affect the claim to the ship. If the ship was Spanish property, why seek to show that the cargo was Spanish also? The proprietary interest in the ship is supposed to have been acquired, under a judicial sale upon a bottomry-bond. But the previous history of the ship is not satisfactorily explained, and so far
*41] as it is given, points to an enemy origin: and the proceedings under which the *sale was had, are manifestly collusive and fraudulent.

The claim to the cargo is also supported by mere formal documents, unsupported by the oaths of witnesses, and contradicted by the *evidentia rei*. The spoliation and concealment of the papers are not satisfactorily explained. Such explanation could only proceed upon the ground of the papers being innocent in themselves, and that they were destroyed from a necessity unconnected with an attempt to evade the right of search. But as to the papers thrown overboard, all that we know of their character is, that they came from the counting-house of the claimant, who ordered them to be thrown overboard, in case of capture; and as to the supposed necessity of destroying them, the only reason alleged is the fear of South American cruisers. This could not be the true reason, since the papers retained on board would equally show the Spanish ownership of the ship and cargo, which it is now insisted they are sufficient to establish. And as to the papers mutilated and concealed, a careful inspection of them will satisfy the court, that they point to the English origin of the adventure, and to English interests in its results. The learned counsel concluded by a very minute and able analysis of the proofs of proprietary interest.

Harper, for the claimant and appellant, in reply.—1. Insisted, that the destination of the vessel, in this case, was not a false destination; and that even a false destination is not a substantive cause of condemnation. *A false destination is an unlawful destination concealed: but here the alternative destination did, in fact, appear on the face of the [*42 papers, and both London and Hamburg were equally lawful ports for Spanish vessels to trade with. In the cases of *The Juffrouw Anna*, 1 Rob. 125, and *The Welvaart*, Ibid. 122, the false destination was combined with other circumstances of illegal conduct or suspicion, and the condemnation did not proceed upon that ground alone. In the case of *The Nancy*, 3 Rob. 125, it was also connected with the offence of carrying contraband goods on the outward voyage. So, the case of *The Mars*, 6 Rob. 79, was that of engaging in the colonial trade of the enemy, attempted to be concealed by a false destination; and further proof being necessary, it was refused, on account of those circumstances of fraud and illegality.

2. Nor ought the present case to be affected by the fact of the vessel having set sail from the Havana, under convoy of a British frigate. This protection was necessary against South American cruisers, to whom Spanish property would have been good prize. But the Isabella intended to leave her convoy, off the coast of Florida, and such an intention admits of a *locus pœnitentiæ* which was availed of: for she had, in fact, left the fleet, before the capture. The case of the Hanse vessels, taken under Swedish convoy, was very different from this (*The Esebe*, 5 Rob. 173). The Swedish *armed vessels prepared to resist, and only yielded to the terror of a [*43 superior force; and the Hanse vessels were affected by what was considered as an actual resistance of the convoy, having associated themselves under its protection.

3. As to the spoliation and concealment of papers, the facts do not warrant the inference of its having been done for unlawful purposes. There is no evidence whatever, that the papers thrown overboard were connected with this transaction. The concealed papers were innocent; and were even essential to show the Spanish interest in the cargo: and as to the mutilation, if

practised at all, it must have been by the captors themselves, as they alone had an interest in defacing papers which were material to the claimant's proofs of property. The fact as to the papers thrown overboard was frankly and freely disclosed by the parties who alone had any knowledge of it, and a satisfactory reason for their conduct assigned by them, on their first examination. Even supposing, however, that the fact of the spoliation and suppression of papers would, under other circumstances, exclude the claimant from the benefit of further proof, it is now too late for the captors to object, an order for further proof having been granted in the court below, without any objection on their part. *The Pizarro*, 2 Wheat. 227, 240.

4. The passport in this case is sufficient to establish the national character of the ship, so as to protect both her and the cargo under the treaty with *44] *Spain. It is one of a series of passports issued by the governor of the island of Cuba; is numbered 94, showing that many more of the same kind had been issued; and the words "for want of royal passports," are printed, which circumstance shows that it was an established *formula*. The circumstances of the Spanish nation, at that period, when Ferdinand had been just restored to the throne, sufficiently explain the cause of the defect of passports, with the king's sign-manual. The very act of exercising such an authority on the part of the colonial governor, is strong *primâ facie* evidence of his possessing the power; and until rebutted by some contrary proof, must be considered as conclusive, that such is the usage of Spain. There is no substantial difference between such a document and royal passports; since the latter must be issued in blank, and sent to the different ports throughout the extent of the Spanish dominions, and the distribution of them intrusted to subordinate officers, so that the same frauds may be perpetrated as are imagined in the present instance. What better security have we, that the royal passport itself will not be employed to protect the trade of our enemy? It may be safely admitted, that you may inquire so far as to ascertain that the passport is not forged, or obtained by criminal means, or fraudulently applied to a vessel, for which it was not issued: but if none of these circumstances occur, and the passport regularly issues, from an authority which is competent to grant it, according to the local usages of the neutral country, the treaty makes it conclusive, on the ques- *45] tion of *property. In this case, the passport was granted, under a judicial decree of the Consulado, at the Havana, proceeding according to the course of the court of admiralty, to enforce a bottomry-bond, given for repairs to the ship. The sentences of foreign tribunals, having jurisdiction of the subject-matter, and proceeding *in rem*, are considered as conclusive, by the law of this, and every other country, wherever the title to the thing comes incidentally or directly in controversy. Here, it is the very question in issue before the court; and the decision of the Spanish tribunal not only warranted the governor of Cuba in granting the passport, but even if he had not issued it, would bind this court to consider the property as Spanish. Therefore, admitting that the captors had a right to bring in this vessel for adjudication, because she had not the passport required by the treaty, or because it was not exhibited to them, at the time of the capture, still, the equivalent proof is more than sufficient to supply the want of a passport, in any form that can be conceived; because, it shows, that the ship was entitled to every document which would prove her to be a Spanish

ship, the tribunal of the Consulado having adjudged her to be Spanish property. The captors may possibly be exempt from costs and damages; but it does not, therefore, follow, that the case is taken entirely out of the special provisions of the treaty, and left at large, to be determined under the law of nations. The object of the treaty was to provide, that neutral vessels should protect goods, to whomsoever belonging, with the exception of contraband only. The *passport was to be conclusive of the neutrality of the ship, and the certificate was to show, that the cargo was not [*46 contraband. If these documents are wanting, then the property of the ship is to be established by equivalent testimony; and that being shown to be neutral, will protect the cargo, even if enemy's property, unless, indeed, it consist of contraband articles. The "equivalent testimony" required, must mean, that other documents shall be produced which will prove precisely the same facts that were intended to be proved by the passport and certificate; and not that sort of evidence which the technical rules of the prize court demand, in a case requiring further proof. Doubtless, the intention of the contracting parties is to be regarded, in construing treaties, as it is in the interpretation of all other instruments; but that intention is to be gathered from the words they use. Although there are many treaties consecrating the maxim, that free ships shall make free goods, there is no other example of a treaty, stipulating what should be conclusive evidence of the freedom of the ship. The parties to this treaty intended to exclude the jurisdiction of the prize courts of the belligerent, as far as possible, by forbidding the detention of vessels having the required documents, and where they were carried in for adjudication, for want of these documents, limiting the inquiry of the prize courts to such testimony as should be equivalent. All the cases cited on the other side, of the supposed exception to the general immunity, are cases arising under treaties or ordinances, merely recognising the principle, that free *ships should make free goods, without providing any rule of evidence to establish the national character of [*47 the ship, and leaving that question to be determined by the general law of nations. But here, the conventional law adopts a new rule of evidence, from which the court is not at liberty to depart.

The learned counsel also argued the question of proprietary interest, with great minuteness and ability.

March 4th, 1820. THE COURT directed the cause to be re-argued, upon the point as to the form and effect of the passport.

The *Attorney-General*, for the captors and respondents, insisted, that the form of passport to which an effect so important was attributed, not having been annexed to the original treaty, by the contracting parties, could not now be supplied by the judicial tribunals of either. Such an attempt would be an encroachment on the treaty-making power, which, in our government, is exclusively confided to the president and senate. The office of this court is to construe, not to make or amend treaties. The treaty (art. 17) provides, that "the ships and vessels belonging to the subjects or people of the other party, must be furnished with sea-letters or passports, expressing the name, property and bulk of the ship, as also the name and place of habitation of the master of the said ship, that it may appear thereby that the ship really

and truly belongs to the subjects of one of the parties, which passport shall be made out and granted according to the form annexed to this treaty." *48] These particulars were required to be inserted, for *the purpose of identifying the vessel to which the passport was intended to apply, and to satisfy the other contracting party, that she is really entitled to the immunities stipulated in the treaty. The passport, in the present case, was either intended to certify that the ship was Captain Cacho's, or not. The words are, "Captain ——— Cacho, with his Spanish ship called," &c. If Cacho was meant to be certified to be the owner, the claim does not conform to it. He expressly swears that it is not his, but that it belongs exclusively to Munos, who claims. Nobody else can have restitution but the actual claimant, and he is not certified in the passport to be the owner. But the term "his Spanish ship," is evidently a mere figurative expression, and means nothing more than the ship of which he is master. What then is the import of the term "Spanish ship?" A certificate that a ship of a certain name and bulk, and master, is a Spanish ship, is not a certificate that it is Spanish property, or in other words, the property of Spanish subjects, which is alone intended to be protected by the express terms of the article. A vessel may be a Spanish ship, by adoption, by having a license to trade with the Indies, without ceasing to be the property of foreigners, or becoming the property of Spanish subjects. It is not sufficient, to certify the national character of the ship merely. There must be a certificate, that it is the individual property of particular subjects of Spain, for to such alone does the protection of the treaty extend. The treaty being left imperfect, in omitting to annex *49] the form of *passport, it is very questionable, whether the stipulation, as to its effect as evidence, is not wholly void. But admitting that the court can supply the form, how is it to be done? Two modes may be selected. First, to take the literal words of the treaty; and then, the passport should have stated the ship to be the property of Munos, the claimant: or secondly, the form may be supplied, by referring to other treaties similar in their nature. In the form of passport annexed to the French treaties of 1778 and 1801, the master is required to swear, that "the ship belongs to one or more of the subjects of ———. The act whereof shall be put at the end of these presents," &c. No form of the oath which is to be thus appended is given; but the Dutch treaty of 1782 shows what the form of the oath would probably be: "C. D. of ———, personally appeared before us, and declared by solemn oath, that the ship or vessel called, &c., does rightfully and properly belong to him or them only," &c. The terms of these treaties are the same with the Spanish treaty, and require "the name, the *property*, and the burden of the vessel," to be expressed. It is not property in the abstract, the national character merely, acquired by a fictitious adoption into the navigation of Spain; but the individual proprietary interest of some Spanish domiciled subject, that is to be protected.

Harper, contra, contended, that the treaty merely required the nationa character of the property, and not its individual ownership, to be expressed *50] in the passport. There can be no doubt, that this passport *must be according to the regular Spanish form, because both this and the royal passport for the Clara, which was also found on board, have the same expression, viz., "his Spanish ship." This is precisely equivalent to a certifi-

cate, that the ship belongs to Spanish subjects. A warranty, in a policy of insurance, that a ship is an American ship, is a warranty that she is the property of citizens of the United States. The form of passport which was intended to have been annexed, having been omitted, good faith requires that it should be supplied by construction, since it must be concluded that the parties intended to waive it. A construction has been given to the stipulation, by the usage of the two countries, which is sufficient for all practical purposes. What good purpose would be answered, by inserting the name of the owner? The court could not inquire even whether such a person existed, much less as to his national character or domicil. The conclusive effect attributed to the passport, would prevent any such extrinsic investigation, and therefore, a fictitious name might be inserted, which would satisfy all the requisites of the treaty. So that a general certificate of the national character of the property is as efficacious, as would be a certificate that it was the property of some particular person.

March 15th, 1820. The cause was again argued, upon the application of the executive government, to the court, on the question of the construction of the Spanish treaty, and the form and effect of the Spanish passports.

*Pinkney, for the captors and respondents, stated four points for the consideration of the court. [*51

1st. That the passport produced in this case, was not within the terms of the treaty, because it was obtained by fraud.

2d. That it was not within the treaty, because not issued by the Spanish sovereign, or his known authorized substitute.

3d. That it was not within the same, because the only article which professes to provide for it, is incomplete and inofficious, the form never having been annexed, according to the terms of the article.

4th. Because the passport issued for this ship, is not conformable either with the terms or the substance of the article; since it does not state that the ship is the property of a Spanish subject, nor name any Spanish subject as the owner.

This treaty is, unquestionably, to be interpreted by a just regard to the public faith, but only so far as the public faith is actually pledged by it. The spirit which animated the parties to the armed neutrality is to be regarded; but it must be remembered, that the celebrated confederacy which has received that name, was intended to introduce new rules, to the disparagement and repeal of those which then existed, and in derogation of the ancient law of nations. The intention of the parties to the Spanish treaty, is also to be taken into view. But this intention is to be collected from the language they have used; if that be clear and plain, there is no room for interpretation; but if ambiguous in itself, then the intention may be fairly collected from the *object and circumstances of the stipulation in question. In a word, the treaty is to be executed as it is, and no new [*52 treaty to be made by the labor of exposition.

1. The object of the stipulation is expressed in the article to be "the ships and vessels belonging to the subjects or people of the other party," &c. This, necessarily, excludes all other ships or vessels. Consequently, it cannot be applied to vessels, which are not really those of Spanish sub-

jects, but only fraudulently represented to be such. It is a principle, not only of the common law, but of universal jurisprudence, that fraud vitiates every act, whether public or private, contracts, deeds and judgments, are all affected by it, even as to *bonâ fide* purchasers. No record, however solemn, estops an allegation of fraud. Judgments of courts of competent jurisdiction import absolute verity, wherever they are brought in question, but if obtained by fraud, they are set aside, either in the same or any other tribunal; and a person affected by the fraud may show it and avoid the judgment though not a party to the suit. Thus, a stranger may avoid a recovery in a real action, if covinous or fraudulent, and he is prejudiced by it. These analogies of the municipal law are applicable to similar cases arising under the law of nations. The comity which is due to foreign states does not require us to respect the acts of their administrative or judicial officers, when they are contaminated with fraud, and still less, where this fraud has deceived those very officers, and induced them to issue Spanish papers to a
*53] British *ship. In such a case, even if a royal passport had been issued, we should have a right to say, in the language of the common law, "the king has been deceived in his grant." A repetition of such transactions as the present case discloses, would bring the entire treaty into jeopardy. The honor and interest of both nations equally require that they should be repressed. The only mode of preserving the amicable relations between the two powers, is by judicial interposition, preventing the effect of such violations of the spirit of the treaty, before they grow too mighty to be controlled by diplomatic remonstrance. Make these frauds successful, and encourage them by your decisions, and such violations will be frequent. On the other hand, by arresting them *in limine*, the presumed and declared purposes of the contracting parties will be fulfilled, and dissensions and hostilities prevented.

That there must be some implied exceptions to the conclusive effect attributed to the passport, by the letter of the treaty, is manifest. Such would be the case of a royal passport, signed in blank, obtained by corruption of the officer in whose custody it was, and filled up fraudlently, applied to a vessel not entitled to the privilege. Here is a passport *de facto*, with all the solemnities upon its face, yet certainly examinable in this particular; and if shown by extrinsic evidence to be thus fraudulently obtained and used, not only would the captors be excused from costs and damages for detaining the vessel, but she must be condemned, under the ordinary rules of prize law.
*54] So that all the mischiefs of stopping vessels at sea may arise, *notwithstanding this stipulation; and, indeed, all such attempts to limit the range of maritime warfare will be found, in practice, to be quite illusory, unless, indeed, the capture of private property be entirely prohibited; and even then, contraband and breach of blockade must be excepted. A passport, as in the present case, actually filled up by the proper authority, and intended for the ship for which it is actually used, if issued upon false suggestions, is no more a legal passport than the one just proposed. The will of the grantor does not concur. The fraud makes it no passport.

But it is objected, that by the 18th article, the passport, if in due form, is to be conclusive, when shown at sea, and the belligerent cannot detain the vessel, after this document is exhibited. If the precise letter of the treaty be adhered to, this objection will be found to be groundless. "If the ships

of the said subjects, &c., shall be met with," &c., "the master or commander of such ship shall exhibit his passports concerning the property of the ship, made out according to the form inserted in this present treaty," &c. Suppose, a ship exhibiting such a passport, should be proved by other evidence found on board, not to be a "ship of the said subjects;" then the letter of the treaty does not apply to her. If not a "ship of the said subjects," her passport is no absolute and conclusive protection. On the other hand, if the spirit of the treaty be regarded, the result is precisely the same. The intention of the contracting parties was, to protect Spanish ships, and not enemy ships; to give effect to the *maxim of free ships, free goods; not to make enemy ships protect enemy goods. Even admitting, that the [*55 contracting parties meant to confide in the good faith of each other, that they would grant their respective passports only to their own vessels; still, it is not to be supposed, that they meant to confide in the good faith of their enemies, that these last would not attempt to deceive their officers. It would, indeed, be an imputation on their good faith, to suppose, that they wished such frauds to be successful. Every such national stipulation must receive a fair and reasonable construction. One which subverts its object, which encourages fraud and perjury, and makes the stipulation destructive to the rights of both parties, and benefits their enemies only, cannot be just. So pernicious a construction destroys all the advantages of the treaty. Look at its consequences to our belligerent rights. The passport, however obtained, and attended with whatever concomitant proof of fraud and falsehood, is supposed to be incontrovertible. However clumsy and barefaced the imposition may be, still it must prevail; and while our enemy is warring upon us in all directions, and by every means, we must suffer his trade to pass unmolested, in his own ships, wearing a Spanish veil, which disguises nothing, and only compels us to affect blindness. On the other side, the evils flowing from the interpretation we insist upon, amount to nothing. The passport is still protecting evidence to all reasonable and honest purposes. The captor who disregards it, does so at the *peril of exemplary costs and [*56 damages, to be inflicted in the discretion of the court, according to the peculiar circumstances of every case. There is, then, the moral restraint of a great responsibility. It is sufficient to give protection, where it is due, and was intended to be given. It provides for the consequences of slavish submission to the letter of the instrument, on the one hand, and guards against vexatious interruptions of neutral commerce, on the other.

2. But if the document can be issued by any inferior functionary, the argument on the first point is entitled to still more weight. It is impossible to conceive, that any nation would be so unwise, as to consent that subordinate officers, at a distance from the sovereign authority, of great facility, surrounded by corrupt agents, or, perhaps, themselves corrupt, should grant such an omnipotent document, sacred, infallible and conclusive, even against the manifest fact and truth. Where is the authority of this court to countenance the issuing of such a document, by an authority less than the highest? The treaty is here silent. If the form had been annexed, it would probably have made provision on this subject also. If this omission is to be supplied by construction, the court will remember the high dignity and vast power of the document, and will not too easily confide in the responsibility of subordinate agents, remote from the control of the sovereign. The pass-

port now in question, professes to be issued "for want of royal passports." But why want them? Their absence proves a want of confidence in the
*57] *officer who has here assumed the authority to substitute his own, for the passport of his prince. In the absence of any evidence of a right to exercise an authority so high, or of the fact that any royal passports had ever been intrusted to his distribution, the court cannot recognise the validity of a document thus issued.

3. The 17th and 18th articles of the treaty, so far as they provide for the form and effect of passports, are inofficious and incomplete, for want of the annexation of the form intended. The 17th provides, that the "passport shall be made out, and granted, according to the form annexed to this treaty." The ships of the two nations are to be "provided with passports, as above mentioned," &c., "without which requisites they may be sent to one of the ports," &c. The 18th stipulates that the master "shall exhibit his passports, concerning the property of the ship, made out according to the form inserted in this present treaty, and the ship, when she shall have showed such passport, shall be free, and at liberty to pursue her voyage," &c. So that there is nothing in these articles which gives a conclusive effect to any other passport than one, which it is impossible to have under the treaty, as the parties have left it. The first part of the 17th article does, indeed, give some of the qualities of the passport; but it must have others, and they are unattainable, by reason of the omission of the form. The court then must either strike out the reference to a form, or imagine a form and annex it. To
*58] do either, would be a high act of legislation, to which the court is *incompetent.

But let us try to discover the form; and taking the 17th article for a guide, it must express the name, property and bulk of the ship, and the name and habitation of the master. Still, there are several things more to be ascertained. Who is authorized to grant the passport? This is an essential circumstance; is ascertained by the forms of passport annexed to several treaties; and would probably have been expressed in this form, had it been annexed. How is the proprietary interest to be stated: as the general property of the subjects of the state, or as the special property of some individual named? Is the national character of the ship, as a part of the navigation of the country under whose flag she sails, sufficient; or must it appear to be the property of subjects in general, or of some individual owner? Under what sanctions and solemnities, and accompanied by what proofs, is the document to issue? These, too, are regulated by the forms annexed to several treaties, which were brought to the notice of the court, at the former argument. The court may supply these requisites, conjecturally, but it can have no assurance that it will not err, and defeat, instead of promoting the intention of the parties. The stipulations of the treaty are nothing, and profess to be nothing, without the form of passport. The contracting parties have made no effectual contract on this matter, without the form. The court cannot finish, what they have left imperfect, any more than it could frame new articles, and insert them in the treaty. The con-
*59] tracting parties give conclusiveness to no passport *but one according to a form to be annexed. The court knows not what that form would have been. It might have explained, varied or added to the requisites of the passport contained in the body of the treaty.

The Amiable Isabella.

Can the court give conclusive effect to any other passport than the one intended to be provided by the treaty? If it can, the treaty would, to a certain extent, be made by the court. But the judiciary has no portion of the treaty-making power under our constitution; and cannot exercise it, under the pretext of interpreting treaties made by the president and senate. Here is no room for interpretation. The language of the treaty is express and intelligible, so far as it goes. It creates but one *casus fœderis*. The court cannot vary it, or superadd another.

The 14th article of the Prussian treaty of 1785, contains a similar stipulation with that of the Spanish treaty. The passport is to express the "name, property and burden of the vessel, as also the name and habitation of the master, which passports shall be made out in good and due forms (to be settled by conventions between the parties, whenever occasion shall require."), &c. Suppose, that no such conventions were ever concluded (and in fact they never were), could the court supply the form, or give effect to the stipulation in the treaty with Prussia? Yet the two cases are the same: for the omission of a convention settling the form, or, of the annexation of the form, equally fail to complete the stipulation. If one can be judicially supplied, why cannot the other? It is a gratuitous assumption to say, that by the non-annexation, the *parties intended to refer the form to each other's good faith and discretion. If they had changed their [*60 minds in this respect, when they executed their treaty, a supplemental article would have been added: and the only fair inference from their silence is, that they meant to leave the stipulation of free ships, free goods, to support itself by the ordinary rules of evidence as to the property of the ship. The court cannot alter the treaty by mere implication, and that too, not a necessary implication, for the non-annexation might have been the result of inadvertence. It might, also, have been the result of an intention to abandon the scheme of conclusive passports, or of passports more than usually efficacious, by omitting to perfect the treaty in that respect. If the defect proceeded from accident, the parties might have supplied it, by a subsequent convention: and if they have not thought fit to do it, the proper inference is, that they did not wish to do it; and if wishing it, they have neglected it, they have no reason to complain, that the court acts upon the treaty as it finds it. The inadvertence, therefore, was remediable in a regular manner, by the treaty-making power on both sides; and the court has no right to say, that it was not an inadvertence; or if by design, that it was not intended to leave the stipulation abortive as to the effect of passports.

And where is the mighty mischief of leaving it unaccomplished? The great object of the treaty was the principle of free ships, free goods. Take away the conclusiveness of the passport, and that principle remains in full force. It stands in many a treaty, without it. The passport would still *have its proper effect. It would be entitled to respect, as *primâ facie* evidence, but it would not be conclusive against further exam- [*61 ination. No doubt, the public faith is to be preserved, but the care of it is dsvolved upon this court to a limited extent only; the executive government is answerable for the rest. The jurisdiction of the court to carry the treaty into effect, arises out of the constitution, which declares it to be the supreme law of the land, and it is only as a law that the court can deal with it. Where a treaty gives a legal rule, the court may enforce it directly, in the

exercise of its ordinary and regular jurisdiction. But where it fails to give such a rule, the court is without power. As a court of the law of nations, it cannot, by analogy to its equitable jurisdiction, supply the defective execution of a treaty, as chancery supplies the defective execution of a power, or a trust. A court of equity supplies a remedy, where there is a right merely equitable. It has a control over the parties, to compel them to do justice, although there be no legal obligation. But this court cannot deal with treaties in this manner. It must execute them as it finds them, since it acts upon them as written laws merely, and has no control over the parties, to make them conform their conventions to their actual intentions. Suppose, the United States had refused to make a convention providing the form of passports under the Prussian treaty, could this court compel the government to do it, or consider it to be done, because in equity it ought to be done? An equitable jurisdiction over treaties, implies a control over parties. But the *power of the court over treaties is incidental merely; it makes the treaty act, where it professes to act, and does not supply rules of conduct which the treaty does not give. Its province is interpretative, as in the case of other laws: and it can no more assume the treaty-making power, than any other legislative power.

*62]

4. But putting the last objection out of the question, the passport produced does not conform to the 17th article of the Spanish treaty. The requisition of the treaty is, that the passport shall state "the name, property and bulk of the ship," &c., "that it may appear thereby, that the ship really and truly belongs to the subjects of one of the parties," &c. But this passport merely licenses the master, by name, "to proceed in his Spanish ship," &c. How does it appear by this, that the ship is the property of any subject of Spain? The words of the treaty, or absolute synonyms, are essential, and cannot be dispensed with, without frustrating the object of the stipulation. Unless, therefore, the substituted words, necessarily, and under all circumstances, mean the same thing, and give the same security to the belligerent, the departure is fatal. The pronoun "his," as here used, does not relate to property, but to the official character of the master; nor is it pretended that he is owner. The words "Spanish ship," do not necessarily denote Spanish property. Spain may adopt or naturalize foreign vessels, for temporary or permanent purposes, without making their owners her subjects. Even a Spanish passport, given to a vessel, documented in other respects as a foreign vessel, may be held to communicate *the Spanish national character. It depends on Spain to make any vessels Spanish vessels, and thus to give the protection of her flag and pass to the whole navigation of our enemy. The words here substituted, do not then necessarily import the same with the words of the treaty; they are susceptible of evasion; they may be true, and yet the requisitions of the treaty remain unsatisfied.

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Harper, contrà, referred to the former argument on the part of the claimant and appellant on all the points, except that relative to the omission of the form of passport provided by the treaty, which, he insisted, did not defeat the conclusive effect meant to be attributed to the passport by the treaty. The construction contended for on the part of the captors, would destroy the benevolent object of the contracting parties. It is highly improbable, that the two nations would have suffered so important an alteration

to be worked in their original intentions, either by an accidental or designed omission of the form of passport. The annexation could hardly have been omitted from negligence; and if the entire effect of the stipulation was meant to have been waived, the parties would have distinctly expressed this change in their views. The fair inference, therefore, is that they meant to refer the form to each other's good faith, and to be satisfied, if it contained a compliance with the substantial requisitions of the treaty. Under this confidence, our vessels have been furnished with the sea-letter, and the vessels of Spain with a royal passport, or a passport substituted *for it [*64 by the Spanish authorities, to whom the issuing of royal passports is intrusted, and containing the same particulars as to the property of the ship, &c., which the royal passport contains. It is not contended, that the passport may be issued by any Spanish authority, however inferior, or however alien his functions to the matter in question; but only by such officers as the Spanish government authorizes to grant them. If, notwithstanding a vessel has such a passport or sea-letter on board, she is liable to be interrupted in her voyage, and carried in for adjudication, under the ordinary rules of the prize court, independent of the conventional law, the object of the contracting parties will be entirely defeated. It is true, that free ships will still make free goods; but if the freedom of the ship must be established by the tedious process of judicial investigation, notwithstanding the provisions of the treaty intended to exclude such investigation, very little will be gained for the security of neutral commerce. The terms used in the passport with which this ship was furnished, are precisely synonymous with those of the treaty. The treaty does not say, that the passport shall express the individual proprietary interest of any particular Spanish subject, but that it shall express the property of the ship. How can a ship be a "Spanish ship," without being Spanish property? And how can it be Spanish property, without being the property of the subjects of Spain? This is the effect of the terms, as used in a policy of insurance, and other commercial transactions. A mere license to a foreign ship, *documented as a for- [*65 eign ship, conferring on her the privileges of Spanish trade, by fictitious adoption similar to that which gave rise to the British rule of 1756, relative to the colonial trade, would not make her a Spanish ship. And even if Spain should abuse the immunity conferred by the treaty, it is no reason why this court should dispense with its obligations. It is for the legislative authority to determine when political considerations will justify this country in suspending any of the provisions of a foreign treaty. The court must take the law from the treaty-making power, or from the higher legislative power dispensing with the obligations of a treaty.

The cause was continued to the next term for advisement.

February 22d, 1821. At the present term, the opinion of the court was delivered by STORY, Justice.—This cause was heard upon the whole evidence, introduced by both parties, at the last term; and as it embraced several points of great importance and difficulty, the court, *ex mero motu*, directed one of those points to be re-argued; and another, including a final construction of the Spanish treaty, in matters of deep and universal interest, was re-argued, upon the application of the government itself. The last argument was heard at so late a period of the session, that it was found

impracticable for all of us to prepare deliberate opinions, and the cause was
*66] ordered by the court to be *continued for advisement. The court has now come to a result, which I am directed to pronounce.

A preliminary question was raised, at the original argument, that the libel ought to be dismissed, because the capture was made without public authority, and by a non-commissioned vessel. Whether this be so or not, we do not think it material now to inquire. It is a question between the government and the captors, with which the claimant has nothing to do. If the ship and cargo be enemy's property, it cannot be restored to the claimant. If the captors made the capture, without any legal commission, and it is decreed good prize, the condemnation must, under such circumstances, be to the government itself. If, with a commission, then it may be to the captors. But in any view, the question is matter of subsequent inquiry, after the principal question of prize is disposed of; and the government may, if it chooses, contest the right of the captors, by an interlocutory application, after a decree of condemnation has passed, and before distribution is decreed. The claimant can have no just interest in that question, and cannot be permitted to moot it before this court.

Having disposed of this point, which, indeed, has been long recognised as a settled principle of the law of prize, the path is open for the consideration of the other points of the cause.

The captors contend, that the whole evidence establishes, that the ship and cargo are enemies' property, the property of British subjects, disguised
*67] under Spanish documents, and bound to a British port. *That the voyage had its origin in London, and was to terminate there; and that the usual frauds of false papers, false destination, and suppression of evidence, have been resorted to, for the purpose of giving a neutral character to hostile interests. The counsel for the claimant deny the matter of fact, and assert, that the proprietary interest of ship and cargo is *bonâ fide* Spanish; and endeavor, with great ingenuity and force, to explain away the difficulties with which it is admitted, on all sides, this part of the cause is surrounded. If this ground should be thought not to be entirely and satisfactorily made out, the counsel for the claimant further contend, that the ship was duly documented as a Spanish ship, according to the stipulations of the Spanish treaty of 1795; and that the effect of those stipulations is, to preclude all inquiry into the proprietary interest of ship and cargo. Of the former, because the passport is conclusive evidence of the national character and ownership of the ship, which all persons are estopped to deny; of the latter, because, by the treaty, free ships make free goods, and the national character of the cargo becomes wholly immaterial. To this point, which, if settled one way, is decisive of the cause, the counsel for the captors have given several answers. 1. That the passport of this ship was obtained by fraud, and this is always inquirable into, and vitiates all, even the most sacred, instruments and records. 2. That the passport is not conformable to the treaty, not having been issued by royal authority, or authenticated by the
*68] royal government, *but issued by a mere colonial governor; and that, such as it is, it does not state the ship to be owned by Spanish subjects, which is indispensable under the treaty. 3. That the substituted proof required by the 17th article of the treaty, where the passport is not regular, must be such as is subject to the thorough examination of the prize court,

4. That the form of the passport, referred to in the 17th article of the treaty, never having been annexed to it by the contracting parties, that article, so far as it purports to give any effect to passports, is inoperative and imperfect, and the imperfection cannot be supplied by any judicial tribunal.

Such are the leading propositions, pressed with great ability and earnestness into the discussion of this cause, by the respective parties. They embrace principles of international law of vast importance; they embrace private interests of no inconsiderable magnitude; and they embrace the interpretation of a treaty which we are bound to observe with the most scrupulous good faith, and which our government could not violate, without disgrace, and which this court could not disregard, without betraying its duty. It need not be said, therefore, that we feel the responsibility of our stations on this occasion, and that in delivering our opinion to the world, we have pondered on it, with great solicitude and deliberation, and have looked to consequences no further than the sound principles of interpretation and international justice required us to look.

The point to which the court will first direct its attention, is that last made, viz., whether the 17th *article of the treaty of 1795, so far as it respects passports, is inoperative and imperfect, in consequence of the [*69 omission to annex the form of the passport to the treaty. This is a very delicate and interesting question. The 17th article provides, "that in case either of the parties hereto shall be engaged in a war, the ships and vessels belonging to the subjects or people of the other party, must be furnished with sea-letters or passports (*patentes de mar o pasaportes*), expressing the name, property (*propiedad*) and bulk of the ship; as also, the name and place of habitation of the master or commander of the said ship, that it may appear thereby, that the ship really and truly belongs to the subjects of one of the parties, which passports (*dichos pasaportes*) shall be made out and granted, according to the form annexed to this treaty." The article proceeds to declare, "that such ships, being laden, are to be provided not only with passports, as above mentioned, but also with certificates containing the several particulars of the cargo, the place whence the ship sailed, that so it may be known, whether any forbidden or contraband goods be on board the same; which certificates shall be made out by the officers of the place whence the ship sailed, in the accustomed form; and if any one shall think it fit or advisable to express in the said certificate, the person to whom the goods on board belong, he may freely do so; without which requisites, they may be sent to one of the ports of the other contracting party, and adjudged *by the competent tribunal, according to what is above set forth, [*70 that all the circumstances of the above omission, having been well examined, they shall be adjudged to be legal prizes, unless they shall give legal satisfaction of their property, by testimony entirely equivalent." In point of fact, no form of a passport was made out and annexed to the treaty. The case, then, now before us, is not within the letter of the treaty, for as no form is prescribed, the documents found on board cannot be compared with any form; and until that comparison is made, it is impossible to say, whether the stipulations originally intended by the treaty have been exactly and literally complied with or not. There is no room here left for interpretation, on account of the ambiguous language of parties. They have

expressed themselves in the clearest manner, and it is to the passport, whose form is to be annexed to the treaty, and to none other, that the effect intended by the treaty, whatever that may be, either as conclusive or *primâ facie* evidence of proprietary interest, is attributed. Into the reasons why this form was omitted to be annexed to the treaty, we are not permitted judicially to inquire. It may have been by accident, or by design, from difference of opinion as to what should be the solemnities accompanying it, or from a willingness to leave it to future negotiation. Can this court annex a form to the treaty? Can it supply the deficiency of the treaty, and give effect to it, in the same manner, as if no form were referred to? Can it look to the stipulations, and decide for itself, what the parties regarded as
*71] substance, and what as mere form? *Can it say, that the stipulations in the text would have been agreed to, without the auxiliary form of the passport? Can it decide judicially, that under no circumstances, the form of the passport could be of the essence of the stipulations? These are grave questions, and are not to be lightly answered. They deserve and require deliberate consideration. We have given it; and our opinion will now be delivered.

In the first place, this court does not possess any treaty-making power. That power belongs by the constitution to another department of the government; and to alter, amend or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be, on our part, an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties, by just rules of interpretation, applied to the subject-matter; and having found that, our duty is to follow it, so far as it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind. The parties who formed this treaty, and they alone, have a right to annex the form of the passport. It a high act of sovereignty, as high as the formation of any other stipulation of the treaty. It is a matter of negotiation between the governments. The treaty does not leave it to the discretion of either party, to annex the form of the passport; it
*72] requires it to be the joint act of both; and that act *is to be expressed by both parties, in the only manner known between independent nations—by a solemn compact through agents specially delegated, and by a formal ratification.

Nor is there anything strange or singular in leaving matters of this sort to be settled by future negotiations. In our treaty with Prussia of 1785, the 14th article contains a provision as to passports, in substance like that of the 17th article of our treaty with Spain, except that it declares that these "passports shall be made out, in good and due form, to be settled by conventions between the parties, whenever occasion shall require." This stipulation manifestly contemplates that the form of the passport is to be a solemn act of the treaty-making power of both governments, and that neither government has authority, in its discretion, to use a form which shall be binding, without its consent, upon the other contracting party.

In the next place, this court is bound to give effect to the stipulations of the treaty, in the manner and to the extent which the parties have declared, and not otherwise. We are not at liberty to dispense with any of the con-

ditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation, upon any notion of equity or general convenience, or substantial justice. The terms which the parties have chosen to fix, the forms which they have prescribed, and the circumstances under which they are to have operation, rest in the exclusive discretion of the contracting parties, and whether they belong to the essence or the modal *parts of the treaty, equally give the rule to judicial tribunals. The same powers which have contracted, are alone competent to change [*73 or dispense with any formality. The doctrine of a performance *cy pres*, so just and appropriate in the civil concerns of private persons, belongs not to the solemn compacts of nations, so far as judicial tribunals are called upon to interpret or enforce them. We can as little dispense with forms, as with substance.

In the next place, we cannot admit, that the annexation of the form of the passport was, in itself (supposing we had a right to inquire into it), a matter of small moment or importance, so that the omission could be dispensed with, as not belonging to the substance of the treaty. It was competent to the parties, by the particularity of the form, to have qualified the general expressions of the article, and to have made that determinate, which, upon the face of the article, stands indeterminate. It is, for instance, indeterminate upon the face of the article, whether there is to be a specification of the names of the owners of the ship, or only a general declaration that the owners are Americans or Spaniards. It has also been contended here, and is certainly susceptible of doubt, whether the passport was to express the individual ownership, or the national character of the ship. So, the solemnities to be observed in granting the passport, the oaths to be made by the parties, the persons by whom they were to be verified, are all left indeterminate by the treaty. These might have been, and looking to the requisitions of other treaties, must have been, explained and settled by the form annexed *to this treaty. The 25th article of the Dutch treaty of 1782, is substantially the same as the 17th article of the Spanish [*74 treaty; and the form of the passport, certificate and sea-letter annexed to that treaty, reduce to a perfect certainty, every circumstance which has been already mentioned. Other qualifications and limitations might have been added, in the pleasure of the parties. It is impossible, therefore, for this court, judicially, to say, what such passport might or would have contained. We may, indeed, conjecture, but in this conjecture, we may err; and to assert what it would be, *in literis*, would be to exercise a sovereign control over the compact itself.

Nor are the circumstances already stated, mere form or diplomatic ceremony. They might well have entered into the very substance of the stipulation. The counsel for the claimant alleges, that the passport, intended by the treaty, was to import perfect, unimpeachable verity; that it was to have a sanctity beyond that which is granted to any other solemn instrument. Fraud would not vitiate it, nor the most direct, unequivocal breach of good faith, or abuse of the passport, bring its protecting virtue into question. Assuming, for the purpose of argument, that this is true, the form of the passport, and the solemnities accompanying it, were of the deepest interest and importance to both nations. It was vital to the treaty; vital to the acknowledged rights derived under the law of nations. The immunity

intended by the treaty, in this view of it, was a derogation from the general belligerent rights of both parties. They might be willing to confide the
*75] issuing *of such passports to the Spanish high officers of state, with the royal approbation and signature, or with the corresponding signatures of our own secretary of state and president. They might have full faith and confidence, that under such guards, the danger of abuses would be very much diminished, if not entirely checked. But they might not be willing to trust to the integrity, discretion and watchfulness of subordinate agents; to officers of the customs; to colonial governors, or commanders in distant provinces. In point of fact, our own passports have issued under the authority and signatures of our highest executive officers. What reason has this court to presume, that our government would accept of a verification by inferior officers of Spain? What reason has this court to presume, that our government would have been satisfied with a passport signed by a colonial governor, for want of royal passports? It has not been so stipulated in the treaty. It has not, in terms, dispensed with the annexation of the form of the passport to the treaty. Even if one government had been willing to dispense with it, it remains to be shown, that the other was also willing. And if both were willing, it would still remain to be shown, that the act of dispensation was consummated by a solemn renunciation; for the obligations of the treaty could not be changed or varied, but by the same formalities with which they were introduced; or, at least, by some act of as high an import, and of as unequivocal an authority. All that can be said, in the present case, is, that the subject of the annexation of the passport was
*76] taken *ad *referendam*, by the parties. They had competent authority so to do; and this court is bound to presume, that they had good reasons for their conduct. It is far more consistent with every fair interpretation of the acts of the government, to suppose, that the form of the passport was postponed, with a view to the suspension of the article, until the subject was more deliberately considered, or could be more conveniently attended to, than to suppose that words of reference were used without meaning, and forms, carrying with them such important and interesting solemnities, and such obligatory force and dignity, were hastily abandoned, at the very moment they were studiously sealed to the text. Unless this court is prepared to say, that all forms and solemnities were useless and immaterial; that neither government had a right to insist upon a form, after having assented to the terms of the article; that a judicial tribunal may dispense with what its own notions of equity may deem unimportant in a treaty, though the parties have chosen to require it; it cannot consider the 17th article of this treaty as complete or operative, until the form of the passport is incorporated into it by the joint act of both governments.

Upon the whole, it is the opinion of the court, in which opinion six judges agree, that the form of the passport, not having been annexed to the 17th article of the treaty, the immunity, whatever it was, intended by that article, never took effect; and therefore, in examining and deciding on the case before us, we must be governed by the general law of prize.
*77] *This view of the case renders it unnecessary to consider the other points made by the counsel for the captors, as to the effect of the treaty; and we therefore give no opinion upon them.

It remains then to consider, whether the ship and cargo, now in judg-

ment, are, in fact, neutral or hostile property. The facts are extremely complicated, and the evidence, in many instances, clashes, so as to forbid all hopes of reconciling it. It cannot be disguised, too, that the claim is involved in much perplexity, and is shaded by some circumstances that have not been entirely cleared away. If it were not a task from which we could derive no general instruction, the whole evidence might be minutely examined, as to the questions of false destination, suppression of papers and use of false papers. But the labor would be very great, and after all, would conduce to no important purpose. We shall content ourselves, therefore, with a brief statement of the result of our opinion.

It is to be recollected, that by the settled rule of prize courts, the *onus probandi* of a neutral interest rests on the claimant. This rule is tempered by another, whose liberality will not be denied, that the evidence to acquit or condemn, shall, in the first instance, come from the ship's papers, and persons on board; and where these are not satisfactory, if the claimant has not violated good faith, he shall be admitted to maintain his claim by further proof. But if, in the event, after full time and opportunity to adduce proofs, the claim is still left in uncertainty, and the neutrality of the property is not established, *beyond reasonable doubt, it is the invariable rule of prize courts to reject the claim, and to decree condemnation of [*78 the property. There is another rule, too, founded in the most salutary and benign principles of justice, that the assertion of a false claim, in whole, or in part, by an agent of, or in connivance with, the real owners, is a substantive cause of forfeiture, leading to condemnation of the property. These principles are not alluded to in this case, for the purpose of founding our present judgment upon them; for we do not rely upon it, as a case merely of reasonable doubt; but to show that a case less strong might justly have supported the decree, we feel ourselves bound to pronounce, of condemnation.

We cannot resist the conclusion, looking to the whole evidence, that this is a case where the whole mercantile adventure had its origin, in the house of trade of Messrs. Von Harten & Gobel, a house domiciled in London. The ship was, beyond all question, a foreign ship; but of what nation, and in whose ownership, at the time when she acquired her ostensible Spanish character, is studiously concealed. She came, just before her naturalization, from New Providence; and that naturalization was procured, as we feel ourselves constrained to believe, by an imposition practised upon the Spanish judicial authorities, by means of a pretended lien under a bottomry-bond, supposed to be given for repairs. The holder of the bond procured a judicial sale of the vessel, became himself the purchaser, and afterwards obtained the Spanish character, by a negotiation with the Spanish colonial government, *making awkward apologies for his asserted [*79 ignorance of the former ownership, and endeavoring to allay the well-founded distrust of that government. To this very hour, the claimant has observed a profound silence on this point, a source of just and pregnant suspicion, although he has loaded the cause with documentary proofs and affidavits on other points. He has not chosen to give any information as to the origin of the bottomry-bond, or former ownership of the vessel, or of the circumstances under which the supposed lien was acquired. Yet these facts would seem to have lain immediately within his reach. On board, too,

of the vessel, at the time of the capture, was the special and confidential agent of Messrs. Von Harten & Gobel, and also the brother-in-law of Mr. Von Harten. Some papers were thrown overboard, others were concealed, and others spoliated. The testimony of the witnesses upon the standing interrogatories, was far from satisfactory; and it is extremely difficult to exempt the agents on board the vessel, from the imputation of designed suppression of facts and prevarication. The claimant, Mr. Munos, is the father-in-law of Mr. Gobel, and claims this very valuable shipment as his own property, asserting himself to be a merchant, now engaged in business. And yet it is proved by a weight of testimony that seems difficult to resist, that Mr. Munos has not been known to be engaged in commercial business, on his own account, for at least fifteen years before the time of this shipment. And it is established in the most satisfactory manner, and is, indeed,
*80] admitted by the claimant himself, *that on account of the foreign character of Mr. Gobel (the son-in-law of Mr. Munos), all the foreign business of Mr. Gobel has been constantly carried on, for several years, under the cover of Mr. Munos. These are a few of the extraordinary facts of this case, and combining them with the indications of the papers found on board, and the suppressed documents which have reached the light; the vehement presumption, and almost written proof, that Mr. Gobel, the admitted partner of the English house of Von Harten & Gobel, was the stationed agent of the house, at the Havana; and the fact, that the destination was alternative, or double, to London or Hamburg, or both; the conclusion is difficult to overcome, that the cargo was the property of Messrs. Von Harten & Gobel, or some other unknown enemy proprietor, and covered by the Spanish character of Mr. Munos. And the court is constrained to consider the proceeding at the Havana, as mere machinery to naturalize an enemy's ship, and that the ship, either previously belonged to Messrs. Von Harten & Gobel, or some other enemy proprietor, or was purchased at New Providence, on his or their account. It is perfectly immaterial, whether Mr. Munos had any subordinate interest in the ship and cargo or not. If his claim be substantially false, in the manner in which it is framed, having been adopted by him, he has justly incurred a forfeiture of any such interest, by attempting an imposition upon the prize court.

It is the judgment of the court, that the decree of the circuit court,
*81] condemning the ship and cargo, *be affirmed, with costs. From so much of this opinion as respects the question of proprietary interest of vessel and cargo, three judges dissent.

JOHNSON, Justice. (*Dissenting.*)—This is an appeal from the sentence of the circuit court of North Carolina, condemning this vessel and cargo as prize of war to the Roger privateer.

The condemnation below appears to have proceeded on evidence of an hostile interest existing in the ship. For, as to the cargo, it is not denied, that the proprietary interest is immaterial; since, if the ship be Spanish, the existence of an enemy interest in the cargo, does not affect it. Yet, much of the evidence and argument have been introduced, to prove the existence of an hostile interest in the cargo; but it has been with a view to maintain two positions: 1st. That it is a strong circumstance to prove the vessel to be British property: and 2d. That, though it be not enemy owned,

yet, as both vessel and cargo, are claimed by the neutral, if it be proved that he has attempted a fraud, the penal consequence is the forfeiture of his own interest.

It cannot be denied, that there are many circumstances in the case, going strongly to prove too intimate a connection between this adventure, and the mercantile transactions of the house of Gobel, consisting of Gobel and Von Harten, a British merchant. Nor is it entirely clear, that Rahlives, who appears in the machinery as supercargo, is not himself a participator in interest. If I felt myself now called upon to decide this case, on the ordinary principles *which govern the decisions of prize courts, on neutral claims, it must be acknowledged, that there is a good deal of evidence, which must be rejected, in order to clear it from the tissue of difficulties in which the circumstances involve it. Yet there is one important consideration, which rides over all the unaccountable combinations of interest which present themselves to the view of the court. Why should British property, on board a Spanish vessel, have been disguised as Spanish? There are obvious reasons, why Spanish property should have been disguised as British; for, it would have afforded protection against the only enemy a Spaniard had to fear—the patriot privateer. But as England was at peace with all the world, except America, and enemy property secure from American capture in a Spanish vessel, it is difficult to conceive a reason, why this disguise should have been thrown over a British cargo. The course, however, which I will pursue in coming to a conclusion, precludes the necessity of disentangling the web, in which the interests of the claimant are wound up, by the various circumstances of the destruction, mutilation and concealment of papers, and the questionable shape in which several of the actors in the drama present themselves to the view of this court. [*82

The claimant founds his right to restitution, on his Spanish character and the sufficiency of his Spanish documents under the treaty. The captor contends, that the documents found on board, were not of the first order under the treaty, and that when let in to *the production of substitutes, a plenary inquiry is opened into proprietary interest [*83

Before entering upon these more general questions, it is necessary to take notice of a preliminary ground of condemnation, which, if it can be sustained, anticipates every other inquiry. It appears, that the vessel left the Havana, under convoy of a British frigate, and it is contended, that this circumstance is, *per se*, a ground of condemnation. This is, at least, a new ground in this court; and it cannot be expected, that it will meet with a very favorable admission from a court which has manifested no disposition to multiply causes of condemnation. Without being supposed to express any inclination to adopt the principle, I deem it sufficient to remark, that if it could be admitted, it ought not to be applied to a nation which needed that protection against an existing and enterprising enemy; and which ought, therefore, to be considered, as having sought it for that purpose, and not against a neutral, whose principles of conduct it had then no reason to distrust. The Gulf of Florida, at that time, swarmed with patriot privateers; and the convoying ship had, moreover, parted from the fleet, before this capture was made. The conduct of this vessel was perfectly pacific, when overhauled by the American cruiser. The utmost to which the courts of Great Britain have gone, has been to affect the merchant ves-

sel, actually taken under convoy, with the resistance or character of the convoying ship; and when such a case shall occur, it will be time enough
*84] for this court to determine on the course it *will adopt. At present, I feel no inclination to go so much beyond those decisions as has been here contended for.

On the principal question, it appears, that this vessel was provided, at the time of her sailing, both with a passport and certificate of her cargo. That these papers were on board, at the time of the capture, cannot be doubted; they were both delivered by the captain to the registrar of the district court, the former marked A, No. 7; the latter B, No. 1. Some doubt arises, whether they were both exhibited prior to the capture; but this is wholly immaterial, on the question of condemnation.

In behalf of the claimant, it is contended, that on the production of the passport and certificate, or bill of lading of the cargo, he is entitled to restitution. To this, the captor objects, that the 17th article of the treaty with Spain, contemplated a form of passport, intended to be attached to that treaty; that as no such form was settled by the two nations, the claim must rest altogether upon the provisions of the 15th article, and the proprietary interest is to be inquired into, as in ordinary cases. But if the contracting parties are to be permitted to devise forms of passports for themselves, severally, then that this is not a passport in the language of the treaty, but a substitute for one, and is defective in not expressing unequivocally that the ship was Spanish property.

On this part of the case, it is proper to remark, that it is not always easy for the criticising eye of the common law, to expand to the enlarged views
*85] and *remote perceptions which should govern the mind in the construction of treaties. Yet nothing could be more inconsistent with international law, than to apply to such instruments those scrutinising principles, which enter into the construction of a special plea or a criminal statute. From history, analogy and policy, as well as language, are to be gathered the views of the contracting parties; and however either may be pressed, by the application of conventional stipulations to particular cases, or under particular circumstances, not less is the obligation to execute them, in a spirit, not only of good faith, but of liberality. Where no coercive power exists, for compelling the observance of contracts, but the force of arms, honor and liberality are the only bonds of union between the contracting parties, and all minor considerations are to be sacrificed to the great interests of mankind.

In the case before us, I see no reason for nullifying the operation of the 17th article, for want of the form which was in contemplation to be drawn up and attached to the treaty. The substance of the passport, intended to be prescribed, is so copiously exhibited, as to render it a matter of the simplest effort to throw it into form. This, no doubt, was the cause why the contracting parties manifested so much indifference about carrying their intention into effect. I am, therefore, content to give the same effect to any instrument complying substantially with this article, as ought to have been given to a passport in a prescribed form. What is that effect?

*86] *This is easily ascertained, by compairing the provisions, of the 15th, 17th and 18th articles. By the 15th, the principle is established, that free ships shall make free goods, and that several branches of commerce,

which the modern law of nations has prohibited to neutrals, shall, notwithstanding, be freely prosecuted. But, knowing the endless litigation which questions of proprietary interest give rise to, and the sad depravity of morals exhibited by witnesses in prize courts, the enlightened statesmen who formed that treaty resolved, by the 17th and 18th articles, to make the freedom of the ship to rest upon documentary evidence, in the first instance, and evidence of property, in those cases only, in which the vessel was unprovided with the necessary documents; that each nation should be sovereign to judge for itself, in conferring upon its own vessels the immunity secured by the treaty, and that the acknowledged right of adjudication in the courts of the capturing power, should be superseded, when a vessel was found on the ocean, provided with the documentary evidence stipulated for by treaty; and only revert, when the vessel, being unprovided with such documents, was obliged to resort to evidence of property of a less solemn nature.

It is contended, that this is yielding an important national right. What if it is? It is a mutual relinquishment, and one made by the government, not by this court. And although it operate against us now, the time may come, when the comity of Spain, or her colonies, may extend the benefits of it to the commerce of this country. But be that as it may, *if the relinquishment has been made, it is incumbent on us to observe it. [*87 And although it may not be so sensibly felt at present, the time is scarce gone by, when it was thought a highly beneficial stipulation to this country. Spain was, at the date of that treaty, a respectable naval power; her relations with Europe and the Barbary powers, often involved her in wars. America abounded with ships and seamen, and her prospects were favorable for the enjoyment of peace. To carry on the commerce of the West Indies and Mediterranean, as the favorite carriers of belligerent cargoes, was therefore, to us, a highly flattering object. And though occasional impositions might be practised, it was, comparatively, a trivial consideration, and the chances mutual. When abuses should become flagrant and intolerable, it would have presented a just cause for dissolving the treaty; but it does not rest with courts of justice to dissolve a treaty.

As to considerations drawn from the impolicy of discouraging the spirit of cruising, I attach to them very little importance. The most serious doubts may well be entertained, of the policy of giving encouragement to that species of enterprise. Certain it is, that no nation can pursue it long, without feeling its demoralizing influence. It draws together a race of men, from every quarter, who want for nothing but a legal pretext, for indulging their appetite for blood and violence; and while their habits and examples become popular, the rapid fortunes which are occasionally acquired, render the most valuable classes of a community dissatisfied with seeking *competence by the slow progress of useful labor. It will not, perhaps, be too much to say, that this country is, at this time, experiencing something of the baneful effects which flow to the world, from letting loose the passions of men to gratify themselves with plunder. But be this as it may, it is the direct object of these articles, of this treaty, to cover commerce from capture; and if a treaty is to be construed, with a view to effectuate its intent, that construction which will afford the most ample protection to commerce, will be most consistent with the views which dictated this treaty. [*88

Could the language of the treaty leave a doubt on this subject, it is historically known, that the policy of the United States, at the time of its date, was, if possible, to annihilate the right of cruising against commerce. With many ships, and a most flourishing trade, she had not a vessel of war; and while every other nation was likely to be embroiled in wars, her policy was peace, and her prospects favorable to the enjoyment of it. To become the carriers of the world, was the object to which her negotiations were directed; and could she have obtained the same stipulation from all the rest of the European nations, she must have succeeded greatly.

The example of other nations in the construction of treaties, is brought to the notice of this court. But, besides that the analogy in the cases referred to is very remote, I cannot admit the force of any example that contravenes general principles. It is a melancholy truth, that nations and
*89] their courts are too often inclined to restrict or enlarge construction, *under a temporizing policy, suggested by the pressure or allurement of present circumstances. I will endeavor to give this treaty the same construction against an American captor, as ought to be given it in the courts of the opposite contracting party. And the day may arrive, when American commerce will have no cause to regret that our courts have pursued liberal and enlarged views in adopting this construction.

On the exceptions taken to the form of the passport, it is to be observed, that on the face of the instrument, it is declared to be issued in default of royal passports. From this circumstance, a doubt arose, whether it was an instrument of the highest authority. This led to an inquiry, at the highest sources of information, relative to the powers of the governor of Cuba to issue such passports. From the information thus obtained, I am satisfied, that his powers are amply sufficient to support the authority of that document. Some very serious doubts also have been raised, relative to the form of the instrument, particularly, that passage of it, which has relation to the national character of the ship. The treaty requires that it should set forth the name, property and bulk of the ship; also the name and habitation of the master or commander. These requisites are all minutely complied with, unless we except that part which relates to the property of the vessel. The words used with that view are simply *fregata mercante Espanola;* and a doubt has existed, whether this be a sufficient affirmance of the property or
*90] national character of the vessel. Nor has this doubt *been removed, without a careful reference to the passports of various nations. The result is, that in all of them, the affirmance is general, withot specifying the individual proprietor. It is also in evidence, that this is the form known and used in Spain and her colonies, as the passport of regularly documented and acknowledged Spanish vessels; and I feel myself bound to receive and acknowledge it, as sufficient in form and substance.

Thus far the opinion was written, and prepared to be delivered, prior to the argument ordered at the instance of the executive. I have seen no reason to change a word of it, from anything since heard. On the contrary, the last argument has fully confirmed me in its correctness. Thousands of imaginary cases of fraud and collusion have been suggested, to alarm the court; and it may be, that our government, having now a prospect of becoming a respectable naval power, and having experienced the activity and enterprise of our privateers in the late war, may feel less disposed to promote

the principles of the armed neutrality, than they did formerly. This conviction of former error has generally grown out of the same change of circumstances, in other states. But it is not through the medium of courts of justice, that this change of sentiment is to develop itself. If this treaty was ever binding, it is equally binding now; and in adjudicating between individuals, the same rules which would ever have been applicable, ought to be religiously adhered to, under all possible changes of interest or policy.

But the interests and apprehensions so eloquently *pressed upon the notice of this court are not real. They are factitious; and may [*91 have their effect on a client's cause, but they are not the well-understood interest, or the well-founded apprehensions of the government. The execution of one treaty, in a spirit of liberality and good faith, is a higher interest than all the predatory claims of a fleet of privateers.

What has this country to fear? A practical answer is always most satisfactory on such a question; with similar treaties existing with various other powers, what real injury was sustained in the late war? The truth is, and every one conversant in national policy well knows, that there is always less danger of imposition in reality, than a limited view of the operation of such a stipulation would suggest. It is not the interest of the belligerent to foster the carrying trade of a commercial rival; hence, Great Britain would rather, in time of war, compel her own vessels to sail under convoy, than permit her merchants to use a neutral bottom. Nations are generally jealous of permitting foreigners to hold domestic tonnage, or use domestic names. There are, commonly, privileges of trade attached to the ship's character, and severe laws enacted against a practice which is always viewed as a fraud upon the government whose flag is thus acquired. Witness the severity of our own laws in such cases.

If there is any nation in the world, more interested than all others, in the liberal support of the doctrine contended for by this claimant, it is the United States. Our chances of enjoying peace are much greater than any other; and if there be a tendency *to war, it is with a nation which [*92 will not be driven to the necessity of making use of neutral bottoms. I cannot therefore, really see why our administration should have been so seriously alarmed at the prospect of our deciding in favour of this Spaniard, as has been urged upon this court. But considerations of policy, or the views of the administration, are wholly out of the question in this court. What is the just construction of the treaty, is the only question here. And whether it chime in with the views of the government or not, this individual is entitled to the benefit of that construction.

The more I have examined this subject, the more thoroughly I have been convinced, that my view of the construction of the treaty is the correct one, viz., that national protection was to depend upon authentic documents, and not proprietary interest; or more correctly, that each nation should be restricted from looking beyond those documents. There is one provision contained in all these treaties, which sets this points, in my opinion, beyond all doubt. Which is, that in the case of convoy, the word of the commander of the convoying ship is to be taken conclusively, for the neutral character of every vessel in the fleet. This is the substitute in the case of a fleet, for the passport of a single vessel. I speak of authentic documents; for the

absurdity never was imagined, that a passport, stolen or seized by violence, was to have the force of one regularly issued.

But it is contended, that it is due to Spain, to pursue these inquiries into proprietary interest, and due to the peace of both nations, that such questions *should be examined in courts of justice, rather than leave them to be the subjects of diplomatic remonstrance. This is a specious, but very unsound argument. Have not the vexations of courts of vice-admiralty, and the violence of armed cruisers, been the pregnant sources of half the commercial altercations of the last century? This was the evil intended to be remedied, and whatever impositions might flow from the remedy, it was well understood, that the benefits of a commerce, uninterrupted by the cupidity of cruising vessels, would more than compensate. There is one consideration, which, on this subject, is conclusive. No sovereign can appear in courts of justice to defend his subjects, and it was therefore that a method was devised for taking such questions from courts of justice, if possible, and referring them to another tribunal. Every stipulation in the treaties of that day, teems with the object of ridding commerce of vexatious capture, and more vexatious litigation. A better practical illustration of the wisdom of such a measure cannot be imagined, than that which the present case presents.

*93]

But it has been earnestly and successfully contended, that if such was the intention of the treaty, it must fail altogether for want of the form of a passport, contemplated in the 17th article. Yet, if there is any one question more clear of doubt than all others, I think, it is this. For the fallacy of the position admits almost of mathematical demonstration. This omission must have been the result of either accident or design. It may have *proceeded from accident, between the negotiators in Europe; but after the receipt of the treaty, and its submission to the cabinet and the senate here, the omission could not have been the result of accident, when it received the sanction of our government. It must then have been designedly omitted by our constituted authorities. And for what purpose? Will any one presume to suggest, that it was a deliberate fraud upon the other government? calculated to leave our courts at liberty, on some subsequent day, to declare the 17th and 18th articles, in effect, void? Did we hold out to them the idea of having adopted the provisions of those articles into our national code, when we were conscious, that they contained an innate vice, calculated to defeat every beneficial effect? If the argument on this point could meet the sanction of our government, I would blush for it. From the advocate of a captor, it might have been expected; but cannot lay claim to the sanction or countenance of the American government. I am sensible, that the cabinet would disavow such a doctrine.

*94]

But it is urged, with much emphasis, that we have no right to annex a form, or to add a clause to the treaty. It is not contended, that we have. No member of this bench entertains such a thought. But why may not the contracting parties supply one? All the requisites being prescribed in language, the form and the substance are the same thing. If the contract is complied with, what matters form? Whether it is substantially complied with or not, must be a question for the courts of the contracting parties. But how ridiculous would it be, to be trying *form, and shape and size, like the ignorant Arab, where the treaty is substan-

*95]

tially complied with. Had it merely stipulated, that a passport, in a form prescribed, should be given mutually, there would have been something in the argument; but in expressing with precision the substance of the instrument to be given, it renders the devising of a form, a mere work of supererogation. If no other conclusion is to be drawn from its omission, certainly, this may, that it was too trival to be remembered.

In order to support the argument, that the absence of the form nullifies the 17th and 18th articles of this treaty, the attention of this court has been drawn to the provisions of the 14th article of the treaty with Prussia. And it has been contended, that until a form of a passport be adjusted between the two nations, that article is also a dead letter. The construction is one which could not be supported, even on a common-law instrument. The words are, "which passports shall be made out in good and due forms (to be settled by conventions between the parties whenever occasion shall require)." If the Spanish treaty is to be construed by analogy to this, the argument is directly on the other side. For these words, obviously leave "the good and due forms" of these instruments to be devised by the parties severally, and only stipulate for settling a form by convention, "whenever occasion shall require;" that is, whenever either shall be dissatisfied with the form used by the other. The nations which, in the very same article, could repose such implicit faith in each other's candor, as to leave the neutrality of *whole fleets to be determined on the word of the convoying officer, merit more the confidence of each other, than to have imputed [*96
to them an evasion so obvious.

As it became indispensable to assign some reason for retaining these two articles in the treaty, if they were to be held a dead letter, for want of the form, it has been suggested, that the only operation intended by them was to prescribe a law to the caprice or violence of cruisers, and subject them to more exemplary punishment than in ordinary cases. No one who reads and compares these four articles, the 15th, 16th, 17th and 18th, and considers the historical events in which they originated, can for a moment suppose, that this was the object which led to the insertion of the two latter of those articles. The intention was to engraft into the law of nations, a great and a new principle. And although power and cupidity may affect to sneer at it, and melancholy experience cannot dismiss the apprehension, that it is too ethereal to subsist in this nether atmosphere, yet it is one which philanthropy will ever cling to, and justice cherish. To engraft into this treaty the principles of the armed neutrality was the object, and for this purpose, the 15th article declares those principles in detail. The 16th furnishes the exceptions to them; the 17th prescribes the evidence on which those privileges shall be conceded; and the 18th, after regulating the conduct of cruisers towards vessels so protected, proceeds to declare, that "the ship, when she shall have showed such passport, shall be free, and at liberty *to pursue her [*97
voyage, so as it shall not be lawful to molest or give her chase in any manner, or force her to quit her intended course." It is impossible for language to be stronger. That the violation of these stipulated privileges, would aggravate the punishment to be inflicted on cruisers, is a consequence of the thing provided for, not the thing itself,

Upon the whole, I am decidedly of opinion, that the claimant is entitled to restitution. Nor should I find much difficulty in supporting his right, on

the ground of proprietary interest. But entertaining the opinion that I do, on this preliminary point, there is no necessity to examine into this part of the case.

Sentence affirmed.

March 6th, *Harper*, for the claimant and appellant, moved to vacate the decree of condemnation entered in this cause, and that it should be again continued to the next term, in order to enable the claimant to procure further proof as to the annexation of forms of passports to the original Spanish treaty, and read an affidavit annexed to a printed copy of the treaty, published at the royal printing-office in Madrid, which contained two forms of passport, which will be found in the margin.(*a*)

*98] *The motion was opposed by the *Attorney-General* and *Wheaton*, for the captors and respondents.

(*a*) Modelo del pasaporte, ó patente de mar que se concede á los buques para navegaen América, citado en el articulo XVII.

Don Carlos, por la Gracia de Dios, Rey di'Castilla, de Leon, de Aragon, de las dos Sicilias, de Jerusalem, de Navarra, de Granada, de Toledo, de Valencia, de Galicia, de Mallorca, de Sevilla, de Cerdeña, de Córcoba, de Córcega, de Murcia, de Jaen, de los Algarbes, de Algezira, de Gibraltar, de las Islas de Canarias, de las Indias orientales y occidentales, Islas y Tierra-firme del Mar Océano; Archiduque de Austria, Duque de Borgoña, de Brabante, y Milan, Conde de Abspurg, Flandes, Tiroly, Barcelona, Señor de Vizcaya, y de Molina, &c.

Por quanto he concedido permiso á ——— para que con su ——— nombrado ——— de porte de ——— toneladas, pueda salir del puerto de ——— con carga, y registro de efectos de comercio, y transferirse al ——— y restituirse á Españaal Puerto de ——— con expresa condicion de hacer su derrota de ida y vuelta directamente á los señalados parages de su destino, sin extraviarse, ni hacer arribada á puertos nacionales ó extrangeros, en islas, ó tierra-firme de Europa, ó América, á ménos de verse obligado de accidentes de otra suerte no remediables: Por tanto quiero, que el presidente de la contratacion á —— Indias ó el ministro encargado del despacho de navios á aquellos dominios, y el intendente, ó ministro de marina del puerto en que se equipare, concurran á facilitarle quanto fuere regular ó esto fin, cada uno en la parte que le tocare: el primero en lo respectivo á su habilitacion y carga; y el de marina en lo que mira á tripulacion, que deberá componerse de gente matriculada, y constar que lo sea per lista certificada, que ha de entregarle, obligàndose á cuidar de su conserracion, y responder de sus faltas, segun previenen las ordenanzas de marina.

Y mando á los officiales generales, ó particulares comandantes de mis esquadras y baxeles, al presidente, y ministros de la contratacion á Indias, á los comandantes, y intendentes de los departamentos de marina, ministros de sus provincias, sub-delegados, capitanes de puerto, y otros qualesquiera oficiales, ministros, y dependientes de la armada, á los vireyes, capitanes, ó comandantes generales de reynos y provincias, á los gobernadores, corregidores y justicias de los pueblos de la costa de mar de mis dominios de Europa y América, á los officiales reales, ó jueces de arribadas en ellos establecidos, y á todos los demas vasallos mios, á quienes pertenece, ó pertenecer puidere, no le pongan embarazo, causen molestia, ó detencion; ántes le auxîlien, y faciliten lo que hubiere menester para su regular navegacion, y legitimo comercio: Y á los vassallos y subditos de reyes, principes y repbùlicas amigas y aliadas mias á los comandantes, gobernadores ó cabos de sus provincias, plazas, esquadras, y baxeles, requiero, que asimismo no le impidan su libre navegacion, entrada, salida ó detencion en lospuertos, á los quales por algun accidente se conduxere; permitiéndole que en ellos se bastimente, y provea de todo lo que necesitare: A cuyo fin he mandado despachar este pasaporter refrendado de mi secretario de estado, y de la negociacion de marina, et qual valdrá por

The Amiable Isabella.

*STORY, Justice.—Without giving any opinion upon the sufficiency of the evidence, to establish the *probability, that the forms of passport now offered to the inspection of the court were ever authoritatively *annexed to the original treaty, in the possession of the Spanish government, the court is of opinion, that the motion for a continuance must be denied. The passport found on board the Isabella, is materially variant, both in form and substance, from the forms of passport now produced; and to the form of the passport actually annexed to the treaty, and to no other, was the effect intended by the treaty, whatever that effect may be, meant to be attributed. The possession of that form, and not of any other passport which might be substituted for it, was of the very essence of the treaty. It is clear, therefore, that even if the case were as the claim- [*100 [*101

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el tiempo que durare su viage de ida y vuelta; y concluido que sea, le recogerá el ministro que entendiere en su descarga: Y para su validacion y uso pondrá á continuacion la nota que corresponde, el que concurriere á su despacho. Dado en ——— á ——— de mil setecientos. Yo el Rey.

PEDRO VARELA.

Modelo del pasaporte, o patente de mar que se concede a los buques para navegar en Europa, citado en el articulo XVII.

Don Carlos, por la Gracia de Dios, Rey de Castilla de Leon, de Aragon, de las dos Sicilias, de Jerusalem, de Navarra, de Granada, de Toledo, de Valencia, de Galicia, de Mallorca, de Sevilla, de Cerdeña, de Cordoba, de Corcega de Murcia, de Jaen, de los Algarbes, de Algezira, de Gibraltar, de las Islas de Canarias, de las Indias orientales y occidentales, Islas y tierra-firme del mar oceano; Archiduque de Austria; Duque de Borgoña, de Brabante y Milan; Conde de Abspurg, Flandes, Tirol, Barcelona, Señor de Vizcaya y de Molina, &c.

Por quarto he concedido permiso á ——— vecino de ——— para que con su ——— nombrado ——— de porte de ——— toneladas pueda navegar, y comerciar en los mares y puertos de Europa, tanto de mis dominios, como de extrangeros; y singularmente en los ——— con absoluta prohibicion de pasar á los de Islas, ó tierra-firme de América: Por tanto quiero, que constando la pertenencia de la embarcacion al referido ——— ó aotro vasallo mio de quienatenga poder, se le permita equiparla con gente ———de su misma provincia, ó de otra de mis dominios, habil á este efecto, segun lo prevenido en las ordenanzas de marina, para salir á navegar, y comerciar en ella, baxo las reglas establecidas.

Y mando a los officiales generales, o particulares comandantes de mis esquadras y baxeles; á los comandantes y intendentes de los departementos de marina: á los ministros de sus provincias, sub-delegados, capitanes de puerto, y otros qualesquier oficiales y ministros de mi armada: á los capitanes, ó comandantes generales de provincias: á los gobernadores, corregidores, jueces y justicias de los puertos de is dominios y a todos los demas vasallos mios, á quienes pertenece, ó pertenecer pudiere, no le pongan embarazo, causen molestia, ó detencion alguna; ántes le auxilien, y faciliten lo que hubiere menester para su regular navegacion y legitimo comercio: Y á los vasallos y subditos de reyes, principes y republicas amigas y aliadas mias: á los comandantes, gobernadores, ó cabos de sus provincias, plazas, esquadras y baxeles, requiero, que asimismo no le pongan embarazo en su libre navegacion, entrada, salida ó detencion en los Puertos, á los quales deliberadamente, ó par accidente se conduxere, y le permitan exercer en ellos su legitimo comercio, bastimentarse, y proveerse de lo oncecesario para continuarle; á cuyo fin he mandado despachar este pasaporte, refrendado de mio secretario de estado, y de la negociacion de marina, el qual valdra, y tendrá fuerza por termino de ——— contado desde el dia en que usare de él, segun conste por la Nota que á su continuacion se pusiere. Dado en ——— á ——— de ——— de mil setecientos noventa. Yo el Rey.

PEDRO VARELA.

ant's counsel supposes, he could derive no benefit whatever from it, because the treaty passport was not on board; and the case must, therefore, in this respect, be judged by the rules of the prize court, independent of the conventional law.

Motion denied.

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*102] *BUSSARD v. LEVERING.

Bills of exchange.—Notice of non-payment.

Where the second day of grace falls on Saturday, it is the last day of grace;[1] and notice of non-payment given to the drawer of a bill on that day, after a demand upon the acceptor, on the same day, is sufficient to charge the drawer.[2]

Notice to the drawer, by putting the same into the post-office, where the persons live in different places, is good.[3]

ERROR to the Circuit Court for the District of Columbia. *Assumpsit* against the defendant below (Bussard), as drawer of an inland bill of exchange, drawn at Baltimore, on the 3d of October 1816, upon and Martin Gillet, for $1244.79, payable six months after date, and accepted by Gillet. Plea, *non assumpsit.*

On the trial of the cause, the plaintiff produced and read in evidence to the jury, the bill, acceptance and protest; the handwriting of the respective parties being admitted; and gave evidence to prove that after bank hours, on Saturday, the 5th of April 1817, being the second day of grace after the said bill became due, the same was presented by a notary, to the acceptor, for payment, and not being paid, was duly protested. And on the same day, written notice was sent by the mail to the defendant, residing at Georgetown, District of Columbia, notifying him of the non-payment and protest of the bill. And gave evidence that such protest and notice, on the second *103] day of grace, under those circumstances, was conformable *to the general usage in Baltimore. And no other evidence of demand or notice was offered. Whereupon, the counsel for the defendant prayed the opinion and instruction of the court to the jury, that the defendant, under the circumstances so given in evidence, was not liable in this action, the drawer of the said bill not having received due notice of the dishonor of the same; but that the notice given upon the same day, that the payment of the draft was demanded, to wit, on Saturday, the 5th of April 1817, was not regular and sufficient to charge the defendant in this action: which instruction the court refused, and the defendant's counsel excepted. A verdict and judgment thereon was rendered for the plaintiff, and the cause was brought by writ of error to this court.

February 7th, 1821. This cause was argued by *Jones*, for the plaintiff in error, and by *Key*, for the defendant.

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[1] Jackson v. Richards, 2 Caines 343; Ontario Bank v. Petrie, 3 Wend. 456; Mechanics' & Farmers' Bank v. Gibson, 7 Id. 460.

[2] Corp v. McComb, 1 Johns. Cas. 328; Coleman v. Carpenter, 9 Penn. St. 178.

[3] It is sufficient to deposit a notice of non-payment in the letter-box at the post-office. Bank of New Berlin v. Church, 3 T. & C. 10; s. c. 60 N. Y. 634; or in a postal letter-box; Greenwich Bank v. De Groot, 7 Hun 210; Mechanics' & Traders' Bank v. Crow, 5 Daly 191; s. c. 60 N. Y. 85.

Lindenberger v. Beall.

THIS COURT were unanimously of opinion, that, by the general law-merchant, notice of non-payment, given to the drawer, on the last day of grace, after a demand upon the acceptor on the same day (and Saturday, in this case, was the last day of grace, the next day being Sunday), was sufficient to charge the drawer; and that the notice in this case given to the drawer, by putting the same into the post-office, was good.

Judgment affirmed.

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*LINDENBERGER *et al. v.* BEALL. [*104

Promissory notes.—Notice of non-payment.

After demand of the maker of a note, on the third day of grace, notice to the indorser on the same day, is sufficient by the general law-merchant.

Evidence of a letter, containing notice, having been put into the post-office, directed to the indorser, at his place of residence, is sufficient proof of the notice, to be left to the jury, and it is unnecessary to give notice to the defendant, to produce the letter, before such evidence can be admitted.

ERROR to the Circuit Court for the District of Columbia. *Assumpsit* against the defendant (Beall), as indorser of a promissory note, drawn by one Tunis Craven, dated at Baltimore, October 22d, 1811, in favor of the defendant, and by him indorsed to the plaintiffs, for $191.17, negotiable at the bank of Washington, payable six months after date.

At the trial, the note was given in evidence, and the handwriting of the maker and indorser admitted. The plaintiffs further proved, by a notary, that the note was, by him, demanded of the maker, on Saturday the 25th of April 1812, being the day on which it became payable, that is, the last day of grace. And not being paid, notice of the non-payment thereof was inclosed in a letter, addressed to the defendant, at the city of Washington, and put into the post-office at Georgetown. The notary testified, that he had no recollection of these facts, *and only know them from his notarial book, and the protest made out at the time; by which it appeared, [*105 that a demand was then made of the maker, and the protest made, and notice sent; and from its being his invariable practice to give notice, either personally, or by letter, to the indorsers, on the same day. Nor did he then recollect, that he addressed the letter to the defendant, in Washington, but he presumed from his book and protest, and his uniform practice, that if he did not know where the defendant lived (which was probably the case when he received the note), he inquired, and ascertained his residence, and addressed it properly. Upon which evidence, the defendant's counsel prayed the court to instruct the jury, that the above proof of notice was insufficient to charge the defendant as indorser of said note, and that the plaintiffs were not entitled to recover; which opinion the court gave. The plaintiffs' counsel excepted to the opinion. A verdict and judgment thereon was rendered for the defendant by the court below, and the cause was brought by writ of error to this court.

February 7th, 1821. *Key*, for the plaintiff, was stopped by the court.

Jones and *Law*, for the defendant, contended, that the notice was insufficient: 1. Because it was on the third day of grace: and 2. That there

was no sufficient proof of notice having been sent by mail, or of the contents of the letter sent; and that before secondary evidence would be *let in to prove the contents, notice should have been given to the defendant to produce it.

*106]

THE COURT were unanimously of opinion, that after demand of the maker on the third day of grace, notice to the indorser, on the same day, was sufficient, by the general law-merchant; and that evidence of the letter containing notice having been put into the post-office, directed to the defendant, at his place of residence, was sufficient proof of the notice, to be left to the jury; and that it was unnecessary to give notice to the defendant to produce the letter, before such evidence could be admitted.

Judgment reversed.

MECHANICS' BANK OF ALEXANDRIA *v.* WITHERS.

Opening default.

The circuit court for the district of Columbia has authority to adjourn to a distant day, and the adjourned session is considered as the same term.

The regular term began on the 3d Monday in April, and the court continued to sit, *de die in diem*, until the 16th of May, when it adjourned to the 4th Monday of June: *held*, that a defendant, against whom an office-judgment had been entered on the 16th of May, had a right, under the law and practice of Virginia, to appear at the adjourned session, and have the default set aside, on giving special bail, and pleading issuably.

ERROR to the Circuit Court for the District of Columbia.

*This cause was argued by *Lee* and *Swann*, for the plaintiff in error, and by *Taylor*, for the defendant in error.

*107]

February 9th, 1821. MARSHALL, Ch. J., delivered the opinion of the court.—This is a writ of error to a judgment rendered by the circuit court for the district of Columbia, sitting in Alexandria, in an action of debt; and the case depends on the laws of Virginia, as they stood when jurisdiction over the district was first exercised by congress.

By the law of Virginia, the proceedings, until an issue is made up in a cause, are taken in the clerk's office, at monthly rules, and judgments by default become final, on the last day of the succeeding term, until which day the defendant in any such action has a legal right to set the judgment aside, and to plead to issue. The circuit court held its regular session in April 1818, and continued to sit regularly until the 16th day of May, when it adjourned to the fourth Monday of the following June. The clerk, considering the day on which the court adjourned as the last day of the term, and the judgments at the rules as having, on that day, become final, issued an execution on one of these judgments, which had been obtained by the plaintiffs against Cave Withers and his common bail. When the court met in June, the defendant appeared, and, on motion, was allowed to set aside the office-judgment, give special bail, and plead to issue. The execution was, consequently, quashed. In the course of the term, judgment *was confessed by the defendant, for the sum claimed in the declaration, and a writ of error was then sued out, the object of which was to reverse the last judgment, and set aside all proceedings subsequent to the

*108]

16th of May, on the idea, that the judgment rendered at the rules became final on that day. The sole question in the cause is, whether the adjournment from the 16th of May to the fourth Monday in June, was a continuaof the April term, or constituted a distinct term?

There being nothing in any act of congress which prevents the courts of the district from exercising a power common to all courts, that of adjourning to a distant day; the adjournment on the 16th of May to the fourth Monday in June, would be a continuance of the same term, unless a special act of congress, expressly enabling the courts of the district to hold adjourned sessions, may be supposed to vary the law of the case. That act is in these words: "and the said courts are hereby invested with the same power of holding adjourned sessions that are exercised by the courts of Maryland." These words do not, in themselves, purport to vary the character of the session; they do not make the adjourned session a distinct session. They were, probably, inserted, from abundant caution, and are to be ascribed to an apprehension, that courts did not possess the power to adjourn to a distant day, until they should be enabled so to do by a legislative act. But this act, affirming a pre-existing power, ought not to be construed, to vary the nature of that power, unless words are employed which manifest *such intention. In this act, there are no such words, unless they are found in the reference to the courts of Maryland. But on inquiry, [*109 we find, that in Maryland, an "adjourned session" is considered as the same session with that at which the adjournment was made. Since, then, the term at which this conditional or office-judgment was to become final, was still continuing, when it was set aside, and the defendant permitted to plead to the declaration, there was no error in that proceeding.

Judgment affirmed.

Hopkins *v.* Lee.

Judgment.—Damages.

A judgment or decree of a court of competent jurisdiction is conclusive, wherever the same matter is again brought in controversy.

But the rule does not apply to points which come only collaterally under consideration, or are only incidentally considered, or can only be argumentatively inferred from the decree.[1]

In an action at law, by the vendee, against the vendor, for a breach of the contract, in not delivering the thing sold, the proper measure of damages is not the price stipulated in the contract, but the value at the time of the breach.[2]

This rule applies to the sale of real, as well as personal property:[3] but *quære?* whether it is the proper measure of damages, in the case of an action for eviction?

Error to the Circuit Court for the District of Columbia. This was an action of covenant, brought by the defendant *in error (Lee), against [*110 the plaintiff in error (Hopkins), to recover damages for not convey-

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[1] Holmes *v.* Trout, 7 Pet. 206; Hibshman *v.* Dulleban, 4 Watts 183; Lentz *v.* Wallace, 17 Penn. St. 412; Martin *v.* Gernandt, 19 Id. 124; Yams *v.* Lewis, 42 Id. 402, Lewis's Appeal, 67 Id. 158.

[2] Edgar *v.* Boies, 11 S. & R. 445; Smethurst *v.* Woolston, 5 W. & S. 106; Blydenburgh *v.* Welsh, Baldw. 331; Halsey *v.* Hind, 6 McLean 102.

[3] Brinckerhoff *v.* Phelps, 24 Barb. 100; *s. c.* 43 Id. 469.

ing certain tracts of military lands, which the plaintiff in error had agreed to convey, upon the defendant in error relieving a certain incumbrance, held by one Rawleigh Colston, upon an estate called Hill and Dale, and which Lee had previously granted and sold to Hopkins, and for which the military lands in question were to be received in part payment.

The declaration set forth the covenant, and averred that Lee had completely removed the incumbrance from Hill and Dale. The defendant below pleaded: 1. That he had not completely removed the incumbrance: 2. That he (the defendant below) had never been required by Lee to convey the military lands to him: and on these pleas issues were joined.

Upon the trial, Lee, in order to prove the incumbrance in question was removed, offered in evidence to the jury a record of the proceeding in chancery, on a bill filed against him in the circuit court, by Hopkins. The bill stated, that on the 23d of January 1807, the date of the agreement on which the present action at law was brought, Hopkins purchased of Lee, the estate of Hill and Dale, for which he agreed to pay $18,000: viz., $10,000 in military lands, at settled prices, and to give his bond for the residue, payable in April 1809. That Lee, in pursuance of this agreement, selected certain military lands in the bill mentioned. That at the time of the purchase of Hill and Dale, it was mortgaged to Colston for a large sum, which Lee had promised to discharge, but had failed so to do, in consequence of which
*111] Hopkins had paid off the *mortgage himself. The bill then claimed a large sum of money from Lee, for having removed this incumbrance, and prayed that the defendant might be decreed to pay it, or in default thereof, that the claimant might be authorized, by a degree of chancery, to sell the military lands, which he considered as a pledge remaining in his hands, and out of the proceeds thereof, to pay himself. On the coming in of Lee's answer, denying several of the allegations of the bill, the cause was referred to a master, who made a report, stating a balance of $427.77, due from Hopkins to Lee. This report was not excepted to, and the court, after referring to it, proceeded to decee the payment of the balance. To this testimony, the defendant in the present action objected, so far as respected the reading of the master's report, and the decretal order thereon; but the objection was overruled by the court below, and the evidence admitted.

The counsel for the plaintiff in error then prayed the court to instruct the jury, that in the assessment of damages, they should take the price of the military lands as agreed upon by the parties, in the articles of agreement upon which the action was brought, as the measure of damages for the breach of covenant. But the court refused to give this instruction, and directed the jury to take the price of the lands, at the time they ought to have been conveyed, as the measure of damages. To this instruction, the plaintiff in error excepted; and a verdict and judgment thereon, being rendered for the plaintiff below, the cause was brought by writ of error to this court.

*112] *_Pinkney_ and _Swann_, for the plaintiff in error, argued: 1. That the proceedings in chancery were not admissible evidence in the action at law. A verdict and judgment are indeed conclusive evidence between the same parties; but the other proceedings in the cause, and all that which is merely inducement to the verdict or judgment, are not evidence. So, a

decree in chancery is not conclusive evidence of all the facts in the course of the cause. Not that the decree is not conclusive as a *res judicata:* but the decree here is no otherwise conclusive, than as giving the party, in whose favor it was pronounced, a right to have it executed. It is not evidence at all, unless it be conclusive evidence: but it cannot be conclusive evidence of the details of the cause, and of the incidental questions which arose in its progress.

2. The proper measure of damages in the action at law, was the price agreed by the parties. When a portion of the price of land is to be paid for in other land, the pecuniary, price, with interest, is the rule at law, where specific performance is not called for. It is thus subjected to the analogical rule in the court of chancery, where the contract is rescinded, instead of being specifically performed.

Jones and *Lee*, for the defendant in error, insisted: 1. That the proceedings in chancery were not only admissible evidence in the suit at law, but conclusive evidence. It may be safely admitted, that the decree is not evidence of such facts as are only collaterally or incidentally drawn in question, *or can only be argumentatively inferred from the decree. But [*113
where the decree professes to be founded on a particular fact, which was the principal question in issue, and was ascertained by the master's report, it must be conclusive, in any other suit between the same parties.

2. As to the proper measure of damages, it is the settled doctrine of this court, that in an action by the purchaser for a breach of the contract of sale, the rule of damages is the price of the article, at the time of the breach. (*Shepherd* v. *Hampton*, 3 Wheat. 200.) It is true, that the case of *Shepherd* v. *Hampton*, was a sale of goods; but it is not perceived, that there is any difference in the application of the principle to real or to personal property.

February 12th, 1821. LIVINGSTON, Justice, delivered the opinion of the court.—The first question which this court has to consider is, whether the proceedings in chancery were properly admitted in evidence in the court below. It is not denied, as a general rule, that a fact which has been directly tried, and decided by a court of competent jurisdiction, cannot be contested again between the same parties, in the same or any other court. Hence, a verdict and judgment of a court of record, or a decree in chancery, although not binding on strangers, puts an end to all further controversy concerning the points thus decided, between the parties to such suit. In this, there is and ought to be, no difference between a verdict and judgment *in a court of common law, and a decree of a court of equity. They [*114
both stand on the same footing, and may be offered in evidence under the same limitations, and it would be difficult to assign a reason why it should be otherwise. The rule has found its way into every system of jurisprudence, not only from its obvious fitness and propriety, but because without it, an end could never be put to litigation. It is, therefore, not confined, in England or in this country, to judgments of the same court, or to the decisions of courts of concurrent jurisdiction, but extends to matters litigated before competent tribunals in foreign countries. It applies to sentences of courts of admiralty; to ecclesiastical tribunals; and, in short, to every court which has proper cognisance of the subject-matter, so far as they profess to decide the particular matter in dispute.

Under this rule, the decree in this case was proper evidence, if it decided, or professed to decide, the same question which was made on the trial at law. For to points which came only collaterally under consideration, or were only incidentally under cognisance, or could only be inferred by arguing from the decree, it is admitted, that the rule does not apply. On a reference to the proceedings at law, and in chancery, in the case now before us, the court is satisfied, that the question which arose on the trial of the action of covenant, was precisely the same, if not exclusively so (although that was not necessary), as the one which had already been directly decided by the court of chancery. The bill, which was filed by the present plaintiff
*115] in error, states, that on the 23d of January *1807, which is the date of the agreement on which the action at law is brought, Hopkins purchased of Lee the estate of Hill and Dale, for which he was to pay $18,000—that is, $10,000 in military lands, at settled prices, and the remainder in bonds, payable in April 1809. That Lee, in pursuance of this agreement, selected certain military lands in the bill mentioned. That at the time of the purchase of Hill and Dale, it was mortgaged to Rawleigh Colston for a large sum, which Lee had promised to discharge, but that he had failed so to do, in consequence of which, Hopkins had paid the mortgage himself. The complainant then claims a large sum from Lee for having removed this incumbrance, and prays that the defendant may be decreed to pay it, or in default thereof, that the complainant may be authorized, by a decree of the court, to sell the military lands, which he considered as a pledge in his hands, and out of the proceeds to pay himself. Not a single demand is stated in the bill, except the one arising out of the complainant's extinguishment of the incumbrance, which Lee had taken upon himself to remove.

On Lee's answer coming in, denying several of the allegations of the bill, the cause is referred to a master commissioner, who, after a long investigation, in the presence of both parties, and the examination of many witnesses, makes a report by which Hopkins is made a debtor of Lee in the sum of $427.77. On inspection of this report, it will be seen, that the chief, if not the only controversy between the parties was, whether Hill and Dale had
*116] been relieved *from its incumbrance to Colston, by funds furnished by Lee to Hopkins for that purpose, and that unless that fact had been found affirmatively, a report could not have been made in Lee's favor. The court, after referring to this report, and stating that it had not been excepted to, proceeds to decree the payment of this balance by the complainant to the defendant. From this summary review of the proceedings in chancery, the conclusion seems inevitable, that the chief, if not sole matter in litigation in that suit, was, whether Hill and Dale had been freed of the incumbrance to Colston, by Lee or by Hopkins, and that the report and subsequent decree proceeded on the ground, and established the fact, that Lee had discharged it, which was also the only point put in issue by the first plea of the defendant, in the action of covenant. No rule of evidence, therefore, is violated, in saying that this decree was properly admitted by the circuit court.

But if the decree were admissible, it is supposed, thet the report of the master ought not to have been submitted to the jury. The court entertains a different opinion. No reason has been assigned why a decision by a proper and sworn officer of a court of chancery, in the presence and hearing of both

parties, according to the acknowledged practice and usage of the court, on the very matters in controversy, not excepted to by either party, and confirmed by the court, should not be as satisfactory evidence of any fact found by it, as the verdict of a jury, on which a judgment is afterwards rendered. The advantage which a verdict may be supposed to possess over a report, from its *being the decision of twelve, instead of the opinion of a single man, is, perhaps, more than counterbalanced by the time which [*117 is allowed to a master for deliberation, and a more thorough investigation of the matters in controversy. But a better and more satisfactory answer is, that it is the usual, known and approved practice of the court to whose jurisdiction the parties had submitted themselves. But if this document be witheld from a jury, how are they or the court to arrive at the grounds of the decree, or a knowledge of the points or matters which have been decided in the cause? Without it, the decree may be intelligible; but the grounds on which it proceeds, or the facts which it means to decide, may be liable to much uncertainty and conjecture. The report, therefore, as well as the decree, was proper evidence, not only of the fact that such report and decree had been made, but of the matter which they professed directly to decide. We are not now called upon to say, whether, in those respects, they were conclusive, as they do not appear to have been offered with that view; but without meaning to deny to them such effect, we only say, which is all that the present case requires, that they were competent and proper, in the absence of other testimony, to establish the fact of the removal of the incumbrance by the defendant Lee, from the estate of Hill and Dale.

In the assessment of damages, the counsel for the plaintiff in error, prayed the court to instruct the jury, that they should take the price of the land, as agreed upon by the parties, in the articles of agreement upon which the suit was brought, for their government. *But the court refused [*118 to give this instruction, and directed the jury to take the price of the lands, at the time they ought to have been conveyed, as the measure of damages. To this instruction the plaintiff in error excepted. The rule is settled in this court, that in an action by the vendee for a breach of contract on the part of the vendor, for not delivering the article, the measure of damages is its price, at the time of the breach. The price being settled by the contract, which is generally the case, makes no difference, nor ought it to make any; otherwise, the vendor, if the article have risen in value, would always have it in his power to discharge himself from his contract, and put the enhanced value in his own pocket. Nor can it make any difference in principle, whether the contract be for the sale of real or personal property, if the lands, as is the case here, have not been improved or built on. In both cases, the vendee is entitled to have the thing agreed for, at the contract price, and to sell it himself at its increased value. If it be withheld, the vendor ought to make good to him the difference. This is not an action for eviction, nor is the court now prescribing the proper rule of damages in such a case. (a)

Judgment affirmed.

(a) As to the damages recoverable upon an eviction of real property, see 2 Wheat. 62, note.

*Thatcher *et al. v.* Powell *et al.*, Lessees.

Tax sales.

The execution, by a public officer, of a power to sell lands for the non-payment of taxes, must be in strict pursuance of the law under which it is made, or no title is conveyed.[1]

It is essential to the validity of the sale of lands for taxes, under the laws of Tennessee, that it should appear on the record of the court, by which the order of sale is made, that the sheriff had returned that there were no goods and chattels of the delinquent proprietor, out of which the taxes could be made.

The publications which are required by law to be made, subsequent to the sheriff's return, and previous to the order of sale, are indispensable preliminaries to a valid order of sale.

In summary proceedings, where a court exercises an extraordinary power, under a special statute, which prescribes its course, that course ought to be strictly persued, and the facts which give jurisdiction, ought to appear on the face of the record; otherwise, the proceedings are not merely voidable, but absolutely void, as being *coram non judice.*

In construing local statutes respecting real property, this court is governed by the decisions of the state tribunals.[2]

Error to the Circuit Court of West Tennessee.

February 12th, 1821. This cause was argued at the last term, and at the present term, the opinion of the court was delivered by Marshall, Ch. J.— This was an action of ejectment, instituted by the defendants in error against the plaintiffs, to recover 640 acres of land in Montgomery county. Upon the trial in the court below, the lessors of the plaintiffs, in support of their *120] title, read in evidence a grant *from the state of North Carolina to Stokeley Donaldson, dated the 12th of January 1797; also a deed for the same land from the said Donaldson to John Love, dated the 13th of January 1797, and registered in Montgomery county, on the 25th of July 1815, upon a probate made in the county court of Grange county, at May term of the said court, 1814. The defendants in that court, to support their title, read in evidence a transcript of a record from the county court of Montgomery county, at their July session of 1801, as follows, viz:

"Haydon Wells, who was appointed by the court of January term 1801, to receive the list of taxable property in Captain Boyd's company, reports to court a list of taxable property in the county of Montgomery, not listed for the year 1799, nor taxes paid thereon, to wit, among others, 'Stokeley Donaldson, 2560 acres on Yellow Creek waters.'

"Haydon Wells, T. P."

"Ordered, that the clerk make out a certificate of lands and tenements reported by Haydon Wells, Esq., for the year 1799, that are liable to the payment of taxes, agreeably to the 14th section of 'an act to ascertain what property in this state shall be deemed taxable, and the mode of collecting, accounting for, and paying public taxes.' And now, to wit, at January term 1802, the following proceedings were had thereon, to wit: on motion, it is ordered, adjudged and decreed, that the tracts of land entered in the *121] names of the following persons, be subject *to the payment of taxes due thereon, agreeably to report of Haydon Wells, Esq., receiver of taxable property, as delinquent for the year 1799, agreeably to law, and that

[1] Ronkendorff *v.* Taylor, 4 Pet. 349; Parker *v.* Overman, 18 How. 137; Slater *v.* Maxwell, 6 Wall. 269.

[2] See Raymond *v.* Longworth, 14 How. 76.

execution issue accordingly," (among others) Stokeley Donaldson, $11.90. Upon which order or judgment, an execution, bearing date the fourth Monday in March 1802, was issued to the sheriff of Montgomery county, commanding him, that of the lands of Stokeley Donaldson, reported to be in arrears for taxes for the year 1799, he cause to be made the sum of $11.90, as also, the sum of $1.40 and charges, &c. Upon this execution, the sheriff made the following return:

"Levied on 2133, and advertised agreeably to the old; not sold, because the new act which requires it to be advertised in the Gazette, did not come forward till the day of sale.

"JOHN SAUNDERS, Sheriff, M. C."

On the 1st of May 1802, an *alias* execution issued, bearing date the fourth Monday in April 1802, in the words of the former, on which the sheriff made the following return: "The within land sold, agreeably to law, on the 23d of July 1802, at seven mills per acre." They also read in evidence a deed from John Cocke, sheriff of Montgomery county, to Samuel Vance, one of the defendants, dated the 14th of April 1808, reciting, that whereas, John Saunders, late sheriff of Montgomery county, did, on the 23d of July 1802, by virtue of an execution or order of sale, to him directed, from the court of *Montgomery county, expose to sale 2560 acres of land granted to Stokeley Donaldson, or so much thereof as would be [*122 sufficient to satisfy the taxes due thereon for the year 1799, agreeably to an act of assembly in such cases made and provided. And whereas, Morgan Brown became the purchaser of 2229¼ acres of the said land, at seven mills per acre, he being the highest and best bidder, the taxes and costs due thereon being $17.10; and the said Morgan Brown having authorized a deed to be made therefor to Samuel Vance: Now, the said John Cocke, in consideration of the said sum being paid to the said John Saunders, sheriff, &c., doth sell and convey the said 2229¼ acres of land, &c. The said deed then described one tract of 640 acres, the tract in question; also, two other tracts of 640 acres each; also, one other part of a survey of land of 309 acres granted to Stokeley Donaldson.

The lessors of the plaintiffs then introduced grants from the state of North Carolina to Stokeley Donaldson, all dated about the same time, for two different tracts of land of 640 acres each, a part of which are those described in the said sheriff's deed, all lying upon the waters of Yellow Creek, and proved, that the same lay in one connection of surveys, adjoining each other, but those described in the sheriff's deed were of much the greatest value.

Upon this evidence, the court instructed the jury, that it was for them to determine, whether the said lands in the said sheriff's deed mentioned, were the same lands which the former sheriff, Saunders, had *sold, or not. If not the same land, then the said sheriff's deed was not good [*123 in law. And the court further instructed the jury, that the said record, or anything therein contained, was not sufficient in law to authorize the sale of the lands made by the said sheriff, Saunders, nor the deed aforesaid made to the said Vance by the said John Cocke, the said successor of the said Saunders, and that the said sale and deed did not in law vest any title to said lands in the said Samuel Vance. To this instruction of the court, the

counsel for the defendants excepted. In consequence of this instruction, the jury found a verdict for the plaintiffs, and a judgment was accordingly rendered in their favor. The cause was then brought by writ of error to this court.

The objections made on the record to the title papers of the plaintiff, so far as respects their registration, have not been pressed in this court, and do not appear to be sustainable. The plaintiffs in error rely principally on the deed made by John Cocke, the sheriff of Mortgomery county, on the 14th of April 1808, and insist, that the instruction given by the circuit court to the jury, on this point, is erroneous.

The validity of this deed depends on the act passed by the legislature of the state of Tennessee, on the 25th of October 1797, respecting the collection of taxes. The 3d section of that act directs the court of each county, at its session, in the month of January, in each year, to appoint a justice of the *124] *peace, for each captain's district in the county, to receive lists of the taxable property, for the then present year." The 5th section makes it the duty of the sheriff to discover, and report in writing, to the clerk of the court, such taxable property as may not have been returned within the time limited by law. The 6th section directs non-residents to return to the court an inventory of their taxable property. The 9th section enacts, that if any non-resident "shall fail, by himself, his agent or attorney, to return his, her or their taxable property, as by the act directed, the property of such person, so failing, shall be liable, and stand bound to pay a fine of fifty dollars, and a double tax, to be collected and paid, as by this act directed, and the justice shall report the said property to the best of his knowledge and information as aforesaid." The 13th section directs the sheriff, in the event of the non-payment of taxes by a specified time, "to levy the same by distress and sale of the goods and chattels of every person so neglecting." And the 14th section directs the sheriff, in case there shall not be any goods and chattels on which distress may be made, to report the same to the court of the county, whose duty it is "forthwith to direct the clerk to make out a certificate of the lands and tenements liable for payment of the said taxes, together with the amount of taxes and charges due thereon." This is to be published; and if no person shall pay the taxes and other charges, within *125] thirty days, the "court shall enter up judgment *for the amount of taxes due," &c., for which execution shall issue, under which execution, the land may be sold and conveyed by the sheriff.

That no individual or public officer can sell, and convey a good title to, the land of another, unless authorized so to do by express law, is one of those self-evident propositions to which the mind assents, without hesitation; and that the person invested with such a power must pursue with precision the course prescribed by law, or his act is invalid, is a principle which has been repeatedly recognized in this court. The validity of the sale and deed made by the sheriff of Montgomery county will then depend on the regularity of the order under which the sale was made, and on the question whether that order, if erroneous, will still support the sale which has been made in pursuance of it?

Previous to an order for the sale of lands for the non-payment of taxes, the sheriff is ordered to levy them by distress and sale of the goods and chattels of the delinquent; and if there be no such goods and chattels, he is

to report the same to the court, as the foundation of any proceeding against the lands. By this act, no jurisdiction is given to the court over the lands of a person who has failed to pay his taxes, until the sheriff shall report that there are no goods and chattels out of which the taxes may be made.

This being an important fact on which the jurisdiction of the court depends, it ought, we think, to appear on record, either in the judgment itself, or in the previous proceedings. In this case, no such report appears to have been *made. Could it even be contended, that this report might be presumed, the answer is, that the terms of the order exclude [*126 such a presumption. It would appear, that the report of the magistrate, that the land in question had not been listed, was made in July 1801, and that the court immediately made that order which the law directs to be made on the sheriff's report, that there are no goods and chattels; and this order refers not to any report of the sheriff, not to any deficiency of goods and chattels, but to the report of the justice of peace, that the lands have not been listed.

This is not the only defect which appears in these proceedings. Previous to an order for a sale of land, and subsequent to the report of the sheriff, certain publications are to be made, in the manner and form prescribed by the act. These publications are indispensable preliminaries to the order of sale. They do not appear to have been made. The judgment against the land was given, at January term 1802, on motion, without its appearing, by recital or otherwise, that the requisites of the law, in this respect, had been complied with, and that the tax still remained unpaid. We think, this ought to have appeared in the record.

The argument is, that the judgment, for these errors in the proceedings in the county court, may be voidable, but is not void; that until it be reversed, it is capable of supporting those subsequent proceedings which were founded on it. *We think otherwise. In summary proceedings, where a court exercises an extraordinary power, under a special [*127 statute prescribing its course, we think, that course ought to be exactly observed, and those facts, especially, which give jurisdiction, ought to appear, in order to show that its proceedings are *coram judice*. Without this act of assembly, the order for sale would have been totally void. This act gives the power only on a report to be made by the sheriff. This report gives the court jurisdiction; and without it, the court is as powerless as if the act had never passed.

In construing the acts of the legislature of a state, the decisions of the state tribunals have always governed this court. In Tennessee, the question arising in this cause, after considerable discussion, seems to have been finally settled on principles which are thought entirely correct. The case of *Francis's Lessee* v. *Washburn & Russell*, reported in 5 Hayw. 294, is this very case, and was decided as this case was decided in the circuit court. On the authority of that case, and on principle, the court is of opinion, that there is no error in the judgment of the circuit court.

Judgment affirmed.

*Randolph *et al.* v. Barbour *et al.*

Dismissal of appeal.

An equity suit, where an appeal has been taken from the circuit court to this court, but not prosecuted, will be dismissed, upon producing a certificate from the court below, that the appeal has been taken and not prosecuted.

February 12th. *B. Hardin*, for the respondents, moved to docket and dismiss the appeal in this case, which was a suit in chancery, commenced in the Circuit Court of Kentucky, and a decree entered, from which an appeal was taken, but not prosecuted. He produced a certificate from the clerk of the court below to that effect.

The Court stated, that the case was within the spirit of the 20th rule of court, although that rule applied, in terms, only to writs of error.

Motion granted.

Order.—A certificate, from the clerk of the circuit court for the district of Kentucky, stating that an appeal had been taken in this case, in May term 1819, from the decree of the said circuit court, having been produced and filed, and it appearing, that the record in said cause, has not been filed: on motion of Mr. Hardin, of counsel for the respondents, it is ordered, that the said appeal be and the same is hereby dismissed.(*a*)

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*129] ## *Mayhew *v.* Thatcher *et al.*

Interest.—State records.

As, by the laws of Louisiana, questions of fact in civil cases are tried by the court, unless either of the parties demands a jury; in an action of debt on a judgment, the interest on the original judgment may be computed and made part of the judgment, in Louisiana, without a writ of inquiry and the intervention of a jury.

The record of a judgment in one state, is conclusive evidence in another, although it appears that the suit in which it was rendered, was commenced by an attachment of property, the defendant having afterwards appeared and taken defence.[1]

Error to the District Court of Louisiana. This was an action of debt, commenced by the defendants in error, against the plaintiff in error, in the district court of Louisiana, upon a judgment obtained in the circuit court of Massachusetts. The original suit, in which the judgment was obtained, was commenced by a process of foreign attachment, according to the local laws of Massachusetts; but the defendant, Mayhew, subsequently appeared and took defence. The cause was referred to arbitrators, and judgment rendered upon their report against the defendant, Mayhew, for the sum of $4788.57 debt, and $284.33 costs.

The defendants in error having declared upon this judgment, against the plaintiff, in the district court of Louisiana, the plaintiff in error pleaded *nil*
*130] *debet*, to which plea there was a general demurrer, and judgment being rendered thereon for the defendants in error, for the *sum of

(*a*) See new rule of court of the present term. Rule XXXII.

[1] Lincoln *v.* Tower, 2 McLean 473; Westervelt *v.* Lewis, Id. 511.

$5072.90 debt, with interest thereon, &c., and the cause was brought before this court.

February 10th, 1821. This cause was argued by *C. J. Ingersoll*, for the plaintiff in error, and by *Hopkinson* and *Mills*, for the defendants in error. (*a*)

February 12th. MARSHALL, Ch. J., delivered the opinion of the court that as by the local laws and practice of Louisiana, questions of fact in civil cases were tried by the court, unless either of the parties demanded a jury, the interest upon the original judgment in Massachusetts might be computed, and make a part of the judgment in Louisiana, without a writ of inquiry, and the intervention of a jury. And that although the original suit was commenced by an attachment, yet that the defendant, Mayhew, had personal notice of the suit, and afterwards appeared and took defence, so that even supposing there was any objection to the proceeding by attachment, it was cured by the appearance of the defendant, and his litigating the suit.

Judgment affirmed.

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*FARMERS' & MECHANICS' BANK OF PENNSYLVANIA *v.* SMITH. [*131

State insolvent laws.

An act of a state legislature which discharges a debtor from all liability for debts contracted previous to his discharge, on his surrendering his property for the benefit of his creditors, is a law impairing the obligation of contracts, within the meaning of the constitution of the United States, so far as it attempts to discharge the contract: and it makes no difference, in such a case, that the suit was brought in a state court of the state, of which both the parties were citizens, where the contract was made, and the discharge obtained, and where they continued to reside until the suit was brought.[1]

Farmers & Mechanics' Bank *v.* Smith, 3 S. & R. 63, reversed.

ERROR to the Supreme Court of the State of Pennsylvania. This was an action of *assumpsit*, brought by the plaintiffs in error, in the supreme court of the commonwealth of Pennsylvania, against the defendant in error, as indorser of a promissory note, made at Philadelphia, by one Edward Shoemaker, on the 6th of June 1811, for $2500, payable in six months after date, and indorsed by the defendant to the plaintiffs at the same place, on the same day.

The declaration was in the usual form; and the defendant pleaded, that on the 8th day of September 1812, he was a citizen of the said commonwealth, residing in the city and county of Philadelphia, and having resided there for more than two years before that time; and that, being such citizen and resident, he, the defendant, in conformity to the act of the *legislature of the said commonwealth, passed on the 13th of March 1812, [*132 entitled, "an act for the relief of insolvent debtors residing in the city and county of Philadelphia," did, on the said 8th day of September 1812, at the

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(*a*) The latter cited Brown *v.* Van Braam, 3 Dall. 344; Renner *v.* Marshall, 1 Wheat. Rep. 215, to show, that where the action is brought for a sum certain, or which may be made certain by computation, judgment for the damages may be entered up by the court, without a writ of inquiry.

[1] Golden *v.* Prince, 3 W. C. C. 313.

city of Philadelphia aforesaid, present his petition to Charles Jared Ingersoll, &c., the commissioners appointed under and by virtue of said act, &c.; in which petition, he, the said petitioner, did state his belief, that he was insolvent, and did pray that he might be permitted to assign all his estate and property for the benefit of his creditors, and be discharged by virtue of said act. Whereupon, the said commissioners did appoint Matthew Randall, &c., to be curators, to whom the defendant did thereupon forthwith assign all his estate, real and personal, in conformity with the provisions of the said act. And the said commissioners did then and there appoint the second day of October 1812, aforesaid, for the hearing the defendant and his creditors, of which due notice was given according to the provisions of the act aforesaid. Upon which day, &c., the said petitioner did exhibit a true account and list of all his creditors, and moneys due, and to become due, and owing to them respectively by him; and also an inventory and account of his estate, real and personal, and of all interest of him, the said petitioner, either present or contingent, in anything of value, and of all books, vouchers and securities relating to the same. And thereupon, the said Charles Jared Ingersoll, one of the said commissioners, did administer to him, the said
*133] petitioner, the oath required by the said law, which was duly *taken by him, the said petitioner, according to the requisition of the said law. And afterwards, &c., the said commissioners did assign to Chandler Price, &c., who were duly nominated and appointed assignees, all the estate, real and personal, of him the said petitioner, or which was of him the said petitioner, at the time of the provisional assignment so as aforesaid made to the curators aforesaid. And the said commissioners did appoint the 15th day of October, then next, for a second examination of him the said petitioner. Upon which second examination, it appearing to the satisfaction of the said commissioners, that the said petitioner had not concealed any part of his property, &c., and he, the said petitioner, having also, in all other things, conformed to the provisions of the said act, the said commissioners did, then and there, give to him, the said petitioner, a certificate, under their hands and seals, that he, the said petitioner, had, in all things, conformed to, and was discharged by, said act. The plea also averred, that the cause of action arose in the city and county of Philadelphia, from contracts made within the same, and that the plaintiff and defendants were, at the time the said contracts were made, and at the time the causes of, action accrued, and at the time the said act passed, citizens of the state of Pennsylvania, and still continued to be citizens thereof.

To this plea, there was a demurrer; and judgment being rendered thereon for the defendant, the cause was brought by writ of error to this court.

*134] *This cause was argued by *Hopkinson*, for the plaintiffs, and by *Sergeant*, for the defendant.

February 12th, 1821. MARSHALL, Ch. J., delivered the opinion of the court, that this case was not distinguishable from its former decisions on the same subject,(*a*) expect by the circumstances, that the defendant, in the present

(*a*) Sturges *v.* Crowninshield, 4 Wheat. 122; McMillan *v.* McNeill, Id. 209.

case, was a citizen of the same state with the plaintiffs, at the time the contract was made in that state, and remained such, at the time the suit was commenced in its courts. But that these facts made no difference in the cases. The constitution of the United States was made for the whole people of the Union, and is equally binding upon all the courts and all the citizens.

Judgment reversed.

JUDGMENT.—This cause came on to be heard, on the transcript of the record of the supreme court for the eastern district of the commonwealth of Pennsylvania, and was argued by counsel: On consideration whereof, the court is of opinion, that the said supreme court for the eastern district of the commonwealth of Pennsylvania erred, in giving judgment for the defendant, on the demurred of the plaintiffs to the plea of the said defendant: It is, therefore, adjudged and ordered, that the judgment of the said supreme court for the eastern district of the commonwealth of Pennsylvania be and *the same is hereby reversed and annulled. And it is further [*135
ordered, that the said, cause be remanded to the said supreme court for the eastern district of the commonwealth of Pennsylvania, with directions to enter judgment for the plaintiffs in the said court.

UNITED STATES *v.* WILKINS.

Public contracts.

Where, in a contract with the secretary of war, for supplying the troops of the United States with provisions, specific prices are stipulated for rations issued at certain places mentioned in the contract; and it is further provided, that "should any rations be required, at any places, not specified in this contract, the price of the same shall be hereafter agreed on betwixt the public and the contractor;" if the parties cannot agree upon the price for the rations thus required, a reasonable compensation is to be allowed, and is to be proved by competent evidence, and settled by a jury; and the contractor, upon the trial, is at liberty to show, that the sum allowed by the secretary of war is not a reasonable compensation.

Under the 3d and 4th sections of the act of the 3d of March 1797, the defendant is entitled, at the trial, to the full benefit of any credit in his favor, whether arising out of the particular transaction for which he was sued, or out of distinct and independent transactions, which would constitute a legal or equitable set-off, in whole or in part, of the debt sued for by the United States.[1]

THIS was an action of debt, brought in the District Court of Kentucky, against the defendant, a former contractor for supplying the troops [*136
of the United *States with provisions. The defendant pleaded *nil debet.*

The attorney of the United States, to support the issue on the part of United States, produced a certain account, marked A. The counsel for the defendant, to support the issue on his part, produced the contract marked B; also a paper marked C, and an account for contingent claims, marked D. By the contract entered into between the defendant and the secretary of war, on the 3d of July 1801, it was, among other thing, agreed, that the contractor should receive "for every complete ration issued at the Chickasaw bluffs, at Nashville, at Bear creek, on the Tennessee, or at any other

[1] United States *v.* Bank of the Metropolis, 15 Pet. 377; United States *v.* Collier, 3 Bl. C. C. 326; United States *v.* Mann, 3 Brock. 9.

place on the road between Nashville and Bear creek, fourteen cents;" and "for every complete ration issued at any place in the Chickasaw or Choctaw country, on the road between Bear creek and Natchez, eighteen cents and one-half cent;" and that, "should any rations be required at any places, or within any other districts not specified in this contract, the price of the same shall be hereafter agreed on betwixt the public and the contractor."

It appeared from the evidence, that at the time the contract was entered into, the road from Nashville to Natchez crossed the Tennessee river, at the mouth of Bear creek, which empties into the Tennessee river on the south-west side. That after the date of the contract, a new road from Nashville to Natchez, passing through the Chickasaw and Choctaw country, was cut out by the United States troops, which crossed the Tennessee river, about *137] twelve or fourteen miles above the mouth of Bear creek, and *about ten miles farther from Nashville. That during the continuance of the contract, a cantonment was established on the south-west side of the Tennessee river, at the crossing point of the new road, and in the Chickasaw country. That the rations on which the two first deductions were made in the paper marked C, were issued at this cantonment, and on the new road, as far as Bear creek. That supplying rations at the cantonment, and on the road as aforesaid, was more expensive to the contractor than it would have been at the mouth of Bear creek. That Fort Deposit is situated on the road from Natchez to Nashville, on the north-east side of the Bayou Piere, about half a mile above the Grindstone ford. That when the contract was entered into, the Bayou Piere was considered the Choctaw boundary; but at the treaty afterwards held at Fort Adams, it was discovered, that an old boundary line existed between the Choctaw Indians and the French, twenty miles in advance from the Grindstone ford, and this line was adopted in the treaty. That at this post the rations were deposited, on which the third deduction was made in the paper marked C.

On the trial of this cause, the following questions occurred: 1. Whether, under the contract marked B, the defendant was entitled to the sums, or either of them, disallowed in the papers C and D, which had been presented to the proper officers, and by them disallowed? 2. If the defendant be not *138] entitled to the amount *claimed in the first, second and third items, or either of them, in the paper marked C, on the ground, that the place at which the rations were delivered is not specially provided for in the contract, has he a right to show, that the sum allowed by the secretary of war for those rations is not a reasonable compensation? 3. Upon such proof, is the defendant entitled to a reasonable compensation for those rations, to be ascertained by the jury? 4. If the defendant be entitled to any of the above sums, can he be permitted to claim a credit for them in this suit?

The opinions of the judges of the circuit court being opposed upon these questions, they were ordered to be certified to this court, according to the act of congress.

February 6th, 1821. This cause was argued by the *Attorney-General*,(a) for the United States, and by *Jones* and *B. Hardin*, for the defendant.

(a) He cited the case of the Commonwealth v. Matlack, 4 Dall. 308, in which it was

United States v. Wilkins.

February 14th. STORY, Justice, delivered the opinion of the *court.—This case comes up from the circuit court of Kentucky, upon a division of opinion of the judges upon certain questions stated in the record.

It appears from the record, that the defendant, on the 3d of July 1801, entered into certain articles of agreement with the secretary at war, for supplying the troops of the United States with provisions, at certain places enumerated in the contract. Among other things, the articles provide, that that the contractor should receive, "for every complete ration issued at the Chickasaw bluffs, at Nashville, at Bear creek, on the Tennessee, or at any place on the road between Nashville and Bear creek, fourteen cents;" and, "for every complete ration issued at any place in the Chickasaw or Choctaw country, on the road between Bear creek and Natchez, eighteen cents and one-half cent;" and that, "should any rations be required, at any places or within any other districts not specified in this contract, the price of the same shall be hereafter agreed on betwixt the public and the contractor."

At the time the contract was entered into, the road from Nashville to Natchez crossed the Tennessee river at the mouth of Bear creek, which empties into Tennessee river on the south-west side. After the date of the contract, a new road from Nashville to Natchez, passing through the Chickasaw and Choctaw country, was cut by the United States troops, which crossed the Tennessee river about twelve or fourteen miles above the mouth of Bear creek, and about ten miles farther from Nashville. During the continuance of the contract, a *cantonment was established on the south-west side of the river Tennessee, at the crossing point of the new [*140 road, and in the Chickasaw county. At this cantonment, certain rations were issued by the defendant, for which he claimed the contract price of eighteen and a half cents a ration, as rations in the Chickasaw country. This claim was disallowed by the treasury department, and constitutes the first and second items of an account presented to the treasury, and referred to in the first question as the paper marked C. The remaining item of the same account, which was disallowed by the treasury, was for certain rations deposited at Fort Deposit, for which the defendant claimed also the contract price of eighteen and a half cents a ration, as rations issued in the Choctaw country. At the time the contract was made, Fort Deposit was considered within the Choctaw boundary; but at the treaty afterwards held at Fort Adams, it was discovered, that an old boundary line existed between the French and the Choctaws, which was the line adopted by that treaty, and excluded Fort Deposit from the Choctaw country. There is another account annexed to the record marked D, consisting of certain claims of the defendant against the United States, which were presented to and disallowed by the treasury department. Upon these claims, it is unnecessary to say more, than that this court entirely concurs in the opinion of the treasury department.

The first question, then, is, whether the defendant is entitled to any or

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held by the supreme court of Pennsylvania, under the statute of that state, that a debtor to the commonwealth, who was sued by it, could not indirectly recover from the state a substantive, independent claim, by way of set-off, any more than he could directly recover a debt due from the state, by bringing a suit against it. He also cited United States v. Giles, 9 Cranch 212, 228, to the same effect.

ail of the items disallowed by *the treasury department in the account C. It is contended on behalf of the United States, that the two first items for rations issued and deposited at the cantonment on the new road on Bear creek, were within that part of the contract providing for rations issued "at any place on the road between Nashville and Bear creek," for which the defendant was entitled to the contract price of fourteen cents only; and that this sum had been allowed therefor at the treasury. On the other hand, the defendant's counsel pretends, as has been already stated, that this cantonment was within the Chickasaw country, and that the phrase, "Bear creek on the Tennessee," in the contract, means the mouth of Bear creek, on the Tennessee; so that the defendant is entitled to the contract price of eighteen and a half cents.

We are, however, of opinion, on this point, that the contract must necessarily be presumed to refer to the actual state of things, at the time of its inception, inasmuch as there is nothing in it which shows that the parties had in contemplation any prospective changes. The phrase "Bear creek, on the Tennessee," seems to be an unusual description of the junction of a creek with a river; but in its connection with the context, we are unable to give it any other rational interpretation. And if this were even doubtful, we are of opinion, that the road between Nashville and Bear creek, spoken of in the contract, is the road then in existence and use between those places, and cannot, in the absence of all evidence of intention, be construed to mean a
*142] new road, not then laid out or made, nor shown to be in *the contemplation of the parties. The rations, then, issued and deposited at the cantonment, on the new road, were not provided for in the contract, at a specific price; not at the price of fourteen cents, for they were not issued at any place on the old road between Nashville and Bear creek, described in the contract; and not the price of eighteen and a half cents, for it was not sufficient, that the cantonment should be in the Chickasaw and Choctaw country, but it must also be on the road between Bear creek and Natchez, existing at the time of the contract. The case, then, falls precisely within that clause of the articles of agreement, that provides, that the price of rations delivered at any other places not specified, shall be thereafter agreed on betwixt the public and the contractor; and this is the construction originally adopted by the government itself.

The same reasons which lead us to this conclusion, constrain us to adopt the construction, that the parties, in their contract, in referring to the Chickasaw and Choctaw country, intended not a disputed, imaginary or rightful boundary afterwards to be settled; but the actual reputed boundary of that country. If, then, Fort Deposit was within the reputed boundary, at the time of the contract, the line as afterwards settled by the treaty at Fort Adams, though the true line, has nothing to do with the case; and the rations deposited at Fort Deposit are to be paid for at the contract price of eighteen and a half cents a ration.

The second and third questions propounded by the circuit court, may be
*143] shortly answered. If *there be no specific price agreed upon in the contract for rations issued at any place, the contract leaves the price to be adjusted by the government and the contractor. It is to be the joint act of both parties, and not the exclusive act of either. If they cannot agree, then a reasonable compensation is to be allowed; and that reasonable com-

pensation is to be proved by competent evidence, and settled by a jury, as in common cases; and the defendant upon such a trial, is at liberty to show, that the sum allowed him by the secretary of war is not a reasonable compensation.

The fourth question is, whether the defendant can be permitted to claim a credit for the sums due him, under the contract, in this suit. The answer may materially depend upon the true construction of the act of congress of the 3d day of March 1797, c. 74, providing for the more effectual settlement of accounts between the United States and public receivers. The third section of that act provides, that upon suits instituted against any person indebted to the United States, judgment shall be rendered at the return-term, unless the defendant shall, in open court, make oath or affirmation, that he is equitably entitled to credits which had been, previous to the commencement of the suit, submitted to the consideration of the accounting officers of the treasury, and rejected, &c. The fourth section then provides, that in suits between the United States and individuals, no claim for a credit shall be admitted upon trial, but such as shall appear to have been presented to the accounting officers of the treasury for their *examination, and by them disallowed, in whole or in part, unless it shall be proved to the [*144 satisfaction of the court, that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the treasury, by absence from the United States, or some unavoidable accident. The terms of these sections are very broad and comprehensive. The third section manifestly supposes, that not merely legal, but equitable credits ought to be allowed to debtors of the United States by the proper officers of the treasury; and the fourth section prohibits no claims for any credits, which have been disallowed at the treasury, from being given in evidence by the defendant at the trial. There being no limitation as to the nature and origin of the claim for a credit which may be set up in the suit, we think it a reasonable construction of the act, that it intended to allow the defendant the full benefit, at the trial, of any credit, whether arising out of the particular transaction for which he was sued, or out of any distinct and independent transaction, which would constitute a legal or equitable set-off, in whole or in part, of the debt sued for by the United States. The object of the act seems to be, to liquidate and adjust all accounts between the parties, and to require a judgment for such sum only, as the defendant in equity and justice should be proved to owe to the United States. If this be the true construction of the act, which we do not doubt, the defendant might well claim a credit in this suit for the sums due him, even if they had *grown out of distinct [*145 and independent transactions, for he is legally, as well as equitably, entitled to them. But even if this construction of the act were doubtful, upon the facts of this particular case, so far as we can gather them, we should have probably come to the same result.

This suit seems to have been brought by the United States, for the money price of certain provisions received by the defendant under the articles of agreement. The real object of the suit is, therefore, to procure an account and settlement of that claim. It forms an item in the general account between the parties, like every other advance made by the government to the defendant; and independent of any statute provision, the defendant

would have a right to show, that he had accounted for the value of such advance, by delivering the equivalent provisions for which it was originally made. In this view also, the fourth question might be answered in the affirmative.

The opinion of the court will be certified accordingly to the circuit court of Kentucky:

1. That under the contract marked B, the defendant is not entitled to the sums disallowed in the paper D, nor to the sums specifically charged in the first and second items of the paper C, which were disallowed by the treasury officers; but is entitled to the sum charged in the third item of the paper C, which was disallowed by the same officers, if Fort Deposit was within the reputed boundary of the Choctaw country.

*146] *2. That the defendant is not entitled to the first and second items in the paper C, on the ground, that the place at which the rations were delivered is not specially provided for in the contract; but that he has a right to show, that the sum allowed by the secretary of war for those rations, is not a reasonable compensation.

3. That upon such proof, the defendant is entitled to a reasonable compensation for those rations, to be ascertained by the jury.

4. That the defendant ought to be permitted to claim a credit for the above sums due him in this suit.

Certificate accordingly.

YOUNG *v.* BRYAN *et al.*

Jurisdiction.

The circuit court has jurisdiction of a suit brought by the indorsee of a promissory note, who is a citizen of one state, against the indorser, who is a citizen of a different state, whether a suit could be be brought in that court by the indorsee, against the maker or not.[1]

No protest of a promissory note, or inland bill of exchange, is necessary.[2]

ERROR to the Circuit Court of Tennessee. This was an action of *assumpsit*, brought in the court below, by the defendants in error, citizens

*147] of Pennsylvania, against the the plaintiff in error, a citizen *of Tennessee, as the indorser of a promissory note made by another citizen

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[1] Mollan *v.* Torrance, 9 Wheat. 537; Evans *v.* Gee, 11 Pet. 80; Coffee *v.* Planters' Bank, 13 How. 183. The holder of a note payable to bearer, may sue in a circuit court, if otherwise capable. Bank of Kentucky *v.* Wister, 2 Pet. 319; Bonnafee *v.* Williams, 3 How. 574; White *v.* Vermont and Massachusetts Railroad Co., 21 Id. 575; Bradford *v.* Jenks, 2 McLean 130; Halsted *v.* Lyon, Id. 226; Sackett *v.* Davis, 3 Id. 101. And this, though the note be indorsed by the payee. Varner *v.* West, 1 Woods 493. So also, the circuit court has jurisdiction of a suit by the holder of a railroad bond, payable in blank. White *v.* Vermont and Massachusetts Railroad Co., 21 How. 575. And by the holder of a coupon bond, payable to bearer. Thomson *v.* Lee County, 3 Wall. 327. In a suit by the indorsee of a promissory note, the jurisdiction is determined by the citizenship of the indorser at the time of the commencement of the action and not at the making of the indorsement. Chamberlain *v.* Eckert, 2 Biss. 126. But the plaintiff must show that the indorser is a citizen of a different state, though he indorsed solely for the accommodation of the maker. Noell *v.* Mitchell, 4 Id. 346. And he must allege that the citizenship of the parties through whom he claims title, is different from that of the defendant. Morgan's Executor *v.* Gay, 19 Wall. 81.

[2] Union Bank *v.* Hyde, *post*, p. 572; Nicholls *v.* Webb, 8 Wheat. 320; Stephenson *v.* Dickson, 24 Penn. St. 148.

of Tennessee, and indorsed to the plaintiffs. The only questions in the cause were: 1. Whether the court below had jurisdiction: and 2. Whether notice of protest was necessary to charge the indorser in this case. Judgment having been rendered against the defendant below, the cause was brought by writ of error to this court.

February 22d. *Eaton*, for the plaintiff in error, argued: 1. That under the 11th section of the judiciary act of 1789, c. 20, the court below had not jurisdiction. The decision of this court, in the cases of *Montalet* v. *Murray*, 4 Cranch 46, and *Turner* v. *Bank of North America*, 4 Dall. 11, shows, that where jurisdiction does not attach between the drawer and drawee, assignment cannot give jurisdiction. The indorser can only transfer, by the assignment, the rights and interest he possesses; as he had no right (he and the maker being citizens of the same state) to sue in the federal court, he could not, consequently, create any such right by the assignment. It would amount to a creation of jurisdiction, by consent, which the law does not warrant. The case of *Slacum* v. *Pomery*, 6 Cranch 221, went off on the ground of the want of notice. At any rate, that was a *foreign* bill, and perhaps, within the operation of the 11th section of the judiciary act: it is, then, not authority in this case. In the language of the 11th section of the judiciary act, *this is a "suit to recover the contents of a promissory note in favor of an assignee," &c. The declaration contains but [*148 a single count, founded upon the assignment, non-payment and consequent liability of the plaintiff in error. There is no count for money had and received; there is but a single count, and that is to recover the contents of the note, a *chose in action*, which is against the express provision of the act. There is no distinct, substantive contract, between the indorser and holder of the note; and, if there were any, it is not declared on.

2. No notice of protest was given. This was necessary to charge the indorser: *French* v. *Bank of Columbia*, 4 Cranch 141; *Donaldson* v. *Means*, 4 Dall. 109; and the declaration should contain an averment of notice of protest. *Slacum* v. *Pomery*, 6 Cranch 221.

Sergeant, contrà, admitted: 1. That where, by the judiciary act, jurisdiction does not attach between the maker and the payee of a note, assignment cannot give jurisdiction. Such, and no more, is the amount of the decisions referred to. If the payee of the note could not maintain a suit in the federal courts against the maker, neither can the indorsee maintain a suit in the federal courts against the maker. But the jurisdiction of the federal courts extends to the case of a suit brought by the indorsee against the indorser, being citizens of different states, whether a suit could have been there brought against the makers or not. By the words of the act, a general jurisdiction is given, in terms, *embracing all cases where citizens of [*149 different states are parties. Being in conformity with the provisions of the constitution, and intended to secure to the suitor an impartial tribunal, it ought to be liberally construed. Out of this general grant, there is a particular exception, which ought not to be extended beyond its natural construction, but rather to be strictly taken, being against constitutional right; and if there be doubt, that interpretation should be given, which is most favorable to the jurisdiction. The words are, "nor shall any district or circuit

court have cognisance of any suit to recover the contents of any promissory note, or other *chose in action*, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in case of foreign bills of exchange." These words necessarily import a recovery by an assignee, claiming through the medium of an assignment, of the same contents which might have been recovered by the assignor, if he had not assigned. They apply only to a derivative claim. If the payee should make a special indorsement to a citizen of the same state, and such indorsee should indorse the note to a citizen of a different state, the latter, perhaps, could not sue the first indorsee in the federal court, because he would be obliged to claim under the assignment, and in the right of the assignor. But if the payee indorse the note to a citizen of a different state, there is a new contract entered into between the indorser and the indorsee, by the indorsement, and the indorsee would claim
*150] upon the footing of *that contract, without regard to the original engagement, except for the fact (upon which the liability of the indorsee arises), that the note has been dishonored. The contract is so entirely independent, that the indorsee would be liable, though the note were forged, or the maker fictitious. The assignment, it is true, is the evidence of the contract, and in a certain sense, the foundation of his claim; but he does not claim through it, nor under it, nor does he claim at all as assignee. In the case of a note payable to bearer, and transferrible by delivery, it is believed, there could be no doubt of the jurisdiction, in favor of a *bonâ fide* holder, being a citizen of a different state from the maker, through whatever hands it might have passed in its course to him. He would claim in his own right, and not by assignment. In the case of a general indorsement, also transferrible by delivery, and conferring upon the *bonâ fide* holder an original right of suit against the indorser, the court would have jurisdiction of a suit against the indorser, for the same reason. And in case of a special indorsement to a citizen of a different state, the argument, if possible, is still stronger. Neither of these is within the words of the act. The plain intention of the provision is effectuated, by the construction contended for on the part of the defendants in error. The design of the exception was, either to prevent colorable transfers, for the purpose of giving jurisdiction, or to enable the party to a negotiable contract, to secure to himself the jurisdiction of the state courts. The interpretation contended for, does not interfere
*151] with these views. *It is in the power of the indorser to fix the jurisdiction, by making a special indorsement, as it is in the power of the maker to escape the federal jurisdiction, by making the note payable to a citizen of the same state. But, as it must be admitted, that where the note is payable to a citizen of a different state, or, being payable to bearer, comes into the hands of a citizen of a different state, the maker may become subject to federal jurisdiction, it would seem to follow, conclusively, that the indorser (omitting to guard himself, and thereby voluntarily waiving the right) would also be liable. It may be remarked, in the particular case under consideration, that the note appears, from the evidence, to have been made, and probably, indorsed, for the very purpose of being delivered to the plaintiffs below, who were, and were known to be, citizens of Pennsylvania.

2. It appears fully in evidence, that notice of non-payment by the maker,

was, in due time, given to the indorser. This is all that was necessary to be done, no protest being required of a note or inland bill of exchange. *Slacum* v. *Pomery*, 6 Cranch 221, was the case of a foreign bill.

MARSHALL, Ch. J., delivered the opinion of the court, that a suit may be brought in the circuit court, by the indorsee against the indorser, whether a suit could be there brought against the maker or not. In such a case, the indorser does not claim through an assignment. It is a new contract, *entered into by the indorser and indorsee, upon which the suit is brought; and if the indorsee is a citizen of a different state, he may [*152 bring an action against the indorser in the circuit court.

As to the other objection insisted upon by the plaintiff in error, all that was incumbent upon the holder, was, to give due notice to the indorser. No protest of a promissory note or inland bill of exchange is necessary.

Judgment affirmed.

The BELLO CORRUNES: The SPANISH CONSUL, Claimant.

Powers of foreign consuls.—Illegal capture.—Forfeiture.—Salvage.

A foreign consul has a right to claim, or institute a proceeding *in rem*, where the rights of property of his fellow-citizens are in question, without a special procuration from those for whose benefit he acts.[1]

But a consul cannot receive actual restitution of the *res* in controversy, without a special authority from the particular individuals who are entitled.

A capture, made by citizens of the United States, of property belonging to subjects of a country in amity with the United States, is unlawful, wheresoever the capturing vessel may have been equipped, or by whomsoever commissioned; and the property thus captured, if brought within the neutral limits of this country, will be restored to the original owners.[2]

Whatever difficulty there may be, under our municipal institutions, in punishing as pirates, citizens of the United States, who take from a state at war with Spain, a commission to cruise against that power, contrary *to the 14th article of the Spanish treaty, yet, there is no doubt, that such acts are to be considered as piratical acts, for all civil purposes, and [*153 the offending parties cannot appear and claim in our courts the property thus taken.

It seems, that the terms, "a state with which the king shall be at war," in the 14th article of the treaty, include the South American provinces which have revolted against Spain.

But however this may be, the neutrality act of June 1797, extends the same prohibition, with all its consequences, to a colony revolting, and making war against its parent country.

In the case of such an illegal capture, the property of the lawful owners cannot be forfeited, for a violation of the revenue laws of the country, by the captors or by persons who have rescued the property from their possession.

The rights of salvage may be forfeited by spoliation, smuggling or other gross misconduct of the salvors.[3]

APPEAL from the Circuit Court of Rhode Island. This was the case of a Spanish vessel and cargo, stranded on Block Island, and there seized by the officers of the customs.

An information on behalf of the United States was filed in the district court, against the property, as forfeited, for an alleged breach of the revenue

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[1] The London Packet, 1 Mason 14; The Adolph, 1 Curt. 87; The Huntress, 2 Wall. Jr. C. C. 59.

[2] The Conception, *post*, p. 239. And see The Fanny, 9 Wheat. 658.

[3] The John Perkins, 3 Ware 89; The Sarah A. Boice, 2 Int. R. Rec. 45.

laws. His Catholic Majesty's vice-consul for the district of Rhode Island, interposed a claim, on behalf of "certain subjects of the king of Spain," the original owners of the ship and cargo, which was bound on a voyage from the port of Tarragona, in Spain, to La Vera Cruz, and was taken off Cape St. Antonio, on the west end of the island of Cuba, on the 21st of March 1818, by an armed vessel called the Puyerredon, commanded by one James Barnes, sailing under Buenos Ayres colors, and asserting a right to make captures under the authority of the government of that place. Restitution
*154] to the original Spanish owners was claimed, *upon the ground, that the capturing vessel had been equipped in the ports of this country, in violation of our neutrality.

An allegation was also filed by Barnes, demanding restitution of the property to the captors, as having been taken, *jure belli*, on the high seas.

Another claim was also filed by certain persons, part of the original crew of the Bello Corrunes, left on board, after the capture, who asserted a claim for salvage, in case the property should be restored to the original Spanish owners, under the following circumstances. The master of the captured vessel, and all her crew, except four, were taken out, and a prize-master and crew put on board from the Puyerredon. Thus equipped, the Bello Corrunes cruised in company with the Puyerredon, nearly two months, during which period, another Spaniard, of the original crew of the Bello Corrunes, was returned to that vessel. The two vessels afterwards separated, and on the 8th of May, in lat. 32° 30′ north, and longitude 74° W. from London, the prize-crew, assisted by the persons originally on boad the Bello Corrunes, rose on the prize-master and other officers, and rescued the vessel from their possession. They then steered their course for the United States, and the vessel was by some means stranded upon Block Island, where the vessel and cargo were seized by the revenue officers.

A decree was entered in the district court, *pro formâ*, and by consent of parties, restoring the property to the original Spanish owners as claimed, and dismissing the other allegations and claims. This decree was affirmed,
*155] *pro formâ*, and by consent, in *the circuit court, and the cause was brought by appeal to this court.

It appeared by the evidence in the courts below, and by the further proof taken under a commission from this court, that the capturing vessel was formerly owned by citizens of the United States, and called the Mangoree, and was originally armed, equipped and manned at Baltimore; and sailed from that port, in March 1817, under the command of Barnes, a citizen of the United States, domiciled in that city, under Buenos Ayres colors, on a cruise; and after capturing several Spanish vessels, proceeded to Buenos Ayres, where the vessel arrived in August 1817.(*a*) The vessel was then altered from a schooner into a brig, and her name changed to the Puyerredon, an addition of one gun was made to her armament, some of the original crew were re-shipped, and other seamen recruited. An alleged sale of the vessel took place to one Higginbotham, a citizen of the United States, domiciled at Buenos Ayres; and a commission was issued by the supreme director of the United Provinces of South America, dated the 20th of November 1817, au-

(*a*) This was the same vessel which captured the Divina Pastora, in 1816. See 4 Wheat. 52.

thorizing Barnes to capture Spanish property; with which the vessel sailed from Buenos Ayres, on the cruise, during which the present capture was made.

February 8th. The *Attorney-General*, for the United States, argued, that the officers of the government being in *possession of this property, would hold it as a *droit*, until some person appeared duly authorized to claim it. The consul of Spain has no authority to claim, in his own name, and in his official character, the property of persons to him unknown, and by whom he cannot, therefore, have been invested with a special procuration. He is not invested with a general authority for that purpose, *virtute officii*, nor is there evidence, in this particular case, that the consul is the agent, consignee or correspondent of the owners, who are sometimes permitted to claim for their principal, when the latter is absent from the country.(*a*) Great public inconveniences and mischief, *might follow from allowing foreign consuls, not specially authorized by their own government, or by this, nor by the parties, to receive restitution of property, for which they may interpose a claim as belonging to their fellow-subjects. [*156 [*157

Supposing the property here to be divested out of the original owners by the capture, and vested in the captors, *jure belli*, it must be forfeited to the United States, for violating the revenue laws, which was the original in-

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(*a*) The Anne, 3 Wheat. 435; De Steck, *des Consuls*, 64; Warden on Consuls 116, and opinion of M. Portalis, there cited. This opinion of M. Portalis, in the case of the claim of the Danish consul before the French council of prizes, will be found in the appendix to the present volume of reports, Note V. The passage cited from De Steck, is as follows:

§ 27. Selon la règle par la plûpart des traités de commerce et par l'usage presque généralement reçu les consuls sont les juges des gens de mer et des négocians et marchands de leur nation.[1]

§ 28. Il leur est ordinairement attribuée la jurisdiction tant en matière civile que criminelle.

§ 29. Cette jurisdiction attribuée aux consuls n'émane point de la puissance et de l'autorité du souverain, qui les établit, qui n'a point de pouvoir sur ses sujets expatriés, démeurans, commergans, établis en des pays étrangers. Elle depend et derive plutôt de la concession, de l'attribution du souverain de l'état où les consuls résident. Elle suppose donc toujours des traités par lesquels elle est stipulée, accordée, attribuée.

§ 30. Lorsque la jurisdiction est attribuée aux consuls par les traités de commerce, ils ont le pouvoir dans leur district, dans l'endroit de leur établissement et dans leur residence, de juger les différens, contestations et procès qui surviennent entre les gens de mer, les négocians, les commergans de leur nation, qui s'élevent entre les capitaines, patrons, l'équipage, et les passagers des vaisseaux et des batimens nationaux.

§ 31. Leur jurisdiction ne se borne pas alors aux affaires contentienses des nationaux. Ils ont aussi la jurisdiction volontaire, c'est à dire la faculté de recevoir les déclarations des capitaines des vaisseaux, et tous les actes que leur nationaux veulent passer dans leur chancellerie, de les légaliser, de recevoir leur testamens, de régler leurs successions et leur tutelles, de faire l'inventaire de leur biens délaissés et naufragés, etc.

§ 32. Dans les procès que surviennent entre les nationaux et les habitans et sujets de de l'état où les consuls sont établis, ou entre les commergans d'autres nations, ils assistent, protègent, défendent leurs nationaux. Dans les échelles du Levant les juges du lieu n'osent dans ce cas procéder sans la participation et l'intervention du consul, sans la présence des on interprète. De Steck, *des Consuls*, p. 64.

[1] Valin, Com. sur l'Ordonn. de la Marine, lib. 1, tit. 9, art. 12, p. 251.

tention of the parties, and was partially accomplished at Block Island. Or, supposing the re-capture by the prize-crew to be valid, they must be
*158] *considered as the agents of the original proprietors, and their misconduct must be visited upon the original proprietors.

Winder, for the appellants and captors, insisted, that the present capture, being made on the high seas, *jure belli*, under a commission regularly issued by a government acknowledged to be entitled to exercise the rights of war against its enemy, could not be inquired into by the courts of this country; but that the captors, being entitled to the possession, having only been dispossessed by the criminal misconduct of the prize-crew which they had put on board to secure the prize, were entitled to restitution, in order to enable them to proceed against it as prize in the competent court. Whatever military means are directed, from within the territory of one of the belligerent states, against its enemy, are not subject to the review or control of any neutral or other foreign tribunal or authority, except in the single case of a direct violation of the neutral territory itself. This principle grows out of the perfect independence and equality of nations, existing, as it were, in a state of nature, in respect to each other. Their conduct in authorizing acts of war, is no more reviewable by other nations, than any other their acts of sovereignty. Vattel, *Droit des Gens*, Prelim. § 15–23; lib. 2, c. 4, § 54–5. It is this perfect independence and equality of sovereign states, which is the sole foundation of the exclusive jurisdiction of the prize courts of the cap-
*159] tor's country over everything done under a prize *commission. *L'Invincible*, 1 Wheat. 238, 254. In the celebrated case of *The Exchange*, 7 Cranch 116, this court held, that the commission of a sovereign protected that vessel from all inquiry, notwithstanding the flagrantly unjust conduct of the French emperor in appropriating the property of an American citizen to his own use, without the form of a trial, and incorporating it into his military marine. It must be shown, that the act of the government of Buenos Ayres, in granting this commission, is unlawful, before it can be shown that any of the effects of that act are invalid. Suppose, the Exchange, on her voyage, had made a capture, could this court have restored it to the former owners? Or, could it inquire into the validity of such a capture, consistently with the principles laid down in that case? The enlistment of men, in neutral countries, to serve the belligerent powers, is lawful, unless there be some express prohibition of the neutral state. Such a municipal prohibition would certainly make it unlawful, in respect to the neutral state whose laws are violated; but it does not, therefore, follow, that all the acts of such persons in war would be unlawful, or that they are not entitled to the rights of lawful war. Vattel, lib. 3, c. 2, § 13–15; Bynk. Q. J. Pub. pp. 175, 177, Du Ponceau's Trans. The carrying of contraband is prohibited by the law of nations, under the penalty of confiscation, and the exportation of contraband articles may be prohibited by the municipal code, under other penalties; but such prohibition would not invalidate a
*160] *capture made with the munitions of war thus exported. The government of this country naturalizes all foreigners indiscriminately, in peace and in war, and employs them in its land and naval service; and it is not for us to question the right of a citizen of the United States to enter into the military service of a foreign state. It is insisted, that not only the

court has no authority, by the law of nations, to restore to the original owners a prize thus captured, but that the law of nations gives the congress no power to authorize the court to restore. The legislature may prohibit our citizens from enlisting in the service of the belligerents, or from fitting out ships, to be employed in cruising, under ever so severe penalties; but those penalties cannot extend to a forfeiture of the rights of prize, acquired under the commission of an independent sovereign state. Nor are Spain and the United States competent to regulate, by their mutual treaty stipulations, the sovereign rights of the South American provinces, though they may stipulate to inflict penalties *in personam*, for what they deem the criminal conduct of their subjects or citizens. As to the claim of the United States for a forfeiture, on account of the alleged violation of the revenue laws, it is already settled by this court, that the property of foreigners cannot be forfeited for the misconduct of those who are tortiously in possession, as was the case here with the rescuers. *The Josefa Segunda*, 5 Wheat. 338.

* *Webster* and *Wheaton*, for the respondent and claimant, the Spanish consul, contended: 1. That the consul, from the necessity of the [*161 case, had a right to interpose a claim for the property of his fellow-subjects, brought into our ports in this manner. He does not claim as attorney in fact, but his character is more like an attorney-at-law. There is no necessity of a special procuration from those for whom he claims, because it does not follow, that the property will be actually delivered into his hands, until the respective rights of the owners are determined, and a special authority produced from them to receive distribution. There is the more necessity for permitting the consul, as the official protector of the commercial rights and interests of his fellow-subjects, in a foreign country, to interpose a claim, in a case of this nature, because the usual term of a year and a day, allowed in prize causes, where there is no claim, would not be allowed here, since the property is demanded by the captors, under their pretended commission, and if the subjects of Spain, residing at a distance, and ignorant even of the fact of the capture, were not allowed to be represented by their consul, the property would be taken away by the captors, and irrecoverably lost to the original owners. It will also frequently be impossible for the consul to specify the owners for whom he claims, and he ought, therefore, to be allowed to file allegations claiming it for Spanish subjects generally. The opinion of M. Portalis in the case of the Danish consul,(*a*) proceeds entirely upon the peculiar *regulation of France, which makes the [*162 *procurêur-general*, the official attorney of all persons who are not represented before the tribunals by any special procuration; which would, of course, render unnecessary the interposition of foreign consuls, in cases where the rights of their countrymen were involved.

2. They argued, that the vessel by which the present capture was made, having been fitted out in the ports of the United States, and the capture having been made by our citizens, in violation of the law of nations, the acts of congress, and the treaty with Spain, the property must be restored to the original owners, according to the uniform decisions of this court. *The Alerta*, 9 Cranch 359; *Talbot* v. *Jansen*, 3 Dall. 133; *L'Invincible*,

(*a*) See Appendix, Note V.

1 Wheat. 238; *The Divina Pastora*, 4 Ibid. 52, note to that case, p. 62; Sir L. Jenkins' Works, there cited; *The Estrella*, 4 Wheat. 298. Under our municipal constitution, the treaty is the supreme law of the land; and it would be so by the law of nations, without that constitutional provision. "Every treaty," says Sir W. SCOTT, "is a part of the private law of the country which has entered into that treaty, and is as binding on the subjects as any part of their municipal laws." *The Eenroom*, 2 Rob. 6. The 9th article of the Spanish treaty declares, that goods taken from pirates shall be restored to the lawful owners; and the 14th article declares the captors, in the present case, to be pirates, as it provides, that they shall be punished as such, for taking a commission to cruise against Spain. And yet we are
*163] inquiring, whether they are entitled to have restitution *of the very property which they have thus piratically taken. It may be admitted, that in some cases, citizens of one country may lawfully engage in the wars of another; we may take the doctrine cited from Bynkershoek, that they may enlist, where there is no prohibition. It may also safely be admitted, that so far as the other belligerents are concerned in their hostile relations with each other, it is lawful war. Spain cannot justly complain of the South American provinces for employing foreigners in their service. And if the capturing ship were a national vessel, like the Exchange (7 Cranch 116), no doubt, her commission would estop all judicial inquiry into her conduct. But this is a private claim. The original Spanish owners claim nothing against the government of Buenos Ayres; that government claims nothing of the Spanish owners. Our own citizens assert a claim to this property acquired in war, which can only be maintained, upon the supposition, that they may be at war, whilst their country is at peace; that they are not bound by the laws and treaties of their own country; that they may expatriate themselves, *flagrante bello*, for the purpose of committing hostilities against nations in amity with the United States. If the doctrine contended for on the part of the captors, that the commission is conclusive, be correct, then the court can never look behind it, and the belligerents may dispense with our laws, and the allegiance of our citizens, at their pleasure.
*164] The case of *Talbot* v. *Jansen*, 3 Dall. 133, whatever may be thought *of it in other respects, has never been overruled, as to the principle, that the neutral tribunals have a right to inquire into the validity of a captor's commission, to see whether it was obtained and used in violation of the laws of the neutral country. That case has been made the basis of a series of decisions, which have become the settled law of this court, and which it is now too late to question. The court has uniformly treated it as a necessary consequence of the personal illegality of the act of taking the commission, that the property captured under it should be restored to the lawful owner. It is, therefore, immaterial, where, or by whom, the capturing vessel was equipped. It is sufficient, that the capturing persons are citizens of the United States, and cannot assert a right of property founded on their own illegal conduct.

3. But even admitting that the original capture was legal, the prize cannot now be reclaimed by the captors. An interest acquired in war by possession, is lost with the possession. The rights of capture are completely divested by re-capture, escape or rescue. *The Astrea*, 1 Wheat. 125; *The Invincible*, 2 Gallis. 35; *Hudson* v. *Guestier*, 4 Cranch 293; s. c. 6 Ibid.

281; *The Diligentia*, 1 Dods. 404. Here, the property has been divested out of the possession of the captors, by the rescuers, for the benefit of the original owners, and the rescuers hold it in trust for their benefit.

Wheaton, for the salvors, stated, that the original *owners being thus shown to be entitled to restitution, the next question would be, whether the salvors were entitled to any, and what salvage. Unless the property were thus restored to the Spanish owners, the rescuers could not claim any salvage; for, certainly, the captors would not admit, that any meritorious service had been rendered them by the rescue. But as against the former owners, the rescuers have a just claim, having saved the property from the grasp of their enemy: and it would be idle, to send the salvors to the courts of Spain, to prosecute their claim, since the possession of the property enables this court to do complete justice between all the parties. *The Two Friends*, 1 Rob. 281. And this court has already determined, that in a case of derelict, by one belligerent, a neutral is entitled to salvage, and the courts of the neutral country into which the property is brought, have authority to award it. *The Mary Ford*, 3 Dall. 198. As to the *quantum* of salvage: one-third was allowed in that case; and it was doubted, whether more ought not to have been allowed, if the salvors had appealed. The case of *The Adventure*, 8 Cranch 221, which was a donation as sea by the belligerent captor to a neutral, who brought the property into a port of his own country, was held to be a lawful salvage, and a moiety was allowed. In the case of *Rowe* v. *The Brig* ———, 1 Mason 372, which was a Spanish vessel captured by a South American cruiser, one of the learned judges of this *court allowed a moiety of the net value. And in general, it may be affirmed that there is no inflexible rule, either in cases of derelict, or of rescue; a reasonable salvage, proportioned to the meritorious exertions of the salvors, is to be decreed; but never less than a third, unless the property is very valuable, or the services rendered very inconsiderable.(a) [*165 [*166

Webster, contrà, upon the claim for salvage, insisted, that it appeared by the evidence, that there had been a partial embezzlement of the property by the alleged salvors, and that it was a fixed rule, that such misconduct, or any circumstance of fraud, forfeited the rights of salvage. *The Blaireau*, 2 Cranch 240.

February 26th, 1821. JOHNSON, Justice, delivered the opinion of the court.—This vessel was stranded on Block Island, in an alleged effort to reach a port of the United States. The vessel and cargo have been seized by the collector of Newport, for supposed violations of the trade laws of this country, and an information was accordingly filed, to subject the whole to condemnation, in the district court for Rhode Island district.

This claim of the United States has been opposed by three classes of competitors. The vessel and *cargo, it appears, are Spanish property, and were captured on the south-western coast of Cuba, by the Puyer- [*167

(a) Abbott on Ship. 451, Story's ed. note 1; The Favorite, 4 Cranch 347; The Jonge Bastiann, 5 Rob. 322; The Lord Nelson, Edw. 79; L'Esperance, 1 Dods. 49; The Blendenhall, Ibid. 421; Barrels of Flour v. Prior, 1 Gallis. 133.

redon, a private armed brig, bearing the flag of the Buenos Ayrean republic and commanded by Captain James Barnes. Being armed, and well calculated for a privateer, she was manned with a complement of the privateer's men, about thirty in number, and her original commander, and all except four of the Spanish crew, removed. Thus equipped, it appears, that she cruised, as a tender to the Puyerredon, for about two months, during which time, another Spaniard was added to her crew, and on the 8th of May, when when in lat. 32° 30, N., and long. 74° W., from London, the crew rose upon the officers, subdued them, put them on board the first vessel they met with, and steered their course for this continent.

Thus circumstanced, Capt. Barnes has libelled in behalf of the captors, the Spanish vice-consul, in behalf of the original Sponish owners, and the crew of the Bello Corrunes have libelled for a compensstion by way of salvage, to which they suppose themselves entitled, in the event of restitution being decreed to the original owners. To these several claims, it is objected on behalf of the United States, that restitution cannot be decreed to the Spanish vice-consul, because he is not in that capacity a competent party in court, to assert the rights of individual subjects; nor in favor of the captors, because the privateer was originally fitted out in the United States, and is still owned by American citizens; nor in favor of the salvors, because
*168] *they have forfeited their claim to salvage, by spoliation, and an attempt to smuggle.

As these suggestions open the whole case, it shall be disposed of, by considering them severally in their order, only remarking *en passant*, that though they were all sustained, it would avail the United States nothing; since, without evidence sufficient to sustain the criminal charge, it would only follow, that the proceeds of the property libelled, must lie in the registry of the court, until a proper claimant shall make his appearance.

On the first point made by the attorney-general, this court feels no difficulty in deciding, that a vice-consul, duly recognised by our government, is a competent party to assert or defend the rights of property of the individuals of his nation, in any court having jurisdiction of causes affected by the application of international law. To watch over the rights and interests of their subjects, wherever the pursuits of commerce may draw them, or the vicissitudes of human affairs may force them, is the great object for which consuls are deputed by their sovereigns; and in a country where laws govern, and justice is sought for in courts only, it would be a mockery, to preclude them from the only avenue through which their course lies to the end of their mission. The long and universal usage of the courts of the United States, has sanctioned the exercise of this right, and it is impossible, that any evil or inconvenience can flow from it. Whether the powers of the vice-consul shall, in any instance, extend to the right to receive, in his
*169] national character, *the proceeds of property libelled and transferred into the registry of a court, is a question resting on other principles. In the absence of specific powers given him by competent authority, such a right would certainly not be recognised. Much, in this respect, must ever depend upon the laws of the country from which, and to which, he is deputed. And this view of the subject will be found to reconcile the difficulties supposed to have been presented by the authorities quoted on this point. Considering, then, the original Spanish interest as legally represented, the

questions are, whether that interest is not forfeited to the United States, or superseded by the superior claims of the capturing vessel?

This is not the ordinary case of a capture made under the taint of an illegal outfit. The decision of this court must rest upon a very different principle. In those cases, the national character of the claimant is immaterial. He has violated the neutrality of this country, and cannot shelter himself under his commission, or his allegiance, however unquestionable his right, individual or national, would have been, otherwise. But can a citizen of this country, who has violated its laws, ever be recognised in our courts, as a legal claimant of the fruits of his own wrong? We are of opinion, he cannot, and it, therefore, becomes material to determine, what is the national character of the claimants, under the capture made by the Puyerredon?

At the time of this vessel's first sailing from Baltimore, she was, unquestionably, American owned and commanded. During the time of her cruising *under the name of the Mangoree, it is not pretended, that she changed owners. The legality of her conduct, at that period, has [*170 been defended altogether on the ground of her taking the flag of Buenos Ayres, being commissioned in a foreign state, and her commander, Barnes, assuming the character of a citizen of the power that had commissioned him. It is not until her arrival at Buenos Ayres, in 1817, that any change of property in the vessel has been set up in proof. At that time, it is contended, she was set up at auction, and changed owners, passing into the hands of a Mr. Higginbotham, a citizen of the United States, married and domiciled at Buenos Ayres. If this fact had been satisfactorily made out in evidence, it would have drawn this court into the consideration of some questions of great nicety, which have never yet received a solemn adjudication in this court. But the evidence to support this pretended change of property, is so wholly unsatisfactory, that the court rejects it; for the ordinary solemnities of such transfers are too well known, to admit the belief that, in this instance, the change of property, had it been real, would not have been effected or commemorated by written documents.

This court, then, proceeds upon the assumption that the Puyerredon is still, in reality, American owned, and they are also of opinion, that she must be held to be American commanded; since, even if the doctrine could be admitted, that a man's allegiance may be put off with his coat, it is very clear, that Mr. Barnes's citizenship is altogether in fraud of the laws of his own country. His family has never *been removed from Baltimore, and his home has been always either there, or upon the ocean. [*171

The question then is, whether thus circumstanced, the claim in behalf of the owners and mariners of the Puyerredon, can be sustained. We are decidedly of opinion, it cannot. By the 2d section of the 14th article of the treaty with Spain, "citizens, subjects or inhabitants" of the United States, are strictly prohibited from taking "any commission or letter of marque, for arming any ship or vessel, to act as privateers against the subjects of his Catholic majesty, or the property of any of them, from any prince or state with which the said king shall be at war." And it is further provided, "that if any person of either nation shall take such commissions or letters of marque, he shall be punished as a pirate." Whatever difficulties there may exist, under the free institutions of this country, in giving full efficacy

to the provisions of this treaty, by punishing such aggressions, as acts of piracy, it is not to be questioned, that they are prohibited acts, and intended to be stamped with the character of piracy: and to permit the persons engaged in the open prosecution of such a course of conduct, to appear and claim of this court, the prizes they have seized, would be to countenance a palpable infraction of a rule of conduct, declared to be the supreme law of the land.

Some doubts have been suggested on the use of the words "state at war" with Spain. This court would not readily lean to favor a restricted construction *of language, as applied to the provisions of a treaty, which always combines the characteristics of a contract, as well as a law; but it is not necessary to examine the grounds of these doubts, as applied to the present case: because this treaty has been enforced by the provisions of the act of congress of the 14th June 1797, so as to leave no doubt of its extension to the case of cruising against Spain, under a commission from the new states formed in her colonies. Citizens of the United States, therefore, present themselves to this court, to demand restitution of a prize which they had made in violation of the most solemn stipulations of a treaty, and provisions of a law of their own country, and of which they have been dispossessed by their own associates in guilt. Under such circumstances, this court cannot hesitate to reject the claim, and adjudge the property to the original proprietors. *172]

This view of the subject obviates the necessity of examining the reality and effect of the alleged rescue, on behalf of the original owners, with a view to the question of restitution; but it still becomes necessary, with a view to the question of forfeiture, and the merit of the alleged salvors. With regard to the former, it is very clear, that supposing the rescue to have been real and complete, the Spanish consul ought not to be precluded from his election, whether to put his claim upon the ground, that the interest of those whom he represents was never legally divested, or that it was afterwards legally recovered. In the one case, there is no ground for *affecting it with the forfeiture, because of the conduct of the crew; and in the other, some question may be made, how far the property was affected by the illegal acts of those who, at that time, held in the right of the owners. But even in this latter view of the state of the property, we are of opinion, that the forfeiture was not incurred; since, although it be supposed, that the property was in custody of those who held for the Spanish owners, it was not held by those to whom the Spanish owners had intrusted the vessel and cargo. And this is the only ground upon which the acts of the ship's company are made to produce forfeitures of the interest of shippers or shipowners. For, besides the considerations drawn from the great predominance of the force detached from the privateer, in the effort to re-capture, the few men of her own crew were gratuitous actors. Their contract with the owners had ceased, and they assumed the character of voluntary agents, whose conduct the owners might or might not adopt, according to their own views or interests. *173]

As to the claims of the salvors, it may be remarked, that maritime courts always approach them with great benignity and favor. Yet, in proportion to the inclination to favor where there is merit, is the indignation with which they view every indication of a disposition to take advantage of the

unfortunate. Spoliation, and even gross neglect, may forfeit all the pretensions of salvors to compensation. In the case before us, it is not too much to pronounce the claim of those of the crew of the Puyerredon *who libel for salvage, to be not only groundless, but impudent; for, besides [*174 spoliation, smuggling and the grossest irregularities, it is perfectly clear, from the pilot's evidence, that they ran the vessel on shore purposely. So that, whatever may have been the reality of their benevolent designs towards the Spanish owners originally, their subsequent conduct not only casts a doubt over their candor, but divests them of all pretensions to compensation.

Nor do the five Spaniards who composed a part of the crew of the Bello Corrunes, at the time she was stranded, and who were not of the capturing crew, escape being involved in the suspicions which fasten on their associates. It is a melancholy truth, too well known to this court, that the instruments used in the predatory voyages carried on under the colors of the South American States, are among the most abandoned and profligate of men. Under the influence of strong interests or fears, the mind of man too often yields, even where the moral sense still exerts its influence; but hold out to one of these practised adventurers in a course of plunder, the hope of gain on the one hand, and the fear of imprisonment for piracy on the other, and what are the chances for truth!

That these men were selected from the Spanish crew, to associate with those of the capturing vessel, is a circumstance not very favorable to their characters and conduct, and it would require some strong evidence of their innocence, to remove from them the suspicion of a voluntary association with the enemies of their king. Joining in, or even setting on *foot [*175 or promoting the re-capture (facts which rest wholly on their own veracity), can prove very little in their favor, since such mutinies are become every-day occurrences, whenever such a crew find themselves in possession of a valuable cargo. Nor will the inference in their favor be very strong from their resorting to the consul of their country, since it was the only course which held out a chance of gain, or of escape from the imputation both of piracy and smuggling. There is no evidence to separate their conduct from a complete identification with the rest of the crew, except what is obtained from their own testimony. Yet it is suggested, that they may still make their innocence and merits to appear; and as the parties have signified their consent that the case may be opened in the court below, as to this class of salvors, the case will be remanded to the circuit court, for further proceedings, so far as the claim for salvage is concerned.

Decree accordingly.

DECREE.—This cause came on to be heard, on the transcript of the record of the circuit court for the district of Rhode Island, and was argued by counsel: on consideration whereof, it is ordered and decreed, that the decree of the said circuit court in this case be and the same is hereby affirmed, with costs, against Barnes and others, except so far as relates to the libel for salvage of Emanuel Rodriguez, Emanuel Josef, Emanuel Barbarus, Antonio *Josef and Josef Isnages, who formed no part of the crew of the pri- [*176 vate armed brig Puyerredon: and as to so much of the said decree as relates to the said libellants, Emanuel Rodrigues and others, it is further

decreed and ordered, by consent of parties, by their counsel, that the decree of the said circuit court be and the same is hereby reversed and annulled. And it is further ordered, that the said cause be remanded to the said circuit court for further inquiry; and that the proceeds of the said Bello Corrunes and the cargo lie in the registry of the said circuit court, to be paid over, under the order of that court, to the Spanish owners, as interest shall be made to appear.

Smith *et al.* *v.* Universal Insurance Company.

Marine insurance.—Total loss.

Where, in a policy of insurance, a technical total loss is asserted, as the ground of recovery, the loss must be occasioned by the immediate operation of some of the perils insured against, and it is not sufficient, that the voyage be abandoned for fear of the operation of the peril.[1]

The insurers do not undertake, that the voyage shall be performed, without delay, or that the perils insured against shall not occur; they undertake only for losses sustained by those perils; and if any peril does begin to act upon the subject, yet, if it be removed, before any loss takes place, and the voyage is not thereby broken up, but is, or may be, resumed, the insured cannot abandon for a total loss.

*177] Insurance on munitions of war, laden on board a neutral vessel, on *a voyage from New York, to and at a port or ports, place or places in the gulf of Mexico, from the Balize to Campeachy, both inclusive, and from either, back to New York, &c., with a memorandum, that the insurers should be free from any loss arising from illicit or prohibited trade: the goods insured were prohibited from being imported into the ports of New Spain, in possession of the royalists, by the laws of Old Spain, but were permitted to be introduced into such ports as were in possession of the insurgents: the vessel and cargo arrived off a place, in possession of the patriot general Mina, and the master made an agreement to sell the cargo to him, deliverable, from time to time, as he should want it, at St. Ander; but before the cargo could be delivered, the vessel was chased off by Spanish armed ships, and after making several attempts to return, was compelled to proceed to the Balize for repairs; after which, she again approached the coast, but found it still in possession of the royalists, General Mina having retired into the interior; the objects of the voyage being thus defeated, the vessel returned to New York, with the original cargo on board; and the insured then abandoned to the underwriters, not having before had information of the breaking up of the voyage: *Held*, that the insured were not entitled to recover as for a total loss of the voyage.

Error to the Circuit Court of Maryland. This was an action of covenant, on a policy of insurance, underwritten by the defendants, for the plaintiffs, on the 4th of February 1817, on a voyage at and from New York, to and at a port or ports, place or places, in the gulf of Mexico, from the Balize to Campeachy, both inclusive, and from either, back to New York, or a port of discharge in the United States, upon all kinds of lawful goods and merchandises laden, or to be laden, on board the schooner Ellen Tooker. In another part of the policy, it was stated to be "on cargo, consisting chiefly *178] of munitions *of war." There was a memorandum also in the policy, whereby the underwriters are warranted by the assured free from any charge, damage or loss which might arise, in consequence of a seizure or detention of the property for or on account of any illicit or prohibited trade. The declaration alleged, that the vessel, with the cargo, proceeded on the voyage, and asserted as a loss, within the contract, that while on the voyage, the schooner, with her cargo, was restrained and detained by certain per-

[1] See note to Swan *v.* Union Ins. Co., 3 Wheat. 168.

sons acting under the authority of the king of Spain, whereby the goods and merchandises became wholly lost.

The material facts, as they appeared on the trial, are these: The Ellen Tooker, having on board property of the plaintiff, of a greater value than the sum insured, sailed from New York, on the voyage insured, on the 31st of January 1817. On the 25th of February, she arrived at the Balize, where the master left the vessel and went to New Orleans, and having obtained information, that Nantla and Talacuta were in possession of the independents, to which places American vessels might proceed, on his return to the Balize, the schooner proceeded for Nantla, and arrived off that place, on the 23d of March, and found it in possession of the royalists. The schooner then proceeded to Talacuta, and having arrived off that place, a boat was sent ashore for information, the crew of which were made prisoners. Concluding from this occurrence, that the place was in possession of the royalists, the schooner put to sea, and on the 5th of April, fell in with a fleet *of six sail under the command of General Mina, with troops on board, [*179 bound for the bar of St. Ander. The master having had communication with General Mina, and received encouragement from him, that he would purchase the cargo, the schooner kept company with the fleet, and arrived off the bar of St. Ander, on the 28th of April, where the schooner came to anchor, in the open sea, the entrance being too shoal to permit her to cross the bar. On the 11th of May, the master left the schooner, and went up the river to Porto la Marina (where General Mina had his head-quarters), for the purpose of selling the cargo, which he accordingly did, deliverable to General Mina, as he should want it, from time to time, at St. Ander, the whole delivery to be completed by the first of July. On the 18th of May, while the master was on shore, a Spanish frigate and two armed schooners of the royalists hove in sight, and the schooner was immediately gotten under way, for the purpose of escaping them, and after four hours' chase, effected her escape. The schooner made several attempts to return, but was prevented by Spanish ships hovering about the place; on the 26th of May, finding the coast clear, she returned to St. Ander, which was still in possession of the independents, and the master was taken on board. The foremast of the schooner being found to be loose in the step and injured, and the crew being short of water, the schooner proceeded to the mouth of the Rio Grande, for water, and to examine the foremast; and there, the heel of the foremast being found to be gone, the schooner proceeded to the *Balize for repairs, and arrived there on the 6th of June. The fore- [*180 mast was there repaired, and the schooner sailed again for St. Ander, for the purpose of delivering the cargo to General Mina, according to contract, and on her arrival there, on the 22d of June, the place was found to be in possession of the royalists, who occupied it with a military force. In consequence of this, the schooner did not approach the shore, but proceeded along the coast northward, to a place called Pass Cavellos, about 270 miles from St. Ander, where information was received that St. Ander and the coast were completely in possession of the royalists. The objects of the voyage being in this manner defeated, the schooner returned to New York, with her original cargo on board, and arrived there on the 22d of July 1817. The plaintiffs had no intelligence of the breaking up of the voyage, until the return of the schooner to New York, and then abandoned to the underwriters,

in due time, assigning as a cause, that the Ellen Tooker was "compelled, by an armed force, to leave St. Ander, in the gulf of Mexico, where she had arrived and was about to deliver her cargo, and was prevented thereafter, by a like force, from re-entering that place." This abandonment was not accepted. It was also in evidence, that the cargo of the Ellen Tooker was shipped, and intended to be sold to the independent party of Mexico, which was waging war with the king of Spain, and that the same was prohibited from importation into Mexico, by the laws of Spain, and would have been seized and confiscated, if it had been carried into any of the ports in *181] *possession of the royalists, but would have been freely admitted into any ports in possession of the independent party.

Upon these facts, a verdict was given, and judgment rendered for the defendants, and the cause was brought to this court by writ of error.

February 17th. *Winder* and *Raymond*, for the plaintiffs, stated, that this was an action of covenant on a policy of insurance, and that the breach assigned in the declaration was a loss occasioned by the restraint and detention of certain persons acting under the authority of the king of Spain. The voyage was broken up and destroyed by the constraint imposed upon the vessel to leave St. Ander, in order to avoid capture by the Spanish armed ships. The insurers were apprised of the nature of the risk. The port of St. Ander became the destination, and the vessel was prevented from entering it, by the risks insured against. This is a restraint within the meaning of the policy. Every restraint or control, exerted by a people, prince or state, over the subject-matter insured, so as to defeat the voyage, is a loss within the policy. Such are the restraints of a blockade (*Schmidt* v. *United Ins. Co.*, 1 Johns. 249; *Craig* v. *United Ins. Co.*, 6 Ibid. 226; *Yeaton* v. *Fry*, 6 Cranch 335; *Olivera* v. *Union Ins. Co.*, 3 Wheat. 183); an embargo, limited in point of time, or indefinite (*McBride* v. *Marine Ins. Co.*, 5 Johns. 299; *Walden* v. *Phœnix Ins. Co.*, 5 Ibid. 310; *Ogden* v. *Firemen Ins. Co.*, 10 Ibid. 177; *Rhinelander* v. *Ins. Co. of Pennsylvania*, 4 Cranch 29); and *182] the municipal law of a *country which subjects the vessel and cargo to confiscation, if it is morally certain that it applies to the vessel, and would be enforced. *Craig* v. *United Ins. Co.*, 6 Johns. 226. So, if the port of destination be shut, by being in possession of an enemy, or by interdiction of trade, it is a just cause for breaking up the voyage. 1 Johns. 268, *per* KENT, Ch. J., citing 1 Emerig. *des Assur.* 242. There is a great apparent discrepancy in the English authorities, as to "restraint of princes." But this court has settled the import and meaning of the term in the case of *Olivera* v. *Union Insurance Company*, 3 Wheat. 183. But it may be said, that there is no proof that the blockade existed, at the time of the abandonment. To which it is answered, that this principle does not apply to a technical total loss, produced by blockade. In the case of an embargo or capture, the voyage is not necessarily broken up; it is merely suspended: but in that of a blockade, it is entirely defeated, and the object of the voyage cannot be accomplished. Though the restraint now under consideration, is not that of a blockade, yet it is equivalent; since the master was prevented by the restraint, from entering the port which he had selected, within the limits prescribed by the policy. A reasonable fear of loss by capture, seizure, &c., is a justifiable cause of deviation, and consequently, protects against all los-

ses arising from deviation. In the case of *Schmidt* *v. *United Insurance Company*, it is said to be "sufficient, to justify the master's conduct in cases of this kind, if he have good reason to apprehend that a capture will be the consequence of going on."(*a*)

Pinkney and *D. B. Ogden*, contrà, argued, that in order to establish a technical total loss, in this case, the insured must show a restraint, within the policy and declaration; and that it actually produced the breaking up of the voyage. The *onus probandi* is on the plaintiffs, and they must trace the supposed consequences of the peril home to its efficient cause. The insurance was on munitions, contraband of war; but the memorandum that the underwriters were not to be liable for a loss by illicit trade, secured them against any loss by mere municipal regulations. They have nothing to do with an internal conflict, by which the port may change masters. The declaration alleges a loss by restraint of princes; but this restraint must be the direct and immediate agent in breaking up the voyage; as in an embargo or blockade, which being removed, the peril instantly ceases. Here, the restraint was not only not the efficient cause of the loss, but it arose out of illicit traffic. This part of the coast of Mexico did not cease to be subject to the colonial code of Spain, by the temporary possession of the insurgents. The vessel attempted to escape, not merely from the *ordinary peril of capture in war, but from that combined with the local prohibition. [*184 It was a loss from a fear which, had it been realized, would not have made the underwriters liable. All the *quia timet* cases, are cases where they would be so liable. The attempt is to make the underwriters find a lawful market; whereas, the assured stipulates to take that upon himself, by his warranty. Even if the market were lawful for a time, its ceasing to be so, is not at the risk of the underwriters. So that the assured have broken up the voyage, for a technical total loss, arising from perils not insured against.

February 26th, 1821. STORY, Justice, delivered the opinion of the court, and after stating the facts, proceeded as follows:—Upon these facts, the circuit court directed the jury, that the plaintiffs were not entitled to recover; and the propriety of this direction is the question before us upon this writ of error.

Two points have been argued at the bar: 1. That there were no actual restraint of persons acting under the authority of Spain, whereby the voyage was defeated. 2. That if a technical total loss took place, by the loss of the voyage, it was a loss occasioned by engaging in an illicit and prohibited trade, for which, by the memorandum in the policy, the underwriters are not liable.

The declaration and the abandonment, both tie up the case to a total loss of the voyage, by the restraint of Spanish authorities. If this case be not made out in proof, there is an end of the controversy. *In cases [*185 of this sort, where a technical total loss is asserted as a ground of recovery, it is not sufficient, that the voyage has been entirely frustrated

(*a*) *Per* LIVINGSTON, 1 Johns. 262; and Targa, Ponderaz. c. 59, 291; Casaregis, Disc. 88, No. 84, cited by him. See also 1 Emerig. *des Assur.* 509.

and lost; but the loss must be occasioned by some peril actually insured against. The peril must act directly, and not circuitously, upon the subject of the insurance. It must be an immediate peril, and the loss the proper consequence of it; and it is not sufficient, that the voyage be abandoned, for fear of the operation of the peril.

The plaintiffs rely upon the fact of the Ellen Tooker's being chased away from St. Ander, and being prevented for several days from returning to that place, by the presence of Spanish armed ships, as decisive proof of actual restraint. But the voyage was delayed only, and not broken up, by this occurrence, for the vessel afterwards returned in safety to St. Ander. The insurers do not undertake that the voyage shall be performed, without delay, or that the perils insured against shall not occur; they undertake only for losses sustained by those perils; and if any peril does act upon the subject, yet if it be removed, before any loss takes place, and the voyage be not thereby broken up, but is, or may be resumed, the assured cannot abandon for a total loss. If a vessel be captured, during a voyage, and afterwards be re-captured, and performs, or may perform it, there can be no abandonment, after the re-capture, for a technical total loss. In the present case, the vessel actually did resume her voyage, after the restraint ceased; and there is no evidence to show that any object of the voyage was defeated
*186] by this temporary *restraint and delay to avoid capture. Then, what was the real cause of the final destruction of the voyage? It was, that St. Ander, which, but for a short time, was in the possession of the troops of General Mina, was *in transitu*, again occupied by the royalists, and the colonial government resumed its functions. A trade was inhibited with that place, by the ordinary colonial laws of Spain; and the voyage itself, in which the Ellen Tooker was engaged, placed her, and her cargo also, in the character of an enemy. It was clear, therefore, that a proceeding into St. Ander, would have subjected the Ellen Tooker to confiscation for a double cause; for breach of the ordinary laws of trade, and for a violation of neutral duties. The voyage, then, was broken up from fear of loss, by reason of the seizure and confiscation of the property. It was abandoned by the master *quia timebat*, and not because there was any actual direct restraint, which prevented the vessel from proceeding to the port of destination. The case, therefore, falls directly within the authority of the cases of *Hodkinson* v. *Robinson*, 3 Bos. & Pul. 388, and *Lubbock* v. *Rowcroft*, 5 Esp. 50, which have never been shaken. In the former case, Lord ALVANLEY said, "any loss which necessarily arises from capture or detention of princes, is a loss within the policy; but here the captain, learning that if he entered the port of destination, the vessel would be liable to confiscation, avoided that port, whereby the object of the voyage is defeated. This does not operate to the total destruction of the thing insured." There are precisely
*187] the same circumstances *in the case now at bar. The underwriter does not warrant that the vessel shall have a right to trade at the port of destination; but only that notwithstanding the perils insured against, the vessel shall proceed to such port. If the plaintiffs, in the events which have occurred, were entitled to abandon and recover, as for a technical total loss, they would have been entitled to abandon for the same cause, at the time of the vessel's sailing from New York on the voyage; for St. Ander was at that time just as much shut against the vessel, and she was

just as liable to confiscation, for illegal traffic with that place, as she was at the time the voyage was broken up.

It is the unanimous opinion of the court, that the judgment of the circuit court be affirmed, with costs.

Judgment affirmed.

The Robert Edwards : Savage, Claimant.

Duties on imports.

A question of fact under the 46th section of the collection law of the 2d March, 1799, c. 128, exempting from duty the wearing-apparel, and other personal baggage, of persons arriving in the United States.

Where the *res gestæ*, in a revenue cause, are incapable of explanation, consistently with the innocence of the party, condemnation follows, although there be no positive testimony of the offence having been committed: circumstances are sometimes more convincing than the most positive evidence.

*Although a mere intention to evade the payment of duties be not, *per se*, a cause of forfeiture, yet, when a question arises, whether an act has been committed, which draws after it that consequence, such intention will justify the court in not putting on the conduct of the party, in respect to the act in question, an interpretation as favorable as, under other circumstances, it would be disposed to do. [*188

Appeal from the Circuit Court of South Carolina.

February 17th, 1821. This cause was argued by *Winder* and *Raymond*, for the appellant and claimant, and by the *Attorney-General*, for the United States.

February 26th. Livingston, Justice, delivered the opinion of the court. —This is a libel for an alleged forfeiture under the 46th section of the collection law, passed the second of March 1799. This section exempts from duty the wearing-apparel, and other personal baggage, of those persons who arrive in the United States; and to ascertain what articles are to be exempted, it is directed, that due entry thereof, as of other goods, but separate and distinct therefrom, shall be made with the collector, by the owner, or his agent, verified by oath, stating, among other things, that the packages mentioned in such entry, contain no goods whatever, except the wearing-apparel and other personal baggage of the person to whom they belong. And it is provided, that whenever any articles subject to duty, shall be found among such baggage, which shall not be mentioned to the collector, at the time such entry is made, they shall be forfeited, and the person in *whose baggage they shall be found, shall, moreover, forfeit and pay treble the value of such articles. [*189

These proceedings commenced in the district court of the district of South Carolina, and after sentences of condemnation in that court, and in the circuit court of the United States for that district, the claimant has appealed to this court. The only question we have to decide, is, whether the goods libelled, and which are admitted to be subject to duty, were entered as baggage or not. If they were, they must be condemned; if not, the claimant is entitled to restitution.

The claimant insists, that the trunks seized were not included in her baggage entry, and that no act of hers, prior or subsequent to the entry, shows

that it was her intention to cover them by it. Her baggage entry comprised "seven trunks wearing-apparel, sundry band-boxes and bedding, for Mrs. Savage and family, passengers in the ship Robert Edwards." Under this entry, and a permit given in conformity with it, the claimant took away several trunks and band-boxes, the contents of some of which do not appear, but she alleges that they contained only baggage, and no dutiable article, and that she never demanded the trunks in question, as part of those mentioned in the entry of her baggage. Some reliance is also placed on the fact, that before any seizure, these trunks were regularly entered by the master, and the duties on them secured or paid. Whether they were thus entered or not, can have no influence on the present question, which is con-
*190] fined to the single inquiry, whether they had, previous *to such act on the part of the master, been entered by the owner, as part of her baggage. For no act of the master, subsequent to such entry, could relieve them from the forfeiture which in that case had previously attached.

It will be sufficient to advert to a few of the prominent facts, to ascertain the real character of this transaction. The court has been reminded, that it ought not, without the most satisfactory and positive proof, in a case so highly penal, to decide that a violation of law has been committed. Although such proof may generally be desirable, we are not to shut our eyes on circumstances, which sometimes carry with them a conviction, which the most positive testimony will sometimes fail to produce. And if such circumstances cannot well consist with the innocence of the party, and arise out of her own conduct, and remain unexplained, she cannot complain, if she be the victim of them. No extraordinary prudence or circumspection on the part of the claimant, was necessary, to have avoided the unpleasant predicament in which she is placed. If she had brought these goods on board, in London, as cargo; if she had paid freight for them as such; if she had desired them to be placed on the manifest of the cargo, which she was most probably apprised was necessary; if, when she entered her other merchandise, imported in the same vessel, she had also entered these; if, after making her baggage-entry, she had distinguished or informed the inspector which of the trunks contained her baggage, and which were filled with
*191] merchandise, the whole *of the present difficulty would have been avoided. The claimant neglecting to take any one of these precautions, which could not have been the effect of ignorance, as it appears she is occasionally engaged in the importation of goods in the line of her business, leads, irresistibly, to the conclusion, that she intended to land these trunks, without the payment of duties, and that this end was to be effected, under the disguise of entering them as baggage and wearing-apparel. Although a mere intention to evade such payment, be no cause of forfeiture, yet when a question arises, whether an act has been committed, which draws after it this consequence, such intention will assist in dispelling some of the doubts in which the act itself might otherwise be involved, and will justify a court in not putting on the conduct of the party, in relation to the act in question, an interpretation as favorable as, under other circumstances, it would feel disposed to do. Thus, in the case before us, the claimant wishes us to believe, that the seven trunks of wearing-apparel, and the band-boxes which were included in her baggage-entry, were all of them actually landed under her permit; and that, therefore, the five trunks which remained on

board, and were seized as composing part of her baggage-entry, were not comprised in it. But is this made out with any reasonable certainty? On the contrary, is there any evidence whatever, on which we can come to a satisfactory conclusion, that seven trunks, which was the number entered by her as baggage, were actually landed before the seizure. What the [*192 *claimant herself considered as band-boxes, and actually represented as such to the inspector, she now desires may be converted into trunks. Unless this can be done, which would be to disbelieve the whole evidence in the cause, there is no pretence for saying, that all the trunks entered by her as baggage, had been landed. The marks on the trunks do not furnish even a presumption in her favor, for on those landed, and on those seized, we find the same inscription, that is, "Mrs. Savage's baggage, apparel and haberdashery." In this uncertainty and confusion, which is the result of her own irregular conduct, and which it was her business, and not that of the court, to remove, she has exposed her case to very unfavorable inferences. One of the trunks landed was empty, or contained only a few books and loose papers; and yet it appears, by a cocket produced before the circuit court, that this very trunk, when taken board, was valued in London at 115*l.* sterling. What became of the goods which it then contained, is left without explanation. This forms a part of the *res gestæ*, and is a circumstance, if not of strong suspicion, at any rate, but little calculated to evince the integrity of the transaction.

Without, therefore, entering into a more minute detail of the circumstances of this case, the court is well satisfied, from the whole of the evidence, notwithstanding some little obscurity in which it is involved, that the trunks in question formed a part of the baggage entry of the claimant, and therefore, affirm the sentence of the circuit court, with costs.

Sentence affirmed.

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*The Nueva Anna and The Liebre: The Spanish Consul, Claimant. [*193

Prize.—Insurgent states.

This court does not recognise the existence of any lawful court of prize at Galveston, nor of any Mexican republic or state, with power to authorize captures in war.

Appeal from the District Court of Louisiana. These were the cases of the cargoes of two Spanish ships, captured and condemned by a pretended court of admiralty at Galveston, constituted by Commodore Aury, under the alleged authority of the Mexican republic. The goods were, after this condemnation, brought into the port of New Orleans, and there libelled by the original Spanish owners, in the district court. That court, decreed restitution to the original owners, and the captors appealed to this court.

February 26th, 1821. This cause was argued by *Hopkinson*, for the respondents and libellants; no counsel appearing for the appellant and captors.

The Court stated, that it did not recognise the existence of any court of admiralty, sitting at Galveston, with authority to adjudicate on captures,

nor had the government of the United States hitherto acknowledged the existence of any Mexican republic or state, at war with Spain; so that the
*194] court could not consider as legal, any acts done under the *flag and commission of such republic or state. But, as the record, in this case, stated the capture to have been made under the flag of Buenos Ayres, it became necessary to send back the case, in order to ascertain under what authority it was in fact made.

Sentence reversed, and cause remanded for further proceedings.

The Collector: Wilmot, Claimant.

Practice in admiralty.

In all proceedings *in rem*, on an appeal, the property follows the cause into the circuit court, and is subject to the disposition of that court; but it does not follow the cause into the supreme court, on an appeal to that court.[1]

After an appeal from the district to the circuit court, the former court can make no order respecting the property, whether it has been sold, and the proceeds paid into court, or whether it remains specifically, or its proceeds remain, in the hands of the marshal.

It is a great irregularity, for the marshal to keep the property, or the proceeds thereof, in his own hands, or to distribute the same among the parties entitled, without a special order from the court; but such an irregularity may be cured, by the assent and ratification of all the parties interested, if there be no *mala fides*.

Appeal from the Circuit Court of Maryland. The facts of this case were as follows: In the year 1807, the schooner Collector and cargo were libelled in the district court of the district of Maryland, as forfeited, under
*195] the act of congress *prohibiting commercial intercourse with certain ports of St. Domingo. John Wilmot, the present petitioner and libellant, and the house of Tagart & Caldwell, claimed the whole property.

Pending the proceedings in the district court, the vessel and cargo were sold, under an order to "bring in the proceeds, subject to the future disposition thereof." The money, notwithstanding this order, was never paid to the clerk, nor was it ever deposited by him in any court, and the court never afterwards made any order respecting it.

The property was condemned in the district and circuit courts, which latter decree was reversed by the supreme court, in the term of February 1809, and the property libelled ordered to be restored. The mandate of the supreme court was filed below, the 11th of May following. The present libel and petition was filed in the district court, the 8th of June 1816, when a decree passed, dismissing the same, which was afterwards affirmed by the circuit court, from whose sentence this appeal was taken.

The object of the present appeal was to obtain the benefit of the decree of the supreme court, that is, restitution of the property, according to the rights of the respective claimants; the appellant insisting on one-half of the proceeds of vessel and cargo, as joint-owner and also upon a lien on the other half, as ship's husband, for advances made beyond his proportion of

[1] The Lottawanna, 20 Wall. 201; Montgomery v. Anderson, 21 How. 386; Hayforth v. Griffith, 3 Bl. C. C. 34; The Grotius, 1 Gallis. 503; The Seneca, Gilp. 34; The Sunbeam, 1 Bl. Pr. Cas. 638. See The Peterhoff, Id. 620.

the outfits of the voyage, as well as for expenses in defending the vessel and cargo against the information which had been filed against them, *and for this purpose prayed that the marshal might be ordered to bring [*196 in the proceeds, according to the interlocutory decree, and that the same might be restored, pursuant to the decree of the supreme court, preserving to the parties their respective rights, liens, &c.; concluding with a general prayer for relief.

From the petition of the appellant, the answer of the marshal, and the proofs in the cause, it appeared, that the marshal, although he sold the schooner and her cargo, did not, in fact, bring the money into court. That for the moiety of the proceeds belonging to Tagart & Caldwell, an order was given by them, in favor of Van Wyck & Dorsey, as early as March 1807, in consequence of which order, Van Wyck & Dorsey, who sold the property at auction, under the marshal's directions, were permitted to retain the part belonging to Tagart & Caldwell, upon an understanding to keep it, if the vessel and cargo were acquitted, but to return it, in case of a different issue. That the other moiety of the proceeds was paid, on the 6th of April 1809, which was previous to the filing of the mandate in the court below, by the marshal, to the present appellant, as appeared by his receipt of that date, and which expressed the sum therein mentioned, to be for his one-half of the net proceeds of the sale of the schooner Collector and cargo. The marshal died, pending the proceedings, and they were revived against his executors.

February 23d. *Mitchell*, for the appellant and claimant:—*1. Stated, that this was not a motion in the court below, for a rule [*197 against the marshal, to lay the foundation for an attachment, but a proceeding in the nature of an original libel, to give effect to the sentence of this court, as another court of admiralty, in the former cause. That the district court has jurisdiction to sustain such a libel or petition, founded upon the sentences of foreign courts, and *à fortiori*, of our own, appears by numerous authorities. *Penhallow* v. *Doane*, 3 Dall. 54, 97, 118; *Jennings* v. *Carson*, 2 Cranch 21; *Livingston* v. *McKenzie*, 3 T. R. 323, note; *Smart* v. *Wolff*, 3 Ibid. 329; 2 Bro. Civ. & Adm. Law 120; 7 Ves. jr. 593; *Camden* v. *Home*, 4 T. R. 385, 395. The mandate from this court was properly filed in the district court, because, if the proceeds were to be considered as in court at all, they were in that court. They remained in that court, notwithstanding the appeal, and it was, therefore, the proper tribunal to execute the decree of restitution. According to the English practice in proceedings *in rem*, the thing in controversy does not follow the suit into the court of appeals, but remains in that where the proceeding was originally commenced. 2 Bro. Civ. & Adm. Law 405. This is also the law of our own country. *Jennings* v. *Carson*, 2 Cranch 21. The ground of complaint here is, that the proceeds have not been brought into the registry, in pursuance of the interlocutory degree of the district court, which is the only tribunal competent to vindicate its own decrees. The circuit court has no original jurisdiction in *admiralty and maritime cases, and cannot redress a violation of the orders of the district court. The object of the pres- [*198 ent application, is not merely to compel the payment of the proceeds into court, but to obtain payment of money out of court, which requires the

solemnity of a petition, analogous to the proceedings in chancery in a similar case. Lord ELDON would never suffer money to be paid out of court, on motion, but put the party to his petition, stating his rights, which would thus appear on the records of the court, at any distance of time; and this practice was approved and adopted by Lord ERSKINE. 3 Ves. jr. 393.

2. The claimant insists upon his lien as part-owner and ship's husband, on the voyage in which she was seized, for advances made by him, besides his absolute right in one moiety. Abb. on Ship. 114, Story's ed. It is an incontrovertible principle, that where property is taken out of the hands of a party, *in invitum*, and by legal process, the law will retain all his liens, and return it to him, still subject to them, as before. *Wilson* v. *Kymer*, 1 M. & S. 157, 163. It is true, that a person holding a dormant title, who stands by and witnesses a sale to another, is guilty of fraud; but if this lien be an equity raised by law, and not by the act of the parties, it requires no notice. The receipt of part out of the registry of a court of admiralty, is no bar or prejudice to the residue of the claim, but the party may aftewards file his libel, and have a monition for the further sum due. *Bymer* v. *Atkyns*, 1 H. Bl. 167. The *marshal has not done his duty, under the interlocutory decree, directing him to bring the money into court. We do not insist on an actual delivery to the register, *in facie curiæ*, but that the specific proceeds should be separated from all other property, so that the decree of the court shall act upon it, without the necessity of the concurring will of the officer. The property is not to be confounded with the private funds of the officer, so that it cannot be distinguished and recovered, if he absconds; or if he dies, will be subject to a distribution of assets in the hands of his personal representative. *The Princessa*, and *La Reine Elizabeth*, 2 Rob. 31. In this case, the executor is liable, not as for a tort, but to restore funds which are not assets in his hands.

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Pinkney and *Wheaton*, contrà.—1. Insisted, that the cases cited on the other side, of *Jennings* v. *Carson*, 2 Cranch 21, and *Penhallow* v. *Doane*, 3 Dall. 54, were proceedings to enforce the decrees of the continental court of appeals, which had ceased to exist; similar in their nature to those cases in England, where the prize commissions to certain vice-admiralty courts had expired, application was made to the high court of admiralty to carry into effect their decrees. *The Picimento*, 4 Rob. 360. In the cases cited, the district court had jurisdiction, because it is a court of prize of the first resort, with all the powers of the English high *court of admiralty inherent in it; and the proceeding could be commenced nowhere else, because it is the only court of original prize jurisdiction. But the present case is a proceeding under the judiciary act, where the supreme court does not execute its own decrees, but sends its mandate to the circuit, and not to the district court; and the circuit court, must, therefore, execute the mandate, and distribute the proceeds of the property. The property follows the cause into the circuit, but not into the supreme court.

*200]

2. Here, the distribution, though irregularly made by the marshal, without the special direction of the court, is precisely what the court would have made, upon an application. It is a rule of the court of admiralty, to restore, or to condemn, the gross tangible property, without regard to any liens which parties other than the general owners may have upon it. So that, if

the court had now to pronounce the distribution of the property, it would not enter into these minute inquiries respecting the claims of the part-owners against each other, but leave them to their remedy at common law or in equity. Thus, in the case of *The Jefferson*, 1 Rob. 325, Sir W. Scott refused to sever the share of a bankrupt partner, in favor of his assignees, but restored the property *in solidum*, leaving the assignees to their remedy it the proper *forum*.

3. But supposing the court would interfere to protect the pretended lien, there is no proof of its existence; or if it ever existed, it has been waived, and the distribution made *with the assent of all the parties interested. The appellant has received his moiety of the gross property. And [*201 even if it were not so, the personal representative of the deceased marshal is not liable in this form. The regular course would be, to proceed against the marshal himself, by motion, and a rule directing him to bring the money into court. But this proceeding could not be continued against his executors. The provisions of the judiciary act relative to the revival of suits, do not apply to this proceeding, because it cannot, upon general principles of admiralty law and practice, be continued against the personal representatives of the officer. If it could be revived against them, the relation of their testator with the court, as an officer, would cease, and it would become a common debt, subject to the ordinary course of administration.

March 2d, 1821. Livingston, Justice, delivered the opinion of the court, and after stating the facts, proceeded as follows:—This is, to say the least, a very novel and extraordinary proceeding. The marshal, probably, without any improper views, or an intention of making use of the proceeds of the vessel and cargo, disobeys the order of the judge, and instead of depositing them in the registry of the court, keeps them under his own control, and finally distributes them among the parties, without any direction of the court on the subject. This was a great irregularity, but the owners of the schooner Collector and cargo have no right, at this day, to complain of it. They were early apprised of the situation of their *property. Two [*202 of them gave an order on the marshal for their proportion of the proceeds, before any sale had taken place; and the other, who is the present appellant, received of the marshal his share, before the sentence of reversal, which was pronounced here, had been made known to the court below. After this ratification, or sanction, on their part, of the irregular conduct of the marshal, neither of them ought now to be permitted to seek any other redress from him. Before any distribution of the proceeds by the marshal, they might have applied to the court to enforce obedience to its order, as it regarded the bringing of them into court, and then have had their respective pretensions adjudicated by the court itself. Not having proceeded in this manner, the district court, if it have jurisdiction of the case, could not now, without great danger of doing injustice, interfere in this business. Whatever notice it might have taken of the lien, which is now set up by the appellant, on a part of these proceeds, beyond his moiety, if the proceeds were still in that court, it is by no means clear, that the marshal ought now to be rendered liable to the appellant for them, there being nothing like satisfactory proof, that he had notice of such a claim, when the appellant took from him his moiety, nor until long after he had parted with the whole of

the property. Under this view of the case, the court is of opinion, that the appellant, under the particular circumstances of this case, is not entitled, on the merits, to any relief against the marshal.

*203] But the court is further of *opinion, that the proceeding on the present petition, and that in the district court, was *coram non judice.* By an appeal from the sentence of a district court to a circuit court, the latter becomes possessed of the cause, and executes its own judgment, without any intervention of the former. It is fit, therefore, that the proceeds of the property, if it have been converted into money, should follow the appeal into the circuit court, and be deposited in such bank, or other place, as it may direct, there to remain, subject to the disposition and direction of the circuit court. And if the property, at the time of the appeal, remain in specie, in the marshal's custody, and any order or direction shall become necessary for its sale or preservation, after an appeal, such order must emanate from the circuit court. But if a further appeal be had to the supreme court, the property, or its proceeds, will still continue in the circuit court, because the supreme court, in such cases, does not execute its own judgments, but sends a special mandate to the circuit court to award execution thereon.

The proceeds, therefore, of the Collector and cargo, at the time of filing the present petition and libel, even if the order of the district court in relation to them, had been complied with, could not, after the appeal, be regarded as in, or under, the control of the district court, which was, therefore, incompetent, when this petition was filed, to make any order respecting them.

Sentence affirmed, with costs.

*Anderson v. Dunn.

Power of congress to punish a contempt.

To an action of trespass against the sergeant-at-arms of the house of representatives of the United States, for an assault and battery and false imprisonment, it is a legal justification and bar, to plead, that a congress was held and sitting, during the period of the trespasses complained of, and that the house of representatives had resolved, that the plaintiff had been guilty of a breach of the privileges of the house, and of a high contempt of the dignity and authority of the same; and had ordered that the speaker should issue his warrant to the sergeant-at-arms, commanding him to take the plaintiff into custody, wherever to be found, and to have him before the said house, to answer to the said charge: and that the speaker did accordingly issue such a warrant, reciting the said resolution and order, and commanding the sergeant-at-arms to take the plaintiff into custody, &c., and delivered the said warrant to the defendant: by virtue of which warrant, the defendant arrested the plaintiff and conveyed him to the bar of the house, where he was heard in his defence, touching the matter of the said charge, and the examination being adjourned from day to day, and the house having ordered the plaintiff to be detained in custody, he was accordingly detained by the defendant, until he was finally adjudged to be guilty, and convicted of the charge aforesaid, and ordered to be forthwith brought to the bar, and reprimanded by the speaker, and then discharged from custody; and after being thus reprimanded, was actually disharged from the arrest and custody aforesaid.[1]

Error to the Circuit Court of the District of Columbia. This was an action of trespass, brought in the court below, by the plaintiff in error, against the defendant in errror, for an assault and battery and false imprisonment: to which the defendant pleaded the general issue, and a special plea of justification. The *plaintiff demurred generally to [*205
the special plea, which was adjudged good, and the demurrer overruled: and judgment upon such demurrer was entered for the defendant, and a writ of error brought by the plaintiff. The question arising upon the demurrer will be best explained, by giving the defendant's plea at large, as pleaded and adjudged good upon general demurrer, in the circuit court, viz:

And the said Thomas, by the leave of the court here first had, further defends the force and injury, when, &c. And as to the coming with force and arms, or whatsoever is against the peace; and also as to the assaulting, beating, bruising, battering and ill-treating of the said John, in manner and form as the said John, in his said declaration, hath above supposed to be done, the said Thomas saith that he is not guilty thereof; and of this he, as before, puts himself upon the country: And as to the imprisonment of the said John, and the keeping and detaining him in confinement, at the time in the said declaration mentioned, to wit, on the said 8th day of January, in the year 1818, and for the space of two months, in the said declaration mentioned, the said Thomas saith, that the said John ought not to have or maintain his action aforesaid against him, because he saith, that long before, and at the said time when, &c., in the introduction of this plea mentioned, and

[1] This case was followed by the circuit court of the district of Columbia, in 1848, in Ex parte Nugent, 1 Am. L. Journ. 107; and again, in 1874, in Stewart v. Blaine, 1 McArthur 453. But it was overruled by the supreme court, in 1880, in the case of Kilbourn v. Thompson, 103 U. S. 168, where it was decided, that no mere legislative body, without judicial powers, can commit for a contempt, one who is neither a member nor an officer of the house, citing Kielley v. Carsin, 1 Moo. P. C. 63, in which it was determined by the judicial committee of the Privy Council, that no such power was possessed by the legislative assembly of Newfoundland; and the older cases to the contrary were overruled. The same point was re-affirmed in Fenton v. Hampton, 11 Moo. P. C. 347, and Doyle v. Falconer, Law Rep., 1 P. C. 328. See also Burnham v. Morrissey, 14 Gray 226.

during all the time in the said declaration mentioned, a congress of the United States was holden at the city of Washington, in the county of Washington, and district of Columbia aforsaid, and was, then and there, *206] *and during all the time aforsaid, assembled and sitting; and that long before, and at the time when, &c., in the introduction of this plea mentioned, and during all the time in the said declaration mentioned, he the said Thomas was, and yet is, sergeant-at-arms of the house of representatives (then and their being one of the houses whereof the said congress of the United States consisted), and by virtue of the said office, and by the tenor and effect of the standing rules and orders ordained and established by the said house for the determining of the rules of its proceedings, and by the force and effect of the laws and customs of the said house, and of the said congress, was, then and there, and during all the time aforesaid, and yet is, duly authorized and required, amongst other things, to execute the commands of the said house, from time to time, together with all such process issued by authority thereof, as shall be directed to him by the speaker of the said house: and that long before, and at the time when, &c., in the introduction of this plea mentioned, and during all the time in the declaration mentioned, one Henry Clay was, and yet is, the speaker of the said house of representatives, and by virtue of his said office, and by the tenor and effect of such standing rules and orders as aforsaid, and by the force and effect of such laws and customs as aforsaid, then and there, and during all the time aforesaid, was, and yet is, amongst other things, duly authorized and required to subscribe with his proper hand, and to seal with his seal, all writs, warrants and *subpœnas*, issued by order of the said house: and that long before, *207] and *at the time when, &c., in the introduction of this plea mentioned, and during all the time in the said declaration mentioned, one Thomas Dougherty was, and yet is, the clerk of the said house of representatives; and by virtue of his said office, and by the tenor and effect of such standing rules and orders as aforesaid, and by the force and effect of such laws and customs as aforesaid, then and there, and during all the time aforesaid, was, and yet is, amongst other things, duly authorized and required to attest and subscribe with his proper hand, all such writs, warrants and *subpœnas*, issued by order of the said house: and that long before, and at the time when, &c., in the introduction of this plea mentioned, and during all the time in the said declaration mentioned, and ever since, it was, and yet is, amongst other things, ordained, established and practised, by and under such standing rules and orders as aforesaid, and such laws and customs as aforesaid, that all writs, warrants, *subpœnas*, and other process issued by order of the said house, shall be under the hand and seal of the said speaker of the said house, and attested by the said clerk of the said house; and so being under the hand and seal of the said speaker, and attested by the said clerk as aforesaid, shall be executed, pursuant to the tenor and effect of the same, by the said sergeant-at-arms: and the said Thomas, the defendant, further saith, that the said Henry Clay, so being such speaker of the said house or representatives as aforesaid, and the said Thomas Dougherty, so being such clerk of the same house as aforesaid, and he the said defendant, *208] *so being such sergeant-at-arms of the same house as aforesaid, and the said congress so being assembled and sitting as aforesaid, heretofore, and before the said time when, &c., in the introduction of this plea

mentioned, to wit, on the 7th day of January, in the year aforesaid, at Washington aforesaid, in the county and district aforesaid, it was, in and by the said house, for good and sufficient cause to the same appearing, resolved and ordered, pursuant to the tenor and effect of such standing rules and orders so ordained and established as aforesaid, and according to the force and effect of such laws and customs as aforesaid, that the said John had been guilty of a breach of the privileges of the said house, and of a high contempt of the dignity and authority of the same; wherefore, it was then and there, in and by the said house, further resolved and ordered, in the like pursuance of such standing rules and orders as aforesaid, and of such laws and customs as aforesaid, that the said speaker should forthwith issue his warrant, directed to the sergeant-at-arms, commanding him to take into custody the body of the said John, wherever to be found, and the same forthwith to have before the said house, at the bar thereof, then and there to answer to the said charge, &c., as by the journal, record and proceedings of the said resolutions and order, in the said house remaining, reference being thereto had, will more fully appear. Whereupon, the said Henry Clay, so being such speaker as aforesaid, in pursuance of such standing rules and orders as aforesaid, and according to such laws and customs as aforesaid, did, for *the execution of the resolutions and order aforesaid, afterwards, and before the time when, &c., in the introduction of this plea [*209
mentioned, to wit, on the said 7th day of January, in the year aforesaid, at Washington aforesaid, in the county aforesaid, as such speaker as aforesaid, duly make and issue his certain warrant, under his hand and seal, duly directed to the said Thomas, the defendant, as such sergeant-at-arms as aforesaid (to whom, so being such sergeant-at-arms as aforesaid, the execution of such warrant then and there belonged), and by the said Thomas Dougherty, so being such clerk as aforesaid; in and by said warrant, reciting that the said house of representatives had, that day, resolved and adjudged, that the said John Anderson had been guilty of a breach of the privileges of the said house, and of a high contempt of its dignity and authority; and that the said house had thereupon ordered the said speaker to issue his warrant, directed to the said sergeant-at-arms, commanding him, the said sergeant, to take into custody the body of the said John Anderson, wherever to be found, and the same forthwith to have before the said house, at the bar thereof, then and there to answer to the said charge; therefore, it was required that the said Thomas, the defendant, as such sergeant as aforesaid, should take into his custody the body of the said John Anderson, and then forthwith to bring him before the said house, at the bar thereof, then and there to answer to the charge aforesaid, and to be dealt with by the said house, according to the constitution and laws of the United States: and the said *Henry Clay, so being such speaker as aforesaid, then and [*210
there, and before the said time when, &c., in the introduction of this plea mentioned, delivered the said warrant to the said Thomas, so being such sergeant as aforesaid, to be executed in due form of law, by virtue and in execution of which said warrant, the said Thomas, as such sergeant as aforesaid, afterwards, to wit, at the said time when, &c., in the introduction of this plea mentioned, at Washington aforesaid, in orde to arrest the said John, and convey him in custody to the bar of the said house, to answer to the charge aforesaid, and to be dealt with by the said house, accord-

ing to the constitution and laws of the United States, in obedience to the resolutions and order aforesaid, and to the tenor and effect of the said warrant, so issued as aforesaid, went to the said John, and then and there gently laid his hands on the said John to arrest him, and did then and there arrest him by his body, and take him into custody, and did then forthwith convey him to the bar of the said house, as it was lawful for the said Thomas to do, for the cause aforesaid: and thereupon, such proceedings were had, in and by the said house, that the said John was, then and there, forthwith duly examined, and heard in his defence, before the said house, at the bar thereof, touching the matter of the said charge; and that such examination was, in and by the said house, and by the resolutions and orders of the same, duly adjourned and continued, from day to day, from the said time when, &c., in the introduction of this plea mentioned, until the 16th day of
*211] January, in the *year aforesaid; which said examinations were then so adjourned and continued, as aforesaid, from necessity, in order to go through and conclude the examination and defence of the said John, touching the matter of the said charge, before the said house; neither the said examination, nor the said defence, having been finished or concluded before the day last aforesaid: during all which time, to wit, from the said time when, &c., in the introduction of this plea mentioned, until the day last aforesaid, it was, in and by the said house, duly resolved and ordered, from day to day, as the said examination was adjourned and continued as aforesaid, that the said John should be remanded, kept and detained in the custody of the said Thomas, as such sergeant as aforesaid, by virtue and in execution of the said warrant, in order to have such his examinations and defence finished and concluded, in due form; and the said Thomas, as such sergeant as aforesaid, afterwards, to wit, at and from the said time when, &c., in the introduction of this plea mentioned, until the said 16th day of January, in the year aforesaid, did, in pursuance of the last-mentioned resolutions and orders of said house, and by virtue and in execution of the said warrant, keep and detain the said John in custody as aforesaid, and him did bring and have, from day to day, during the said time, before the said house, at the bar thereof, in order to undergo such examinations as aforesaid, and to be heard in his defence as aforesaid, touching the matter of the said charge, to wit, at Washington aforesaid, in the county aforesaid,
*212] as it was also lawful for him, the *said Thomas, to do, for the cause aforesaid: and thereupon, afterwards, to wit, on the said last-mentioned 16th day of January, in the year aforesaid, such further proceedings were had in and by the said house, that it was, then and there, finally resolved and adjudged, in and by the said house, that the said John was guilty, and convict of the charge aforesaid, in the form aforesaid; and that he be forthwith brought to the bar of the said house, and there reprimanded by the said speaker, for the outrage by the said John committed, and then that he be forthwith discharged from the custody of the said sergeant-at-arms: and thereupon, the said John was, then and there, in pursuance of the last-mentioned resolutions, order and judgment, forthwith reprimanded by the said speaker, and then forthwith discharged from the arrest and custody aforesaid; as by the journals, record and proceedings of the said resolutions, orders and judgment in the said house remaining, reference being thereto had, will more fully appear; which are the same several supposed

trespasses in the introduction of this plea mentioned, and whereof the said John hath, above in his said declaration, complained against the said Thomas, and not other or different: With this, that the said Thomas doth aver that the said John, the now plaintiff, and the said John Anderson, in the said resolutions, orders, warrant and judgment respectively mentioned, was, and is, one and the same person: and that at the said several times in this plea mentioned, and during all the time therein mentioned, the said congress of the United States was *assembled and sitting, to wit, at [*213
Washington aforesaid, in the county aforesaid: and this the said Thomas is ready to verify: Wherefore, he prays judgment, if the said John ought to have or maintain his aforesaid action thereof against him, &c.

February 20th. *Hall*, for the plaintiff in error, made three points. 1. That the house of representatives had no authority to issue the warrant. 2. That the warrant is illegal on the face of it. 3. That in either case, it is no justification to the officer who executed it.

1. If the house had authority, it must be either in virtue of the constitution of the United States, of usage and precedent, or as inherent in, and incidental to, legislative bodies. In the constitution, there are but two clauses which can be made to serve the purpose. The first article, section eight, enables congress to make all laws which may be necessary and proper to effectuate the powers expressly given. But it is obvious, that this merely authorizes the legislature, collectively, not one house separately, to pass certain laws, not mere occasional sentences. And the powers delegated to the United States, being in derogation of the rights of sovereign states, must be construed strictly. 2 Mass. 146. For the same reasons, the authority to determine the rules of its proceedings (art. 1, § 5), cannot be construed to operate beyond the walls of the house, except on its own *members, [*214
and its officers. It is observable also, that this authority is coupled with an authority to punish its members for misbehavior, and to expel a member. It is a rule of construction, that the text should be considered in connection with the context; but the context, viz., the power to punish and to expel, relates solely to the internal polity and economy of the house. The authority is to determine the rules of its proceedings, not the proceedings themselves, for these are determined by the constitution itself, in the first article. The fifth section of the first article authorizes the house to punish its members; *et enumeratio unius est exclusio alterius.* The power of issuing warrants is manifestly judicial. This may be assumed as an axiom. The constitution ordains, that the judicial power (which is equivalent to all the judicial power) shall be vested in one supreme court, and other inferior courts (art. 3, § 1). Thus, the right of the courts to exercise such a power, is exclusive, and an assumption of it by any other department, is an usurpation. Nor can the authority be inferred from usage and precedent. These must be, either of the two houses of congress, the state legislatures, or the British parliament. On the journals of the house of representatives, are found the cases of *Randall* and *Whitney*, and two others. On those of the senate, is the case of the *Editor of the Aurora*, &c. Shall we be told, that these proceedings were acquiesced in? The want of spirit in the individual to resist oppression, cannot fairly be construed into acquiescence on [*215
the part of the public; since that resistance *could be made only by

the person immediately affected. As to the usage of the state legislatures, it is either under color of their unlimited powers, of express provisions in their constitution, or of the common law and the usage of parliament. In this case, unlimited powers and express provision are not pretended; the penal code of the common law is no part of the federal system. Is, then, the authority incident to legislative bodies? An incident is defined, "a thing necessarily depending upon, or appertaining to, another that is more worthy, or principal." So, the constitution of the United States (art. 1, § 8), when regulating the incidental powers of congress, authorizes it to make such law only as may be "necessary" to effectuate the express powers. Necessity, then, is the criterion of incident. But is a power to punish the offer of a bribe, beyond the verge of the house, necessary to enable congress to perform its duties? The impunity of the offence being the only possible reason of the necessity, if the offender may be adequately punished by the courts of justice, in the ordinary mode of proceeding, the supposed necessity ceases. Bribery of a member of congress is punishable in the state courts, and in the circuit court of the district of Columbia, according to the course of the common law. Redress may also be had, before the same tribunals, in case of the battery or libel of a member; and if the existing remedies be insufficient, an act of congress may be made to supply the deficiency. And though the ordinary remedies should not reach every possible case, it is a
*216] rule, that "if the *words of a statute do not extend to a mischief which rarely occurs, they shall not, by an equitable construction, be extended to that mischief; but it is a *casus omissus*; and the objects of statutes, are mischiefs, *quæ frequentius accidunt.*" Vaugh. 373. It is evident, that the framers of the constitution deemed it more prudent to leave such mere possible mischiefs unprovided for, than to incur a certain evil, by vesting an extraordinary and dangerous prerogative for their suppression.

2. The warrant is illegal on the face of it. By the fourth article of the amendments to the constitution, it is provided, that "no warrant shall issue, but on probable cause, supported by oath or affirmation." Thus, are prohibited, all warrants which do not rest on oath, and on probable cause. But it is no less necessary, that the warrant should recite the cause in special and the oath. The constitution is not satisfied with "a cause" so vague and indefinite, as "high contempt and breach of privilege." When it adopts a term from the common law, it adopts, also, the law regulating its incidents and properties, unless repugnant to that instrument. Now, what are the incidents and properties of a warrant at common law? It is said by Dalton, that "the warrant ought to contain the special cause and matter whereupon it is granted." Dalt. on Sheriffs 169.

3. If there be either a defect of authority in the house, or illegality in the warrant, it is no justification. That it is none, in the former case, has
*217] long since *been settled in this court. *Little* v. *Barreme*, 2 Cranch 179. As to the latter alternative of the proposition, the constitution, by prohibiting an act, renders it void, if done; otherwise, the prohibition were nugatory. 4 Bl. Com. 491. Thus, the warrant is a nullity. The rights of congress on the subject of contempts, have been considered similar, and equal to those of the federal courts. But here we must recur again to the maxim, that when the constitution adopts a term from the common law, it adopts also its incidents. At common law, the power to

punish contempt is incident to courts. But "congress," and the "house of representatives," being terms unknown to the common law, can derive no claims through it. Courts enforce the laws; they must, therefore, be clothed with authority to compel obedience to them: whereas, the legislature is merely deliberative. But, it is asked, are the members to be insulted with impunity, in a manner which will not authorize the interference of a court? If the insolence be merely by word or gestures, not amounting to slander or assault, the genius of our institutions does not admit of its punishment. Privilege of congress is reduced by the sixth section, art. 1, of the constitution, to exemption from arrest, and freedom of speech. From the nature of the enumerated privileges, it is evident, that the sole object of giving them was, to prevent interruption of the business of the houses, not to render the person and feelings of members more sacred than those of other citizens. An attempt *to bribe a member may be made in Maine or Missouri. The speaker's warrant may be issued, on a mere [*218 allegation, without oath, commanding the sergeant-at-arms to arrest the accused "wherever found," and bring him to the bar of the house. So that he may be dragged from the extreme of the Union, to be tried by a legislative body. Yet the constitution (art. 3, § 2) provides, that "the trial of all crimes shall be by jury; and that such trial shall be held in the state and district where the offence was committed;" and also (art. 5, amendments) that "no person shall be held to answer for an infamous crime, except on the presentment or indictment of a grand jury; nor shall be deprived of liberty, without due process of law." And further, that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district." It is only necessary to compare the conduct of the house of representatives, in the case at bar, with these provisions, in order to perceive its gross injustice and illegality.

The *Attorney-General* and *Jones*, contrà, stated, that the only question before the court was, whether the house of representatives could exercise the power in question, either as incidental to its legislative, or its judicial capacity?

1. The house being one branch of the legislature, no legislative act can be performed without its concurrence, and therefore, an attack upon it, is an attack upon the whole congress. The necessity of self-defence is as incidental to legislative, as to judicial *authority. This power is not [*219 a substantive provision of the common law adopted by us; it is rather a principle of universal law, growing out of the natural right of self-defence, belong to all persons. It is unnecessary to resort to the doctrine of constructive contempts, in order to vindicate the conduct of the defendant as a ministerial officer. He merely executed the judgment of the house, pronouncing the plaintiff guilty of a breach of privilege, and a high contempt. It was confessedly within the competency of the house, to render such a judgment in some cases: such as that of a direct interruption of its proceedings, by open violence within the walls. But from the plea, *non constat*, what was the nature of the offence committed by the plaintiff. Nor was it necessary that the plea should set out the facts constituting the contempt. It is sufficient for the protection of the officer, that the house has jurisdiction to punish contempts, and that it had adjudged the plaintiff guilty of a

contempt. The power of punishing contempts is incidental to all courts of justice, and even to the most inferior magistrates, when in the exercise of their public functions, and arises out of the absolute necessity of the case, which renders it indispensable that they should have such a power.

2. Each branch of the legislature has certain powers of judicature, under the constitution, and the house of representatives has the exclusive power of impeachment; which necessarily involves the authority of compelling the attendance of witnesses, and punishing them for contempt. Even Lord
*220] Holt, who was an enemy of the extravagant privileges *of parliament, admits that the power of impeachment residing in the house of commons, necessarily involved the authority of committing the accused, and of punishing contempts. *Regina* v. *Patty*, 2 Ld. Raym. 1105. The powers of judging of elections, and of punishing members for disorderly conduct, necessarily involves all the incidents of judicature. Nothing appears upon the face of the record, to show that it was not in the exercise of these very powers, or in defence of the admitted privileges of the house, that the warrant issued. It need not appear on the face of the warrant, that the cause out of which the contempt grew, was within the judicial powers of the house. The mere question between the ministerial officer and the offender, is, whether the warrant was issued by a court of competent jurisdiction, and whether he has pursued the precept in the manner of executing it. In other words, the only question is, whether the house has, in any case, the power of punishing contempts. If it has jurisdiction, it is a peculiar exclusive jurisdiction, and its exercise cannot be questioned or re-examined elsewhere. The doctrine is settled and established in this court, that the grant of the powers expressly given to congress in the constitution, involves all the incidental powers necessary and proper to carry them into effect. *Mc Culloch* v. *Maryland*, 4 Wheat. 316. And the general grant of judicial powers to the courts of the United States, does not exclude the other
*221] branches of the government from the exercise of certain portions *of judicial authority. The different departments of the government could not be divided in this exact, artificial manner; they all run into each other. Even the president, though his functions are principally executive, has a portion of legislative power; and the congress is invested with certain portions of judicial power. The whole of this subject has been thoroughly investigated, in two recent cases in England, and the authorities cited on the argument of those cases, renders it unnecessary to repeat a reference to them on the present occasion. *Burdett* v. *Abbott*, 14 East 1; *Burdett* v.
*222] *Colman*, Ibid. 163. (*a*) *It is sufficient to say, that they fully establish the doctrine that a legislative body has, from the necessity

(*a*) In these cases, the pleas by the speaker and sergeant-at-arms of the house of commons justified the supposed trespasses, under a warrant reciting a resolution of the house, that "a letter signed 'Sir Francis Burdett' and a further part of a paper entitled 'Argument,' in Cobbett's Weekly Register, of March 24th, 1814, was a libellous and scandalous paper, reflecting on the just rights and privileges of that house; and that Sir Francis Burdett, who had admitted the letter and argument to have been printed by his authority, has been thereby guilty of a breach of the privileges of that house," and that it was, thereupon, ordered by the house, that the plaintiff, for his said offence, should be committed to the tower; and that the speaker should issue his warrants accordingly. The cases were carried from the court of king's bench to the exchequer

of the case, a right to commit persons for contempt, *in breach of their privileges; that they are the exclusive judges whether those privileges have been violated in the particular instance; and that *their decisions [*224 upon the subject cannot be questioned in any other court or place.

3. As to the form of the warrant, it is unnecessary to describe the offence

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chamber, where the judgments in favor of the defendants were affirmed upon the same grounds stated by the judges of the K. B. in East's reports. The plaintiff, Sir Francis Burdett, having brought a writ of error to the house of lords, the cause was argued for him by Mr. Brougham and Mr. Courtnay, in the session of 1816-17. After the counsel for the plaintiff in error had been heard, Lord ELDON (Chancellor) proposed to their lordships, that the counsel for the defendants should not be heard, until the house should have received the opinion of the judges on the following question, viz: "Whether, if the court of common pleas, having adjudged an act to be a contempt of court, had committed for the contempt, under a warrant, stating such adjudication generally, without the particular circumstances, and the matter were brought before the court of King's Bench, by return to a writ of *habeas corpus*, the return setting forth the warrant, stating such adjudication of contempt, generally; whether, in that case, the court of king's bench would discharge the prisoner, because the particular facts and circumstances out of which the contempt arose, were not set forth in the warrant." The question being handed to the judges, and they having consulted among themselves for a few minutes, Lord Chief Baron RICHARDS delivered their unanimous opinion, that in such a case, the court of king's bench would not liberate.

Lord ELDON, Chancellor.—That this is a case of very great importance, none will dispute: but, at the same time, I do not think it a case of difficulty. If I did, I should be anxious to hear the counsel for the defendants, before proceeding to judgment. But in my view of the case, considering it as clear in law, that the house of commons have the power of committing for contempt; that this was a commitment for contempt; that the general nature of the contempt, if that was necessary, was sufficiently set forth in the warrant; and being of opinion, that the objections, in point of form, have not been sustained, unless any other noble Lord should express a wish to hear the counsel for the defendants, I shall now move that the judgments in the court below be affirmed.

Lord ERSKINE.—When this matter was first agitated, I understood, that the house of commons intended to pursue a very different course. I was, therefore, alarmed; I expressed myself, because I felt, with warmth. I have changed none of the opinions I then entertained; I then said, that the house of commons ought to be jealous of such privileges as were necessary for its protection. My opinion is, that these privileges are part of the law of the land, and upon this record there is nothing more than the ordinary proceeding; the speaker of the house of commons, like any other subject, putting himself on the country as to the fact, and pleading a justification in law; for this was not a plea to the jurisdiction, but a plea in bar. This course of proceeeding gave rise to the most heart-felt satisfaction; for if the judgment had been adverse to the defendants, the house would, no doubt, have submitted. It would be a libel on the house of commons, to suppose that it would not. Therefore, by this judgment, it appears, that it is the law which protects the just privileges of the house of commons, as well as the rights of the subject. The case has been argued with great propriety; but it was contended, that it was not alleged in the warrant, that the libel was published by the plaintiff. But it is alleged, that the paper was printed by his authority. And if I send a manuscript to the printer of a periodical publication, and do not restrain the printing and publishing of it, and he does print and publish it in that publication, then I am the publisher. The word reflecting, standing by itself, would not be sufficiently distinct. But the warrant recites that the letter had been adjudged to be a libellous and scandalous paper, reflecting on the just rights and privileges of the house of commons; and the meaning there must be, arraigning the just rights and privileges of the house. I myself, while I presided in the court of chancery, committed for contempt,

particularly in the warrant, except for the purpose of letting the party see whether it is bailable or not.(*a*) But this was only a warrant to arrest the plaintiff, and bring him before the house; a preliminary proceeding absolutely necessary to exercise any sort of jurisdiction over the matter.

March 2d, 1821. JOHNSON, Justice, delivered the opinion of the court.—Notwithstanding the range which has been taken by the plaintiff's counsel, in the discussion of this cause, the merits of it really lie in a very limited compass. The pleadings have narrowed them down to the simple inquiry, whether the house of representatives can take cognisance of contempts committed *against themselves, under any circumstances? The duress complained of was sustained under a warrant issued to compel the party's appearance, not for the actual infliction of punishment for an offence committed. Yet it cannot be denied, that the power to instituted a prosecution must be dependent upon the power to punish. If the house of representatives possessed no authority to punish for contempt, the initiating process issued in the assertion of that authority must have been illegal; there was a want of jurisdiction to justify it.

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It is certainly true, that there is no power given by the constitution to either house, to punish for contempts, except when committed by their own members. Nor does the judicial or criminal power given to the United States, in any part, expressly extend to the infliction of punishment for contempt of either house, or any one co-ordinate branch of the government. Shall we, therefore, decide, that no such power exists?

It is true, that such a power, if it exists, must be derived from implication, and the genius and spirit of our institutions are hostile to the exercise of implied powers. Had the faculties of man been competent to the framing of a system of government which would have left nothing to implication, it cannot be doubted, that the effort would have been made by the framers of the constitution. But what is the fact? There is not in the whole of that admirable instrument, a grant of powers which does not draw after it others,

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in a case in which a pamphlet was sent to me, the object of which was, by partial representation, and by flattering the judge, to procure a different species of judgment from that which would be administered in the ordinary course of justice. I might be wrong, but I do not think I was. The house of commons, whether a court or not, must, like every other tribunal, have the power to protect itself from obstruction and insult, and to maintain its dignity and character. If the dignity of the law is not sustained, its sun is set, never to be lighted up again. So much I thought it necessary to say, feeling strongly for the dignity of the law; and have only to add, that I fully concur in the opinion delivered by the judges.

The counsel were called in, and informed, that the house did not think it necessary to hear counsel for the defendants. And then, without further proceeding, the judgments of the court below were affirmed. 5 Dow 165, 199.

(*a*) Chitty's Crim. Law, and the authorities there cited.

[1] The power of the House of Commons to commit for contempt, results from its constituting a branch of the High Court of Parliament, and its consequent possession of judicial powers. Kilbourn *v.* Thompson, 103 U. S. 168; 4 Inst. 47; Brass Crosby's Case, 3 Wils. 188; Case of the Sheriff of Middlesex, 11 Ad. & E. 273. But nevertheless, the question of the jurisdiction of the House is always open to the inquiry of the courts, in a case where that question is properly presented. Stockdale *v.* Hansard, 9 Ad. & E. 1. And see Burnham *v.* Morrissey, 14 Gray 226.

not expressed, but vital to *their exercise; not substantive and independent, indeed, but auxiliary and subordinate. The idea is Utopian, that government can exist without leaving the exercise of discretion somewhere. Public security against the abuse of such discretion must rest on responsibility, and stated appeals to public approbation. Where all power is derived from the people, and public functionaries, at short intervals, deposit it at the feet of the people, to be resumed again, only at their will, individual fears may be alarmed by the monsters of imagination, but individual liberty can be in little danger. No one is so visionary as to dispute the assertion, that the sole end and aim of all our institutions is the safety and happiness of the citizen. But the relation between the action and the end, is not always so direct and palpable as to strike the eye of every observer. The science of government is the most abstruse of all sciences; if, indeed, that can be called a science, which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion, applied to the exigencies of the state as they arise. It is the science of experiment.

But if there is one maxim which necessarily rides over all others, in the practical application of government, it is, that the public functionaries must be left at liberty to exercise the powers which the people have intrusted to them. The interests and dignity of those who created them, require the exetion of the powers indispensable to the attainment of the ends of their creation. Nor is a casual conflict with *the rights of particular individuals any reason to be urged against the exercise of such powers. [*227
The wretch beneath the gallows may repine at the fate which awaits him, and yet it is no less certain, that the laws under which he suffers were made for his security. The unreasonable murmurs of individuals against the restraints of society, have a direct tendency to produce that worst of all despotisms, which makes every individual the tyrant over his neighbor's rights. That "the safety of the people is the supreme law," not only comports with, but is indispensable to, the exercise of those powers in their public functionaries without which that safety cannot be guarded. On this principle it is, that courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect and decorum in their presence, and submission to their lawful mandates, and as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution.

It is true, that the courts of justice of the United States are vested, by express statute provision, with power to fine and imprison for contempts; but it does not follow, from this circumstance, that they would not have exercised that power, without the aid of the statute, or not in cases, if such should occur, to which such statute provision may not extend; on the contrary, it is a legislative assertion of this right, as incidental to a grant of judicial power, and can only be considered, only as an instance of abundant caution, or a legislative declaration, that the power *of punishing for [*228
contempt shall not extend beyond its known and acdnowledged limits of fine and imprisonment.

But it is contended, that if this power in the house of representatives is to be asserted on the plea of necessity, the ground is too broad, and the result too indefinite; that the executive, and every co-ordinate, and even

subordinate, branch of the government, may resort to the same justification, and the whole assume to themselves, in the exercise of this power, the most tyranical licentiousness. This is, unquestionably, an evil to be guarded against, and if the doctrine may be pushed to that extent, it must be a bad doctrine, and is justly denounced. But what is the alternative? The argument obviously leads to the total annihilation of the power of the house of representatives to guard itself from contempts, and leaves it exposed to every indignity and interruption, that rudeness, caprice, or even conspiracy, may meditate against it. This result is fraught with too much absurdity, not to bring into doubt the soundness of any argument from which it is derived. That a deliberate assembly, clothed with the majesty of the people, and charged with the care of all that is dear to them; composed of the most distinguished citizens, selected and drawn together from every quarter of a great nation; whose deliberations are required, by public opinion, to be conducted under the eye of the public, and whose decisions must be clothed
*229] with all that sanctity which *unlimited confidence in their wisdom and purity can inspire; that such an assembly should not possess the power to suppress rudeness, or repel insult, is a supposition too wild to be suggested. And accordingly, to avoid the pressure of these considerations, it has been argued, that the right of the respective houses to exclude from their presence, and their absolute control within their own walls, carry with them the right to punish contempts committed in their presence; while the absolute legislative power given to congress within this district, enables them to provide by law against all other insults against which there is any necessity for providing.

It is to be observed, that so far as the issue of this cause is implicated, this argument yields all right of the plaintiff in error to a decision in his favor; for, *non constat*, from the pleadings, but that this warrant issued for an offence committed in the immediate presence of the house.[1] Nor is it immaterial, to notice what difficulties the negation of this right in the house of representatives draws after it, when it is considered, that the concession of the power, if exercised within their walls, relinquishes the great grounds of the argument, to wit, the want of an express grant, and the unrestricted and undefined nature of the power here set up. For why should the house be at liberty to exercise an ungranted, an unlimited, and undefined power, within their walls, any more than without them? If the analogy with individual right and power be resorted to, it will reach no further than to exclu-
*230] sion, and it requires no exuberance of imagination, *to exhibit the ridiculous consequences which might result from such a restriction, imposed upon the conduct of a deliberative assembly.

Nor would their situation be materially relieved, by resorting to their legislative power within the district. That power may, indeed, be applied to many purposes, and was intended by the constitution to extend to many purposes indispensable to the security and dignity of the general government; but they are purposes of a more grave and general character than the offences which may be denominated contempts, and which, from their very nature, admit of no precise definition. Judicial gravity will not admit

[1] This is the only ground on which the case can be supported. Kilbourn v. Thompson, 103 U. S. 196-97.

of the illustrations which this remark would admit of. Its correctness is easily tested by pursuing, in imagination, a legislative attempt at defining the cases to which the epithet contempt might be reasonably applied.

But although the offence be held undefinable, it is justly contended, that the punishment need not be indefinite. Nor is it so. We are not now considering the extent to which the punishing power of congress, by a legislative act, may be carried. On that subject, the bounds of their power are to be found in the provisions of the constitution. The present question is, what is the extent of the punishing power which the deliberative assemblies of the Union may assume and exercise on the principle of self-preservation?

Analogy, and the nature of the case, furnish the *answer—"the least possible power adequate to the end proposed;" which is the power of imprisonment. It may, at first view, and from the history of the practice of our legislative bodies, be thought to extend to other inflictions. But every other will be found to be mere commutation for confinement; since commitment alone is the alternative, where the individual proves contumacious. And even to the duration of imprisonment a period is imposed, by the nature of things, since the existence of the power that imprisons is indispensable to its continuance: and although the legislative power continues perpetual, the legislative body ceases to exist, on the moment of its adjournment or periodical dissolution. It follows, that imprisonment must terminate with that adjournment. [*231

This view of the subject necessarily sets bounds to the exercise of a caprice which has sometimes disgraced deliberative assemblies, when under the influence of strong passions or wicked leaders, but the instances of which have long since remained on record only as historical facts, not as precedents for imitation. In the present fixed and settled state of English institutions, there is no more danger of their being revived, probably, than in our own. But the American legislative bodies have never possessed, or pretended to, the omnipotence which constitutes the leading feature in the legislative assembly of Great Britain, and which may have led occasionally to the exercise of caprice, under the specious appearance of merited resentment.

*If it be inquired, what security is there, that with an officer avowing himself devoted to their will, the house of representatives will confine its punishing power to the limits of imprisonment, and not push it to the infliction of corporal punishment, or even death, and exercise it in cases affecting the liberty of speech and of the press? the reply is to be found in the consideration, that the constitution was formed in and for an advanced state of society, and rests at every point on received opinions and fixed ideas. It is not a new creation, but a combination of existing materials, whose properties and attributes were familiarly understood, and had been determined by reiterated experiments. It is not, therefore, reasoning upon things as they are, to suppose that any deliberative assembly, constituted under it, would ever assert any other rights and powers than those which had been established by long practice, and conceded by public opinion. Melancholy, also, would be that state of distrust, which rests not a hope upon a moral influence. The most absolute tyranny could not subsist, where men could not be trusted with power, because they might abuse it, much less a government which has no other basis than the sound morals, [*232

moderation, and good sense of those who compose it. Unreasonable jealousies not only blight the pleasures, but dissolve the very texture of society.

But it is argued, that the inference, if any, arising under the constitution, is against the exercise of the powers here asserted by the house of repre-
*233] sentatives; that the express grant of power to punish their *members, respectively, and to expel them, by the application of a familiar maxim, raises an implication against the power to punish any other than their own members. This argument proves too much; for its direct application would lead to the annihilation of almost every power of congress. To enforce its laws upon any subject, without the sanction of punishment, is obviously impossible. Yet there is an express grant of power to punish in one class of cases, and one only, and all the punishing power exercised by congress, in any cases, except those which relate to piracy and offences against the laws of nations, is derived from implication. Nor did the idea ever occur to any one, that the express grant in one class of cases repelled the assumption of the punishing power in any other. The truth is, that the exercise of the powers given over their own members, was of such a delicate nature, that a constitutional provision became necessary to assert or communicate it. Constituted, as that body is, of the delegates of confederated states, some such provision was necessary to guard against their mutual jealousy, since every proceeding against a representative would indirectly affect the honor or interests of the state which sent him.

In reply to the suggestion, that, on this same foundation of necessity, might be raised a superstructure of implied powers in the executive, and every other department, and even ministerial officer, of the government, it would be sufficient to observe, that neither analogy nor precedent would support
*234] the assertion *of such powers in any other than a legislative or judicial body. Even corruption anywhere else would not contaminate the source of political life. In the retirement of the cabinet, it is not expected, that the executive can be approached by indignity or insult; nor can it ever be necessary to the executive, or any other department, to hold a public deliberative assembly. These are not arguments; they are visions which mar the enjoyment of actual blessings, with the attack or feint of the harpies of imagination.

As to the minor points made in this case, it is only necessary to observe, that there is nothing on the face of this record, from which it can appear on what evidence this warrant was issued. And we are not to presume, that the house of representatives would have issued it, without duly establishing the fact charged on the individual. And as to the distance to which the process might reach, it is very clear, that there exists no reason for confining its operation to the limits of the district of Columbia; after passing those limits, we know no bounds that can be prescribed to its range but those of the United States. And why should it be restricted to other boundaries? Such are the limits of the legislating powers of that body; and the inhabitant of Louisiana or Maine may as probably charge them with bribery and corruption, or attempt, by letter, to induce the commission of either, as the inhabitant of any other section of the Union. If the inconvenience be urged, the reply is obvious: there is no difficulty in observing
*235] *that respectful deportment which will render all apprehension chimerical.

Judgment affirmed.

La Conception: The Spanish Consul, Claimant.

Prize.—Breach of neutrality.

Where a capture is made of the property of the subjects of a nation in amity with the United States, by a vessel built, armed, equipped and owned in the United States, such capture is illegal, and the property, if brought within our territorial limits, will be restored to the original owners.

Where a transfer of the capturing vessel, in the ports of the belligerent state, under whose flag and commission she sails on a cruise, is set up, in order to legalize the capture, the *bona fides* of the sale must be proved by the usual documentary evidence, in a satisfactory manner.

Appeal from the Circuit Court of South Carolina. This was an allegation filed in the district court of South Carolina, by the vice-consul of his Catholic Majesty, claiming restitution of the ship La Conception and cargo, as the property of Spanish subjects to him unknown, which had been illegally captured by the armed ship La Union, sailing under the flag of Buenos Ayres, and pretending to have a commission or letter of marque from that government, but actually built, equipped, armed and manned in the United States. A claim was interposed *by one Brown, claiming the property as having been taken by him, as commander of La Union, on the high seas, under a commission from the government of Buenos Ayres, authorizing him to capture the property of the subjects of Spain. [*236

The district and circuit courts decreed restitution of the property to the captors, no sufficient evidence being produced of the capturing vessel having been equipped, or having augmented her force in the ports of the United States. On appeal to this court, further proof was taken, showing conclusively, that the capturing vessel was originally built, owned and equipped in this country, and after proceeding to Buenos Ayres, and sailing from that port on a cruise, had touched at the port of New Orleans, and there illegally augmented her force, since which, the capture in question was made. This evidence was attempted to be repelled, on the part of the captors, by testimony tending to show a transfer of the capturing vessel, at Buenos Ayres, to domiciled subjects of that country, and that the subsequent augmentation of her force at New Orleans, if any, was very trifling, and only amounted to a replacement of her former equipment.

March 8th. The *Attorney-General* and *Hopkinson*, for the appellant and claimant, the Spanish consul, argued, that the original owners were entitled to restitution, according to the uniform series of decisions in this court, upon the ground, that the capturing ship was built and equipped in the United States, with the intention of cruising against the subjects of Spain, in violation of our neutrality, and actually belonged *to citizens of the United States, when the present capture was made; or had illegally augmented her force in our ports, previous to the capture. *The Alerta*, 9 Cranch 359; *The Divina Pastora*, 4 Wheat. 298; *The Estrella*, Ibid. 298; *La Amistad de Rues*, 5 Ibid. 385; *The Bello Corrunes*, *ante*, p. 152. That the pretended transfer at Buenos Ayres was evidently colorable, and was not proved by the production of the bill of sale, or any of the other documentary evidence usually expected by maritime courts, to establish a change of this species of property. That the enlistment of additional seamen to the crew at New Orleans, being proved, the *onus* was thrown back upon the [*237

captors, to show that the persons so enlisted were subjects of Buenos Ayres, transiently within the United States. *The Estrella*, 4 Wheat. 298.

Winder, contrà, insisted, that it must be a clear case of the violation of our neutral rights, or the court would not interfere to restore a capture made under a commission from a sovereign state, and that the *onus probandi* for this purpose was on the Spanish claimant. *La Amistad de Rues*, 5 Wheat. 385. We have an unquestionable right to build ships for sale, and to export any kind of contraband, subject to the risk of capture: and even if a ship be expressly built for war, it may be sold to a belligerent, and afterwards equipped in his own ports, to cruise against his enemy. *The Alfred*, 3 Dall. *238] 387. Here, the purchaser *was actually domiciled at Buenos Ayres, and there is nothing to impeach the *bona fides* of the transaction. He then sailed again from Buenos Ayres on a cruise, and the alleged augmentation of the crew at New Orleans was, in effect, nothing but a replacement of the original force, the vessel having lost by desertion nearly the same number of men which she acquired by enlistment. Such a replacement, this court has already determined not to afford a ground for restitution. *The Phœbe Ann*, 3 Dall. 319. It is true, that the case cited was under the French treaty of 1778. But the 19th article of that treaty provides nothing more than a right of asylum and hospitality, the same as is enjoyed by the South American cruisers in our ports, under the president's instructions.

The counsel on both sides also argued on the same grounds which are stated in the case of *The Bello Corrunes* (*ante*, p. 155), and which it is not thought necessary to repeat.

Story, Justice, delivered the opinion of the court.—In this case, if the cause had stood solely upon the evidence before the circuit court, we should have no difficulty in affirming its decision. But upon the new proofs which have been since taken, and are now produced to this court, it is apparent, that the capturing vessel was originally built, equipped, manned and armed in the United States for a cruise, being owned by citizens of this country, *239] and *sailed with the intent of cruising against Spain. It is true, that she went to Buenos Ayres, and sailed, under the colors of that government, on a second cruise, during which this capture was made; but, there is no satisfactory evidence, that the American ownership ever ceased, or that there was a real, *bonâ fide* sale, at Buenos Ayres. If such a sale had really taken place, it was perfectly in the power of the captors to have proved it, in the clearest manner. A bill of sale is the customary and universal document by which the ownership of vessels is evidenced; and the want of any document of this nature, or of any direct and positive evidence of an actual sale, leaves no doubt in the mind of the court, that no such sale ever was made. The consequence is, that the capturing vessel must still be considered, as owned in the United States; and according to the decisions which have already been made, the capture was illegal, and the property must be restored to the original Spanish owners.

Sentence reversed.

*Willinks *v.* Hollingsworth *et al.*

Recoupment of damages.

H. and others, merchants, in Baltimore, consigned a vessel and cargo to W. and others, merchants, in Amsterdam, with instructions to them respecting her ulterior destination, which showed, that on the failure of getting a freight to Batavia, or of selling the vessel at a price limited, she was to proceed to St. Petersburg, and there take in a return-cargo of Russian goods for the United States, but with instructions to the master, committing to him the management of the ulterior voyage. No freight to Batavia could be obtained, and the vessel could not be sold for the price limited, at Amsterdam, and W. and others purchased, in Amsterdam, with the concurrence of the master, a return-cargo of Russian goods, partly with the money of H. and others, and partly with money advanced by themselves. On the return of the vessel to Baltimore, H. and others objected to the purchase of this cargo in Amsterdam, as being contrary to express orders, and gave notice to W. and others, of their determination to hold them responsible for all losses sustained in consequence of this breach of instructions; but received the goods and sold them. W. and others brought an *assumpsit* against H. and others, to recover from them the moneys advanced; the declaration contained the three usual money counts: *Held*, 1st. That the plaintiffs had a demand in law against the defendants, which could be maintained in this form of action: 2d. That whether the plaintiffs could, or could not, be made responsible in any form of action which might be devised, for the possible loss resulting from the breaking up of the intended voyage to St. Petersburg, the defendants were not entitled to a deduction from the plaintiffs' demand, for the amount of such loss.

This was an action of *assumpsit*, brought in the Circuit Court of Maryland, by the plaintiffs, who were merchants of Amsterdam, to recover from the defendants, merchants of Baltimore, a sum of money advanced by the plaintiffs, in Amsterdam, for the *cargo of the Henry Clay, a vessel [*241
belonging to the defendants, which had been consigned by them to the plaintiffs, with an outward cargo, and with orders respecting her ulterior destination, which showed, that on the failure of getting a freight to Batavia, or of selling her at Amsterdam, she was to go to St. Petersburg, and there take in a return-cargo of Russian goods for the United States. The plaintiffs purchased, in Amsterdam, with the concurrence of the master, a return-cargo for the Henry Clay, partly with the money of the defendants, and partly with money advanced by themselves. On her arrival at Baltimore, the defendants objected to the purchase of this cargo in Amsterdam, as being contrary to express orders, and immediately gave notice to the plaintiffs, of their disapprobation of the transaction, and of their determination to hold them responsible for all losses sustained in consequence of this departure from instructions. They, however, received the cargo, and sold it.

The declaration contained three counts: the first, for money lent and advanced to the defendants; the second, for money laid out and expended for their use; and the third, for money received by them for the use of the plaintiffs.

On the trial of the cause, in the circuit court, the defendants prayed the court to instruct the jury, that upon the whole evidence, which was spread on the record, "the plaintiffs have not any demand in law against the defendants, which can be maintained in this action; but that, if they have, the defendants *are entitled to a deduction fron the same, of the amount [*242
of the loss which the jury shall find the said defendants sustained, by reason of the alteration aforesaid, in the destination to St. Petersburg, of the said ship, and the loading her as aforesaid at Amsterdam." On this

motion, the judges were divided in opinion, and the division certified to this court.

The evidence principally consisted of two letters, dated the 29th of April 1815, written by McKim, one of the defendants, addressed, the one to the plaintiffs, the other to the master of the Henry Clay. That to the plaintiffs was as follows:

"Gentlemen: The owners of the ship Henry Clay having appointed me the ship's husband for this voyage, and from the introduction of our mutual friends, Robert Gilmor & Sons, I have been directed by the owners, to consign the ship to your house, also that part of her cargo which I consider belongs to her owners jointly, agreeable to the invoice, amounting to $1363.40. You will find, that the owners of the ship have shipped tobacco, on their separate accounts; the proceeds are to be placed to the credit of John McKim, Jun., to remain a fund for the purpose of loading the ship, if she should proceed to St. Petersburg. The freight and primage, and also Captain Charles Gantt's bills, which are now inclosed, drawn on you for the sum of 6550 guilders, are to constitute part of the funds for the loading of the ship. Our wish is, in the first place, if a good freight or charter can be
*243] had for the ship to Batavia, that *she should proceed there, in preference to any other place. And secondly, if the ship can be sold for 8000*l.* sterling, you will dispose of her, rather than send her to St. Petersburg." The letter then proceeded to give such a description of the ship as might enhance her value in the estimation of a purchaser, and then added, "If the Henry Clay proceeds to St. Petersburg, we must depend on your placing funds there, to purchase a cargo of iron, hemp and other goods. If the funds we have placed in your hands should fall short of loading her, Messrs. Gilmor & Sons have written you to make us any advances that may be deficient. Agreeable to the estimate, what we have ordered from St. Petersburg, will not exceed $45,000, and you may rest assured, that any sum advanced us will be remitted to you as soon as we know the amount." The letter to the master was in these words:

"Dear Sir: The ship Henry Clay is given you in charge, that you proceed with all possible dispatch for Amsterdam, and it is recommended, that you sail north about, at this fine season of the year. The owners of the ship have the greatest confidence in your good management; that you will take care that your disbursements in every foreign port may be as moderate as possible; that you will purchase every article yourself, on the lowest terms, that may be required for the ship; that you will use the greatest economy in all your expenditures. After your arrival at Amsterdam, your
*244] first object is a *good charter for Batavia, and if what you know to be a good charter is obtained, you will, of course, accept it in preference to anything else. And if a good freight cannot be had to Batavia, and the ship can be sold for 8000*l.* sterling, you have orders to sell her, and we confidently expect that she will bring more, as she cost upwards of 14,000*l.* sterling, and never made one voyage. I hope that every exertion will be made to proceed to St. Petersburg immediately, if you do not go to Batavia, and the ship cannot be sold; as the season is far advanced, no time must be lost. The same industry must be used to get away from St. Petersburg, for fear that you might be detained there all the winter. The owners must also depend on your attention at St. Petersburg, that the hemp is good that

you receive." The letter then gave instructions respecting pilots, protests, &c., and then added, "Messrs. Willinks will, of course, endeavor to consign the ship to a friend of theirs at St. Petersburg, but we have great confidence in a house recommended by Mr. Cumberland D. Williams, Messrs. Meyer & Buxner, and we could wish you to consign the ship to them. If any freight should offer from St. Petersburg to Baltimore, of course, you will accept of it, and if any goods for Philadelphia or New York should be there, yon can inform the shippers how easy they may be sent," &c.

It was also proved, that no freight to Batavia could be obtained, and that the vessel could not be sold at the price limited.

February 23d. *_Harper_ and _Winder_, for the plaintiffs, argued: [*245
1. That the present action could be maintained by the plaintiff for the moneys advanced by them at Amsterdam, for the purchase of the return-cargo received by the defendants, at Baltimore. Even supposing that the defendants might have refused to receive it, yet having actually sold it, and received the proceeds of the sale, this raises an _assumpsit_ to pay the money thus received. In the case of _Manella_ v. _Barry_, 3 Cranch 415, foreign merchants sent, by their general agent, written orders to their factor in this country, to purchase goods here, upon their account, but to ship the goods in the name of the factor, and by those orders, the factor was referred to the verbal communications of the general agent, who undertook to order the goods to be shipped in the name of another person, and declared, that he had authority from the foreign merchants thus to control and vary their orders; the factor was held to be justified in obeying the new orders of the general agent, though contrary to the first written orders. So, here, the consignment of the ship to the plaintiffs was limited to her transactions at Amsterdam, and the control of her ulterior movements was left to the master. The learned counsel here entered into a minute examination of the correspondence, to show that this was its import.

2. The defendants cannot claim a deduction from the plaintiffs' demand, of the amount of the supposed loss sustained by the alteration of the intended destination *of the vessel to St. Petersburg, and the loading [*246
her at Amsterdam. This question depends not on the English statute of set-off, but on the act of assembly of Maryland, of November 1785, c. 46, § 7. This act provides, "That in case any suit shall hereafter be brought on any judgment, or on any bond, or other writing sealed by the party, and the defendants shall have any demand or claim against the plaintiff, upon judgment, bond or other instrument under seal, or upon note, agreement, _assumpsit_, or account proved as by this act is allowed the defendant, or otherwise, according to law, shall be at liberty to file his account in bar, or plead discount to the plaintiff's claim, and judgment shall be given for the plaintiff for the sum only which remains due, after just discount made; provided, the sum which shall remain due after such discount be sufficient to support a judgment in the court where the cause may be tried, according to its established jurisdiction; and in all cases of suits upon simple contracts, the defendant may file an account in bar, or plead discount of any claim he may have against the plaintiff, proved as aforesaid, or otherwise proved according to, which may be of an equal or superior nature to the plaintiff's claim, and judgment shall be given as aforesaid." Unliquidated damages cannot

be admitted by way of discount, according to the very letter of the law, and the uniform decisions of the local courts of Maryland. But even the English statute has received the same construction. Montagu on Set-Off 21, and the authorities there cited; *Brown* v. *Cuming*, 2 Caines 33, and note a; *Winchester* v. *Hackley*, 2 Cranch 341. Damages for *a
*247] breach of the implied contract of an agent are, and necessarily must be, unliquidated. If then such damages cannot be set off, under the statute, neither can they be admitted incidentally, by way of deduction, upon the equitable principles of an action for money had and received. It would be an evasion of the law, to permit such an equitable deduction, which sounds rather in tort than contract. The policy of the law is to prevent two distinct issues, involving controverted questions, from being tried at the same time, thus confounding the simplicity of actions and of proceedings in a court of law.

Pinkney and *D. B. Ogden*, contra:—1. Insisted, that the action could not be maintained by the plaintiffs, there having been a manifest breach of instructions on their part, not justified by the pretended approbation of the master.

2. The defendants have a right to a deduction for the loss sustained by them in breaking up the intended voyage to St. Petersburg. No part of the money for which the action is brought, can be said to be received to the use of the plaintiffs, which, by the very nature of their claim, ought in conscience to be applied to the indemnity of the defendants against the breach of contract which originated the plaintiffs' demand. The claim of the plaintiffs arises from a breach of their duty to the defendants. That breach of
*248] duty forced the money in question into the hands of the *defendants. If the plaintiffs should obtain a judgment for the whole of this money, it cannot be doubted, that chancery would enjoin execution, until the extent of the injury inflicted upon the defendants, by the acts which produced the judgment, could be ascertained by a jury. And surely, in this action for money had and received, a court of law will proceed with the same view, if the existence of the defendants' right to complain is ascertainable (although the exact *quantum* of the injury is not) by the same evidence, and through the same circumstances, which properly belong to the case of the plaintiffs. The acknowledged nature of the action for money had and received will otherwise cease, and it will differ in nothing from any other form of action. If we are not to inquire, in this action, how, and under what circumstances, money was received, in order that we may determine whether, *ex æquo et bono*, the defendants may retain the whole, or any part of it; and if nothing can prevent a recovery of the whole, but a plea of discount, or a notice of set-off, or such other defence as in ordinary actions may be competent, the character given in the books of the action for money had and received, is a perfect delusion. The case of *Dale* v. *Sollet*, 4 Burr. 2133, goes the whole length of this doctrine. The deduction there claimed might, perhaps, have been used as a discount or set-off, under the statute; although, as the claim was not a liquidated one, it probably could not; but at any
*249] rate, it was not so used, and consequently, as a discount or set-off, *no advantage could be taken of it at the trial. Why then was it allowed in that case? Because of the equitable nature of the plaintiff's action, and

of the intimate connection between the claim and the defence, out of which arose the conclusion, that the defendant might retain, or stop so much of the money, although it was, in fact, the plaintiff's money which he received, and although there was no precise contract that it should be stopped out of the money received. The right in that case to stop a reasonable compensation (which the parties had not defined) out of the whole sum which had come to the defendant's possession, was exactly such a right as we now insist upon. It stood, as ours does, upon the qualities of that sort of suit which the plaintiff had instituted, and upon the union of the claim and the defence. The defence, indeed, was less complicated in that case, than it is in the present one: but so, too, was the plaintiff's demand. And besides, a defence is not the less a good defence, or an examinable defence, because it does not depend upon a single fact, or does depend on many facts. A jury can deal with it, nevertheless, and does deal with such defences every day: and there would be a defect of justice, if they did not. The defence in this case rests, incontestibly, upon contract, as it did in that. The deduction claimed was in that, as in this, unliquidated in amount. The right to the deduction arose in that, out of the whole circumstances of the case; it does so equally in this. The amount was, in that case, as well as in this, part of the case itself, as respected the demand of the plaintiff. Evidence was necessary on the *part of the defendant, to ascertain there the *quantum* of the deduction, as much as it is here. What case could the plaintiffs in [*250 this cause have shown, upon any of the counts in their declaration, without exposing, or letting in an exposition, of the whole matter on which the defendants rely? Of necessity, the entire transaction was before the jury, and it is upon that, as in *Dale* v. *Sollet*, that we contend for the admissibility of a defence which the entire transaction brings under the notice of the court and jury. And it should seem to be monstrous, that when the whole is regularly and necessarily presented, and the result is, that the defendants ought, in conscience and equity, to be permitted to retain an ascertainable part of the money received by them, for their own use, they should be turned round to a cross-action against persons, who appear in their writ to be foreigners, and are not therefore amenable to our judicatures, or that (being probably remediless at law, if they are compelled to part with the whole of the money in their hands) they should be driven into chancery for an injunction, upon grounds of equity, equally available, as we are taught by the authorities, in an action for money had and received. The cross-action, to which the other side refer us, must, in truth, try the present action over again; and a verdict for the present defendants, in such an action, could scarcely be reconciled with a verdict in this cause, for the whole amount of the plaintiffs' claim. A cross-action, which is to unravel the action now *sub judice*, and which, upon the same circumstances, is to establish that the present plaintiffs *ought not to have what it is now contended they ought [*251 to have, seems to be supererogation at least. When a cross-action is unavoidable, the necessity must be submitted to; and it *is* unavoidable, where the matters of inquiry are not combined in their nature. But where so combined, an action for money had and received opens the entire investigation, and can do ample justice, without other assistance. Indeed, it cannot do justice at all, on such occasions, without exhausting the whole investigation. And to affect to administer equity, by shutting out one-half

of the real case (upon which the equity of the other half depends), would be a mere mockery. Cross-actions are always avoided, when it is possible; and here it is not only possible, but absolutely required by the facts.

March 8th, 1821. MARSHALL, Ch. J., delivered the opinion of the court, and after stating the facts, proceeded as follows:—On the first branch of the question certified from the circuit court, no doubt can be entertained. The defendants having received the cargo of the Henry Clay, and sold it, are accountable for the proceeds, although the cargo should be considered as the property of the plaintiffs. Whether the defendants are liable for the moneys actually advanced in Amsterdam, or for the net amount of sales in Baltimore, considering the goods as the property of the plaintiffs, still they are liable for something; and, of consequence, the action is sustainable.

*252] *In deciding on the second branch of the instructions which were required, it becomes material to examine the orders which were carried out by the Henry Clay, on her voyage from Baltimore to Amsterdam, contained in the letters of the 25th of April, the one to the plaintiffs, the other to the master.

It is admitted, that no freight to Batavia could be obtained, and that the vessel could not be sold at the limited price; consequently, the only deviation from orders alleged by defendants is, the purchase of the Russian goods for the return-cargo, at Amsterdam, instead of sending the Henry Clay to St. Petersburg. That the orders of the defendants to send their ship to St. Petersburg, in the event which had occurred, were positive; and that no authority was given to purchase her return-cargo at Amsterdam, under any circumstances, are too apparent for controversy. That this purchase, thus made, without authority, whether with, or without, the consent and concurrence of the master, must have been made at the risk of the plaintiffs, is also too clear for argument. But the liability of the plaintiffs for any loss which the defendants may have sustained by the breaking up of the voyage to St. Petersburg, depends on the question, whether the control of that voyage was committed to them, or to the master. In considering this question, it is proper to take into view all the instructions which were given, and to compare the two letters written by the defendants with each other.

*253] In the commencement of the letter written by *Mr. McKim, on the part of the defendants, he says, "I have been directed by the owners to consign the ship to your house, also that part of the cargo which I consider belongs to the owners jointly." Whether this consignment was limited to the transactions in Amsterdam, or extended to any subsequent voyage in which the Henry Clay might be directed to engage, depends on other parts of the letter. Mr. McKim then proceeds to direct, that certain parts of the outward cargo should "remain as a fund, for the purpose of loading the ship, if she should proceed to St. Petersburg." These orders are precise and explicit, with respect to the funds which are to remain in the hands of the plaintiffs for the purchase of the cargo in St. Petersburg, but are silent respecting any agency of the plaintiffs in making that purchase. After communicating the desire of the defendants, that a freight should be obtained for Batavia, the letter proceeds to say, "And secondly, if the ship can be sold for 8000*l.* sterling, you will dispose of her rather than send her to St. Petersburg." This part of the letter may indicate, that in some other part

of it, might be found an express order to send the Henry Clay to St. Petersburg, if the primary objects of the defendants should be unattainable, but does not in itself amount to such express order. The writer does not say, "we request you, if the vessel cannot be sold, to send her to St. Petersburg;" but, "you will dispose of her, rather than send her to St. Petersburg;" as if there were some authority *not communicated by these words, to which they have allusion. There is no such authority, [*254 uuless it be implied in the general consignment of the vessel.

That consignment is completely satisfied by the agency which was to be exercised in Amsterdam. If it was designed to extend it to the eventual voyage to St. Petersburg, the Messrs. Wilinks would naturally expect to find some instructions respecting that voyage; respecting the articles of which the cargo was to consist, and their conduct in the purchase of them; but they could find no such instruction. In a subsequent part of the letter, Mr. McKim states the estimated value of the cargo he had ordered, and is explicit in his request, that they would advance the necessary funds for laying it in, should those placed in their hands be insufficient; but he is entirely silent with respect to their having any other agency in the voyage. It was impossible for these gentlemen to read this letter, without, at least, doubting their power to interfere further, with respect to the voyage to St. Petersburg, than to advance the money which might be required for the cargo to be purchased at the place. The letter contains all the information, and all the power which was necessary for this purpose, but contains neither information nor power, for any other purpose.

It was natural for the Messrs. Willinks to require further information on this subject, and to seek it from the master. He could have no motive for withholding his letter of instructions from them, and in that, they would find, that the management of the *voyage was committed to him, and that the utmost confidence was reposed in his intelligence and integrity. [*255 "I hope," says McKim, "that every exertion will be made to proceed to St. Petersburg immediately, if you do not go to Batavia, and the ship cannot be sold." These exertions were to be made by the master; he was to proceed immediately to St. Petersburg; and as no reference is here made to the Messrs. Willinks, the fair inference seems to be, that he was expected to proceed, not in consequence of any orders he should receive from them, but in consequence of the orders he had received from the owners. "The same industry," he is told, "must be used to get away from St. Petersburg." The letter then adds, "the owners must also depend on your attention at St. Petersburg, that the hemp is good that you receive." But the part of the letter which seems to be conclusive on this point, is that which relates to the consignment of the ship. "The Messrs. Willinks," says the writer, "will of course endeavor to consign the ship to a friend of theirs at St. Petersburg, but we have great confidence in a house recommended by Mr. Cumberland D. Williams, Messrs. Meyer & Buxner, and we wish you to consign the ship to them." The owners then did not suppose, that they had empowered the plaintiffs to order the ship to St. Petersburg. They did not suppose, that their original consignment of the Henry Clay to the Messrs. Willinks, implied a control over her, after the transactions at Amsterdam should be terminated. Had *such a control existed, those gentlemen would not have consigned her to one of their friends. But these words show [*256

conclusively, that the defendants themselves directed the consignment of the ship from Amsterdam to St. Petersburg, and in executing their orders, the master is not merely directed to proceed, without consulting the Messrs. Willinks, he is directed to disregard their advice should it be offered.

The plaintiffs could not compare this letter with that addressed to themselves, without perceiving that, with respect to the voyage to St. Petersburg, every order was given directly to the master, without reference to them, further than to show, that their interference, with respect to the consignment of the ship, was to be disregarded; and that their agency was confined to advancing the necessary funds for the purchase of the return-cargo. Both the master and the Messrs. Willinks appear to have acted on this construction of their respective powers. The correspondence between them contains no indication of an opinion in either, that the voyage to St. Petersburg depended on the orders of those gentlemen. The master does not require their orders, but asks their advice; they do not attempt to order, they only advise. This advice may have been dictated by their best judgment, or may have been dictated by a view to personal interest; still it is mere advice, and was both given and received as advice.

The conduct of the parties, then, is full proof of the opinion each entertained of the authority of each; and the first letters written after they had
*257] met in *Amsterdam, show that free communications had taken place between them. In a letter of the 19th of June, addressed to Captain Gantt, the Messrs. Willinks say, "we have not received yet the promised note of the Russian goods that would be wanted for the Henry Clay." And in the master's letter from the Helder, of the 18th of June, he says, "herewith, I annex you a copy of the order for Russian produce, which the owners of the Henry Clay wish to constitute her return-cargo." These letters strengthen the probability, that in the verbal communications which were made at Amsterdam, the master had stated his orders relative to the voyage to St. Petersburg; at any rate, they show, that the note for the cargo, which had not been transmitted to the Messrs. Willinks, had been intrusted to him. There is an expression in the last letter of the plaintiffs to the defendants, which seems to have some bearing on the question, whether the master had communicated to them his letter of instructions. They say, "you cannot expect, gentlemen, that we shall enter here into all the details of this business, which has been conducted by us, *bonâ fide*, with a view to your greatest benefit and advantage, faithfully relying on your promises, and considering the incomplete state of your instructions to us, that your captain was furnished with more particular orders."

There is a vagueness in these expressions, arising, probably, from the unskilfulness of the translation, if they were not written in our language,
*258] which *leaves it, in some measure, uncertain, whether the plaintiffs meant to assert, that the master was furnished with more particular orders, or that they inferred this fact, from the incomplete state of the instructions to themselves. If the case depended entirely on the question, it might, perhaps, be proper to refer to the original; but we do not think, that the right of the defendants to the deduction they claim from the demand, depends entirely on the fact, that their orders to their master were shown to the plaintiffs. Their letter to the plaintiffs was, at best, equivocal; and any evidence showing that the construction which the plaintiffs put on that let-

ter, conformed to the intention of the defendants, will justify the plaintiffs, although that evidence was not in their possession, pending the transaction. The defendants cannot be permitted to say, "It is true, we did not intend to consign the Henry Clay to you, further than was necessary to your agency in Amsterdam. We did not intend to give you any control over her voyage to St. Petersburg. We had committed that whole subject to our master, and had given him precise orders respecting it. We had even gone so far as to direct him to disregard your consignment of the vessel, should you endeavor to make one. But you did not see these orders, and we will, therefore, make you responsible for not having understood our letter to you, as creating a duty which we did not intend it should create." This, certainly, cannot be permitted. As little can they be permitted to charge the Messrs. Willinks, in consequence of the *advice they gave, with the profits which might possibly have been made on the voyage to St. Petersburg. Although the orders were broken, with their advice, still they were broken by the master, to whom their execution was confided, not by the Messrs Willinks, to whom their execution had not been confided. [*259

Were it even possible, that the Messrs. Willinks could be made responsible, in any form of action which could be devised, for the possible loss resulting from the breaking up of the voyage to St. Petersburg, they cannot, we think, be made responsible in this. Having loaded the Henry Clay, at Amsterdam, clearly without authority, the cargo was shipped at their risk. The defendants might have refused it altogether; but they have sold it, and received the money; this creates an *assumpsit* to pay the money received. This action, then, so far as respects the count for money received by the defendants to the plaintif's use, is founded on the transactions in Baltimore; and, were it even possible, which we are far from admitting, that the defendants could be allowed to make a deduction of this supposed loss, from the sum to be recovered on the count for money laid out and expended to their use, provided that count could be supported, yet they cannot be allowed to make that deduction from the sum to be recovered on the count for money had and received to the use of the plaintiffs, for goods sold as the goods of the plaintiffs.

*Certificate.—This cause came on to be heard, on the transcript of the record of the circuit court, for the fourth circuit and district of Maryland, and on the question on which the judges of said court were divided, and was argued by counsel: On consideration whereof, this court is of opinion, that the plaintiffs have a demand in law against the defendants, which can be maintained in the action now depending in the circuit court, and that the defendants are not entitled to a deduction from the same, for the amount of any loss which may have been sustained by them by reason of the alteration in the destination of the ship Henry Clay to St. Petersburg, and the loading her at Amsterdam. Which opinion is directed to be certified to the circuit court. [*260

GREEN *v.* WATKINS.

Death of parties.

In real or personal actions, at common law, the death of parties, before judgment, abates the suit; and it requires the aid of some statutory provision, like that of the 31st section of the judiciary act of 1789, to enable the suit to be prosecuted by, or against, the personal representative or heirs of the deceased, where the cause of action survives.

In writs of error upon judgments already rendered, in personal actions, if the plaintiff in error dies, before assignment of errors, the writ abates, at common law; but if, after assignment of errors, the defendant may join in error, and proceed to get the judgment affirmed, *if not erroneous, and may then revive it against the representatives of the plaintiff.

*261]

But a writ of error, in personal actions, does not abate by the death of the defendant in error, whether it happen before or after errors assigned; and the personal representatives may not only be admitted voluntarily to become parties, but a *scire facias* may issue to compel them.

By the rules of this court, if either party, in real or personal actions, die, pending the writ of error, his representatives in the personalty or realty, may voluntarily become parties, or may be compelled to become parties, in the manner prescribed by the rule.

March 1st, 1821. *B. Hardin*, for the defendant in error, moved to dismiss the writ of error, in this case, which was a real action, upon a suggestion of the death of the demandant and plaintiff in error, pending the proceedings in this court. He insisted, that, at common law, the death of either party, any time before final judgment, would have abated the suit (Tidd's Pr. 1024; Bac. Abr. tit. Abatement); that the judiciary act of 1789, § 31, made no provision for this case, since it merely extended to the case of the death of parties, in personal actions, before judgment; and that the statute 17 Car. II., c. 8, and the act of Kentucky, showed the sense of parliament and the local legislature, that real actions abated by the death of the parties, before judgment, upon writ of error on judgments already rendered.

March 8th. STORY, Justice, delivered the opinion of the court.—The preliminary question which has been argued at the bar, is, whether the writ of error in this case, *which is a writ of right, has abated by the death of the demandant, who is the plaintiff in error, pending proceedings in this court. There is a material distinction between the death of parties, before judgment and after judgment, and while a writ of error is depending. In the former case, all personal actions, by the common law, abate; and it required the aid of some statute, like that of the 31st section of the judiciary act of 1789, ch. 20, to enable the action to be prosecuted by or against the personal representative of the deceased, when the cause of action survived.[1] In real actions, the like principle prevails, for a still stronger reason, for, by the death of either party, the right descends to the heir, and a new cause of action springs up; and the plea is not, therefore, in the same condition as it was in the lifetime of the party.

*262]

But in cases of writs of error upon judgments already rendered, a different rule prevails. In personal actions, if the plaintiff in error dies, before assignment of error, it is said, that by the course of proceedings at common law, the writ abates; but if, after assignment of errors, it is otherwise. In this latter case, the defendant may join in error, and proceed to get the judgment affirmed, if not erroneous; and he may then revive it against the representatives of the plaintiff. But in no case, does a writ of error, in per-

[1] See Macher *v.* Thomas, 7 Wheat. 530.

sonal actions, abate by the death of the defendant in error, whether it happen before or after errors assigned. If it happen before, and the plaintiff will not assign errors, the representatives of the defendant may have a *scire facias quare executio non*, in order to compel *him; if it happen after, they must proceed as if the defendants were living, till judgment be affirmed, and then revive by *scire facias*. And the plaintiff, in order to compel the representatives of the defendant in error, to join in error, may sue out a *scire facias ad audiendum errores*, either generally, or naming them. Such is the doctrine of approved authorities. 2 Tidd's Pr. ch. 43, Error, p. 1096. It is clear, therefore, that at common law, in these cases, a writ or error does not necessarily abate: and that the personal representatives may not only be admitted voluntarily to become parties, but a *scire facias* may issue to require them to become parties. And such has been the practice hitherto adopted in this court, in all personal actions, whether there has been an assignment of errors or not; for a specific assignment of errors has never been insisted on here, as a preliminary to the argument, or decision of the cause. [*263

In respect to real actions, this is the first time the question has presented itself upon a writ of error, where the death of either party has occurred *pendente lite*. There is no doubt, that the heir, or privy in estate, who is injured by an erroneous judgment, may prosecute a writ of error to reverse it. And there seems no good reason why, in case of the death of his ancestor, pending proceedings, he may not be admitted to become a party, or be cited to become a party, to pursue or defend the writ, in the same manner as in personal actions. The death of neither party produces any change in the condition *of the cause, or in the rights of the parties. It would seem reasonable, therefore, that the suit should proceed, and not be dismissed or abated. In the absence of all authority which binds the court to a different course, we are disposed to adopt this doctrine, and shall promulgate a general rule on the subject. [*264

Rule accordingly.(a)

(a) See new order of court of the present term; *ante*, Rule 82.

COHENS *v.* VIRGINIA.

Constitutional law.—Error to a state court.—State powers.

This court has, constitutionally, appellate jurisdiction, under the judicary act of 1789, § 25, from the final judgment or decree of the highest court of law or equity of a state, having jurisdiction of the subject-matter of the suit, where is drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of such their validity; or of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption, specially set up or claimed by either party, under such clause of the constitution, treaty, statute or commission.[1]

It is no objection to the exercise of this appellate jurisdiction, that one of the parties is a state, and the other a citizen of that state.[2]

*265] *The act of congress of the 4th of May 1812, entitled, "an act further to amend the charter of the city of Washington," which provides (§ 6), that the corporation of the city shall be empowered, for certain purposes, and under certain restrictions, to authorize the drawing of lotteries, does not extend to authorize the corporation to force the sale of the tickets in such lottery, in a state where such sale may be prohibited by the state laws.[3]

THIS was a writ of error to the Quarterly Session Court for the borough of Norfolk, in the state of Virginia, under the 25th section of the judiciary act of 1789, c. 20, it being the highest court of law or equity of that state having jurisdiction of the case.

Pleas at the Court-house of Norfolk borough, before the Mayor, Recorder and Aldermen of the said borough, on Saturday, the 2d day of September 1820, and in the 45th year of the commonwealth.

Be it remembered, that heretofore, to wit, at a Quarterly Session court, held the 26th day of June 1820, the grand jury, duly summoned and impanelled for the said borough of Norfolk, and sworn and charged according to law, made a presentment in these words: We present P. J. and M. J. Cohen, for vending and selling two halves and four quarter lottery-tickets of the national lottery, to be drawn at Washington, to William H. Jennings, at their office at the corner of Maxwell's wharf, contrary to the act thus made and provided in that case, since January 1820: on the information of William H.

*266] Jennings. *Whereupon, the regular process of law was awarded against the said defendants, to answer the said presentment, returnable to the next succeeding term, which was duly returned by the sergeant of the borough of Norfolk, "executed."

And at another Quarterly Session court, held for the said borough of Norfolk, the 29th day of August 1820, came, as well the attorney prosecuting for the commonwealth, in this court, as the defendants, by their attorney, and on the motion of the said attorney, leave is given by the court to file an

[1] Worcester *v.* Georgia, 6 Pet. 515.

[2] McGuire *v.* Massachusetts, 3 Wall. 382.

[3] The states may prohibit the sale of ardent spirits, within their boundaries, though the laws of congress authorize their importation. License Cases, 5 How. 504. And licenses granted under the internal revenue law of congress, confer no authority upon the licensees, to carry on the licensed business, within a state. License Tax Cases, 5 Wall. 462. Mere matters of police regulation, contained in the internal revenue acts, have no constitutional operation within state limits; they can only have effect, where the legislative authority of congress excludes, territorially, all state legislation. United States *v.* Dewitt, 9 Wall. 41, 45.

information against the defendants, on the presentment aforesaid. which was accordingly filed, and is in these words:

Norfolk borough, to wit: Be it remembered, that James Nimmo, attorney for the commonwealth of Virginia, in the court of the said borough of Norfolk, cometh into court, in his proper person, and with leave of the court, giveth the said court to understand and be informed, that by an act of the general assembly of the said commonwealth of Virginia, entitled, "an act to reduce into one, the several acts and parts of acts to prevent unlawful gaming," it is, among other things, enacted and declared, that no person or persons shall buy or sell, within the said commonwealth, any lottery, or part or share of a lottery-ticket, except in such lottery or lotteries as may be authorized by the laws thereof: and the said James Nimmo, as attorney aforesaid, further giveth the court to understand and be informed, that P. J. and M. J. Cohen, traders and partners, late of the parish of Elizabeth River, and *borough of Norfolk aforesaid, being evil-disposed persons, and totally regardless of the laws and statutes of the said commonwealth, since [*267 the first day of January, in the year of our Lord 1820, that is to say, on the first day of June, in that year, and within the same commonwealth of Virginia, to wit, at the parish of Elizabeth River, in the said borough of Norfolk, and within the jurisdiction of this court, did, then and there, unlawfully vend, sell and deliver to a certain William H. Jennings, two half lottery-tickets, and four quarter lottery-tickets, of the national lottery, to be drawn in the city of Washington, that being a lottery not authorized by the laws of this commonwealth; to the evil example of all other persons in the like case offending, and against the form of the act of the general assembly in that case made and provided. James Nimmo, for the Commonwealth.

And at this same Quarterly Session court, continued by adjournment, and held for the said borrough of Norfolk, the 2d day of September 1820, came, as well the attorney prosecuting for the commonwealth, in this court, as the defendants, by their attorney, and the said defendants, for plea, say, that they are not guilty in manner and form, as in the information against them is alleged, and of this they put themselves upon the country, and the attorney for the commonwealth doth the same; whereupon, a case [*268 *was agreed by them to be argued in lieu of a special verdict, and is in these words:

Commonwealth against Cohens: Case agreed.—In this case, the following statement is admitted and agreed by the parties, in lieu of a special verdict: That the defendants, on the first day of June, in the year of our Lord 1820, within the borough of Norfolk, in the commonwealth of Virginia, sold to William H. Jennings a lottery-ticket, in the lottery called and denominated the national lottery, to be drawn in the city of Washington, within the district of Columbia. That the general assembly of the state of Virginia enacted a statute, or act of assembly, which went into operation on the first day of January, in the year of our Lord 1820, and which is still unrepealed, in the words following:

No person, in order to raise money for himself or another, shall, publicly or privately, put up a lottery, to be drawn or adventured for, or any prize or thing to be raffled or played for; and whosoever shall offend herein, shall forfeit the whole sum of money proposed to be raised by such lottery, raffling or playing, to be recovered by action of debt, in the name of any one

who shall sue for the same, or by indictment or information in the name of the commonwealth, in either case, for the use and benefit of the literary fund. Nor shall any person or persons buy or sell, within this commonwealth, any lottery-ticket, or part or share of a lottery-ticket, except in such
*269] lottery or lotteries as may be authorized by the laws *thereof; and any person or persons offending herein, shall forfeit and pay, for every such offence, the sum of one hundred dollars, to be recovered and appropriated in manner last aforesaid.

That the congress of the United States enacted a statute on the third day of May, in the year of our Lord 1802, entitled "an act, &c.," in the words and figures following: An act to incorporate the inhabitants of the city of Washington, in the district of Columbia.

§ 1. Be it enacted, &c., that the inhabitants of the city of Washington be constituted a body politic and corporate, by the name of the Mayor and Council of the City of Washington, and by their corporate name, may sue and be sued, implead and be impleaded, grant, receive, and do all other acts, as natural persons, and may purchase and hold real personal and mixed property, or dispose of the same, for the benefit of the said city; and may have and use a city seal, which may be altered at pleasure. The city of Washington shall be divided into three divisions or wards, as now divided by the levy court for the county, for the purposes of assessment; but the number may be increased hereafter, as in the wisdom of the city council shall seem most conducive to the general interest and convenience.

§ 2. That the council for the city of Washington shall consist of twelve
*270] *members, residents of the city, and upwards of twenty-five years of age, to be divided into two chambers; the first chamber to consist of seven members, and the second chamber of five members; the second chamber to be chosen from the whole number of councillors, elected by their joint ballot. The city council to be elected annually by ballot, in a general ticket, by the free white male inhabitants, of full age, who have resided twelve months in the city, and paid taxes therein, the year preceding the elections being held: the justices of the county of Washington, resident in the city, or any three of them to preside as judges of election, with such associates as the council may, from time to time, appoint.

§ 3. That the first election of members of the city council, shall be held on the first Monday in June next, and in every year afterwards, at such place in each ward as the judges of the election may prescribe.

§ 4. That the polls shall be kept open from eight o'clock in the morning, till seven o'clock in the evening, and no longer, for the reception of ballots. On the closing of the poll, the judges shall close and seal their ballot-boxes, and meet on the day following, in the presence of the marshal of the district, on the first election, and the council afterwards, when the seals shall be broken, and the votes counted: within three days after such election, they shall give notice to the persons having the greatest number of legal votes, that they are duly elected, and shall make their return to the mayor of the city.

*271] *§ 5. That the mayor of the city shall be appointed annually by the president of the United States; he must be a citizen of the United States, and a resident of the city, prior to his appointment.

§ 6. That the city council shall hold their sessions in the city-hall, or

until such building is erected, in such place as the mayor may provide for that purpose, on the second Monday in June, in each year; but the mayor may convene them oftener, if the public good require their deliberations; three-fourths of the members of each council may be a *quorum* to do business, but a smaller number may adjourn from day to day: they may compel the attendance of absent members, in such manner, and under such penalties, as they may, by ordinance, provide: they shall appoint their respective presidents, who shall preside during their sessions, and shall vote on all questions where there is an equal division: they shall settle their rules of proceedings, appoint their own officers, regulate their respective fees, and remove them at pleasure: they shall judge of the elections, returns and qualifications of their own members, and may, with the concurrence of three-fourths of the whole, expel any member for disorderly behavior, or malconduct in office, but not a second time for the same offence: they shall keep a journal of their proceedings, and enter the yeas and nays on any question, resolve or ordinance, at the request of any member, and their deliberations shall be public. The mayor shall appoint to all offices under the corporation. All ordinances *or acts passed by the city council, shall be sent to the mayor for his approbation, and when approved by him, [*272 shall then be obligatory as such. But if the said mayor shall not approve of such ordinance or act, he shall return the same within five days, with his reasons in writing therefor; and if three-fourths of both branches of the city council, on reconsideration thereof, approve of the same, it shall be in force in like manner as if he had approved it, unless the city council, by their adjournment, prevent its return.

§ 7. That the corporation aforesaid shall have full power and authority to pass all by-laws and ordinances to prevent and remove nuisances; to prevent the introduction of contagious diseases within the city; to establish night watches or patrols, and erect lamps; to regulate the stationing, anchorage and mooring of vessels; to provide for licensing and regulating auctions, retailers of liquors, hackney carriages, wagons, carts and drays, and pawn-brokers, within the city; to restrain or prohibit gambling, and to provide for licensing, regulating or restraining theatrical or other public amusements within the city; to regulate and establish markets; to erect and repair bridges; to keep in repair all necessary streets, avenues, drains and sewers, and to pass regulations necessary for the preservation of the same, agreeably to the plan of the said city; to provide for the safe-keeping of the standard of weights and measures fixed by congress, and for the regulation of all weights and measures used in the city; to provide *for the licensing and regulating the sweeping of chimneys, and fixing the [*273 rates thereof; to establish and regulate fire-wards and fire companies; to regulate and establish the size of bricks that are to be made and used in the city; to sink wells, and erect and repair pumps in the streets; to impose and appropriate fines, penalties and forfeitures for breach of their ordinances; to lay and collect taxes; to enact by-laws for the prevention and extinguishment of fires; and to pass all ordinances necessary to give effect and operation to all the powers vested in the corporation of the city of Washington: Provided, that the by-laws or ordinances of the said corporation shall be in no wise obligatory upon the persons of non-residents of the said city, unless in cases of intentional violation of the by-laws or ordinances

previously promulgated. All the fines, penalties and forfeitures imposed by the corporation of the city of Washington, if not exceeding twenty dollars, shall be recovered before a single magistrate, as small debts are by law recoverable; and if such fines, penalties and forfeitures exceed the sum of twenty dollars, the same shall be recovered by action of debt, in the district court of Columbia, for the county of Washington, in the name of the corporation, and for the use of the city of Washington.

§ 8. That the person or persons appointed to collect any tax imposed in virtue of the powers granted by this act, shall have authority to collect the same, by distress and sale of the goods and chattels of the person chargeable
*274] therewith; no sale shall be made, unless ten days' *previous notice thereof be given: no law shall be passed by the city council subjecting vacant or unimproved city lots, or parts of lots, to be sold for taxes.

§ 9. That the city council shall provide for the support of the poor, infirm and diseased of the city.

§ 10. Provided always, and be it further enacted, that no tax shall be imposed by the city council on real property in the said city, at any higher rate than three-quarters of one *per centum*, on the assessment valuation of such property.

§ 11. That this act shall be in force for two years from the passing thereof, and from thence to the end of the next session of congress thereafter, and no longer.

And another act, on the 23d day of February 1804, entitled "an act supplementary to an act, entitled, an act to incorporate the inhabitants of the city of Washington, in the district of Columbia."

§ 1. Be it enacted &c., that the act, entitled, an act to incorporate the inhabitants of the city of Washington, in the district of Columbia, except so much of the same as is consistent with the provisions of this act, be and the same is hereby continued in force, for and during the term of fifteen years from the end of the next session of congress.

*275] § 2. That the council of the city of Washington, from and after the *period for which the members of the present council have been elected, shall consist of two chambers, each of which shall be composed of nine members, to be chosen by distinct ballots, according to the directions of the act to which this is a supplement; a majority of each chamber shall constitute a *quorum* to do business. In case vacancies shall occur in the council, the chamber in which the same may happen shall supply the same by an election by ballot, from the three persons next highest on the list to those elected at the preceding election, and a majority of the whole number of the chamber in which such vacancy may happen, shall be necessary to make an election.

§ 3. That the council shall have power to establish and regulate the inspection of flour, tobacco and salted provisions, the gauging of casks and liquors, the storage of gunpowder, and all naval and military stores, not the property of the United States, to regulate the weight and quality of bread, to tax and license hawkers and peddlers, to restrain or prohibit tippling-houses, lotteries and all kinds of gaming, to superintend the health of the city, to preserve the navigation of the Potomac and Anacostia rivers, adjoining the city, to erect, repair and regulate public wharves, and to deepen

docks and basins, to provide for the establishment and superintendence of public schools, to license and regulate, exclusively, hackney coaches, ordinary keepers, retailers and ferries, to provide for the appointment of inspectors, constables, and such other officers as may be necessary to execute the *laws of the corporation, and to give such compensation to the mayor [*276 of the city as they may deem fit.

§ 4. That the levy court of the county of Washington shall not hereafter possess the power of imposing any tax upon the imhabitants of the city of Washington.

That the congress of the United States, on the 4th day of May, in the year of our Lord 1812, enacted another statute, entitled, "an act further to amend the charter of the city of Washington."

§ 1. Be it enacted &c., that from and after the first Monday in June next, the corporation of the city of Washington shall be composed of a mayor, a board of aldermen, and a board of common council, to be elected by ballot, as hereafter directed ; the board of aldermen shall consist of eight members, to be elected for two years, two to be residents of, and chosen from, each ward, by the qualified voters therein ; and the board of common council shall consist of twelve members, to be elected for one year, three to be residents of, and chosen from, each ward, in manner aforsaid ; and each board shall meet at the council-chamber on the second Monday in June next (for the dispatch of business), at ten o'clock in the morning, and on the same day, and at the same hour, annually, thereafter. A majority of each board shall be necessary to form a *quorum* to do business, but a less number may adjourn from day to day. The board of aldermen, immediately after they shall *have assembled, in consequence of the first election, shall divide [*277 themselves by lot into two classes ; the seats of the first class shall be vacated at the expiration of one year, and the seats of the second class shall be vacated at the expiration of two years, so that one-half may be chosen every year. Each board shall appoint its own president from among its own members, who shall preside during the sessions of the board, and shall have a casting vote on all questions, where there is an equal division ; provided, such equality shall not have been occasioned by his previous vote.

§ 2. That no person shall be eligible to a seat in the board of aldermen or board of common council, unless he shall be more than twenty-five years of age, a free white male citizen of the United Statzs, and shall have been a resident of the city of Washington one whole year next preceding the day of the election ; and shall, at the time of his election, be a resident of the ward for which he shall be elected, and possessed of a freehold estate in the said city of Washington, and shall have been assessed two months preceding the day of election. And every free white male citizen, of lawful age, who shall have resided in the city of Washington for the space of one year next preceding the day of election, and shall be a resident of the ward in which he shall offer to vote, and who shall have been assessed on the books of the corporation, not less than two months prior to the day of election, shall be qualified to vote for members to serve in the said board of aldermen and board of common *council, and no other person whatever shall exer- [*278 cise the right of suffrage at such election.

§ 3. That the present mayor of the city of Washington shall be and continue such, until the second Monday in June next, on which day, and on the

second Monday in June annually thereafter, the mayor of the said city shall be elected by ballot of the board of aldermen and board of common council, in joint meeting, and a majority of the votes of all the members of both boards shall be necessary to a choice; and if there should be an equality of votes between two persons, after the third ballot, the two houses shall determine by lot. He shall, before he enters upon the duties of his office, take an oath or affirmation, in the presence of both boards, "lawfully to execute the duties of his office, to the best of his skill and judgment, without favor or partiality." He shall, *ex officio*, have and exercise all the powers, authority and jurisdiction of a justice of the peace for the county of Washington, within the said county. He shall nominate, and with the consent of a majority of the members of the board of aldermen, appoint, to all offices under the corporation (except the commissioners of election), and every such officer shall be removed from office on the concurrent remonstrance of a majority of the two boards. He shall see that the laws of the corporation be duly executed, and shall report the negligence or misconduct of any officer to the two boards. He shall appoint proper persons to fill up all vacancies, during the recess of the board of aldermen, to hold such *appoint-
*279] ment until the end of the then ensuing session. He shall have power to convene the two boards, when, in his opinion, the good of the community may require it, and he shall lay before them, from time to time, in writing, such alterations in the laws of the corporation as he shall deem necessary and proper, and shall receive for his services annually, a just and reasonable compensation, to be allowed and fixed by the two boards, which shall neither be increased or diminished during the period for which he shall have been elected. Any person shall be eligible to the office of mayor, who is a free white male citizen of the United States, who shall have attained to the age of thirty years, and who shall be a *bonâ fide* owner of a freehold estate in the said city, and shall have been a resident in the said city two years immediately preceding his election, and no other person shall be eligible to the said office. In case of the refusal of any person to accept the office of mayor, upon his election thereto, or of his death, resignation, inability or removal from the city, the said two boards shall elect another in his place, to serve the remainder of the year.

§ 4. That the first election for members of the board of aldermen, and board of common council, shall be held on the first Monday in June next, and on the first Monday in June annually thereafter. The first election to be held by three commissioners to be appointed in each ward by the mayor of the city, and at such place in each ward as he may direct; and all sub-
*280] sequent elections shall be held by a like number *of commissioners, to be appointed in each ward by the two boards, in joint meeting, which several appointments, except the first, shall be at least ten days previous to the day of each election. And it shall be the duty of the mayor, for the first election, and of the commissioners, for all subsequent elections, to give at least five days' public notice of the place in each ward where such elections are to be held. The said commissioners shall, before they receive any ballot, severally take the following oath or affirmation, to be administered by the mayor of the city, or any justice of the peace for the county of Washington: "I, A. B. do solemnly swear or affirm (as the may be) that I will truly and faithfully receive, and return the votes of such persons as are

by law entitled to vote for members of the board of aldermen, and board or common council, in ward No. —, according to the best of my judgment and understanding, and that I will not, knowingly, receive or return the vote of any person who is not legally entitled to the same, so help me God." The polls shall be opened at ten o'clock in the morning, and be closed at seven o'clock in the evening, of the same day. Immediately on closing the polls, the commissioners of each ward, or a majority of them, shall count the ballots, and make out, under their hands and seals, a correct return of the two persons for the first election, and of the one person, for all subsequent elections, having the greatest number of legal votes, together with the number of votes given to each, as members of the board of aldermen: and of the three persons having the greatest number of legal *votes, together with the number of votes given to each, as members of the board of [*281 common council. And the two persons, at the first election, and the one person, at all subsequent elections, having the greatest number of legal votes for the board of aldermen; and the three persons having the greatest number of legal votes for the board of common council, shall be duly elected; and in all cases of an equality of votes, the commissioners shall decide by lot. The said returns shall delivered to the mayor of the city, on the succeeding day, who shall cause the same to be published in some newspaper printed in the city of Washington. A duplicate return, together with a list of the persons who voted at such election, shall also be made by the said commissioners, to the register of the city, on the day succeeding the election, who shall preserve and record the same, and shall, within two days thereafter, notify the several persons so returned, of their election; and each board shall judge of the legality of the elections, returns and qualifications of its own members, and shall supply vacancies in its own body, by causing elections to be made to fill the same, in the ward, and for the board in which such vacancies shall happen, giving at least five days' notice previous thereto; and each board shall have full power to pass all rules necessary and requisite to enable itself to come to a just decision in cases of a contested election of its own members: and the several members of each board shall, before entering upon the duties of their office, take the following oath or affirmation: *"I do swear (or solemnly, sincerely and truly affirm and declare, as the case may be) that I will faithfully [*282 execute the office of ———, to the best of my knowledge and ability," which oath or affirmation shall be administered by the mayor, or some justice of the peace for the county of Washington.

§ 5. That in addition to the powers heretofore granted to the corporation of the city of Washington, by an act, entitled, "an act to incorporate the inhabitants of the city of Washington, in the district of Columbia," and an act, entitled, "an act, supplementary to an act, entitled, an act to incorporate the inhabitants of the city of Washington, in the district of Columbia," the said corporation shall have power to lay taxes on particular wards, parts or sections of the city, for their particular local improvements. That after providing for all objects of a general nature, the taxes raised on the assessable property in each ward, shall be expended therein, and in no other; in regulating, filling up and repairing of streets and avenues, building of bridges, sinking of wells, erecting pumps, and keeping them in repair; in conveying water in pumps, and in the preservation of springs; in erecting

and repairing wharves; in providing fire-engines and other apparatus for the extinction of fires, and for other local improvements and purposes, in such manner as the said board of aldermen and board of common council shall provide; but the sums raised for the support of the poor, *aged
*283] and infirm, shall be a charge on each ward, in proportion to its population or taxation, as the two boards shall decide. That whenever the proprietors of two-thirds of the inhabited houses, fronting on both sides of a street, or part of a street, shall, by petition to the two branches, express the desire of improving the same, by laying the curbstone of the foot pavement, and paving the gutters or carriage-way thereof, or otherwise improving said street, agreeably to its graduation, the said corporation shall have power to cause to be done, at any expense, not exceeding two dollars and fifty cents per front foot, of the lots fronting on such improved street or part of a street, and charge the same to the owners of the lots fronting on said street, or part of a street, in due proportion; and also, on a like petition, to provide for erecting lamps for lighting any stree tor part of a street, and to defray the expense thereof, by a tax on the proprietors or inhabitants of such houses, in proportion to their rental or valuation, as the two boards shall decide.

§ 6. That the said corporation shall have full power and authority to erect and establish hospitals or pest-houses, work-houses, houses of correction, penitentiary, and other public buildings for the use of the city, and to lay and collect taxes for the defraying the expenses thereof; to regulate party and other fences, and to determine by whom the same shall be made and kept in repair; to lay open streets, avenues, lanes and alleys, and to regulate or prohibit all inclosures thereof, and to occupy and improve for public
*284] purposes, by *and with the consent of the president of the United States, any part of the public and open spaces or squares in said city, not interfering with any private rights; to regulate the measurement of, and weight, by which all articles brought into the city for sale shall be disposed of; to provide for the appointment of appraisers, and measurers of builders' work and materials, and also of wood, coal, grain and lumber; to restrain and prohibit the nightly and other disorderly meetings of slaves, free negroes and mulattoes, and to punish such slaves, by whipping, not exceeding forty stripes, or by imprisonment, not exceeding six calendar months, for any one offence; and to punish such free negroes and mulattoes for such offences, by fixed penalties, not exceeding twenty dollars for any one offence; and in case of inability of any such free negro or mulatto to pay and satisfy any such penalty and costs thereon, to cause such free negro or mulatto to be confined to labor for such reasonable time, not exceeding six calendar months, for any one offence, as may be deemed equivalent to such penalty and costs; to cause all vagrants, idle or disorderly persons, all persons of evil life or ill-fame, and all such as have no visible means of support, or are likely to become chargeable to the city as paupers, or are found begging or drunk in or about the streets, or loitering in or about tippling-houses, or who can show no reasonable cause of business or employment in the city; and and all suspicious persons, and all who have no fixed place of residence, or cannot give a good account of themselves, all eves-droppers and night-
*285] walkers, all who *are guilty of open profanity, or grossly indecent language or behavior, publicly, in the streets, all public prostitutes,

and such as lead a notoriously lewd or lascivious course of life, and all such as keep public gaming-tables, or gaming-houses, to give security for their good behavior, for a reasonable time, and to indemnify the city against any charge for their support, and in case of their refusal or inability to give such security, to cause them to be confined to labor for a limited time, not exceeding one year at a time, unless such security should be sooner given. But if they shall afterwards be found again offending, such security may be again required, and for want thereof, the like proceedings may again be had, from time to time, as often as may be necessary. To prescribe the terms and conditions upon which free negroes and mulattoes, and others who can show no visible means of support, may reside in the city; to cause the avenues, streets, lanes and alleys to be kept clean, and to appoint officers for that purpose. To authorize the drawing of lotteries for effecting any important improvements in the city, which the ordinary funds or revenue thereof will not accomplish: provided, that the amount to be raised in each year, shall not exceed the sum of ten thousand dollars: and provided also, that the object for which the money is intended to be raised, shall be first submitted to the president of the United States, and shall be approved of by him. To take care of, preserve and regulate the several burying grounds within the city; to provide for registering of births, deaths and marriages; to cause abstracts or minutes *of all transfers of real property, both freehold and leasehold, to be lodged in the registry of the city, at stated [*286 periods; to authorize night-watches and patroles, and the taking up and confining by them, in the night-time, of all suspected persons; to punish by law, corporally, any servant or slave guilty of a breach of any of their by-laws or ordinances, unless the owner or holder of such servant or slave shall pay the fine annexed to the offence; and to pass all laws which shall be deemed necessary and proper for carrying into execution the foregoing powers, and all other powers vested in the corporation, or any of its officers, either by this act, or any former act.

§ 7. That the marshal of the district of Columbia shall receive, and safely keep, within the jail for Washington county, at the expense of the city, all persons committed thereto, under the sixth section of this act, until other arrangements be made by the corporation for the confinement of offenders, within the provisions of the said sections; and in all cases where suit shall be brought before a justice of the peace, for the recovery of any fine or penalty arising or incurred for a breach of any by-law or ordinance of the corporation, upon a return of "*nulla bona*" to any *fieri facias* issued against the property of the defendant or defendants, it shall be the duty of the clerk of the circuit court for the county of Washington, when required, to issue a writ of *capias ad satisfaciendum* against every such defendant, returnable to the next circuit court for the county of Washington thereafter, *and which shall be proceeded on as in other writs of the like [*287 kind.

§ 8. That unimproved lots in the city of Washington, on which two years' taxes remain due and unpaid, or so much thereof as may be necessary to pay such taxes, may be sold at public sale, for such taxes due thereon: provided, that public notice be given of the time and place of sale, by advertising in some newspaper printed in the city of Washington, at least six months, where the property belongs to persons residing out of the United States;

three months, where the property belongs to persons residing in the United States, but without the limits of the district of Columbia; and six weeks, where the property belongs to persons residing within the district of Columbia, or city of Washington; in which notice shall be stated the number of the lot or lots, the number of the square or squares, the name of the person or persons to whom the same may have been assessed, and also the amount of taxes due thereon: And provided also, that the purchaser shall not be obliged to pay, at the time of such sale, more than the taxes due, and the expenses of sale; and that, if within two years from the day of such sale, the proprietor or proprietors of such lot or lots, or his or their heirs, representatives or agents, shall repay to such purchaser the moneys paid for the taxes and expenses as aforesaid, together with ten *per centum*, *per annum*, as interest thereon, or make a tender of the same, he shall be re-instated in his original right and title; but if no such payment or tender be made,
*288] *within two years next after the said sale, then the purchaser shall pay the balance of the purchase-money of such lot or lots, into the city treasury, where it shall remain, subject to the order of the original proprietor or proprietors, his or theirs heirs or legal representatives; and the purchaser shall receive a title in fee-simple to the said lot or lots, under the hand of the mayor, and seal of the corporation, which shall be deemed good and valid in law and equity.

§ 9. That the said corporation shall, in future, be named and styled, "The Mayor, Aldermen and Common Council of the City of Washington;" and that if there shall have been a non-election or informality of a city council, on the first Monday in June last, it shall not be taken, construed or adjudged, in any manner, to have operated as a dissolution of the said corporation, or to affect any of its rights, privileges, or laws passed previous to the second Monday in June last, but the same are hereby declared to exist in full force.

§ 10. That the corporation shall, from time to time, cause the several wards of the city to be so located, as to give, as nearly as may be, an equal number of votes to each ward; and it shall be the duty of the register of the city, or such officer as the corporation may hereafter appoint, to furnish the commissioners of election for each ward, on the first Monday in June, annually, previous to the opening of the polls, a list of the persons having a right to vote, agreeably to the provisions of the second section of this act.

*289] *§ 11. That so much of any former act as shall be repugnant to the provisions of this act, be and the same is hereby repealed.

Which statutes are still in force and unrepealed. That the lottery, denominated the national lottery, before mentioned, the ticket of which was sold by the defendants as aforesaid, was duly created by the said corporation of Washington, and the drawing thereof, and the sale of the said ticket, was duly authorized by the said corporation, for the objects and purposes, and in the mode directed by the said statute of the congress of the United States. If, upon this case, the court shall be of opinion, that the acts of congress before mentioned were valid, and on the true construction of these acts, the lottery-ticket sold by the said defendants as aforesaid, might lawfully be sold within the state of Virginia, notwithstanding the act or statute of the general assembly of Virginia prohibiting such sale, then judgment to be entered for the defendants. But if the court should be of opinion, that

the statute or act of the general assembly of the state of Virginia, prohibiting such sale, is valid, notwithstanding the said acts of congress, then judgment to be entered, that the defendants are guilty, and that the commonwealth recover against them one hundred dollars and costs.

TAYLOR, for defendants.

And thereupon, the matters of law arising upon the said case agreed being argued, it seems to the court here, that the law is for the commonwealth, and *that the defendants are guilty in manner and form, as [*290
in the information against them is alleged, and they do assess their fine to $100, besides the costs. Therefore, it is considered by the court, that the commonwealth recover against the said defendants, to the use of the president and directors of the literary fund, $100, the fine by the court aforesaid, in manner aforesaid, assessed, and the costs of this prosecution; and the said defendants may be taken, &c. From which judgment, the defendants, by their counsel, prayed an appeal to the next superior court of law of Norfolk county, which was refused by the court, inasmuch as cases of this sort are not subject to revision by any other court of the commonwealth. Commonwealth's costs, $31.50.

February 18th. *Barbour*, for the defendant in error, moved to dismiss the writ of error in this case, and stated three grounds upon which he should insist that the court had not jurisdiction: 1. Because of the subject-matter of the controversy, without reference to the parties. 2. That considering the character of one of the parties, if the court could have jurisdiction at all, it must be original, and not appellate. 3. And finally, that it can take neither original nor appellate jurisdiction.

1. As to the first point: it is conceded by all, that the federal government is one of limited powers; this distinguishing trait equally characterises all its departments; it is with the judicial department only, that the present inquiry is connected. It is in the *2d section of the 3d article [*291
of the constitution, that we find an enumeration of the objects to which the judicial power of the Union extends. That part of it which relates to the present discussion, declares, that "the judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." It is not pretended, that any treaty has any sort of relation to the present case: before, then, this court can take jurisdiction, it must be shown, that this is a case arising either under the constitution, or a law of the United States. I shall endeavor to prove, that it does not belong to either description. These two classes of cases are obviously put in contradistinction to each other; and there will be no difficulty in showing to the court the difference in their character. The constitution contains two different kinds of provisions; the one (if I may use the expression), self-executed, or capable of self-execution; the other, only executory, and requiring legislative enactment to give them operation; thus, the 2d section of the 4th article, which declares, that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states;" the 10th section of the 1st article, which prohibits any state from making anything but gold and silver coin, a tender in payment of debts; from passing any law "impairing the obligation of contracts;" and the prohibi-

tion to congress, in the 9th section, and to the states in the 10th section of the same article, to pass "any bill of attainder, or *ex post facto* law," *are
*292] all examples of the self-executed provisions of the constitution; by which, I mean to say, that the constitution, in these instances, is, *per se*, operative, without the aid of legislation. On the contrary, the various provisions of the 8th section of the same article, such, for example, "as the power to establish an uniform system of naturalization, and uniform laws on the subject of bankruptcy," are executory only; that is, without an act of legislation, they have no operative effect.

The cases, then, arising under the constitution, are those which arise under its self-executed provisions; and those arising under the laws of the United States, are those which occur under some law, passed in virtue of the executory provisions of the constitution. If this idea be correct, then, this is not a case arising under the constitution; and it does not correspond with the other part of the description, that is, it does not arise under a law of the United States. In the first place, this court, in the case of *Hepburn* v. *Ellzey*, 2 Cranch 445, decided, that the district of Columbia was not a state, within the meaning of the constitution, and that, therefore, a citizen of that district could not sustain an action against a citizen of Virginia, in the circuit court of that state. Now, it would sound curiously, to call a law passed for a district, not itself exalted to the dignity of a state, a law of the United States. It would seem more strange, to call a law passed by the corporation of Washington, for the local purposes of Washington, *a law of the United States, and yet such is the character of the law
*293] under which this case arises; for the act of congress did not itself create the lottery, but authorized the corporation of Washington to do it.

As to this sub-legislation, legislative power is a trust which cannot be transferred. *Delegatus non potest delegare.* If this can be exercised by substitution, other legislative powers can also. I would then inquire, whether in execution of the power "to lay and collect taxes," "to declare war," &c., congress could authorize the state legislatures to do these things. It is a misnomer, to call by the name of a law of the United States, any act passed for the district of Columbia, though enacted by cengress, without calling in the aid of a corporation. It has been well observed by a former member of this court, that every citizen in the United States, sustains a two-fold political character, one in relation to the federal, the other in relation to the state governments. To put the proposition in other words, it may be stated thus: a two-fold system of legislation pervades the United States; the one of which I will call federal, the other municipal. The first belongs, by the constitution of the United States, to congress, and consists of the powers of war, peace, commerce, negotiation, and those general powers which make up our external relations, together with a few powers of an internal kind, which require uniformity in their operation: the second belongs to the states, and consists of whatever is not included in the first,
*294] embracing particularly everything connected *with the internal police and economy of the several states. If this system knew no exception in its operation, the present question would never have arisen; for no man would ever dream of calling a law of Virginia or Maryland, a law of the United States. But there are certain portions of territory within the United States, of which the district of Columbia is one, in which there is no state

government to act: in relation to these, congress, by the constitution, exercises not only federal, but municipal legislation also: and as the whole difficulty in this case has arisen out of this blending together of two different kinds of legislative power; so, that difficulty will be removed, by a careful attention to the difference in the nature and character of these powers, and the extent of their operation respectively. Whenever a question arises, whether a law passed by congress is a law of the United States, we have only to inquire, whether it is constitutionally passed in execution of any of the federal powers: if it be, it is properly a law of the United States; since the federal powers are co-extensive with the limits of the United States; and this, though the particular act may be confined to certain persons, places or things. Thus, a law establishing federal courts in a particular state, is a law of the United States; for though its immediate operation is upon one state, yet it is in execution of a power co-extensive with the United States; but if a law, though passed by congress, be passed in execution of a municipal power, as, a law to pave the streets of Washington, then it cannot, in any propriety of language, *be called a law of the United States. It is an [*295
axiom in politics, that legislative power has no operation, beyond the territorial limits under its authority. I do not now speak of the doctrine of the *lex loci;* of that comity, by which the different states of the civilized world receive the laws of others, as governing in certain cases of contract, or questions of a civil nature. I speak of the intrinsic energy of the legislative power, its operation *per se.*

If this principle be true, is there anything in this case to impair its force? It is admitted on all hands, that this law was passed in virtue of the power given by the constitution to exercise exclusive legislation over such district, not exceeding ten miles square, as should become the seat of the federal government. If we look into the history of the country, the debates of the conventions, or the declaration of the Federalist, we shall alike arrive at the conclusion, that this power was given, in consequence of an incident which had occurred in Philadelphia, and the necessity which thence seemed to result, of congress deliberating uninterrupted and unawed. The motive, then, for granting this power, would not lead to an extension of it; still less, will the terms; for they are as restrictive as could, by possibility, be used. The district shall not exceed ten miles square, and as was argued in the convention of Virginia, may not exceed one mile: so far from the principle being impaired, then, it is greatly strengthened by the language of this provision. See, to what consequences we should be led, by the doctrine, that because this lottery was authorized by congress, therefore, the tickets *might be sold in any state, against its laws, with impunity. The same [*296
charter authorizes the corporation of Washington to grant licenses to auctioneers and retailers of spirituous liquors: now, upon the doctrines contended for, what will hinder the corporation from granting licenses to persons, to vend goods and liquors in Virginia, by a corporation license, contrary to the laws of Virginia? and thus, greatly impair the revenue which the state raises from these licenses? As it is said, that a salable quality is of the essence, and constitutes the only value of a lottery-ticket, and that, therefore, it is not competent to any state to abridge the value of that, which was rightfully created by the legislature of the Union, would not the same reasoning justify the holders of these corporation licenses, equally to trample

upon the laws of the state; lest, for want of a market, their merchandise and liquors might not be sold, and thus the value of their license diminished. These are cases, in which the revenue of a state would be impaired, as well as the laws for the protection of its morals. Such is the law of Virginia, prohibiting the use of billiard tables. If congress should authorize licenses to be issued, by the corporation of Washington, for using them, and if this law have an operation beyond the territorial limits of the district, then has Virginia lost all power of regulating the conduct of her own citizens.

The solution of the whole difficulty lies in this: That though the laws of congress, when passed in execution of a federal power, extend over the *297] Union, and being laws of the United States, are a part of *the supreme law of the land, yet, a law passed like the one in question, in execution of the power of municipal legislation, extends only so far as the power under which it was passed—that is, to the boundaries of the district; that, therefore, it is no law of the United States, and consequently, not a part of the supreme law of the land. Nor is there anything novel, in the idea of two powers residing in the same body, at the same time, and over the same subject, of a different kind. The idea is familiarly illustrated by cases of ordinary occurrence in the judiciary. For the same trespass, an action or indictment may be brought before the same court, and a different judgment pronounced, as one or the other mode is pursued. So, the same court has frequently common-law and chancery jurisdiction, and pronounces a different judgment in relation to the same subject, as they are exercising the one or the other jurisdiction.

Let us look further at the consequences of calling the laws of the district, laws of the United States. By the sixth article of the constitution, laws of the United States, made in pursuance of the constitution, are declared a part of the supreme law of the land, and the judges in every state shall be bound thereby, anything in the laws of their state to the contrary notwithstanding. If, then, laws of the district be laws of the United States, within the meaning of the constitution, it will follow, that they may be carried to an extent of an interference with every department of state legislation; and *298] whenever they shall so interfere, they are to be considered *of paramount authority. Suppose, the law of Virginia to declare a deed for land void against a purchaser for valuable consideration, without notice, unless recorded upon the party's acknowledgment, or the evidence of three witnesses. Suppose, a law of the district to dispense with record, or to be satisfied with two witnesses. If one citizen should convey to another citizen of the district, land lying in Virginia, in conformity with the district law, upon the principle now contended for, the party must recover, in the teeth of the law of Virginia. It will be admitted, that a law passed, like the one in question, by one state, might be repelled by another; it will also be admitted, that if congress had (as some think they have a right to do, but in which I do not concur) established here a local legislature, which had passed the law in question, its effects might have been repelled from the states by penal sanctions. But if it be said, that as the dominion over the district flows from the same source with every other power possessed by the government of the Union, as it is executed by the same congress, as it was created for the common good, and for universal purposes, that it must be of equal obligation throughout the Union in its effects, with any power known

to the constitution; from whence it is inferred, that the law in question can encounter no geographical impediments, but that its march is through the Union; the answer is, that the federal powers of congress, in their execution, encounter no geographical impediments, because no limit, short of the boundaries *of the Union, are prescribed to them; but the legislative power over the district, in its execution, does encounter geographical impediments, because the limits of the district are distinctly prescribed, as the bound of its extent, and as an insurmountable barrier to its further march. [*299

It may be said, too, that this case bears no resemblance to that of one state repealing, by penal sanctions, the effects of the laws of another; because it is said, one state is no party to the laws of another; whereas, here, the law is its own law, as being represented in congress, and thereby contributing to its passage, and capable in part of effecting its repeal. It will be seen at once, that this principle would prove too much, and therefore, that it cannot be a sound one; for, if the states are to acquiesce in this instance, because they are represented in congress, and have, therefore, an agency in making and repealing laws, the same reasoning would justify congress in legislating beyond their delegated powers; for example, prescribing a general course of descents. It is obvious, that they might contribute as much to the passage and repeal of this law, as any other, and yet this ground will not be attempted to be sustained. If, then, they are not bound, because of their representation in congress, to acquiesce in the assumption of a power not granted; they are surely as little bound, upon that ground, to permit a power, confined to ten miles square, to extend its operation with the limits of the United states.

If, then, the law in question is not a law of the United States, in the sense of that expression in the *constitution, this is not a case arising under the law of the United States, and, consequently, the jurisdiction of this court fails as to the subject-matter. [*300

2. My second proposition is, that if this court could entertain jurisdiction of the case at all, it must be original, and not appellate jurisdiction. This has reference to the character of one of the parties in the present contest. The constitution of the United States, after having carved out the whole mass of jurisdiction which it gives to the federal judiciary, and enumerated its several objects, proceeds, in the second clause of the second section of the third article, to distribute that jurisdiction amongst the several courts. To the supreme court, it gives original jurisdiction in two classes of cases; to wit, "in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party;" in all the other cases to which the judicial power of the United States extends, it gives the supreme court appellate jurisdiction. This court, in the case of *Marbury* v. *Madison*, 1 Cranch 174, thus expresses itself in relation to this clause of the constitution: "If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction, where the constitution has declared their jurisdiction shall be appellate, the distribution of jurisdiction made in the constitution, is form, without substance." Again, the court says, "the plain import of the words seems to be, that in one *class of cases, its jurisdiction is original, not appellate; in the other, it is appellate, not [*301

original;" and accordingly, in that case, which was an application for a *mandamus* to the then secretary of state, to issue commissions to certain justices of the peace in the district of Columbia, the court, after distinctly admitting that the parties had a right, yet refused to grant the *mandamus*, upon the ground, that it would be an exercise of original jurisdiction; that not being one of the cases, in which that kind of jurisdiction was given them by the constitution, it was not competent to congress to give it.

It appears, then, from the constitution, that where a state is a party, this court has original jurisdiction: it appears from the opinion of this court, just quoted, that it excludes appellate jurisdiction. But a state is a party to the present case; it is a judgment for a penalty inflicted for the violation of a public law; the prosecution commenced by a presentment of a grand jury, carried on by an information filed by the attorney for the commonwealth, and the judgment rendered in the name of the commonwealth; and the case has come before this court by a writ of error, which is surely appellate jurisdiction. If, then, when a state is a party, this court have original jurisdiction; if the grant of original, exclude appellate jurisdiction; if, as in this case, a state be a party; and if the jurisdiction now claimed is clearly appellate, then it follows, as an inevitable conclusion, that in this case, this court cannot take jurisdiction in this way, if they could take it at all.

*302] *3. My last proposition is, that considering the nature of this case and that a state is a party, the judicial power of the United States does not extend to the case, and that, therefore, this court cannot take jurisdiction at all. This is a criminal case, both upon principle and authority. A crime is defined to be, an act committed or omitted, in violation of some public law commanding or forbidding it. The offence in this case is one of commission. A prosecution in the name of a state, by information, as this has been shown to be, to inflict a punishment upon this offence, is, therefore, a prosecution for a crime; in other words, a criminal case. Upon authority, too, penal actions are called in the books, criminal actions. But if it be a criminal case, it is conceded, that the courts of the United States cannot take original jurisdiction over it, inasmuch as that right fully belongs to the courts of the state whose laws have been violated; and that jurisdiction having once rightfully attached, they have a right to proceed to judgment; but if they have no original jurisdiction, I have shown, in the discussion of the second point, that they cannot have appellate jurisdiction, and it, consequently, follows, that they cannot have jurisdiction at all.

I will now endeavor to show, from general principles, in connection with the fair construction of the third article of the constitution, that without reference to the particular character of the case, whether as criminal or civil, the judicial power of the United States does not extend to it, on

*303] account of the character of one of the parties; in other words, *because one of the parties is a state. It is an axiom in politics, that a sovereign and independent state is not liable to the suit of any individual, nor amenable to any judicial power, without its own consent. All the states of this Union were sovereign and independent, before they became parties to the federal compact: hence, I infer, that the judicial power of the United States would not have extended to the states, if it had not been so extended to them, *eo nomine*, upon the face of the constitution. But if it can reach them, only because it is expressly given in relation to them, then it can only

reach them to the extent to which it is given. By the original text of the constitution, the judicial power of the Union was extended to the following cases, in which states were parties; to wit, to controversies between two or more states, between a state and citizens of another state, and between a state and foreign states, citizens and subjects. The case of a contest between a state and one of its own citizens, is not included in this enumeration; and, consequently, if the principle which I have advanced be a sound one, the judicial power of the United States does not extend to it; but the uniform decision of this court has been, that if a party claim to be a citizen of another state, it must appear upon the record. As that does not appear upon the record in this case, I am authorized to say, that the plaintiffs in error are citizens of Virginia: then it is the simple case of a contest between a state and one of its own citizens, which does not fall within the pale of federal judicial power.

*It is said, however, that the judicial power is declared, by the constitution, to extend to all cases in law or equity, arising under this constitution, the laws of the United States, and treaties made, &c.; and that by reason of the expression "all cases," where the question is once mentioned in the constitution, the federal judicial power attaches upon the case, on account of the subject-matter, without reference to the parties. Notwithstanding the latitude of this expression, it will be seen, upon inquiry, that in the nature of things, there must be some limitation imposed upon this provision, which the gentlemen seem to consider unlimited. In the first place, there are questions arising, or which might arise, under the constitution, which the forms of the constitution do not submit to judicial cognisance. Suppose, for example, a state were to grant a title of nobility, how could that be brought before a judicial tribunal, so as to render any effectual judgment? If it were an office of profit, it might, perhaps, be said, an information in the nature of a *quo warranto* would lie; but I ask, whether that would lie, in the case which I have stated, or whether an effectual judgment could be rendered? It is a title, a name which would still remain, after your judgment had denounced it as unconstitutional. Where a *quo warranto* lies, in relation to an office, the judgment of ouster is followed by practical and effectual consequences. Again, suppose a state should keep troops or ships of war, in time of peace, or should engage in war, when neither actually invaded, nor in imminent danger. Here would be alarming violations of the *constitution, assailing too directly the federal powers; it would be a most serious question, arising under the constitution, and yet, clearly, such a case as this does not belong to the judicial tribunal. [*304 [*305

If it be said, that the opposite counsel mean all cases, in their nature, of a judicial character, still I shall be able to show, that broad as this expression is, it does not reach all these. It will be remembered by the court, that the words are, not all questions, but all cases. Although, therefore, a question may arise, yet, before there can be a case, there must be parties over whom the court can take jurisdiction; and if there be no such parties, the court cannot act upon the subject, though the question may arise, though it may be clearly of a judicial nature, and though there may be the clearest violation of the constitution. By the 11th article of the amendments of the constitution, it is declared, that "the judicial power of the United States

shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of any foreign state." Now, suppose, that a state should, without the consent of congress, lay a duty on tonnage, which should be paid by a citizen of another state; suppose, too, that a state should cause the lands of a British subject to be escheated, contrary to the ninth article of the treaty of 1794, upon the ground of alienage; or debts due to a British subject, from individuals of the United States, or money or shares belonging to him, in the public funds or banks, to be confiscated, contrary
*306] to the *tenth article of the same treaty, and deposit the proceeds in the public chest: it will be agreed on all hands, that the first is a palpable violation of the federal constitution, and the two others, as palpable violations of the solemn stipulations of a treaty; and that, therefore, the first presents a question arising under the constitution, and the others, one arising under a treaty; yet, will any man contend, that the citizen of another state, in the first case, or the subject of the foreign state, in the others, could bring the offending state before the federal court, for the purpose of redressing their several wrongs? It will not be pretended; and why not? for the reason which I have given, that one of the parties in the cases supposed being a state, and the amendment referred to having declared, that a state should not be amenable to the suit of a citizen of another state, or the subject of a foreign state; although the questions have arisen, the cases have not; that is, the court cannot take judicial cognisance of the questions, because it cannot bring one of the parties interested in litigating it before them. Let us now suppose, that a state should collect a tonnage duty from one of its own citizens; could that citizen bring his own state before a federal court? The words of the 11th amendment apply to the case of a citizen of another state, or the citizen or subject of a foreign state; but the reason is, that it was only to them that the privilege of being parties in a controversy with a state, had been extended in the text of the constitution. It was only from them, therefore, that it was necessary to
*307] take away that privilege; *but, when from those to whom a privilege had been given, that privilege had been taken away, they surely then occupy the same ground, with those to whom it had never been given. When I speak here of the right of these persons, under the constitution, of suing a state, I speak of the interpretation of this court, particularly in the case of *Chisholm's Executors* v. *Georgia*, in which the court decided, that a state might be made a party defendant. It was that decision which produced the 11th amendment. If I am right in the idea, that since that amendment, no matter what the character of the question, this court could not take jurisdiction in favor of the citizen of another state, or subject of a foreign state, against a state as defendant, it is equally true, that without the aid of that amendment, it never could take jurisdiction in favor of a citizen against his own state; because that is not one of the cases, in which the federal judicial power extends to states, and because, in this case, as in the others, although a question has arisen under the constitution, &c., a case has not arisen, inasmuch as you cannot bring one of the parties before you. That the constitution never contemplated giving jurisdiction to the federal courts, in cases between a state and its own citizens, will appear manifestly, from the only reason assigned for giving it in favor of the

citizens of other states, or foreign citizens. That reason was an insufficient one, even for the purpose for which it was assigned; it being, that as against foreigners and the citizens of other states, state courts might not be impartial, where their states were parties: but such as it is, it *never [*308
could apply as between a state and its own citizens, whom they were under every moral and political obligation to protect, and towards whom, therefore, they could be no apprehension of a want of impartiality.

Upon a full view of this aspect of the subject, the fair construction of the constitution will be found to be this—that in carving out the general mass of jurisdiction, it had reference only to the natural and habitual parties to controversies, who are either natural persons, or corporations, short of political societies, not to states; that in relation to these, they could not have been made parties at all, but by express provision, and that, therefore, the extent to which they can be so made, is limited by the extent of that provision. It will be conceded, that the United States cannot be sued: and why? Because it is incompatible with their sovereignty. The states, before the adoption of the federal constitution, were also sovereign; and the same principle applies, unless it can be shown, that they have surrendered this attribute of sovereignty; which I have endeavored to show they have not.

Upon my construction, there is consistency throughout the constitution. According to it, a state can never be subjected, at the suit of any individual, to any judicial tribunal, without its own consent; for it can never be made a party defendant in any case, or by any party, except in the cases between it, and another state, or a foreign state. If it be a party plaintiff, I have already endeavored to prove, that this *court could never take appel- [*309
late, but only original jurisdiction, and that, therefore, as between a state and any individual, that state never could be placed in the attitude of a defendant. This idea is further sustained, by reference to the history of the country. From that, we learn, that the great and radical defect in the first confederacy was, that its powers operated upon political societies or states, not upon individuals. The characteristic difference between that and the present government is, that the latter operates upon the citizens. Take, for example, the power of taxation, which addresses itself directly to the people on the United States, in the shape of an individual demand, instead of a requisition upon the states, for their respective quotas.

It has been said, that if this doctrine prevail, the federal government will be prostrated at the feet of the states, and that the various limitations and prohibitions imposed upon the states by the constitution, will be a dead letter, upon the face of that instrument, for the want of some power to enforce them. Let it be remembered, that the several state legislatures and judiciaries, are all bound by the solemn obligation of an oath, to support the federal constitution; that to suppose a state legislature capable of wilfully legislating in violation of that constitution, if it is to suppose, that it is so lost to the moral sense as to be guilty of perjury; a supposition which, thank God! the character of your people forbids us to make, nor can it be realized, until we shall have reached a maturity of corruption, from which I trust we are separated by a long tract of future *time. But [*310
if the legislatures could be supposed to be so blind to the sacred dictates of conscience and of duty, as to pass such a law, we have another safeguard in the character of the state judiciaries. Before effect could be given

to it, it must be supposed, that the sanctity of the judicial ermine was also polluted. To him, who can for a moment entertain this unjust and injurious apprehension, I have nothing to say, but to ask him to look at the talents, the virtues and integrity which adorn and illustrate the benches of our state courts; and I will add, that according to the doctrine maintained by this court, in the case of *Martin* v. *Hunter*, 1 Wheat. 305, the judgments of the state courts, in questions arising, under the constitution, between individuals, would be subject to the appellate jurisdiction of this court.(*a*) But if the states are under limitations, by the constitution, so also is the federal government. If the state legislatures may be supposed, possibly, capable of violating that instrument, and the state judiciaries disposed to sustain *311] *them in that violation, it may as well be supposed, that the federal legislature may be thus disposed, and the federal judiciary prepared to sustain them.

Whenever the states shall be determined to destroy the federal government, they will not find it necessary to act, and to act in violation of the constitution. They can quietly and effectually accomplish the purpose, by not acting. Upon the state legislatures it depends to appoint the senators and presidential electors, or to provide for their election. Let them merely not act in these particulars; the executive department, and part of the legislative, ceases to exist, and the federal government thus perishes by a sin of omission, not of commission. But I will endeavor in another way to show, that whenever the states shall have reached that point, either of corruption or hostility to the federal government, which they must arrive at, before any of the extreme supposed violations of the constitution could occur, the jurisdiction now claimed for this court would be utterly inadequate as a remedy. Let us suppose one of the most glaring violations of the constitution; a bill of attainder, or *ex post facto* law, for example, passed by a state; and that the state judiciary proceeds to conviction of the party prosecuted. Let us suppose, that this court, claiming an appellate jurisdiction, forbids the execution of the party; but the state court orders its judgment to be executed, and it is executed, by putting to death the prisoner. His life cannot be recalled—that is beyond the reach of human power; can you prosecute the *312] judges or the officer for murder? It will not be contended. *Of what avail, then, the jurisdiction contended for, even for the purpose for which it is claimed? I answer, of none at all.

Smyth stated, that he should support the motion to dismiss the writ of error granted in this case, for two causes: 1. Because the constitution gives no jurisdiction to the court in the case. 2. Because the judiciary act gives no jurisdiction to the court in this case.

1. It is a question undecided, whether the appellate jurisdiction of this

(*a*) Mr. Barbour observed, in reply, that he wished to be distinctly understood, as not yielding his assent to the doctrine of Martin *v.* Hunter. On the contrary, that he decidedly concurred with the court of appeals of Virginia, that the appellate jurisdiction of the supreme court was in relation to inferior federal courts, not state courts. But as that question had been solemnly decided otherwise by this court, with the argument of the court of appeals of Virginia before them, he had forborne to discuss it; he had referred to it, however, because, whilst this court acted upon the principle of that case, there was a controlling power, on the part of the federal, over the state judiciaries, in practical operation.

court, as declared by the constitution, does or does not extend to this case. If it was in all respects similar to the case of *Martin* v. *Hunter*, 1 Wheat. 305, adjudged in this court, I should contend, that the constitutional question of jurisdiction should not be regarded as settled. In that case, the counsel conceded the constitutional question, and no argument has been offered to this court in support of the jurisdiction of the state judiciary. One of the learned judges(*a*) of this court said, in that case, when speaking of the claim of power in this court to exercise appellate jurisdiction over the state tribunals, "this is a momentous question, and one on which I shall reserve myself uncommitted, for each particular case as it shall occur." And the court said, that "in several cases, which have been formerly adjudged in this court, the same point was argued by counsel, and expressly overruled." But the case now before the court, is very different from that of **Martin* v. *Hunter*. This is a writ of error to revise a judgment given in a criminal prosecution, and in a case wherein a state was a party. [*313

The government of the United States being one of enumerated powers, it is not a sufficient justification of the authority claimed, to say, that there is nothing in the constitution that prohibits the federal judiciary to take cognisance, by way of appeal, of cases decided in the state courts. All the powers not granted are retained by the states; judicial power is granted; but it is federal judical power that is granted, and not state judicial power. This grant neither impairs the authority of the state courts, in suits remaining within their jurisdiction, nor makes them inferior courts of the United States. The government of the United States operates directly upon the people, and not at all upon the state governments, or the several branches thereof. The state governments are not subject to this government. The people are subject to both governments. This government is in no respect federal in its operation, although it is, in some respects, federal in its organization. Power has, indeed, been vested, by the constitution, in the state legislatures, to pass certain laws necessary to organize and continue the existence of the general government, and this power congress may in part assume. They may prescribe the time, place and manner of holding elections of representatives; the time and manner of choosing senators by the state legislatures; and the time of choosing electors of a president. This power is expressly given by *the constitution; it was necessary congress should possess it, for self-preservation; and even in these cases, they have no power to prescribe to the state legislature a legislative act. This government cannot prescribe an executive act to the executive of a state, a legislative act to the legislature of a state, or (as I contend) a judicial act to the judiciary of a state. [*314

If the constitution does not confer on the judiciary of the United States the appellate jurisdiction claimed, it is not enough, that the act of congress may purport to confer it. The framers of the judiciary act manifested a distrust of their authority; they seem to have foreseen, that the state courts would refuse to give judgment, according to the opinions of the supreme court. The case decided in the state court was not a case in law, arising under the laws of the United States. It was a prosecution under a law of the state. Should a mandate issue in this case, and obedience be refused,

(*a*) Mr. Justice JOHNSON.

this court will give judgment on a prosecution for violating state laws. If the case decided in the state court be regarded as a case in which a state was a party, the supreme court has, by the constitution, original and not appellate jurisdiction. The appellate jurisdiction of the supreme court is only conferred in cases other than those whereof the supreme court has original jurisdiction. Who has original jurisdiction of those other cases? The inferior federal courts. Some of those other cases are those of admiralty and maritime jurisdiction, of which, certainly, it was not intended, *315] *that the original jurisdiction should be in the state courts.

If this writ of error be considered to be a suit in law, this court has no jurisdiction: for it is prosecuted against a state; and by the 11th amendment to the constitution, no suit in law can be prosecuted by foreigners or citizens of another state against one of the United States. The amendment prohibits such suits commenced or prosecuted against a state. This seems expressly to extend to this writ of error, which, although not a suit in law, commenced against a state, is a suit in law prosecuted against a state. This amendment, denying to foreigners and citizens of other states the right to prosecute a suit against a state, and being silent as to citizens of the same state, affords a proof that the federal courts never had jurisdiction of a suit between a citizen and the state whereof he is a citizen: for it cannot be presumed, that a right to prosecute a suit against a state would be taken from a foreigner or citizen of another state, and left to citizens of the same state. A release of all suits is a release of a writ of error (Latch 110; 2 Bac. Abr. 497; 1 Roll. Abr. 788); and, consequently, a writ of error is "a suit in law," and cannot be prosecuted against a state.

The appellate jurisdiction conferred by the constitution on the supreme court, is merely authority to revise the decisions of inferior courts of the United States. Where the supreme court have not original jurisdiction, they have, by the constitution, appellate jurisdiction as to law and fact. Could it have *been intended, to confer a power to re-examine decis- *316] ions in the state courts; to try again the facts tried in those courts, and this, even in criminal prosecutions? Surely not. Appellate jurisdiction signifies judicial power over the decisions of the inferior tribunals of the same sovereignty. Congress have power to "constitute" such tribunals; and it is made their duty to "ordain and establish" such. The framers of the constitution intended to create a new judiciary, to exercise the judicial power of a new government, unconnected with the judiciaries of the several states. Congress is not authorized to make the supreme court, or any other court of a state, an inferior court. They do not "constitute" such a court; they do not "ordain and establish" it. The judges cannot be impeached before the senate of the United States; they receive no compensation for their services from the United States; and, consequently, cannot be required to render any services to the United States. The inferior courts, spoken of in the constitution, are manifestly to be held by federal judges. The judicial power to be exercised, is the judicial power of the United States; the errors to be corrected are those of that judicial power; and there can be no inferior courts, exercising the judicial power of the United States, other than those constituted, ordained and established by congress.

The supreme court has appellate jurisdiction in cases to which the judicial power of the United States shall extend; but unless the original jurisdic-

tion has extended to the case, the appellate jurisdiction *can never reach it. The original jurisdiction alone is qualified to lay hold of it. If it shall be deemed proper to extend the judicial power to all the cases enumerated, the original jurisdiction must be thus extended. The court exercising appellate jurisdiction, must not only have jurisdiction over such a cause, and such parties, but it must have jurisdiction over the tribunal before which the cause has been depending. Judicial power, includes power to decide, and power to enforce the decision. This court has rather disclaimed power to enforce its mandate to the supreme court of a state. If you have not power to compel state tribunals to obey your decisions, you have no appellate jurisdiction in cases depending before them. Suppose, it should be found necessary to direct a new trial, in a cause removed from a state court, and that the state court refuses to obey your mandate; where shall the new trial be had? If you have appellate jurisdiction in a case decided by a state court, you must have power to make your decisions a part of the record of the state court. The constitution provides, that full faith and credit shall be given in each state, to the judicial proceedings of every other state. A plaintiff recovers in the courts of Virginia judgment for a sum of money; you reverse the judgment; but the state court does not record your decision; the plaintiff obtains a copy of the record of the judicial proceedings of the state, and presents them as evidence before the court of another state; he must recover, notwithstanding your judgment, which *has not been made a part of that record, to which full faith and credit is to be given. [*318

To give jurisdiction over the state courts, it is not sufficient, that the constitution has said, that the supreme court shall have appellate jurisdiction; for that will be understood to signify jurisdiction over inferior federal courts. To confer the jurisdiction claimed, the constitution should have said, that the judicial power of the United States shall have appellate jurisdiction over the judicial power of the several states. If it had been intended to give appellate jurisdiction over the state courts, the proper expressions would have been used. There is not a word in the constitution that goes to set up the federal judiciary above the state judiciary. The state judiciary is not once named. The subjects spoken of are the judicial power of the United States; the supreme and inferior courts of the United States; and the original and appellate jurisdiction of the supreme court. Appellate jurisdiction is not granted to the judicial power of the United States. It is granted to the supreme court of the United States. Federal judicial power is authorized to correct the errors of federal judicial power. I contend, that in no case can the federal courts revise the decisions of the state courts; no such power is expressly given by the constitution: and can it be believed, that it was meant that the greatest, the most consolidating of all the powers of this government, should pass by an unnecessary implication? The states have granted to the United States power to pronounce their own judgment in certain cases; but they have not *granted the state courts to the federal government; nor power to revise state decisions. [*319

The power of the House of Lords to hear appeals from the highest court in Scotland, has been mentioned as a precedent for the exercise of such a power as is claimed for this court; but the cases are by no means similar: Scotland is consolidated with England, under the same executive and legis-

lature; and, therefore, ought to be subject, in the last resort, to the same judicial tribunal. If the states had no executive except the president, and no legislature except congress, the cases would have some resemblance.

If you correct the errors of the courts of Virginia, you either make them courts of the United States, or you make the supreme court of the United States a part of the judiciary of Virginia. The United States can only pronounce the judgment of the United States. Virginia alone can pronounce the judgment of Virginia. Consequently, none but a Virginia court can correct the errors of a Virginia court.

There is nothing in the constitution that indicates a design to make the state judiciaries subordinate to the judiciary of the United States. The argument that congress *must* establish a supreme court, and might have omitted to establish inferior courts, thereby depriving the supreme court of its appellate jurisdiction, unless it should be exercised over the state courts, seems to be without foundation. The judicial power of the United States
*320] is vested in the supreme court, and inferior courts; the judges of *the inferior courts shall receive a compensation. The possibility of congress omitting to perform a duty positively enjoined on them, cannot change the constitution, or affect the jurisdiction of the state courts.

The federal judiciary and state judiciaries possess concurrent power in certain cases; but no authority is conferred on the one to reverse the decisions of the other. The state courts retain a concurrent authority, in cases wherein they had jurisdiction, previous to the adoption of the constitution, unless it is taken away by the operation of that instrument. I say, a concurrent authority, not a subordinate authority. The power of the judiciary of the United States is either exclusive or concurrent, but not paramount power. And where it is concurrent only, then, whichsoever judiciary gets possession of the case, should proceed to final judgment, from which there should be no appeal. If it shall be established, that this court has appellate jurisdiction over the state courts, in all cases enumerated in the third article of the constitution, a complete consolidation of the states, so far as respects judicial power, is produced; and it is presumed, that it was not the intention of the people to consolidate the judicial systems of the states with that of the United States. It has been said, that the courts of the United States can revise the proceedings of the executive and legislative authorities of the states, and if they are found to be contrary to the constitution, may declare them to be of no legal validity; and that the exercise of the same right over
*321] judicial tribunals, is not a higher or *more dangerous act of sovereign power. 1 Wheat. 344. This conclusion seems to be erroneous. When the federal courts declare an act of a state legislature unconstitutional, or an act of the state executive unlawful, they exercise no higher authority than the state courts exercise, who will not only declare an act of the state legislature, but even an act of congress, unconstitutional and void. This only proves that the federal and state judiciaries have equally authority to judge of the validity of acts of the other branches of both governments, and has no tendency whatever to establish the claim set up by federal judicial power, of supremacy over state judicial power.

This writ of error brings up the judgment rendered in a state court, in a criminal prosecution. Every government must possess within itself, and independently, the power to punish offences against its laws. It would

degrade the state governments, and divest them of every pretension to sovereignty, to determine, that they cannot punish offences, without their decisions being liable to a re-examination, both as to law and fact (if congress please), before the supreme court of the United States. The claim set up would make the states dependent for the execution of their criminal codes, upon the federal judiciary. The cases "in which a state shall be a party," of which the supreme court may take cognisance, are civil controversies. This seems obvious; because, to the supreme court is granted original jurisdiction of them. And it will not be contended, *that the [*322 supreme court shall have original jurisdiction of prosecutions carried on by a state, against those who violate its laws. If "cases in law and equity, arising under the laws of the United States," comprehend criminal prosecutions in the state courts, then, every prosecution against a citizen of the state, in which he may claim some exemption under an act of congress or a treaty, however unfounded the claim, may be re-examined, both as to law and fact (if congress please), in the supreme court. And if "controversies" include such prosecutions, then every prosecution against an alien, or the citizen of another state, may be so re-examined, whether he claim such exemption or not. Can this court bring up a capital case, wherein some exemption under a federal law is claimed by a prisoner, in a state court? Would an appeal lie (should congress so direct) from a jury? It would not, even if the trial was had in a federal court; for the accused has a right to a trial by a jury, in the state and district wherein the crime shall be charged to have been committed. In all cases within the appellate jurisdiction of the supreme court, that jurisdiction may extend to the law and the fact. But such jurisdiction, as to the fact, cannot extend to criminal cases; consequently, it was not intended, that the appellate jurisdiction should extend to criminal cases; and therefore, the supreme court have no appellate jurisdiction in criminal cases. Can, then, the court take jurisdiction in this case, which was a criminal prosecution, founded on the presentment of a grand jury? Surely, they cannot. This case was not a *qui *tam* action, which is regarded as a civil suit. Cowp. 382. It was, [*323 both in form and substance, a criminal prosecution. And it has been declared by a judge of this court, that "the courts of the United States are vested with no power to scrutinize into the proceedings of the state courts, in criminal cases." 1 Wheat. 377.

That which is fixed by the constitution, congress have no power to change. The jurisdiction of the state courts is fixed by the constitution. It is not a subject for congressional legislation. The people of Virginia, in adopting the constitution of the United States, had power to diminish the jurisdiction of the state judiciary: but congress have no power over it; they can neither diminish nor extend it; they can neither take from the state tribunals one cause, or give them one to decide. As they cannot impose on the state courts any duties, so neither can they take from them any powers. Congress can neither add to, nor diminish, the legislative power, the executive power, nor the judicial power of a state, as fixed by the constitution. Congress may pass all laws necessary and proper to execute that power which is vested by the constitution in the judiciary of the United States; but this does not sanction a violation of the authority of the state courts. None can enlarge or abridge the jurisdiction of the judiciary of Virginia,

except the people of Virginia, or the legislature of that state. As was the jurisdiction of the state judiciary, on the 4th day of March 1789, so it stands
*324] at this day, unless altered by the *state. If on that day, the states retained jurisdiction of most of the cases enumerated in the third article of the constitution, that jurisdiction must have been left to them by the constitution, and cannot be taken from them by congress. The power either of a state legislature or a state judiciary, cannot depend on the use of, or neglect to use, a power, by congress. Such state power is fixed by the constitution; the same to-day as to-morrow, however congress may legislate.

The judicial power of the United States is conferred by the constitution, and congress cannot add to that power. Congress may distribute the federal judicial power among the federal courts, so far as the distribution has not been made by the constitution. If the constitution does not confer on this court, or on the federal judiciary, the power sought to be exercised, it is in vain, that the act of congress purports to confer it. And where the constitution confers original jurisdiction (as in cases where a state is a party), congress cannot change it into appellate jurisdiction. The extent of the judicial power of the United States being fixed by the constitution, it cannot be made exclusive or concurrent, at the will of congress. They cannot decide, whether it is exclusive of the state courts or not; for that is a judicial question, arising under the constitution. If the judicial power of the United States is exclusive, congress cannot communicate a part of it to the state courts, giving to the federal courts appellate jurisdiction over them. If by the constitution, the state judiciary has concurrent jurisdiction,
*325] *congress cannot grant to the federal courts an appellate jurisdiction over the exercise of such concurrent power. The state judiciary cannot have independent or subordinate power, at the will and pleasure of congress.

The state judiciary have concurrent jurisdiction, by the constitution, over all the cases enumerated in the third article of the constitution, except, 1. Prosecutions for violating federal laws; 2. Cases of admiralty and maritime jurisdiction; and 3. Cases affecting ambassadors, other public ministers and consuls. No government can execute the criminal laws of another government. The states have parted with exterior sovereignty. As they cannot make treaties, perhaps, they have not jurisdiction in the case of ministers sent to the federal government; as they cannot make war and peace, regulate commerce, define and punish piracies and offences on the high seas, and against the law of nations, or make rules concerning captures on the water, perhaps, they have no admiralty jurisdiction. The jurisdiction of the state courts over civil causes, arising under the constitution, laws, and treaties, seems to me to be unquestionable. The state judges are sworn to support the constitution, which declares them bound by the constitution, laws and treaties. This was useless, unless they have jurisdiction of causes arising under the constitution, laws and treaties, which are equally supreme law to the state courts as to the federal courts. The state judges are bound by oath to obey the constitutional acts of congress; but they are not so
*326] bound to obey the decisions of *the federal courts: the constitution and laws of the United States are supreme; but the several branches

of the government of the United States have no supremacy over the corresponding branches of the state governments.

The jurisdiction of the state courts is admitted by congress, in the judiciary act: for, by an odious provision therein, which does not seem to be impartial, the decision of the state court, if given in favor of him who claims under federal law, is final and conclusive. Thus, the state courts have acknowledged jurisdiction; and if that jurisdiction is constitutional, congress cannot control it.

Congress cannot authorize the supreme court to exercise appellate jurisdiction over the decisions of the state courts. Can congress give an appeal from a federal district court to a state court of appeal? I presume, it will be admitted, that they cannot. And why can they not? Because they have no power over the state court. And if they cannot give an appeal *to* that court, they cannot give an appeal *from* that court.

The constitution provides, that the judicial power of the United States shall "extend to" certain enumerated cases. These words signify plainly, that the federal courts shall have jurisdiction in those cases; but this does not imply exclusive jurisdiction, except in those cases where the jurisdiction of the state courts would be contrary to the necessary effect of the provisions of the constitution. Civil *suits, arising under the laws of the United States, may be brought and finally determined in the courts [*327 of foreign nations; and, consequently, may be brought and finally determined in the state courts.

The judiciary of every government must judge of its own jurisdiction. The federal judiciary and the state judiciary may each determine that it has, or that it has not, jurisdiction of the case brought before it: but neither can withdraw a case from the jurisdiction of the other. The question, whether a state court has jurisdiction or not, is a judicial question, to be settled by the state judiciary, and not by an act of congress, nor by the judgment of the supreme court of the United States. Shall the states be denied the power of judging of their own laws? As their legislation is subject to no negative, so their judgment is subject to no appeal. Sovereignty consists essentially in the power to legislate, judge of, and execute laws. The states are as properly sovereign now, as they were under the confederacy; and we have their united declaration, that they, then, individually, retained their sovereignty, freedom and independence. The constitution recognises the sovereignty of the states: for it admits, that treason may be committed against them. They would not be entitled to the appellation of "states," if they were not sovereign.

Although the state courts should maintain a concurrent jurisdiction with the federal courts, yet foreigners would have what, before the adoption of the constitution they had not, a choice of tribunals, before which to bring their actions; and the state *judges are now bound by treaties as [*328 supreme law. If an alien plaintiff sues in the state courts, he ought to be bound by their decision; and if an alien is sued in a state court, he ought to be bound by the decision of the state in which he resides or sojourns, which protects him, to which he owes a temporary allegiance, and to whose laws he should yield obedience. The people could not have intended to give to strangers a double chance to recover, while citizens should be held bound by the first decision; that the citizen should be bound by the judgment of the

state alone, while the stranger should not be bound but by the judgment of the state, and also of the United States. A statute contrary to reason is void. An act of congress which should violate the principles of natural justice, should also be deemed void. It is worthy of consideration, whether this clause in the judiciary act, which grants an appeal to one party, and denies it to the other, is not void, as being partial and unjust. If, in any case brought before them, the state courts shall not have jurisdiction, the defendant may plead to the jurisdiction, and the supreme court of the state will finally decide the point. If this is not a sufficient security for justice, as I apprehend it is, an amendment to the constitution may provide another remedy. If the defendant submits to the jurisdiction of the state court, and takes a chance of a fair trial, it is reasonable, that he should be bound by the result.

As I deny to this court authority to remove, by writ of error, a cause from a state court so I likewise *deny the authority of this court to
*329] remove, before judgment, from a state court, a suit brought therein. It will be equally an invasion of the jurisdiction of the state courts, although less offensive in form, than a removal after judgment has been rendered. Congress can neither regulate the state courts, or touch them by regulation.

Let the supreme court declare (for it is a judicial question) what cases are within the exclusive jurisdiction of the federal courts, by the constitution; and let congress pass the necessary and proper laws for carrying that power into effect. Although I do not admit, that the state courts would be absolutely bound by such a declaration, yet I have no doubt, that the state courts would acquiesce. It is not for jurisdiction over certain cases that the state courts contend. It is for independence in the exercise of the jurisdiction that is left to them by the constitution.

2. Does the 25th section of the judiciary act comprehend this case, so that the court may take jurisdiction thereof? In this case, the construction of a statute of the United States is said to have been drawn in question, and the decision in the state court was against the exemption claimed by the defendant in that court. This court has no jurisdiction, if it shall appear that the defendant really had no exemption to set up, in the state court, under a statute of the United States. If the act of congress has no appli-
*330] cation, no bearing *on the case, the court has no jurisdiction.(a) The parties cannot, by making an act of congress, which does not affect the cause, a part of the record, give this court jurisdiction.

This court have said, that, "the sovereignty of a state in the exercise of its legislation, is not to be impaired, unless it be clear, that it has transcended its legitimate authority; nor ought any power to be sought, much less to be adjudged, in favor of the United States, unless it be clearly within the reach of their constitutional charter." 5 Wheat. 48. This court have also said, that "the sovereign powers vested in the state governments, by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States." 1 Wheat. 325. The state legislatures retain the powers not granted, and not repugnant to the exercise of the powers granted to congress; and it is not denied, that the legislature of Virginia possessed, previous to the passage of

(a) 4 Wheat. 311; Wheat. Dig. § 301; 2 Wheat. 263; 4 Ibid. 314.

the act of congress for incorporating the city of Washington, authority to prohibit the sale of lottery-tickets in Virginia. That legislature still possesses the power, unless the exercise thereof obstructs some means adopted by congress, for executing their delegated powers.

Actions are lawful or criminal, as the laws of the land determine. Whether an action done in Virginia is lawful or criminal, depends on the laws of that *state, unless the action has been authorized or prohibited by congress, in carrying into execution some power granted to [*331 them, or the power of some department or officer of the government. The state governments are charged with the police of the states. They, considering certain acts as having a demoralizing tendency, have prohibited them. Shall congress authorize those very acts to be done within the body of a state? So entirely is the police of a state to be regulated by its own laws, that if congress taxed licenses to sell lottery-tickets, the payment of the tax would not confer on him who paid it, any authority to sell tickets, contrary to the laws of a state. Congress imposed a tax on licenses to sell spirituous liquors by retail; but that did not prevent the state governments from regarding tippling-houses as nuisances, and punishing those retailers of spirits who were not licensed tavern-keepers. The license is grantable by the state; when granted, the federal government may tax it; but they have no power to grant it. The police belongs to the state government, and the federal government cannot, by the power of taxation, interfere with the police, so as to legalize any act which a state prohibits.

It is said, that a lottery-ticket owes its value to its salable quality. It is true, that the salability of the ticket by the managers, is essential to make the lottery of value to the corporation: but those sales may be made in Washington. And if they cannot, must the constitution yield to a lottery? The proprietor of property has not a right everywhere to *dispose of [*332 it, as he pleases. A man may own poison, but he must not sell it as a medicine. He may own money; but he may not, in Virginia, part with it at public gaming. He may come to Washington and purchase a lottery-ticket; but if he takes it to Virginia, he must not sell it there. A lottery-ticket is a *chose in action*, and not assignable by the common law. The state laws determine whether bonds, bills, notes, &c., are assignable or not. Spirituous liquors are property; but they cannot be sold by retail, without the license of the state government.

The act of congress under which this lottery has been authorized, is not an act passed in the execution of any of those specific powers which congress may exercise over the states. The acts of congress must be passed in pursuance of the constitution, or they are void. If they have passed a statute, authorizing an act to be done in a state, which they had no power to authorize in a state, their statute is void. The acts of congress, to be supreme law in a state, must be passed in execution of some of the powers delegated to congress, or to some department or officer of the government. Congress may pass all laws necessary and proper to carry a given power into effect: but they must have a given power. Now, what is the given power, for the execution of which the sale of lottery-tickets in the states is an appropriate means? It is sufficient to show, that the act passed is a means of carrying into execution some delegated power. The degree of its necessity or propriety will not be questioned by this court; but it must obviously tend to

the execution *or sanction of some enumerated power. If it shall appear on the face of the act, that it is not passed for the purpose of carrying into effect an enumerated power, and that it is passed for some other purpose, the act would not be constitutional.

As to the object being a national one, for which the money is raised by the lottery in question: the nation has no particular interest in anything in the city of Washington, except the public property and buildings belonging to the United States. The improvements to be made in the city by the proceeds of this lottery, are not national buildings, for the accommodation of the federal government; they are corporation buildings, for the accommodation of the city, the charge of which is to be borne out of the revenues of the city. But it is not admitted, that if the money was to be applied to building of the capitol, that congress would have power, for that purpose, to authorize the sale of lottery-tickets in a state, contrary to state laws.

The nation is interested in the prosperity of every city within the limits of the Union. All may be made to contribute to the public treasury—the city of Washington as well as others. If these improvements in the city of Washington are such as the United States should pay for, let the money be advanced from the treasury, and raised by taxes or by loans, in a constitutional manner, and let the taxes imposed on the city of Washington, for the purpose of making these improvements, be declared unconstitutional. They doubtless are so, if the people of Washington alone are taxed for purposes truly national. *This measure is not adopted to aid the revenue of *334] the United States. It is adopted for the purpose of aiding the revenue of the city of Washington; for effecting objects which the revenue of the city should effect, but which the ordinary revenue is unequal to. It is to raise an extraordinary revenue for the city of Washington. Virginia, in which state it has been attempted to raise a part of this extraordinary revenue, has no more interest in the penitentiaries and city halls of Washington than in those of Baltimore.

Our opponents must maintain, that this is an act of congress authorizing the sale of lottery-tickets in Virginia: for if it is not, the question is at an end. I call upon them to show a power granted to congress, which the sale of lottery-tickets in a state is an appropriate means of executing. Suppose, that congress had passed an act expressly authorizing P. & M. Cohen to vend lottery-tickets in Virginia, for the purpose of raising a fund to diminish the taxes laid by the corporation of Washington on the inhabitants, for their own benefit—would such an act have been constitutional? Which of the enumerated powers of congress would such an act have been an appropriate means of carrying into effect? Suppose, that congress had considered lotteries as pernicious gambling—could they have prohibited the sale of lottery-tickets in the states? It will be admitted, that they could not. And if they cannot prohibit the sale of tickets in a state, in is contended, that they cannot authorize such a sale. Let us suppose, that congress have passed an act authorizing the sale of *lottery-tickets in the states, for the pur- *335] pose of raising money to build a city hall in the city of Washington —is such an act within the constitutional powers of congress? Is it a mode of laying and collecting taxes? or is it a mode of borrowing money? And is it for the purpose of paying the debts or providing for the general welfare of the United States? Should it even be said, that this lottery is a tax, or

a mode of borrowing money, yet the tax is laid, or the money borrowed, not by and for the United States, but by the corporation for the city of Washington.

Congress have two kinds or grades of power: 1. Power to legislate over the states in certain enumerated cases. 2. Power to legislate over the ten miles square, and the sites of forts and arsenals, in all cases whatsoever. These powers, so very dissimilar, should be kept separate and distinct. The advocates of the corporation confound them. They pass the act of congress, by the power to legislate over the ten miles square, unlimited as to objects, but confined within the lines of the district, and they extend its operations over the states, by the power to legislate over them, limited as to objects, but co-extensive with the Union. The act incorporating the city of Washington was certainly not passed to carry into execution any power of congress, other than the power to legislate over the district of Columbia. If the clause conferring power to legislate in all cases over the ten miles square, had been omitted, could congress establish lotteries? Could an act establishing a lottery be ascribed to any of the specific *powers, in the execution of which congress may legislate over all the states? [*336

If the act authorizing a lottery is justified by the powers which extend to the states, there is no occasion to rest it on the power to legislate in all cases over Columbia. And if it is not justified by the powers which extend to the states, it cannot be justified by that power which, being limited to the district, does not extend to the states. If the act of congress has effect in Virginia, it is a law over the states, and must have been passed by a power to legislate over the states. Now, a law over the states cannot be passed, by a power to legislate over Columbia. But it is the power to legislate over Columbia, that has been exercised. Therefore, no law has been passed over the states; consequently, no law has been passed having effect in the states. It is, then, by the power to legislate over the ten miles square, that the authority to sell lottery-tickets in the states must be defended.

The power to legislate over the ten miles square, is strictly confined to its limits, and does not authorize the passage of a law for the sale of lottery tickets in the states. Virginia Debates, vol. 2, p. 21, 29. When congress legislate exclusively for Columbia, they are restrained to objects within the district. An act of congress, passed by the authority to legislate over the district, cannot be the supreme law in a state; for if, by the power to legislate, in all cases whatsoever, over the district, congress may legislate over the states, it will necessarily *follow that congress may legislate over the states in all cases whatsoever. [*337

The constitution gives to congress power to exercise exclusive legislation over the ten miles square, in all cases whatsoever. In the case of *Loughborough* v. *Blake*, 5 Wheat. 317, the court said, that "on the extent of these terms, according to the common understanding of mankind, there can be no difference of opinion." What is the opinion in which all mankind will unite as to the extent of those terms? Not an opinion, that the laws passed in legislating over the district, shall operate in the states. The opinion in which it is presumed that mankind generally will unite, is, that all acts of congress, not contrary to reason or the restrictions of the constitution, passed in legislating over the district, shall operate exclusively within its limits, but not at all beyond them. The power given to congress, is power to legislate exclusively in all cases over the district. What are the appro-

priate means of executing that power? To frame a code of laws having effect within the district only; to establish courts having jurisdiction within the district only, &c. But what are the powers claimed? Power to repeal the penal laws of a state; power to pass laws "that know no locality in the Union;" laws "that can encounter no geographical impediments;" laws "whose march is through the Union." I admit, that all the powers of congress, except this of exclusive legislation in all cases, extend throughout the
*338] Union; but this, by *the most express words, and from its nature, is local. Yet, in this case, by a power to legislate for a district ten miles square, congress is made to assume a power to legislate over the whole Union; and because an act is authorized to be done in Columbia, over which congress may legislate in all cases whatsoever, it is, therefore, to be a legal act, when done in a state, the laws of such state notwithstanding.

The power given to congress to legislate over the district, in all cases whatsoever, is precisely of the same extent as if this had been the only power conferred on them. Now, had it been the only power conferred on congress, could there have arisen any doubt about its extent? When congress legislate for the district of Columbia, they are a local legislature. The authority to legislate over the district, in all cases whatsoever, is as strictly limited as is that of the legislature of Delaware, to legislate only over Delaware. The acts of the local legislature have no operation beyond the limits of the place for which they legislate.

If this clause confers on congress any legislative power over the states, it must be of the kind granted. But the power granted is exclusive, and no one will contend, that an exclusive power to legislate over the states is conferred on congress. The power given extends to all cases whatsoever, and no one will contend, that congress have power to legislate over the states in all cases whatsoever. The grant is of an exclusive power in all cases over ten miles square. The claim set up is a claim of paramount power over the whole United States.

*Any single measure which congress may adopt, must be justified
*339] by some single grant of power, or not at all. No combination of several powers can authorize congress to adopt a single measure which they could not adopt, either by one or another of those powers, combined with the power to pass necessary and proper laws for carrying such single power into effect.

There is no repugnancy between the acts of Virginia against selling lottery-tickets within that state, and the power granted to congress to legislate over the district of Columbia. There can be none; for the line of the district completely separates them. The act passed by congress is confined to the district; the act of the state legislature is confined to the state: how can there be any repugnancy? A power to legislate over Virginia cannot come into collision with a power to legislate over the district, unless those to whom they are intrusted pass the limits of their jurisdiction. It is not alleged, that the legislature of Virginia have passed the limits of their jurisdiction. If congress have authorized a lottery to be drawn within the city, the sale of tickets, and the drawing of the lottery are thereby legalized within the city. Congress have never said, that lottery-tickets may be sold in the states. Those tickets may be sold, in any place where the local laws will admit. But that that they should be sold in Virginia, where such a sale

is unlawful, congress have neither enacted, nor had power to enact. It is said, that without a power to sell the tickets, the power to draw the lottery *is ineffectual. I answer, if a power to sell lottery-tickets necessarily follows a power to draw lotteries, as the lotteries must be drawn in [*340 the city, so there the tickets must be sold. The authority to sell is the authority to draw; and as the principal authority (to draw) is confined to the city, so is the consequent authority to sell. Can the corporation draw lotteries in the states? If not, where is their authority to sell, where they have no authority to draw? If the seller of lottery-tickets is the agent of the corporation, then they not clothe him with no legal authority to be executed in a state, contrary to the law of the state. The corporation must sell their tickets, where they have authority, or where they are permitted to sell. If the seller was a purchaser of tickets, and desires to sell again, the city has no interest in that subsequent sale; and the purchaser must sell, where he is permitted to sell. Why should the owners of these tickets have an exclusive privilege in Virginia, to sell their tickets, contrary to the laws of the land?

It has been, in effect, maintained, that congress may not only themselves legislate over the Union, but that they may exercise this power by substitute. Power to legislate over a state must be derived from the people, and cannot be transferred. If the power to legislate over the city may be vested in the representatives of the people thereof; yet, surely, a power to legislate over the states cannot be transferred to the representatives of the people of the city. When congress pass an act which shall have the *effect of law in the states, it must be passed in pursuance of power [*341 delegated to them by the people of the states. The constitution declares, that "all legislative power herein granted shall be vested in a congress of the United State." This vested power cannot be transferred to a corporation. It must be exercised by congress, and in the manner prescribed by the constitution. Legislative power is not, in its nature, transferrible. The people do not consent to obey any laws, except those passed by their representatives, according to the constitution. They who legislate for the nation must represent the nation. The corporation of Washington cannot receive power to legislate over the people of the United States. To incorporate the people of the city of Washington, with power to make by-laws for the government and police of the city, is no transfer of power. It is an authority to exercise an inherent power. There is in every body of people a natural inherent right to legislate for themselves; but small societies must have permission or authority, from the great societies, of which they form a part. Thus, congress authorized the people of Missouri to form a constitution, and govern themselves. Is this a transfer of power? No, certainly: it is an authority to exercise the inherent power of the people in governing themselves. Congress may authorize the people of Washington, or the people of Arkansas, to govern themselves; but it was never heard, until this case arose, that a local corporation, authorized by congress to legislate for themseves, could pass laws of *obligation throughout [*342 the Union—laws paramount in the states to the laws of the states.

It seems to have been considered by the advocates of the corporation, that what congress authorizes to be done, that they do. This is not so. Congress authorized Missouri to form a constitution; but congress did not, therefore, form the constitution of Missouri. The corporation of Washing-

ton were left free to act on the subject of lotteries. They were empowered to authorize the drawing of lotteries, and to pass the laws necessary and proper for carrying that power into effect. The law establishing the lottery in question, is the by-law of the corporation. The by-laws of the city of London are not acts of parliament, nor laws of the realm; neither have the by-laws of the city of Washington any force beyond the limits of the city.

Congress have not said, that the lottery-tickets should be sold in the states. They have not even said, that there shall be a lottery. Congress empowered the corporation to pass the law, and the corporation passed it; the ordinance of the corporation establishing a lottery, is no more a part of the act of congress, than the territorial laws now passing in Arkansas will be parts of the acts of congress. It is not an act of congress, under which these tickets have been sold in Virginia, contrary to the laws of that state; it is a by-law of the corporation of Washington that gave existence to this lottery. An act of congress does not apply to the case; and therefore, this court have no jurisdiction under the judiciary act.

*343] *The powers of the corporation of Washington are confined within the limits of the city. Being a corporation for government, all within the corporate limits are subject to them; but no others. 1 Bac. Abr. 544; 2 Com. Dig. 154; 3 Mod. 159; 1 Nels. Abr. 415; T. Jones 144; 1 Nels. Abr. 413; 3 Yeates 478. They cannot make a by-law affecting even their own members, beyond the corporate limits; they have no power to pass a law authorizing the sale of lottery-tickets in Georgetown, much less have they the power to authorize the sale of them in a state, contrary to its laws. This by-law either extends beyond the limits of the city, or it does not. If it does, it is void: and if it does not, it can have no effect in Virginia. The by-laws of a corporation are to be subject to the laws of the land, even within their limits. The laws of the states are the laws of the land, within their limits, on subjects not committed to congress. To those laws, all corporate laws are subject. 1 Bac. Abr. 544–5, 551; Hob. 211; 5 Co. 63; 8 Ibid. 126. But there cannot be that kind of collision between by-laws of the corporation of Washington and state laws, as between the by-laws of the corporation of the city of London, and the laws of England. As the by-laws of London may come in collision with the laws of England, but cannot come in collision with the laws of Ireland and Scotland, in those

*344] countries; so the by-laws of the corporation of *Washington may come in collision with the laws of the United States in the ten miles square; but can never come in collision with the laws of a state, for they cannot have operation in a state.

The court will maintain the powers of congress, as granted by the people, and for the purposes for which they were granted by the people; and will, if possible, to preserve harmony, prevent the clashing of federal and state powers. Let each operate within their respective spheres; and let each be confined to their assigned limits. We are all bound to support the constitution. How will that be best effected? Not by claiming and exercising unacknowledged power. The strength thus obtained will prove pernicious. The confidence of the people constitutes the real strength of this government. Nothing can so much endanger it, as exciting the hostility of the state governments. With them it is, to determine how long this govern-

ment shall endure. I shall conclude, by again reminding the court of a declaration of their own, that, "no power ought to be sought, much less adjudged, in favor of the United States, unless it be clearly within the reach of their constitutional charter."

D. B. Ogden, contrà, stated: 1. That he should not argue the general question whether this court had an appellate jurisdiction, in any case, from the state courts, because it had been already solemnly adjudged by this court, in case of *Martin* v. *Hunter*, 1 Wheat. 304.

*2. This is a case arising under the constitution and laws of the Union, and therefore the jurisdiction of the federal courts extends [*345 to it, by the express letter of the constitution; and the case of *Martin* v. *Hunter* has determined, that this jurisdiction may be exercised by this court in an appellate form. But it is said, that the present case does not arise under the constitution and laws of the United States, because the legislative powers of congress, as respects the district of Columbia, are limited and confined to that district. But if the law be thus limited in its operation, how is this to be discovered, but by examining the constitution? and how is this examination to be had, but by taking jurisdiction of the case? In the whole argument, constant reference was had, and necessarily had, to the constitution, in order to decide the case between the parties, upon this question of jurisdiction; and yet it is said to be a case not arising under the constitution. It is also contended, that it is not an act of congress, the validity of which is drawn in question in the present case; but an ordinance of the corporation of the City of Washington; and the maxim of *delegatus non potest delegare*, is referred to, in order to show that the corporation cannot exercise the legislative power of congress. Is it meant by this, to assert that congress cannot authorize the corporation to make by-laws? Even the soundness of this position cannot be determined, without examining the constitution and acts of congress, and adjudging upon their interpretation. The whole district of Columbia, and all its subordinate municipal corporations, are the creatures *of the constitution; and the acts of congress, relative to it, must be determined by the constitution, [*346 and must be laws of the United States. Are not the extent of the powers vested in congress, and the manner in which these powers are to be executed, necessarily, questions arising under the constitution, by which the powers are given? How can the question, whether this is a lottery authorized by an ordinance of the corporation, and not by a law of the United States, be decided, but by a reference to the laws of the Union, and the constitution under which they were enacted? The plaintiffs in error set up a right to sell lottery-tickets in the state of Virginia, under the constitution and laws of the United States, and the state denies it. By whom is this question to be decided? It is a privilege or exemption, within the very words of the judiciary act, set up or claimed, by the party, under the constitution and laws of the Union. It is immaterial for the present purpose, whether the claim be well or ill founded. The question is, whether the party setting up the claim, is to be turned out of court, without being heard upon the merits of his case. If you have not jurisdiction, you cannot hear him upon the merits. Upon this motion to quash the writ of error, you can only inquire into the jurisdiction, and cannot look into the merits;

but you are asked to turn the party out of court for defect of jurisdiction, and without giving him an opportunity to show, that by the laws and constitution of the Union, he is entitled to the privilege and exemption which he
*347] claims. It is no answer to say, that *any individual may allege that he has such a privilege, in order to remove his case from the state court to this; because no injury would ensue, as the case would be sent back with damages: and even if there might be some inconveniences, from improperly bringing causes here, they ought rather to be submitted to, than to hazard the possible violation of the constitutional rights of a citizen.

3. It is no objection to the exercise of the judicial powers of this court, that the defendant in error is one of the states of the Union. Its authority extends, in terms, to *all* cases arising under the constitution, laws and treaties of the United States; and if there be any implied exceptions, it is incumbent on the party setting up the exception to show it. In order to except the states, it is said, that they are sovereign and independent societies, and therefore, not subject to the jurisdiction of any human tribunal. But we deny, that since the establishment of the national contitution, there is any such thing as a sovereign state, independent of the Union. The people of the United States are the sole sovereign authority of this country. By them, and for them, the constitution was established. The people of the United States, in general, and that of Virginia, in particular, have taken away from the state governments certain authorities which they had before, so that they are no longer sovereign and independent, in that sense which exempts them from all coercion by judicial tribunals. Every state is limited in its powers by the provisions of the constitution; and whether a state
*348] passes those limits, is a question *which the people of the Union have not thought fit to trust to the state legislatures or judiciaries, but have conferred it exclusively on this court. The court would have the jurisdiction, without the word *state* being mentioned in the constitution. The term "*all* cases," means all, without exceptions; and the states of the Union cannot be excepted, by implication, because they have ceased to be absolutely sovereign and independent. The constitution declares that every citizen of one state, shall have all the privileges of the citizens of every other state. Suppose, Virginia were to declare the citizens of Maryland aliens, and proceed to escheat their lands, by inquest of office; the party is without a remedy, unless he can look for protection to this court, which is the guardian of constitutional rights. Because the state, which is the wrongdoer, is a party to the suit, is that a reason why he should not have redress? By the original text of the constitution, there is no limitation in respect to the character of the parties, where the case arises under the constitution, laws and treaties of the Union: and the amendment to the constitution respecting the suability of states, merely applies to the other class of cases, where it is the character of the parties, and not the nature of the controversy, which alone gives jurisdiction. The original clause giving jurisdiction on account of the character of the parties, as aliens, citizens of different states, &c., does not limit, but extends, the judicial power of the Union. The amendment applies to that alone. It leaves a suit between a state and
*349] a citizen, arising under the contitution, laws, &c., *where it found it; and the states are still liable to be sued by a citizen, where the jurisdiction arises in this manner, and not merely out of the character of the

parties. The jurisdiction in the present case arises out of the subject-matter of the controversy, and not out of the character of the parties; and, consequently, is not affected by the amendment.

But it is said, that admitting the court has jurisdiction, where a state is a party, still, that jurisdiction must be original, and not appellate; because the constitution declares, that in cases in which a state shall be party, the supreme court shall have original jurisdiction, and in all other cases, appellate jurisdiction. The answer is, that this provision was merely intended to prevent states from being sued in the inferior courts of the Union; that the supreme court is to have appellate jurisdiction in all cases arising under the constitution, laws and treaties of the United States; that where, in such a case, a state sues in its own courts, it must be understood as renouncing its privilege or exemption, and to submit itself to the appellate power of this court; since, if the jurisdiction in this class of cases be concurrent, it cannot be exercised originally in the supreme court, wherever the state chooses to commence the suit in its own courts. Nor is there any hardship in this construction. The state cannot be sued in its own courts; but if it commences a suit there against a citizen, and a question arises in that suit, under the constitution, laws and treaties of the Union, there must be power in this court to revise the decision of the state court, in order to *produce [*350
uniformity in the construction of the constitution, &c. So, if a consul sues in the circuit court, this court has appellate jurisdiction, although the consul could not be sued in the circuit court. And if the United States, who cannot be sued anywhere, think proper to use in the district or circuit court, they are amenable to the appellate jurisdiction of this court. Even granting, therefore, that a state cannot be sued in any case; the state is not sued here: she has sued a citizen, in her own tribunals, who implores the protection of this high court to give him the benefit of the constitution and laws of the Union. The jurisdiction does not act on the state; it merely prevents the state from acting on a citizen, and depriving him of his constitutional and legal right.

It is true, there are some cases, where this court cannot take jurisdiction, though the constitution and laws of the Union are violated by a state. But wherever a case is fit for judicial cognisance, or wherever the state tribunals take cognisance of it, whether properly or not, the appellate power of this court may intervene, and protect the constitution and laws of the Union from violation. Doubtless, a state might grant titles of nobility, raise and support armies and navies, and commit many other attacks upon the constitution, which this court could not repel. But if these attacks were made by judicial means, or if judicial means were used to compel obedience to these illegal measures, the authority of this court could, and would, intervene. Nor can *this argument apply to a case, which is entirely [*351
judicial in its very origin, and therefore, steers clear of the supposed difficulty of vindicating the constitution and laws of the Union from violation in other cases which may be imagined.

Neither is this a criminal case. The offence in question is not made a misdemeanor by the law of Virginia. That law merely imposes a penalty, which may be recovered by action of debt, or information, or indictment. The present prosecution is a mere mode of recovering the penalty. But suppose it is a criminal case. The constitution declares, that the court shall

have jurisdiction in *all* cases arising under it, or the laws and treaties of the Union; which includes criminal as well as civil cases; unless, indeed, congress has refused jurisdiction over the former in the judiciary act, which we insist it has not.

Pinkney, on the same side, argued: 1. That there was no authority produced, or which could be produced, for the position on the other side, that this court could not, constitutionally, exercise an appellate jurisdiction over the judgments or decrees of the state courts, in cases arising under the constitution, laws and treaties of the Union. The judiciary act of 1789, c. 20, contains a contemporaneous construction of the constitution in this respect, of great weight, considering who were the authors of that law; and which has been since confirmed by the repeated decisions of this court, constantly *352] exercising *the jurisdiction in question. *Clerke* v. *Harwood*, 3 Dall. 342; *Gordon* v. *Caldcleugh*, 3 Cranch 268; *Smith* v. *Maryland*, 6 Ibid. 286; *Matthews* v. *Zane*, 4 Ibid. 382; *Owings* v. *Norwood's Lessee*, 5 Ibid. 344; *Martin* v. *Hunter*, 1 Wheat. 304; *Otis* v. *Walter*, 2 Ibid. 18; *Miller* v. *Nicholls*, 4 Ibid. 311; *Gelston* v. *Hoyt*, 3 Ibid. 246; *McIntire* v. *Wood*, 7 Cranch 505; *Slocum* v. *Mayberry*, 2 Wheat. 1; *McCulloch* v. *Maryland*, 4 Ibid. 316. This legislative and judicial exposition has been acquiesced in, since no attempt has ever been made to repeal the law, upon the ground of its repugnancy to the constitution: *transiit in rem judicatam.* But even before the constitution was adopted, and whilst it was submitted to public discussion, this interpretation was given to it by its friends, who were anxious to avoid every objection which could render it obnoxious to state jealousy. But they well knew, that this interpretation was unavoidable, and the authors of the celebrated Letters of Publius, or the Federalist, have stated it in explicit terms.(*a*)

(*a*) "Here another question occurs—what relation would subsist between the national and the state courts in these instances of concurrent jurisdiction? I answer, that an appeal would certainly lie from the latter to the supreme court of the United States. The constitution, in direct terms, gives an appellate jurisdiction to the supreme court, in all the enumerated cases of federal cognisance, in which it is not to have an original one; without a single expression to confine its operation to the inferior federal courts. The objects of appeal, not the tribunals from which it is to be made, are alone contemplated. From this circumstance, and from the reason of the thing, it ought to be construed to extend to the state tribunals. Either this must be the case, or the local courts must be excluded from a concurrent jurisdiction in matters of national concern, else the judiciary authority of the Union may be eluded, at the pleasure of every plaintiff or prosecutor. Neither of these consequences ought, without evident necessity, to be involved; the latter would be entirely inadmissible, as it would defeat some of the most important and avowed purposes of the proposed government, and would essentially embarrass its measures. Nor do I perceive any foundation for such a supposition. Agreeably to the remark already made, the national and state systems are to be regarded as *one whole*. The courts of the latter will, of course, be natural auxiliaries to the execution of the laws of the Union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of national justice, and the rules of national decisions. The evident aim of the plan of the convention is, that all the causes of the specified classes shall, for weighty public reasons, receive their original or final determination in the courts of the Union. To confine, therefore, the general expressions, giving appellate jurisdiction to the supreme courts,

*But it is said, that the jurisdiction of the state courts is concurrent with those of the Union, over that class of cases arising under the constitution, laws and treaties of the United States. This, however, is not of absolute necessity, but at the discretion of congress, who may restrain and modify this concurrent jurisdiction, or render it exclusive in the federal tribunals, at their pleasure. The supremacy of the national constitution and laws, is a fundamental principle of the federal government, and would be entirely surrendered to state usurpation, if congress *could not, at its [*354
option, invest the courts of the Union with exclusive jurisdiction over this class of cases, or give those courts an appellate jurisdiction over them from the decisions of the state tribunals. Every other branch of federal authority might as well be surrendered. To part with this, leaves the Union a mere league or confederacy of states, entirely sovereign and independent. This particular portion of the judicial power of the Union is indispensably necessary to the existence of the Union. It is an axiom of political science, that the judicial power of every government must be commensurate with its legislative authority: it must be adequate to the protection, enforcement and assertion of all the other powers of the government. In some cases, this power must necessarily be directly exercised by the federal tribunals, as, in enforcing the penal laws of the Union. But in other cases, it is merely a protecting power, and cannot, from the very nature of things, be exercised, in the first instance, by the courts of the Union. Such are suits between citizen and citizen on contract. Here, the state courts must necessarily have original jurisdiction; but if the party defendant sets up a defence, founded (for example) upon an act of the state legislature, supposed to impair the obligation of contracts, and the decision of the state court is in favor of the law thus set up, the judicial authority of the Union must be exerted over the cause, or that clause of the constitution which prohibits any state from making a law impairing the obligation of contracts is a dead letter. There is nothing in the constitution, which prohibits *the exercise of such a controlling authority. On the contrary, it is [*355
expressly declared, that where the case arises under the constitution and laws of the Union, the judicial power of the Union shall extend to it. It is the case, then, and not the *forum* in which it arises, that is to determine whether the judicial authority of the Union shall be exercised over it. But there is a class of cases which must necessarily originate in the state tribunals, because it cannot be known, at the time the suit is commenced, whether it will or will not involve any question arising under the constitution and laws of the Union. Over this class of cases, then, the courts of the Union must have appellate jurisdiction. The appellate power of this court is extended by the constitution to all cases within the judicial authority of the Union, and not included within the original jurisdiction of this court. Its appellate power, so far as respects the constitution, depends, then, on two questions only: is the case within the judicial power of the Union? and is it within the original cognisance of this court? The first question being answered affirmatively, and the second negatively, the appellate power, under the constitution, is completely established in any given case.

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to appeals from the subordinate federal courts, instead of allowing their extension to the state courts, would be to abridge the latitude of the terms, in subversion of the intent, contrary to every sound rule of interpretation." No. 33.

But the power of removing this class of causes, *pendente lite*, is also denied; and it is said, that the authority to remove, before judgment, a suit brought in the state court, into the federal court, is repugnant to the constitution. In *Martin* v. *Hunter*, 1 Wheat. 319, the argument was the other way, and it was insisted, that congress ought to have given to this court the
*356] *power of evoking this description of causes from the state tribunals, the moment any question arose respecting the constitution and laws of the Union, in order to avoid the offensive exercise of an appellate jurisdiction over the state courts. *Quacunque via data*—it is immaterial; for the power of removal, if it be not unconstitutional, is an appellate power, and analogous to a writ of error. If it be unconstitutional, the necessity for the controlling power of a writ of error, is only the more manifest. Take away both, and the constitution, laws and treaties of the Union lie at the mercy of the state judicatures.

Again, it is said, that the judges of the state courts take an oath to support the constitution of the Union, and the laws and treaties of the Union are their supreme law: and it is inferred, that the constitution reposes implicit confidence in them, and there ought to be no revision of their judgments. But it may be asked, if the constitution reposes this implicit confidence in the state tribunals, why does it authorize the establishment of federal courts, which, upon this supposition, would be wholly useless? And why are the members of the state legislatures and executives required to take the same oath? They are bound to support the constitution, by the same solemn sanctions, and yet their acts may confessedly be set aside by the national judicatures, as being repugnant to that constitution. The actual constitution of this country is not a government of confidence; it is a scheme
*357] of government *conceived in the spirit of jealousy, and rendered adequate to all its own purposes, by its own means: and the judicial power of the Union is the principal means of giving effect to it. This it is which distinguishes it from the confederation. Experience has shown the necessity and wisdom of this provision. If the state courts may adjudicate conclusively for the Union, why may not the state legislatures legislate for it; and where is the utility of distinct and appropriate powers, if it cannot maintain them from violation? In *Martin* v. *Hunter*, 1 Wheat. 349, the court considered this argument fully, and thought it operated the other way. The care which the constitution takes to make the state courts respect it, and the laws and treaties made under it, proves, that it was supposed, that cases might come before them by original suit, which would involve the rights and interests of the Union, and lay a foundation for appeal or revision. This was anticipated, and the constitution endeavors to make the first decision correct, by the sanction of an oath. But it does not, improvidently, rely upon that alone. The judges of the inferior courts of the Union take the same oath, and lie under the same obligations; but they are not the less subject to the appellate jurisdiction of the supreme court.

But it is asked, can congress grant an appeal from the district or circuit court, to a state court? The question is answered in the negative, and it is
*358] thence inferred, that they cannot grant an appeal *from a state to a federal court. This seems to imply, that you can do nothing unless you can do its opposite. Such a proposition would repeal all the physical and moral laws of the universe. As well might it be asked, can congress

grant an appeal from the supreme to the district court; and because there is something absurd in the idea of an appeal from a superior to an inferior tribunal, it would be inferred, that the opposite appeal could not be granted. But until the relation of supreme and subordinate is destroyed, the state laws and judicatures must be considered as subordinate to those of the Union, in all cases within the scope of its powers and jurisdiction. Such was once the doctrine asserted by Virginia herself, and to which it is confidently believed she will revert, in a moment of calmer reflection. (*a*)

(*a*) The learned counsel here read the following resolutions of the legislature of Virginia. Extract from the journal of the senate of the commonwealth of Virginia, begun and held at the capitol in the city of Richmond, the 4th day of December 1809.

Friday, January 26th, 1810. "Mr. Nelson reported from the committee to whom was committed the preamble and resolutions on the amendment proposed by the legislature of Pennsylvania, to the constitution of the United States, by the appointment of an impartial tribunal to decide disputes between the state and federal judiciary, that the committee had, according to order, taken the said preambles and resolutions under their consideration, and directed him to report them, without any amendment. And on the question being put thereupon, the same were agreed to unanimously by the house, as follows: The committee to whom was referred the communication of the governor of Pennsylvania, covering certain resolutions of the legislature of that state, proposing an amendment to the constituion of the United States, by the appointment of an impartial tribunal to decide disputes between the state and federal judiciary, have had the same under their consideration, and are of opinion, that a tribunal is is already provided by the constitution of the United States, to wit, the supreme court, more eminently qualified from their habits and duties, from the mode of their selection, and from the tenure of their offices, to decide the disputes aforesaid, in an enlightened and impartial manner, than any other tribunal which could be created. The members of the supreme court are selected from those in the United States who are most celebrated for virtue and legal learning, not at the will of a single individual, but by the concurrent wishes of the president and senate of the United States; they will, therefore, have no local prejudices and partialities. The duties they have to perform lead them necessarily to the most enlarged and accurate acquaintance with the jurisdiction of the federal and several state courts, together with the admirable symmetry of our government. The tenure of their offices enables them to pronounce the sound and correct opinions they may have formed, without fear, favor or partiality. The amendment to the constitution, proposed by Pennsylvania, seems to be founded upon the idea, that the federal judiciary will, from a lust of power, enlarge their jurisdiction, to the total annihilation of the jurisdiction of the state courts; that they will exercise their will, instead of the law and the constitution. This argument, if it proves anything, would operate more strongly against the tribunal proposed to be created, which promises so little, than against the supreme court, which, for the reasons given before, have everything connected with their appointment, calculated to insure confidence. What security have we, were the proposed amendment adopted, that this tribunal would not substitute their will and their pleasure in place of the law? The judiciary are the weakest of the three departments of government, and least dangerous to the political rights of the constitution. They hold neither the purse nor the sword; and even to enforce their own judgments and decrees, must ultimately depend upon the executive arm. Should the federal judiciary, however, unmindful of their weakness, unmindful of the duty which they owe to themselves and their country, become corrupt, and transcend the limits of their jurisdiction, would the proposed amendment oppose even a probable barrier to such an improbable state of things? The creation of a tribunal, such as is proposed by Pennsylvania, so far as we are enabled to form an idea of it, from the description giving in the resolutions of the legislature of that state, would, in the opinion of your committee, tend rather to invite, than pre-

*2. It is further contended on the other side, that this court has no jurisdiction of the present case, because the writ of error presents no
*360] question arising *under the constitution or laws of the United States. And to show this, it is said, that the record speaks only of
*361] the validity of the act of congress, *and nobody denies its validity, and therefore, no question arises under an act of congress. But the words of the judiciary act are pursued by this writ of error, as they always have been in other cases. It is the validity of the act of congress, and the validity of the act of Virginia, as compared with it, which are drawn into question. The court below decided against the first, and in favor of the last, to the full extent of the case. The validity of the act of congress, means the effect attributed to it by the defendant, who sets it up as a defence against so much of the act of the state as inflicts a penalty upon him for doing what the act of congress authorizes. The defendant relies upon the act of congress, as creating an exception in favor of his case, out of the act of Virginia. He says it is valid, or available, or efficacious, to create such an exception. That was the question which the record shows was before the court below; and the court decided, that it was not so valid, or available or efficacious. Whether it is so or not, is the question which the writ
*362] of error presents for inquiry; and it is such a question as the *appellate power of this court can deal with. But the question on this motion to dismiss the writ of error, is not, whether the act of congress is valid as against the act of Virginia; but whether that question is presented by the record, so that this court can determine it, after it has concluded to entertain the writ of error. It is the claim of a right, privilege or exemption under the statute of the United States, which gives the jurisdiction.(a) The decision upon that claim, as it appears upon the record, is the exercise of the jurisdiction. That the claim to exemption appears upon the record,

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vent a collison between the federal and state courts. It might also become, in process of time, a serious and dangerous embarrassment to the operation of the general government.

Resolved, therefore, that the legislature of this state do disapprove of the amendment to the constitution of the United States proposed by the legislature of Pennsylvania.

Resolved, also, that his excellency the governor be, and is hereby requested to transmit forthwith, a copy of the foregoing preamble and resolutions to each of the senators and representatives of this state, in congress, and to the executives of the several states in the Union, and request that the same be laid before the legislatures thereof."

Extract from the journal of the house of delegates of the commonwealth of Virginia:

"Tuesday, January 23d, 1810. The house according to the order of the day, resolved itself into a committee of the whole house on the state of the commonwealth, and after some time spent therein, Mr. Speaker resumed the chair, and Mr. Robert Stanard reported, that the committee had, according to order, had under consideration the preamble and resolutions of the select committee to whom were referred that part of the governor's communication which relates to the amendment proposed to the constitution of the United States, by the legislature of Pennsylvania, had gone through the same, and directed him to report them to the house without amendment; which he handed in at the clerk's table, and the question being put on agreeing to the said preamble and resolutions, they were agreed to by the house, unanimously."

(a) Wheat. Dig., tit. Const. Law, V, b; 186.

cannot be denied in this case more than any other. The claim may even be an absurd one: but this court cannot be called upon, on a motion to dismiss the writ of error, to condemn it as such. All argument upon the sufficiency of the claim is premature, so long as it is *sub judice*, whether the court can examine its sufficiency.

But it is said, that the question does not arise under any statute of the United States, but under a mere by-law of the city of Washington; and that the case involves nothing but that by-law: and it is said to be absurd, to call a by-law of the city of Washington, a law of the United States. It is immaterial, whether it be so or not. The by-law is the execution of a power given by a law of the United States. The effect of the execution of that power, involves the effect of the law; and although the execution of the power is not a law of the United *States, yet that which gives the power, is. The question, therefore, is not, what is the mere effect [*363 of the execution of the power, in the abstract, or unconnected with the law which gives it, but what is the effect of the power, by force of the law which gives it: and that question compels you to mount up to the constitution itself.

The course of the inquiry will then be: 1. What has the party done? and what is the immediate authority under which he did it? 2. What is the nature and extent of that authority? what its qualities under the law which gave it, and the constitution under which that law was passed?

If an officer of the United States does any act for which a state court calls him to account, and he relies in his defence upon the authority, real or supposed, of a statute of congress, his act is not a law of the United States; but his defence is referred to the effect and validity of a law of the United States, and that is again referred to the constitution, which is the paramount law. The last act done need not be a law of the United States. It is sufficient, if it is attempted to be justified, or its consequences maintained, under a law of the United States, which it is alleged gave to it a protecting power in the case before the court.

It is, however, asserted, that the constitution gives jurisdiction only in cases arising under it, or the laws or treaties of the United States; and that this case does not arise under a law of the United States, because the act of congress now in question is not a law of the United States. An act of the congress, *in its capacity of local sovereign of the district of Columbia, [*364 is said not to be a law of the United States. But whose law, then, is it? The United States in congress assembled, are the local sovereigns of the district, and it is by them that this law is passed. Is it less a law of the United States, because it does not operate directly upon the Union at large? A statute is not a law of the United States, on account of the subject on which it acts being limited or unlimited. It is a law of the United States, because it is passed by the legislative power of the United States. The legislative authority over the district of Columbia, is that of the Union. Its sphere is limited, but the power itself is even greater than the general federal power of the Union. It is the power of the people and the states combined, exerted upon their peculiar domain. It is the same congress which passes both description of laws. The question, whether the law operates beyond the district, is the question upon the merits hereafter to be discussed.

Again, it is said, that the by-law alone is in question, and not the act of

congress; because the by-law is not passed by virtue of the act of congress, but by virtue of the inherent power of the people of the district to govern themselves. The act of congress only calls this inherent power into action; and this inherent power, when so called into action, is the only power which this court can deal with. The fallacy of this argument consists in its confounding inherent power with an inherent capacity to receive power.

*365] The subordinate legislative power of the *territories and districts, which belong to the Union in full sovereignty, is not their power, but that their superior. But admit this abstract doctrine of inherent power: the question still recurs, what is the constitutional effect of this power being excited into action by the paramount power? The action of the inherent power will still depend upon the power by which it is set in motion; and what it can, or cannot do, under that impulse, is just the same question with the other.

It is also objected, that a law emanating from the local power of congress over the district of Columbia, cannot bind the Union. But whether it can or not is the very question to be determined, when the merits come to be discussed; which the writ of error gives authority to decide; and which cannot be decided, without entertaining the writ of error. The argument on the other side, proceeds in a vicious circle. It is asserted, that you must quash the writ of error, because you have no jurisdiction over the case or question. It is, then, said, that you must take jurisdiction of, and inquire into, the case and the question, in order that you may dismiss the writ of error: or, in other words, you have and you have not, jurisdiction over the case and question, and you ought to decide them, in order to see that you ought not to decide them. And here again, the supposed absurdity of the claim of protection, by the defendant on the record, against the act of Virginia, is urged, to authorize a refusal to inquire upon the writ of error, whether it is absurd or not.

*366] *3. The next ground of objection to the jurisdiction is, that the writ of error is itself a suit against a state, by a citizen of that or some other state. And Bac. Abr. tit. Error, L, is cited as an authority, to show that a release of all suits is a release of a writ of error. But even admitting that it may sometimes be technically called a suit, it is not such a suit as is contemplated by the constitution. A writ of error, where a party is to be restored to something, may be released, by a release of all suits or actions, because in this respect it resembles an action. But this writ of error is not a suit, because the party is not to be restored to anything. A reversal of the judgment below will leave things just as they were before the judgment. But the state of Virginia is not compelled to come into this court by the writ of error. A citation, or *scire facias ad audiendum errores*, is only notice to the state, leaving it at her option voluntarily to appear. It does not act compulsorily upon the state. It acts upon the court, which she has used as the instrument to enforce her law. A case is presented, by the interference of the judiciary of the state, for the interposition of the appellate power of this court. The object is to reverse the judgment, and that done, there is an end of the exercise of power. The United States are liable to the same coercion. They may be called before this court, in the same manner, and the judgments obtained in their favor may be reversed. And is it then derogatory to the sovereignty of a particular state, that its judg-

ments should be liable to be controlled in the same manner, in cases within the judicial *power of the Union? This control is exerted upon the [*367 judiciary—upon the judgments of the judiciary. The state is incidentally affected; but that has been already determined in this court to be immaterial.(a) Nor is this sort of control more exceptionable than that which is constantly exercised, in suits between private parties, over the acts of the state legislatures and executives, upon the same ground of their repugnancy to the constitution and laws of the Union.

If it be asked, whether you can give costs against the state, and enforce the payment; the answer is, that you cannot do so, in any case, upon a mere reversal of a judgment. And even if you could, in a case between private parties, is it any objection to the appellate jurisdiction of this court, where the United States are plaintiffs below, that you cannot award and enforce the payment of costs against them? It is not jurisdiction over the state of Virginia that is claimed, but over a qustion arising under the laws of that state, and over the judgments of her courts, construing those laws. This point is incidentally touched in *Martin* v. *Hunter*, 1 Wheat. 350, in considering the question as to removal of suits, before judgement, and it is there said by the court, that the remedy of removal of suits would be utterly inadequate to the purposes of the constitution, if it could act only on the parties, and not upon the state courts.

*4. Lastly, it is insisted, for the defendant in error, that this court [*368 has no jurisdiction in the present case, because a state is a party to the original controversy which the writ of error brings before the court: that the jurisdiction of this court, in all cases where a state is a party, is original, and therefore, it cannot have appellate jurisdiction in this case.

The obvious answer to this argument is, that the jurisdiction now claimed does not arise under that part of the constitution which gives original jurisdiction to the supreme court, in cases in which a state is a party; but the jurisdiction is asserted under that clause which gives the federal judiciary cognisance of all cases arising under the constitution, laws and treaties of the United States, without regard to the character of the parties. In this latter class of cases, the supreme court has appellate jurisdiction. In some of this description of cases, the jurisdiction could not be originally exercised. The penal laws of a state cannot be originally enforced, or enforced at all, by a judicature of the Union. They cannot, therefore, form the subjects of, or create subjects for, its original jurisdiction. The courts of the United States can here exert only a controlling or restraining power, for the protection of the rights of the Union, and this can only be done by appeal or writ of error. This view of the subject is taken in *Martin* v. *Hunter*. The court there says (1 Wheat. 341), "Suppose, an indictment for a crime in a state court, and the defendant should allege in his defence, that the crime was committed by an *ex post facto* act of the state; must not the state court, in *the exercise of a jurisdiction which has already rightfully [*369 attached, have a right to pronounce on the sufficiency and validity of the defence?

It would be extremely difficult, upon any legal principles, to give a negative answer to these inquiries. Innumerable instances of the same sort

(a) Wheat. Dig., tit. Const. Law, V, c, 211.

might be stated, in illustration of the position; and unless the state courts could sustain jurisdiction in such cases, this clause of the sixth article would be without meaning or effect, and public mischiefs of a most enormous magnitude would inevitably ensue." So, the court afterwards say, in the context of the passage before cited, speaking of the inadequacy of the remedy of removal of suits, to accomplish the purposes of the constitution, "in respect to criminal prosecutions, the difficulty seems admitted to be insurmountable," &c. 1 Wheat. 350. What difficulty? The difficulty of controlling them by the courts of the United States, without the aid of a writ of error, because those courts could take no original cognisance of this description of cases, and they could not be removed before judgment. As, then, the federal courts have no original jurisdiction of cases arising merely under the constitution, laws and treaties of the Union, it follows, that the clause of the constitution which speaks of cases in which a state shall be a party, does not apply to it: and the appellate power, now in question, is to be sought for in that part of the same article which declares, that the judi-
*370] cial power of the Union shall extend to all cases arising under the *constitution, laws and treaties of the Union, coupled with the subsequent provision, which declares, that in all cases to which that judicial power extends, this court shall have appellate, where it has not original jurisdiction, with such exceptions, and under such regulations as congress may prescribe. That it has appellate jurisdiction, in all cases arising under the constitution, laws and treaties of the United States, is established by the authority of the case of *Martin* v. *Hunter:* and that this appellate power is competent to control the state courts, is also proved by that case. 1 Wheat. 304. There is, therefore, no open question but this: does the fact of a state being a party prosecutor in the state court, make this case an exception, and take it out of the general rule? Upon the plain policy and purpose of the constitution, it does not. This jurisdiction has already been shown to be different in its nature from the original jurisdiction which was exercised over states, before the amendment of the constitution. But that other jurisdiction will go far to show, that there is nothing unnatural in giving appellate power over state courts, in cases where a state is a party plaintiff. The constitution authorized direct coercion over states or private citizens indifferently. The amendment has partly taken this away; but the spirit of the constitution is still manifested by the former provision. The same constitution also authorized appellate control over state courts; and is it natural, that it should condemn
*371] the same control, merely because *a state has obtained the judgment to be revised? The constitution had no delicacy with regard to states on this matter. It considered them as directly amenable, where original jurisdiction can be exerted. Why not empower its tribunals to affect their interests in an appellate form, by acting, not on the state, but on its courts, as unquestionably it does, in all cases where individuals are parties below? The appellate power is trifling, compared with the original, as it formerly stood: and a constitution which gave the last, could have no scruples about the first. The appellate control is respectful to the state sovereignties, compared with the original; and it stands upon high considerations of self-defence, upon grounds of constitutional necessity not applicable to the other. The suability of the states might have been dispensed with, and the constitution still be safe. But the judicial control of

the Union over state encroachments and usurpations, was indispensable to the sovereignty of the constitution — to its integrity — to its very existence. Take it away, and the Union becomes again a loose and feeble confederacy — a government of false and foolish confidence — a delusion and a mockery! Why is it, in cases, in which individuals are parties in a state court, that the judgment may be revised in this court? Because the judiciary of the Union ought to possess ample power to preserve the constitution, and laws and treaties of the Union, from violation by other judicatures. Its judicial powers should be commensurate with its other powers, and rights and prerogatives. They might else be evaded and *trampled under foot by judicatures in which the constitution does not confide. This high motive [*372 is as strong, at least, where a state is plaintiff or prosecutor in its own courts, as where it is not. Indeed, it is far stronger; for all the motives to judicial leanings and partialities here operate in their fullest force, though the state judges may not be conscious of their influence. The sovereignty of the state law — state pride — state interests — are here in paramount vigor, as inducements to error; and judicial usurpation is countenanced by legislative support and popular prejudice. Let the court look to the consequences of this distinction. A state passes a law repugnant to the national constitution. It gives a remedy in the name of an individual — a common informer. You may control this law, if the state judiciary acts upon it. But the state may avoid this (as it seems) by authorizing the remedy in its own name; and you thus lose your protecting jurisdiction over the subject, although you might still exercise it, as in the other case, in the inoffensive mode of confining your control to the state judiciary. The whole constitution of the Union might thus be overturned, unless force should be resorted to: and the object of the constitution was to avoid force, by giving ordinary judicial power of correction.

It has been said, that a sovereign state of the Union is not amenable to judicature, unless made so by express words, *eo nomine*. I deny this, as respects appellate jurisdiction, which acts, not on the state, but on its courts. The words of the constitution *are sufficiently express, and all reason [*373 is on that side: especially, since it is, or must be admitted, that these courts may be thus controlled, and the legislative power of the state be reached through them, and controlled also: and especially too, when the constitution has not scrupled, in other cases, to subject the states to direct control.

But it is contended, that there are cases arising under the constitution and laws of the Union, which, from their very nature, are not the subjects of judicial cognisance, and consequently, are exceptions out of the general grant of judicial power under the constitution; such as the prohibition to the states to grant titles of nobility, &c.; and that the present case may be such an exception. But the very supposition admits, that if the case in question is suited to the exertion of judicial power, it is not an exception: and the moment a state judiciary intervenes, judicial jurisdiction can, and ought to be, exerted. It is unnecessary to inquire, how the case must, in general, exist, in order to become the proper object of judicial cognisance; for here it does exist in a proper shape for that purpose. A state court has intervened, and the regular appellate power of this court may act. Nor does the proof of some exceptions, arising from necessity, establish other

exceptions, free from that necessity. Many unlawful things cannot be restrained by judicature: but does it follow, that where they can be restrained, they shall not?

Again, it is said, that the states may destroy the federal government at *374] their pleasure, merely by forbearing *to elect senators, and to provide for the election of a president and representatives, and that the authority of the Union is incompetent to coerce them. Such extreme arguments prove nothing to the present purpose: but suppose the states could not be coerced, in such a case, to do their duty, because no intervening court or agent is necessary to the accomplishment of such a desperate purpose, does this prove that you cannot defensively control active violations of the constitution or laws, when a controllable judicature or agent intervenes to perpetrate these violations?

It is also said, that this is a prosecution under a penal statute, and that criminal cases peculiarly belong to the domestic forum. The answer is, that so was the case of *Mc Culloch* v. *Maryland*, a *qui tam* action, under a penal law of that state, giving one-half of the penalty to the state, and the other half to the informer; yet this court did not consider the nature of the suit, or the circumstance of the state being a party, as forming a valid objection to the jurisdiction. 4 Wheat. 316. Nobody objects to a state enforcing its own penal laws: all that is claimed is, that in executing them, it should not violate the laws of the Union, which are paramount: *Sic utere tuo ut alienum non lædas.*

The other suppositions which have been stated of bills of attainder and *ex post facto* laws passed by the states, and attempted to be executed, but *375] decided by this court to be unconstitutional, and yet the *state courts persisting in carrying them into effect, even in capital cases, are too wide and extravagant, to illustrate any question which can ever practically arise.

March 3d, 1821. MARSHALL, Ch. J., delivered the opinion of the court.—This is a writ of error to a judgment rendered in the Court of Husting for the borough of Norfolk, on an information for selling lottery-tickets, contrary to an act of the legislature of Virginia. In the state court, the defendant claimed the protection of an act of congress. A case was agreed between the parties, which states the act of assembly on which the prosecution was founded, and the act of congress on which the defendant relied, and concludes in these words: "If upon this case, the court shall be of opinion, that the acts of congress before mentioned were valid, and on the true construction of those acts, the lottery-tickets sold by the defendants as aforesaid, might lawfully be sold within the state of Virginia, notwithstanding the act or statute of the general assembly of Virginia prohibiting such sale, then judgment to be entered for the defendants: And if the court should be of opinion, that the statute or act of the general assembly, of the state of Virginia, prohibiting such sale, is valid, notwithstanding the said acts of congress, then judgment to be entered that the defendants are guilty, and that the commonwealth recover against them one hundred dollars and *376] costs." *Judgment was rendered against the defendants; and the court in which it was rendered being the highest court of the state in

which the cause was cognisable, the record has been brought into this court by writ of error.(a)

The defendant in error moves to dismiss this writ, for want of jurisdiction. In support of this motion, three points have been made, and argued with the ability which the importance of the question merits. These points are—1st. That a state is a defendant. 2d. That no writ of error lies from this court to a state court. 3d. The third point has been presented in different froms by the gentlemen who have argued it. The counsel who opened the cause said, that the want of jurisdiction was shown by the subject-matter of the case. The counsel who followed him said, that jurisdiction was not given by the judiciary act. The court has bestowed all its attention on the arguments of both gentlemen, and supposes that their tendency is, to show that this court has no jurisdiction of the case, or, in other words, has no right to review the judgment of the state court, because neither the constitution nor any law of the United States has been violated by that judgment.

The questions presented to the court by the first two *points made [*377
at the bar are of great magnitude, and may be truly said vitally to affect the Union. They exclude the inquiry whether the constitution and laws of the United States have been violated by the judgment which the plaintiffs in error seek to review; and maintain that, admitting such violation, it is not in the power of the government to apply a corrective. They maintain that the nation does not possess a department capable of restraining, peaceably, and by authority of law, any attempts which may be made, by a part, against the legitimate powers of the whole; and that the government is reduced to the alternative of submitting to such attempts, or of resisting them by force. They maintain that the constitution of the United States has provided no tribunal for the final construction of itself, or of the laws or treaties of the nation; but that this power may be exercised in the last resort by the courts of every state in the Union. That the constitution, laws and treaties may receive as many constructions as there are states; and that this is not a mischief, or, if a mischief, is irremediable. These abstract propositions are to be determined; for he who demands decision, without permitting inquiry, affirms that the decision he asks does not depend on inquiry.

If such be the constitution, it is the duty of the court to bow with respectful submission to its provisions. If such be not the constitution, it is equally the duty of the court to say so; and to perform that task which the American people have assigned to the judicial department.

*1. The first question to be considered is, whether the jurisdiction [*378
of this court is excluded by the character of the parties, one of them being a state, and the other a citizen of that state. The second section of the third article of the constitution defines the extent of the judicial power of the United States. Jurisdiction is given to the courts of the Union, in two classes of cases. In the first, their jurisdiction depends on the character of the cause, whoever may be the parties. This class comprehends "all

(a) The plaintiff in error prayed an appeal from the judgment of the Court of Hustings, but it was refused on the ground there was no higher state tribunal which could take cognisance of the ease.

cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." This clause extends the jurisdiction of the court to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied, against the express words of the article. In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended "controversies between two or more states, between a state and citizens of another state," and "between a state and foreign states, citizens or subjects." If these be the parties, it is entirely unimportant, what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union.

The counsel for the defendant in error have stated, that the cases which arise under the constitution must grow out of those provisions which are
*379] capable *of self-execution; examples of which are to be found in the 2d section of the 4th article, and in the 10th section of the 1st article. A case which arises under a law of the United States must, we are likewise told, be a right given by some act which becomes necessary to execute the powers given in the constitution, of which the law of naturalization is mentioned as an example.

The use intended to be made of this exposition of the first part of the section, defining the extent of the judicial power, is not clearly understood. If the intention be merely to distinguish cases arising under the constitution, from those arising under a law, for the sake of precision in the application of this argument, these propositions will not be controverted. If it be, to maintain that a case arising under the constitution, or a law, must be one in which a party comes into court to demand something conferred on him by the constitution or a law, we think, the construction too narrow. A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either. Congress seems to have intended to give its own construction of this part of the constitution in the 25th section of the judiciary act; and we perceive no reason to depart from that construction.

The jurisdiction of the court, then, being extended by the letter of the constitution to all cases arising under it, or under the laws of the United
*380] States, it follows, that those who would withdraw *any case of this description from that jurisdiction, must sustain the exemption they claim, on the spirit and true meaning of the constitution, which spirit and true meaning must be so apparent as to overrule the words which its framers have employed. The counsel for the defendant in error have undertaken to do this; and have laid down the general proposition, that a sovereign independent state is not suable, except by its own consent.

This general proposition will not be controverted. But its consent is not requisite in each particular case. It may be given in a general law. And if a state has surrendered any portion of its sovereignty, the question, whether a liability to suit be a part of this portion, depends on the instrument by which the surrender is made. If, upon a just construction of that instrument, it shall appear, that the state has submitted to be sued, then it has parted with this sovereign right of judging, in every case, on the justice of

its own pretensions, and has intrusted that power to a tribunal in whose impartiality it confides.

The American states, as well as the American people, have believed a close and firm union to be essential to their liberty and to their happiness. They have been taught by experience, that this union cannot exist, without a government for the whole; and they have been taught by the same experience, that this government would be a mere shadow, that must disappoint all their hopes, unless invested with large portions of that sovereignty which belongs to independent states. Under the influence of this opinion, and thus instructed by experience, *the American people, in the conventions of their respective states, adopted the present constitution. [*381

If it could be doubted, whether, from its nature, it were not supreme, in all cases were it is empowered to act, that doubt would be removed by the declaration, that "this constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby; anything in the constitution or laws of any state to the contrary notwithstanding." This is the authoritative language of the American people; and, if gentlemen please, of the American states. It marks, with lines too strong to be mistaken, the characteristic distinction between the government of the Union, and those of the states. The general government, though limited as to its objects, is supreme with respect to those objects. This principle is a part of the constitution; and if there be any who deny its necessity, none can deny its authority.

To this supreme government, ample powers are confided; and if it were possible to doubt the great purposes for which they were so confided, the people of the United States have declared, that they are given "in order to form a more perfect union, establish justice, ensure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to themselves and their posterity." *With the ample powers confided to this supreme government, for these [*382 interesting purposes, are connected many express and important limitations on the sovereignty of the states, which are made for the same purposes. The powers of the Union, on the great subjects of war, peace and commerce, and on many others, are in themselves limitations of the sovereignty of the states; but in addition to these, the sovereignty of the states is surrendered, in many instances, where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on congress than a conservative power to maintain the principles established in the constitution. The maintenance of these principles in their purity, is certainly among the great duties of the government. One of the instruments by which this duty may be peaceably performed, is the judicial department. It is authorized to decide all cases of every description, arising under the constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a state may be a party. When we consider the situation of the government of the Union and of a state, in relation to each other; the nature of our constitution; the subordination of the state governments to that constitution; the great purpose for which jurisdiction over all cases arising under the constitution and laws of the

United States, is confided to the judicial department; are we at liberty to insert in this general grant, an exception of those cases in which a state may
*383] be a *party? Will the spirit of the constitution justify this attempt to control its words? We think it will not. We think a case arising under the constitution or laws of the United States, is cognisable in the courts of the Union, whoever may be the parties to that case.

Had any doubt existed with respect to the just construction of this part of the section, that doubt would have been removed, by the enumeration of those cases to which the jurisdiction of the federal courts is extended, in consequence of the character of the parties. In that enumeration, we find "controversies between two or more states, between a state and citizens of another state," "and between a state and foreign states, citizens or subjects." One of the express objects, then, for which the judicial department was established, is the decision of controversies between states, and between a state and individuals. The mere circumstance, that a state is a party, gives jurisdiction to the court. How, then, can it be contended, that the very same instrument, in the very same section, should be so construed, as that this same circumstance should withdraw a case from the jurisdiction of the court, where the constitution or laws of the United States are supposed to have been violated? The constitution gave to every person having a claim upon a state, a right to submit his case to the court of the nation. However unimportant his claim might be, however little the community might be interested in its decision, the framers of our constitution thought
*384] it necessary, for the purposes of justice, to provide a *tribunal as superior to influence as possible, in which that claim might be decided. Can it be imagined, that the same persons considered a case involving the constitution of our country and the majesty of the laws, questions in which every American citizen must be deeply interested, as withdrawn from this tribunal, because a state is a party?

While weighing arguments drawn from the nature of government, and from the general spirit of an instrument, and urged for the purpose of narrowing the construction which the words of that instrument seem to require, it is proper to place in the opposite scale those principles, drawn from the same sources, which go to sustain the words in their full operation and natural import. One of these, which has been pressed with great force by the counsel for the plaintiffs in error, is, that the judicial power of every well-constituted government must be co-extensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws. If any proposition may be considered as a political axiom, this, we think, may be so considered. In reasoning upon it, as an abstract question, there would, probably, exist no contrariety of opinion respecting it. Every argument, proving the necessity of the principle, proves also the propriety of giving this extent to it. We do not mean to say, that the jurisdiction of the courts of the Union should be construed to be co-extensive with the legislative, merely because it is fit that it should be so; but we
*385] mean to say, that this fitness furnishes an argument *in construing the constitution, which ought never to be overlooked, and which is most especially entitled to consideration, when we are inquiring, whether the words of the instrument which purport to establish this principle, shall be contracted for the purpose of destroying it.

The mischievous consequences of the constitution contended for on the part of Virginia, are also entitled to great consideration. It would prostrate, it has been said, the government and its laws at the feet of every state in the Union. And would not this be its effect? What power of the government could be executed, by its own means, in any state disposed to resist its execution by a course of legislation? The laws must be executed by individuals acting within the several states. If these individuals may be exposed to penalties, and if the courts of the Union cannot correct the judgments by which these penalties may be enforced, the course of the government may be, at any time, arrested by the will of one of its members. Each member will possess a veto on the will of the whole. The answer which has been given to this argument, does not deny its truth, but insists, that confidence is reposed, and may be safely reposed, in the state institutions; and that, if they shall ever become so insane, or so wicked, as to seek the destruction of the government, they may accomplish their object, by refusing to perform the functions assigned to them.

We readily concur with the counsel for the defendant, *in the declaration, that the cases which have been put, of direct legislative [*386 resistance, for the purpose of opposing the acknowledged powers of the government, are extreme cases, and in the hope, that they will never occur; but we cannot help believing, that a general conviction of the total incapacity of the government to protect itself and its laws, in such cases, would contribute in no inconsiderable degree to their occurrence. Let it be admitted, that the cases which have been put, are extreme and improbable, yet there are gradations of opposition to the laws, far short of those cases, which might have a baneful influence on the affairs of the nation. Different states may entertain different opinions on the true construction of the constitutional powers of congress. We know, that at one time, the assumption of the debts contracted by the several states, during the war of our revolution, was deemed unconstitutional, by some of them. We know, too, that at other times, certain taxes, imposed by congress, have been pronounced unconstitutional. Other laws have been questioned partially, while they were supported by the great majority of the American people. We have no assurance that we shall be less divided than we have been. States may legislate in conformity to their opinions, and may enforce those opinions by penalties. It would be hazarding too much, to assert, that the judicatures of the states will be exempt from the prejudices by which the legislatures and people are influenced, and will constitute perfectly impartial tribunals. In many states, the judges are dependent for office and *for salary, on the will of the legislature. The constitution of the United [*387 States furnishes no security against the universal adoption of this principle. When we observe the importance which that constitution attaches to the independence of judges, we are the less inclined to suppose, that it can have intended to leave these constitutional questions to tribunals where this independence may not exist, in all cases where a state shall prosecute an individual who claims the protection of an act of congress. These prosecutions may take place, even without a legislative act. A person making a seizure under an act of congress, may be indicted as a trespasser, if force has been employed, and of this, a jury may judge. How extensive may be the mischief, if the first decisions in such cases should be final!

These collisions may take place, in times of no extraordinary commotion. But a constitution is framed for ages to come, and is designed to approach immortality, as nearly as human institutions can approach it. Its course cannot always be tranquil. It is exposed to storms and tempests, and its framers must be unwise statesmen indeed, if they have not provided it, so far as its nature will permit, with the means of self-preservation from the perils it may be destined to encounter. No government ought to be so defective in its organization, as not to contain within itself, the means of securing the execution of its own laws against other dangers than those which occur every day. Courts of justice are the means most usually employed; and it is reasonable to expect, that a government should repose on its *own courts, rather than on others. There is certainly nothing in the circumstances under which our constitution was formed—nothing in the history of the times—which would justify the opinion, that the confidence reposed in the states was so implicit, as to leave in them and their tribunals the power of resisting or defeating, in the form of law, the legitimate measures of the Union. The requisitions of congress, under the confederation, were as constitutionally obligatory, as the laws enacted by the present congress. That they were habitually disregarded, is a fact of universal notoriety. With the knowledge of this fact, and under its full pressure, a convention was assembled to change the system. Is it so improbable, that they should confer on the judicial department the power of construing the constitution and laws of the Union in every case, in the last resort, and of preserving them from all violation, from every quarter, so far as judicial decisions can preserve them, that this improbability should essentially affect the construction of a new system? We are told, and we are truly told, that the great change which is to give efficacy to the present system, is its ability to act on individuals directly, instead of acting through the instrumentality of state governments. But ought not this ability, in reason and sound policy, to be applied directly to the protection of individuals employed in the execution of the laws, as well as to their coercion. Your laws reach the individual, without the aid of any other power; why may they not protect him from punishment, for performing his duty in executing them?

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*389] *The counsel for Virginia endeavor to obviate the force of these arguments, by saying, that the dangers they suggest, if not imaginary, are inevitable; that the constitution can make no provision against them; and that, therefore, in construing that instrument, they ought to be excluded from our consideration. This state of things, they say, cannot arise, until there shall be a disposition so hostile to the present political system, as to produce a determination to destroy it; and when that determination shall be produced, its effects will not be restrained by parchment stipulations; the fate of the constitution will not then depend on judicial decisions. But should no appeal be made to force, the states can put an end to the government by refusing to act; they have only not to elect senators, and it expires without a struggle. It is very true, that, whenever hostility to the existing system shall become universal, it will be also irresistible. The people made the constitution, and the people can unmake it. It is the creature of their will, and lives only by their will. But this supreme and irresistible power to make or to unmake, resides only in the whole

body of the people; not in any subdivision of them. The attempt of any of the parts to exercise it, is usurpation, and ought to be repelled by those to whom the people have delegated their power of repelling it.

The acknowledged inability of the government, then, to sustain itself against the public will, and by force or otherwise, to control the whole nation, is no sound argument in support of it constitutional *inability to preserve itself against a section of the nation, acting in opposition to the general will. [*390

It is true, that if all the states, or a majority of them, refuse to elect senators, the legislative powers of the Union will be suspended. But if any one state shall refuse to elect them, the senate will not, on that account, be the less capable of performing all its functions. The argument founded on this fact would seem rather to prove the subordination of the parts to the whole, than the complete independence of any one of them. The framers of the constitution were, indeed, unable to make any provisions which should protect that instrument against a general combination of the states, or of the people, for its destruction; and conscious of this inability, they have not made the attempt. But they were able to provide against the operation of measures adopted in any one state, whose tendency might be to arrest the execution of the laws, and this it was the part of true wisdom to attempt. We think, they have attempted it.

It has been also urged, as an additional objection to the jurisdiction of the court, that cases between a state and one of its own citizens, do not come within the general scope of the constitution; and were obviously never intended to be made cognisable in the federal courts. The state tribunals might be suspected of partiality, in cases between itself or its citizens and aliens, or the citizens of another state, but not in proceedings by a state against its own citizens. That jealousy which might exist in the first case, could not exist in the last, and therefore, the judicial power is not extended to the last. *This is very true, so far as jurisdiction depends on the character of the parties; and the argument would have great force, if urged to prove that this court could not establish the demand of a citizen upon his state, but is not entitled to the same force, when urged to prove that this court cannot inquire whether the constitution or laws of the United States protect a citizen from a prosecution instituted against him by a state. If jurisdiction depended entirely on the character of the parties, and was not given, where the parties have not an original right to come into court, that part of the 2d section of the 3d article, which extends the judicial power to all cases arising under the constitution and laws of the United States, would be mere surplusage. It is to give jurisdiction, where the character of the parties would not give it, that this very important part of the clause was inserted. It may be true, that the partiality of the state tribunals, in ordinary controversies between a state and its citizens, was not apprehended, and therefore, the judicial power of the Union was not extended to such cases; but this was not the sole nor the greatest object for which this department was created. A more important, a much more interesting, object was, the preservation of the constitution and laws of the United States, so far as they can be preserved by judicial authority; and therefore, the jurisdiction of the courts of the Union was expressly extended to all cases arising under that constitution and those laws. If the constitution or laws may be [*391

violated by proceedings *instituted by a state against its own citizens, and if that violation may be such, as essentially to affect the constitution and the laws, such as to arrest the progress of government in its constitutional course, why should these cases be excepted from that provision which expressly extends the judicial power of the Union to *all* cases arising under the constitution and laws?

After bestowing on this subject the most attentive consideration, the court can perceive no reason, founded on the character of the parties, for introducing an exception which the constitution has not made; and we think, that the judicial power, as originally given, extends to all cases arising under the constitution or a law of the United States, whoever may be the parties.

It has been also contended, that this jurisdiction, if given, is original, and cannot be exercised in the appellate form. The words of the constitution are, "in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction." This distinction between original and appellate jurisdiction, excludes, we are told, in all cases, the exercise of the one where the other is given.

The constitution gives the supreme court original jurisdiction, in certain enumerated cases, and gives it appellate jurisdiction in all others. Among
*393] those in which jurisdiction must be exercised, in the appellate *form, are cases arising under the constitution and laws of the United States. These provisions of the constitution are equally obligatory, and are to be equally respected. If a state be a party, the jurisdiction of this court is original; if the case arise under a constitution or a law, the jurisdiction is appellate. But a case to which a state is a party may arise under the constitution or a law of the United States. What rule is applicable to such a case? What then, becomes the duty of the court? Certainly, we think, so to construe the constitution, as to give effect to both provisions, so far as it is possible to reconcile them, and not to permit their seeming repugnancy to destroy each other. We must endeavor so to construe them, as to preserve the true intent and meaning of the instrument.

In one description of cases, the jurisdiction of the court is founded entirely on the character of the parties; and the nature of the controversy is not contemplated by the constitution—the character of the parties is everything, the nature of the case nothing. In the other description of cases, the jurisdiction is founded entirely on the character of the case, and the parties are not contemplated by the constitution—in these, the nature of the case is everything, the character of the parties nothing. When, then, the constitution declares the jurisdiction, in cases where a state shall be a party, to be original, and in all cases arising under the constitution or a law, to be appellate, the conclusion seems irresistible, that its framers designed to
*394] include in the first class, *those cases in which jurisdiction is given, because a state is a party; and to include in the second, those in which jurisdiction is given, because the case arises under the constitution or a law.

This reasonable construction is rendered necessary by other considerations. That the constitution or a law of the United States is involved in a case, and makes a part of it, may appear in the progress of a cause, in which the courts of the Union, but for that circumstance, would have no jurisdic-

tion, and which, of consequence, could not originate in the supreme court; in such a case, the jurisdiction can be exercised only in its appellate form. To deny its exercise in this form, is to deny its existence, and would be to construe a clause, dividing the power of the supreme court, in such a manner, as in a considerable degree to defeat the power itself. All must perceive, that this construction can be justified only where it is absolutely necessary. We do not think the article under consideration presents that necessity.

It is observable, that in this distributive clause, no negative words are introduced. This observation is not made, for the purpose of contending, that the legislature may "apportion the judicial power between the supreme and inferior courts, according to its will." That would be, as was said by this court in the case of *Marbury* v. *Madison*, to render the distributive clause "mere surplusage," to make it "form without substance." This cannot, therefore, be the true construction of the article. *But although the absence of negative words will not authorize the legislature to [*395 disregard the distribution of the power previously granted, their absence will justify a sound construction of the whole article, so as to give every part its intended effect It is admitted, that "affirmative words are often, in their operation, negative of other objects than those affirmed;" and that where "a negative or exclusive sense must be given to them, or they have no operation at all," they must receive that negative or exclusive sense. But where they have full operation without it; where it would destroy some of the most important objects for which the power was created; then, we think, affirmative words ought not to be construed negatively.

The constitution declares, that in cases where a state is a party, the supreme court shall have original jurisdiction; but does not say, that its appellate jurisdiction shall not be exercised in cases where, from their nature, appellate jurisdiction is given, whether a state be or be not a party. It may be conceded, that where the case is of such a nature, as to admit of its originating in the supreme court, it ought to originate there; but where, from its nature, it cannot originate in that court, these words ought not to be so construed as to require it. There are many cases in which it would be found extremely difficult, and subversive of the spirit of the constitution, to maintain the construction, that appellate jurisdiction cannot be exercised, where one of the parties might sue or be sued in this court.

The constitution defines the jurisdiction of the *supreme court, [*396 but does not define that of the inferior courts. Can it be affirmed, that a state might not sue the citizen of another state in a circuit court?[1] Should the circuit court decide for or against its jurisdiction, should it dismiss the suit, or give judgment against the state, might not its decision be revised in the supreme court? The argument is, that it could not; and the very clause which is urged to prove, that the circuit court could give no judgment in the case, is also urged to prove, that its judgment is irreversible. A supervising court, whose peculiar province it is to correct the errors of an inferior court, has no power to correct a judgment given without jurisdiction, because, in the same case, that supervising court has original jurisdiction. Had negative words been employed, it would be difficult to give them

[1] See Wisconsin v. Duluth, 2 Dill. 406; Hughes 138; Georgia v. Atkins, 1 Abb. U. S. 22, North Carolina v. Trustees of the University, 1

this construction, if they would admit of any other. But without negative words, this irrational construction can never be maintained.

So, too, in the same clause, the jurisdiction of the court is declared to be original, "in cases affecting ambassadors, other public ministers and consuls." There is, perhaps, no part of the article under consideration so much required by national policy as this; unless it be that part which extends the judicial power "to all cases arising under the constitution, laws and treaties of the United States." It has been generally held, that the state courts have a concurrent jurisdiction with the federal courts, in cases to which the judicial power is extended, unless the jurisdiction of the federal courts be rendered exclusive *by the words of the third article. If the words, "to all *397] cases," give exclusive jurisdiction in cases affecting foreign ministers, they may also give exclusive jurisdiction, if such be the will of congress, in cases arising under the constitution, laws and treaties of the United States. Now, suppose an individual were to sue a foreign minister in a state court, and that court were to maintain its jurisdiction, and render judgment against the minister, could it be contended, that this court would be incapable of revising such judgment, because the constitution had given it original jurisdiction in the case? If this could be maintained, then a clause inserted for the purpose of excluding the jurisdiction of all other courts than this, in a particular case, would have the effect of excluding the jurisdiction of this court, in that very case, if the suit were to be brought in another court, and that court were to assert jurisdiction. This tribunal, according to the argument which has been urged, could neither revise the judgment of such other court, nor suspend its proceedings: for a writ of prohibition, or any other similar writ, is in the nature of appellate process.

Foreign consuls frequently assert, in our prize courts, the claims of their fellow-subjects. These suits are maintained by them, as consuls. The appellate power of this court has been frequently exercised in such cases, and has never been questioned. It would be extremely mischievous, to withhold its exercise. Yet the consul is a party on the record. The truth is, that where the words confer only appellate jurisdiction, original jurisdiction is most *clearly not given; but where the words admit of appellate *398] jurisdiction, the power to take cognisance of the suit originally, does not necessarily negative the power to decide upon it on an appeal, if it may originate in a different court.

It is, we think, apparent, that to give this distribute clause the interpretation contended for, to give to its affirmative words a negative operation, in every possible case, would, in some instances, defeat the obvious intention of the article. Such an interpretation would not consist with those rules which, from time immemorial, have guided courts, in their construction of instruments brought under their consideration. It must, therefore, be discarded. Every part of the article must be taken into view, and that construction adopted, which will consist with its words, and promote its general intention. The court may imply a negative from affirmative words, where the implication promotes, not where it defeats the intention.

If we apply this principle, the correctness of which we believe will not be controverted, to the distributive clause under consideration, the result, we think, would be this: the original jurisdiction of the supreme court, in cases where a state is a party, refers to those cases in which, according to

the grant of power made in the preceding clause, jurisdiction might be exercised, in consequence of the character of the party, and an original suit might be instituted in any of the federal courts; not to those cases, in which an original suit might not be *instituted in a federal court. Of the last description, is every case between a state and its citizens, and, [*399 perhaps, every case in which a state is enforcing its penal laws. In such cases, therefore, the supreme court cannot take original jurisdiction. In every other case, that is, in every case to which the judicial power extends, and in which original jurisdiction is not expressly given, that judical power shall be exercised in the appellate, and only in the appellate form. The original jurisdiction of this court cannot be enlarged, but its appellate jurisdiction may be exercised in every case cognisable under the third article of the constitution, in the federal courts, in which original jurisdiction cannot be exercised; and the extent of this judicial power is to be measured, not by giving the affirmative words of the distributive clause a negative operation in every possible case, but by giving their true meaning to the words which define its extent.

The counsel for the defendant in error urge, in opposition to this rule of construction, some *dicta* of the court, in the case of *Marbury* v. *Madison*. It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered *in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated. In the case of *Marbury* v. *Madison*, the single question before the court, so far as that case can be applied to this, was, whether the legislature could give this court original jurisdiction, in a case in which the constitution had clearly not given it, and in which no doubt respecting the construction of the article could possibly be raised. The court decided, and we think very properly, that the legislature could not give original jurisdiction in such a case. But in the reasoning of the court in support of this decision, some expressions are used which go far beyond it. The counsel for Marbury had insisted on the unlimited discretion of the legislature in the apportionment of the judicial power; and it is against this argument that the reasoning of the court is directed. They say that, if such had been the intention of the article, "it would certainly have been useless to proceed farther than to define the judicial power, and the tribunals in which it should be vested." The court says, that such a construction would render the clause, dividing the jurisdiction of the court into original and appellate, totally useless; that "affirmative words are often, in their operation, negative of other objects than those which are affirmed; and in this case (in the case of *Marbury* v. *Madison*), a negative or exclusive sense must be given to them, or they have no operation at all." "It cannot be presumed," adds the court, "that any clause in the constitution is intended to be without *effect; and therefore, such a construction is inadmissible, unless the words require it." The whole reasoning of the court proceeds upon the idea, that the affirmative words of the [*400 [*401

clause giving one sort of jurisdiction, must imply a negative of any other sort of jurisdiction, because, otherwise, the words would be totally inoperative, and this reasoning is advanced in a case to which it was strictly applicable. If, in that case, original jurisdiction could have been exercised, the clause under consideration would have been entirely useless. Having such cases only in its view, the court lays down a principle which is generally correct, in terms much broader than the decision, and not only much broader than the reasoning with which that decision is supported, but in some instances, contradictory to its principle. The reasoning sustains the negative operation of the words in that case, because, otherwise, the clause would have no meaning whatever, and because such operation was necessary to give effect to the intention of the article. The effort now made is, to apply the conclusion to which the court was conducted by that reasoning, in the particular case, to one in which the words have their full operation, when understood affirmatively, and in which the negative or exclusive sense, is to be so used as to defeat some of the great objects of the article. To this construction, the court cannot give assent. The general expressions in the case of *Marbury* v. *Madison* must be understood, with the limitations which are given to them in this opinion; limitations *which in no
*402] degree affect the decision in that case, or the tenor of its reasoning.

The counsel who closed the argument, put several cases, for the purpose of illustration, which he supposed to arise under the constitution, and yet to be, apparently, without the jurisdiction of the court. Were a state to lay a a duty on exports, to collect the money and place it in her treasury, could the citizen who paid it, he asks, maintain a suit in this court against such state, to recover back the money? Perhaps not. Without, however, deciding such supposed case, we may say, that it is entirely unlike that under consideration. The citizen who has paid his money to his state, under a law that is void, is in the same situation with every other person who has paid money by mistake. The law raises an *assumpsit* to return the money, and it is upon that *assumpsit*, that the action is to be maintained. To refuse to comply with this *assumpsit* may be no more a violation of the constitution, than to refuse to comply with any other; and as the federal courts never had jurisdiction over contracts between a state and its citizens, they may have none over this. But let us so vary the supposed case, as to give it a real resemblance to that under consideration. Suppose, a citizen to refuse to pay this export duty, and a suit to be instituted for the purpose of compelling him to pay it. He pleads the constitution of the United States in bar of the action, notwithstanding which the court gives judgment against him. This would be a case arising under *the constitution, and
*403] would be the very case now before the court.

We are also asked, if a state should confiscate property secured by a treaty, whether the individual could maintain an action for that property? If the property confiscated be debts, our own experience informs us, that the remedy of the creditor against his debtor remains. If it be land, which is secured by a treaty, and afterwards confiscated by a state, the argument does not assume, that this title, thus secured, could be extinguished by an act of confiscation. The injured party, therefore, has his remedy against the occupant of the land, for that which the treaty secures to him, not against the state for money which is not secured to him.

The case of a state which pays off its own debts with paper money, no more resembles this, than do those to which we have already adverted. The courts have no jurisdiction over the contract; they cannot enforce it, nor judge of its violation. Let it be, that the act discharging the debt is a mere nullity, and that it is still due. Yet, the federal courts have no cognisance of the case. But suppose, a state to institute proceedings against an individual, which depended on the validity of an act emitting bills of credit: suppose, a state to prosecute one of its citizens for refusing paper money, who should plead the constitution in bar of such prosecution. If his plea should be overruled, and judgment rendered against him, his case would resemble this; and unless the jurisdiction of this court might be exercised over it, the constitution would *be violated, and the injured party be unable to bring his case before that tribunal to which the people of the United States have assigned all such cases. [*404

It is most true, that this court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction, if it should. The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the constitution. We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur, which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty. In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the constitution and laws of the United States. We find no exception to this grant, and we cannot insert one.

To escape the operation of these comprehensive words, the counsel for the defendant has mentioned instances in which the constitution might be violated, without giving jurisdiction to this court. These words, therefore, however universal in their expression, must, he contends, be limited and controlled in their construction by circumstances. One of these instances is, the grant by a state of a patent of nobility. The court, he says, cannot annul this grant. *This may be very true;[1] but by no means justifies the inference drawn from it. The article does not extend the judicial power to every violation of the constitution which may possibly take place, but to "a case in law or equity," in which a right, under such law, is asserted in a court of justice. If the question cannot be brought into a court, then there is no case in law or equity, and no jurisdiction is given by the words of the article. But if, in any controversy depending in a court, the cause should depend on the validity of such a law, that would be a case arising under the constitution, to which the judicial power of the United States would extend. [*405

The same observation applies to the other instances with which the counsel who opened the cause has illustrated this argument. Although they show that there may be violations of the constitution, of which the court can

[1] Congress might impose a penalty for accepting such patent of nobility, and give the federal courts jurisdiction to enforce it.

take no cognisance, they do not show that an interpretation more restrictive than the words themselves import, ought to be given to this article. They do not show that there can be "a case in law or equity," arising under the constitution, to which the judicial power does not extend. We think, then, that, as the constitution originally stood, the appellate jurisdiction of this court, in all cases arising under the constitution, laws or treaties of the United States, was not arrested by the circumstance that a state was a party.

This leads to a consideration of the 11th amendment. It is in these words: "The judicial power of the United States shall not be construed to extend to any *suit in law or equity commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of any foreign state." It is a part of our history, that, at the adoption of the constitution, all the states were greatly indebted; and the apprehension that these debts might be prosecuted in the federal courts, formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in congress, and adopted by the state legislatures. That its motive was not to maintain the sovereignty of a state from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more states, or between a state and a foreign state. The jurisdiction of the court still extends to these cases: and in these, a state may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a state. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a state, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister states would be creditors to any considerable amount, and there was reason to retain the jurisdiction of the court in those *cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by states.

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The first impression made on the mind by this amendment is, that it was intended for those cases, and for those only, in which some demand against a state is made by an individual, in the courts of the Union. If we consider the causes to which it is to be traced, we are conducted to the same conclusion. A general interest might well be felt in leaving to a state the full power of consulting its convenience in the adjustment of its debts, or of other claims upon it; but no interest could be felt in so changing the relations between the whole and its parts, and so strip the government of the means of protecting, by the instrumentality of its courts, the constitution and laws from active violation.

The words of the amendment appear to the court to justify and require this construction. The judicial power is not "to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, &c." What is a suit? We understand it to be prosecution or pursuit of some claim, demand or request; in law language, it is the prosecution of some demand in a court of justice. The remedy for

every species of wrong is, says Judge Blackstone, "the being put in possession of that right whereof the party injured is deprived." "The instruments whereby this remedy is obtained, are a diversity of suits and actions, which are defined by the *Mirror, to be 'the lawful demand of one's right;' or, as Bracton and Fleta express it, in the words of Justinian, '*jus prosequendi in judicio quod alicui debetur*,'" Blackstone then proceeds to describe every species of remedy by suit; and they are all cases where the party suing claims to obtain something to which he has a right. [*408

To commence a suit is to demand something by the institution of process in a court of justice; and to prosecute the suit, is, according to the common acceptation of language, to continue that demand. By a suit commenced by an individual against a state, we should understand process sued out by that individual against the state, for the purpose of establishing some claim against it by the judgment of a court; and the prosecution of that suit is its continuance. Whatever may be the stages of its progress, the actor is still the same. Suits had been commenced in the supreme court against some of the states, before this amendment was introduced into congress, and others might be commenced, before it should be adopted by the state legislature, and might be depending at the time of its adoption. The object of the amendment was, not only to prevent the commencement of future suits, but to arrest the prosecution of those which might be commenced, when this article should form a part of the constitution. It, therefore, embraces both objects; and its meaning is, that the judicial power shall not be construed to extend to any suit which may be commenced, or which, if already commenced, may be *prosecuted against a state by the citizen of another state. If a suit, brought in one court, and carried by legal process to a supervising court, be a continuation of the same suit, then this suit is not commenced nor prosecuted against a state. It is, clearly, in its commencement, the suit of a state against an individual, which suit is transferred to this court, not for the purpose of asserting any claim against the state, but for the purpose of asserting a constitutional defence against a claim made by a state. [*409

A writ of error is defined to be, a commission by which the judges of one court are authorized to examine a record upon which a judgment was given in another court, and on such examination, to affirm or reverse the same according to law. If, says my Lord Coke, by the writ of error, the plaintiff may recover, or be restored to anything, it may be released by the name of an action. In Bacon's Abridgment, tit. Error, L, it is laid down, that "where, by a writ of error, the plaintiff shall recover, or be restored to any personal thing, as debt, damage or the like, a release of all actions personal, is a good plea; and when land is to be recovered or restored in a writ of error, a release of actions real, is a good bar; but where, by a writ of error, the plaintiff shall not be restored to any personal or real thing, a release of all actions, real or personal, is no bar. And for this we have the authority of Lord Coke, both in his Commentary on Littleton and in his reports. A writ of error, then, is in the nature of a suit or action, when it is to restore the party who obtains it to the possession of anything which is withheld *from him, not when its operation is entirely defensive. [*410

This rule will apply to writs of error from the courts of the United States, as well as to those writs in England. Under the judiciary act, the

effect of a writ of error is simply to bring the record into court, and submit the judgment of the inferior tribunal to re-examination. It does not in any manner act upon the parties; it acts only on the record. It removes the record into the supervising tribunal. Where, then, a state obtains a judgment against an individual, and the court, rendering such judgment, overrules a defence set up under the constitution or laws of the United States, the transfer of this record into the supreme court, for the sole purpose of inquiring whether the judgment violates the constitution or laws of the United States, can, with no propriety, we think, be denominated a suit commenced or prosecuted against the state whose judgment is so far re-examined. Nothing is demanded from the state. No claim against it, of any description, is asserted or prosecuted. The party is not to be restored to the possession of anything. Essentially, it is an appeal on a single point; and the defendant who appeals from a judgment rendered against him, is never said to commence or prosecute a suit against the plaintiff who has obtained the judgment. The writ of error is given, rather than an appeal, because it is the more usual mode of removing suits at common law; and because, perhaps, it is more technically proper, where a single point of law, *411] and not the whole case, is to *be re-examined. But an appeal might be given, and might be so regulated as to effect every purpose of a writ of error. The mode of removal is form, and not substance. Whether it be by writ of error or appeal, no claim is asserted, no demand is made by the original defendant; he only asserts the constitutional right to have his defence examined by that tribunal whose province it is to construe the constitution and laws of the Union.

The only part of the proceeding which is in any manner personal, is the citation. And what is the citation? It is simply notice to the opposite party, that the record is transferred into another court, where he may appear, or decline to appear, as his judgment or inclination may determine. As the party who has obtained a judgment is out of court, and may, therefore, not know that his cause is removed, common justice requires that notice of the fact should be given him. But this notice is not a suit, nor has it the effect of process. If the party does not choose to appear, he cannot be brought into court, nor is his failure to appear considered as a default. Judgment cannot be given against him for his non-appearance, but the judgment is to be re-examined, and reversed or affirmed, in like manner as if the party had appeared and argued his cause.

The point of view in which this writ of error, with its citation, has been considered uniformly in the courts of the Union, has been well illustrated by a reference to the course of this court, in suits instituted by the United States. The universally received opinion is, that no suit can be commenced *412] *or prosecuted against the United States; that the judiciary act does not authorize such suits. Yet, writs of error, accompanied with citations, have uniformly issued for the removal of judgments in favor of the United States into a superior court, where they have, like those in favor of an individual, been re-examined, and affirmed or reversed. It has never been suggested, that such writ of error was a suit against the United States, and therefore, not within the jurisdiction of the appellate court.

It is, then, the opinion of the court, that the defendant who removes a judgment rendered against him by a state court into this court, for the pur-

pose of re-examining the question, whether that judgment be in violation of the constitution or laws of the United States, does not commence or prosecute a suit against the state, whatever may be its opinion, where the effect of the writ may be to restore the party to the possession of a thing which he demands.

But should we in this be mistaken, the error does not affect the case now before the court. If this writ of error be a suit, in the sense of the 11th amendment, it is not a suit commenced or prosecuted "by a citizen of another state, or by a citizen or subject of any foreign state." It is not, then, within the amendment, but is governed entirely by the constitution as originally framed, and we have already seen, that in its origin, the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties.

*2. The second objection to the jurisdiction of the court is, that its appellate power cannot be exercised, in any case, over the judgment of a state court. This objection is sustained chiefly by arguments drawn from the supposed total separation of the judiciary of a state from that of the Union, and their entire independence of each other. The argument considers the federal judiciary as completely foreign to that of a state; and as being no more connected with it, in any respect whatever, than the court of a foreign state. If this hypothesis be just, the argument founded on it, is equally so; but if the hypothesis be not supported by the constitution, the argument fails with it. This hypothesis is not founded on any words in the constitution, which might seem to countenance it, but on the unreasonableness of giving a contrary construction to words which seem to require it; and on the incompatibility of the application of the appellate jurisdiction to the judgments of state courts, with that constitutional relation which subsists between the government of the Union and the governments of those states which compose it. [*413

Let this unreasonableness, this total incompatibility, be examined. That the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people. In *many other respects, the American people are one; and the government which is alone capable of controlling and managing their interests in all these respects, is the government of the Union. It is their government, and in that character, they have no other. America has chosen to be, in many respects, and to many purposes, a nation; and for all these purposes, her government is complete; to all these objects, it is competent. The people have declared, that in the exercise of all powers given for these objects, it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory. The constitution and laws of a state, so far as they are repugnant to the constitution and laws of the United States, are absolutely void. These states are constituent parts of the United States; they are members of one great empire—for some purposes sovereign, for some purposes subordinate. [*414

In a government so constituted, is it unreasonable, that the judicial power should be competent to give efficacy to the constitutional laws of the legislature? That department can decide on the validity of the constitution

or law of a state, if it be repugnant to the constitution or to a law of the United States. Is it unreasonable, that it should also be empowered to decide on the judgment of a state tribunal enforcing such unconstitutional law? Is it so very unreasonable, as to furnish a justification for controlling the words of the constitution? We think it is not. We think, that in a
*415] government, *acknowledgedly supreme, with respect to objects of vital interest to the nation, there is nothing inconsistent with sound reason, nothing incompatible with the nature of government, in making all its departments supreme, so far as respects those objects, and so far as is necessary to their attainment. The exercise of the appellate power over those judgments of the state tribunals which may contravene the constitution or laws of the United States, is, we believe, essential to the attainment of those objects.

The propriety of intrusting the construction of the constitution, and laws made in pursuance thereof, to the judiciary of the Union, has not, we believe, as yet, been drawn into question. It seems to be a corollary from this political axiom, that the federal courts should either possess exclusive jurisdiction in such cases, or a power to revise the judgment rendered in them, by the state tribunals. If the federal and state courts have concurrent jurisdiction in all cases arising under the constitution, laws and treaties of the United States; and if a case of this description brought in a state court cannot be removed before judgment, nor revised after judgment, then the construction of the constitution, laws and treaties of the United States, is not confided particularly to their judicial department, but is confided equally to that department and to the state courts, however they may be constituted. "Thirteen independent courts," says a very celebrated statesman (and we have now more than twenty such courts) "of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government,
*416] from *which nothing but contradiction and confusion can proceed." Dismissing the unpleasant suggestion, that any motives which may not be fairly avowed, or which ought not to exist, can ever influence a state or its courts, the necessity of uniformity, as well as correctness in expounding the constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal, the power of deciding, in the last resort, all cases in which they are involved.

We are not restrained, then, by the political relations between the general and state governments, from construing the words of the constitution, defending the judicial power, in their true sense. We are not bound to construe them more restrictively than they naturally import. They give to the supreme court appellate jurisdiction, in all cases arising under the constitution, laws and treaties of the United States. The words are broad enough to comprehend all cases of this description, in whatever court they may be decided. In expounding them, we may be permitted to take into view those consideration to which courts have always allowed great weight in the exposition of laws.

The framers of the constitution would naturally examine the state of things existing at the time; and their work sufficiently attests that they did so. All acknowledge, that they were convened for the purpose of strengthening the confederation, by enlarging the powers of the government,
*417] and by giving efficacy *to those which it before possessed, but could

not exercise. They inform us, themselves, in the instrument they presented to the American public, that one of its objects was to form a more perfect union. Under such circumstances, we certainly should not expect to find, in that instrument, a diminution of the powers of the actual government. Previous to the adoption of the confederation, congress established courts which received appeals in prize causes decided in the courts of the respective states. This power of the government, to establish tribunals for these appeals, was thought consistent with, and was founded on, its political relations with the states. These courts did exercise appellate jurisdiction over those cases decided in the state courts, to which the judicial power of the federal government extended. The confederation gave to congress the power "of establishing courts for receiving and determining finally appeals in all cases of captures." This power was uniformly construed to authorize those courts to receive appeals from the sentences of state courts, and to affirm or reverse them. State tribunals are not mentioned; but this clause in the confederation, necessarily comprises them. Yet the relation between the general and state goverments was much weaker, much more lax, under the confederation, than under the present constitution; and the states being much more completely sovereign, their institutions were much more independent.

The convention which framed the constitution, on *turning their attention to the judicial power, found it limited to a few objects, but [*418 exercised, with respect to some of those objects, in its appellate form, over the judgments of the state courts. They extend it, among other objects, to all cases arising under the constitution, laws and treaties of the United States; and in a subsequent clause declare, that in such cases, the supreme court shall exercise appellate jurisdiction. Nothing seems to be given which would justify the withdrawal of a judgment rendered in a state court, on the constitution, laws or treaties of the United States, from this appellate jurisdiction.

Great weight has always being attached, and very rightly attached, to contemporaneous exposition.

No question, it is believed, has arisen, to which this principle applies more unequivocally than to that now under consideration. The opinion of the Federalist has always being considered as of great authority. It is a complete commentary on our constitution; and is appealed to by all parties, in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank; and the part two of its authors performed in framing the constitution, put it very much in their power to explain the views with which it was framed. These essays having being published, while the constitution was before the nation for adoption or rejection, and having been written in answer to objections founded entirely on the extent of its powers, and on its diminution of state sovereignty, are entitled to the more consideration, where they *frankly avow that the power objected [*419 to is given, and defend it. In discussing the extent of the judicial power, the Federalist says, "Here another question occurs: what relation would subsist between the national and state courts in these instances of concurrent jurisdiction? I answer, that an appeal would certainly lie from the latter, to the supreme court of the United States. The constitution in direct terms gives an appellate jurisdiction to the supreme court, in all the enumerated cases of federal cognisance in which it is not to have an original

one, without a single expression to confine its operation to the inferior federal courts. The objects of appeal, not the tribunals from which it is to be made, are alone contemplated. From this circumstance, and from the reason of the thing, it ought to be construed to extend to the state tribunals. Either this must be the case, or the local courts must be excluded from a concurrent jurisdiction in matters of national concern, else the judicial authority of the Union may be eluded, at the pleasure of every plaintiff or prosecutor. Neither of these consequences ought, without evident necessity, to be involved; the latter would be entirely inadmissible, as it would defeat some of the most important and avowed purposes of the proposed government, and would essentially embarrass its measures. Nor do I perceive any foundation for such a supposition. Agreeable to the remark already made, the national and state systems are to be regarded *as* one whole. The courts of the latter will, of course, be natural auxiliaries to the execution *420] *of the laws of the Union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of natural justice, and the rules of natural decision. The evident aim of the plan of the national convention is, that all the causes of the specified classes shall, for weighty public reasons, receive their original or final determination in the courts of the Union. To confine, therefore, the general expression which give appellate jurisdiction to the supreme court, to appeals from the subordinate federal courts, instead of allowing their extension to the state courts, would be to abridge the latitude of the terms, in subversion of the intent, contrary to every sound rule of interpretation."

A contemporaneous exposition of the constitution, certainly of not less authority than that which has been just cited, is the judiciary act itself. We know, that in the congress which passed that act were many eminent members of the convention which formed the constitution. Not a single individual, so far as is known, supposed that part of the act which gives the supreme court appellate jurisdiction over the judgments of the state courts, in the cases therein specified, to be unauthorized by the constitution.

While on this part of the argument, it may be also material to observe, that the uniform decisions of this court on the point now under consideration, have been assented to, with a single exception, by the courts of every state in the Union whose judgments have been revised. It has been the unwel- *421] come *duty of this tribunal to reverse the judgments of many state courts, in cases in which the strongest state feelings were engaged. Judges, whose talents and character would grace any bench, to whom a disposition to submit to jurisdiction that is usurped, or to surrender their legitimate powers, will certainly not be imputed, have yielded without hesitation to the authority by which their judgments were reversed, while they, perhaps, disapproved the judgment of reversal. This concurrence of statesmen, of legislators, and of judges, in the same construction of the constitution, may justly inspire some confidence in that construction.

In opposition to it, the counsel who made this point has presented, in a great variety of forms, the idea already noticed, that the federal and state courts must, of necessity, and from the nature of the constitution, be in all things totally distinct and independent of each other. If this court can correct the errors of the courts of Virginia, he says, it makes them courts of the United States, or becomes itself a part of the judiciary of Virginia. But it

has been already shown, that neither of these consequences necessarily follows: The American people may certainly give to a national tribunal a supervising power over those judgments of the state courts, which may conflict with the constitution, laws or treaties of the United States, without converting them into federal courts, or converting the national into a state tribunal. The one court *still derives its authority from the state, the other still derives its authority from the nation. [*422

If it shall be established, he says, that this court has appellate jurisdiction over the state courts, in all cases enumerated in the 3d article of the constitution, a complete consolidation of the states, so far as respects judicial power is produced. But, certainly, the mind of the gentleman who argued this argument is too accurate not to perceive that he has carried it too far; that the premises by no means justify the conclusion. "A complete consolidation of the states, so far as respects the judicial power," would authorize the legislature to confer on the federal courts appellate jurisdiction from the state courts in all cases whatsoever. The distinction between such a power, and that of giving appellate jurisdiction in a few specified cases, in the decision of which the nation takes an interest, is too obvious not to be perceived by all.

This opinion has been already drawn out to too great a length to admit of entering into a particular consideration of the various forms in which the counsel who made this point has, with much ingenuity, presented his argument to the court. The argument, in all its forms, is essentually the same. It is founded, not on the words of the constitution, but on its spirit—a spirit extracted, not from the words of the instrument, but from his view of the nature of our Union, and of the great fundamental principles on which the fabric stands. To this argument, in all its forms, the same answer may be given. Let the nature and objects of *our Union be considered; let the great fundamental principles, on which the fabric stands, be [*423 examined; and we think, the result must be, that there is nothing so extravagantly absurd, in giving to the court of the nation the power of revising the decisions of local tribunals, on questions which affect the nation, as to require that words which import this power should be restricted by a forced construction. The question then must depend on the words themselves; and on their construction, we shall be the more readily excused for not adding to the observations already made, because the subject was fully discussed and exhausted in the case of *Martin* v. *Hunter*.

3. We come now to the third objection, which, though differently stated by the counsel, is substantially the same. One gentleman has said, that the judiciary act does not give jurisdiction in the case. The cause was argued in the state court, on a case agreed by the parties, which states the prosecution under a law for selling lottery-tickets, which is set forth, and further states the act of congress by which the city of Washington was authorized to establish the lottery. It then states, that the lottery was regularly established by virtue of the act, and concludes with referring to the court the questions, whether the act of congress be valid? whether, on its just construction, it constitutes a bar to the prosecution? and whether the act of assembly, on which the prosecution is founded, be not itself invalid? These questions were decided against the operation of the act of congress, and in favor of the operation of the act of the state. *If the 25th [*424

section of the judiciary act be inspected, it will at once be perceived, that it comprehends expressly the case under consideration.

But it is not upon the letter of the act that the gentleman who stated this point in this form, founds his argument. Both gentlemen concur substantially in their views of this part of the case. They deny that the act of congress, on which the plaintiff in error relies, is a law of the United States; or, if a law of the United States, is within the second clause of the sixth article. In the enumeration of the powers of congress, which is made in the 8th section of the first article, we find that of exercising exclusive legislation over such district as shall become the seat of government. This power, like all others which are specified, is conferred on congress as the legislature of the Union: for, strip them of that character, and they would not possess it. In no other character, can it be exercised. In legislating for the district, they necessarily preserve the character of the legislature of the Union; for it is in that character alone, that the constitution confers on them this power of exclusive legislation. This proposition need not be enforced.

The 2d clause of the 6th article declares, that "this constitution, and the laws of the United States, which shall be made in pursuance thereof, shall be the supreme law of the land." The clause which gives exclusive jurisdiction is, unquestionably, a part of the constitution, and as such, binds all the United States. Those who contend that acts of congress, made in *425] pursuance of *this power, do not, like acts made in pursuance of other powers, bind the nation, ought to show some safe and clear rule which shall support this construction, and prove, that an act of congress, clothed in all the forms which attend other legislative acts, and passed in virtue of a power conferred on, and exercised by congress, as the legislature of the Union, is not a law of the United States, and does not bind them.

One of the gentlemen sought to illustrate his proposition that congress, when legislating for the district, assumed a distinct character, and was reduced to a mere local legislature, whose laws could possess no obligation out of the ten miles square, by a reference to the complex character of this court. It is, they say, a court of common law and a court of equity. Its character, when sitting as a court of common law, is as distinct from its character when sitting as a court of equity, as if the powers belonging to those departments were vested in different tribunals. Though united in the same tribunal, they are never confounded with each other. Without inquiring how far the union of different characters in one court may be applicable, in principle, to the union in congress of the power of exclusive legislation in some places, and of limited legislation in others, it may be observed, that the forms of proceedings in a court of law are so totally unlike the forms of proceedings in a court of equity, that a mere inspection of the record gives decisive information of the character in which the court sits, and *426] consequently, of the extent of its powers. But *if the forms of proceeding were precisely the same, and the court the same, the distinction would disappear.

Since congress legislates in the same forms, and in the same character, in virtue of powers of equal obligation, conferred in the same instrument, when exercising its exclusive powers of legislation, as well as when exercising

those which are limited, we must inquire, whether there be anything in the nature of this exclusive legislation, which necessarily confines the operation of the laws made in virtue of this power, to the place with a view to which they are made. Connected with the power to legislate within this district, is a similar power in forts, arsenals, dock-yards, &c. Congress has a right to punish murder in a fort, or other place within its exclusive jurisdiction; but no general right to punish murder committed within any of the states. In the act for the punishment of crimes against the United States, murder committed within a fort, or any other place or district of country, under the sole and exclusive jurisdiction of the United States, is punished with death. Thus, congress legislates in the same act, under its exclusive and its limited powers. The act proceeds to direct, that the body of the criminal, after execution, may be delivered to a surgeon for dissection, and punishes any person who shall rescue such body, during its conveyance from the place of execution to the surgeon to whom it is to be delivered. *Let these [*427
actual provisions of the law, or any other provisions which can be made on the subject, be considered with a view to the character in which congress acts when exercising its powers of exclusive legislation.

If congress is to be considered merely as a local legislature, invested, as to this object, with powers limited to the fort, or other place, in which the murder may be committed, if its general powers cannot come in aid of these local powers, how can the offence be tried in any other court than that of the place in which it has been committed? How can the offender be conveyed to, or tried in, any other place? How can he be executed elsewhere? How can his body be conveyed through a country under the jurisdiction of another sovereign, and the individual punished, who, within that jurisdiction, shall rescue the body? Were any one state of the Union to pass a law for trying a criminal in a court not created by itself, in a place not within its jurisdiction, and direct the sentence to be executed without its territory, we should all perceive and acknowledge its incompetency to such a course of legislation. If congress be not equally incompetent, it is because that body unites the powers of local legislation with those which are to operate through the Union, and may use the last in aid of the first; or because the power of exercising exclusive legislation draws after it, as an incident, the power of making that legislation effectual, and the incidental power may be exercised *throughout the Union, because the principal power is given [*428
to that body as the legislature of the Union.

So, in the same act, a person who, having knowledge of the commission of murder, or other felony, on the high seas, or within any fort, arsenal dock-yard, magazine, or other place, or district of country within the sole and exclusive jurisdiction of the United states, shall conceal the same, &c., he shall be adjudged guilty of misprision of felony, and shall be adjudged to be imprisoned, &c. It is clear, that congress cannot punish felonies generally; and, of consequence, cannot punish misprison of felony. It is equally clear, that a state legislature, the state of Maryland, for example, cannot punish those who, in another state, conceal a felony committed in Maryland. How, then, is it that congress, legislating exclusively for a fort, punishes those who, out of that fort, conceal a felony committed within it?

The solution, and the only solution of the difficulty, is, that the power vested in congress, as the legislature of the United States, to legislate exclu-

sively within any place ceded by a state, carries with it, as an incident, the right to make that power effectual. If a felon escape out of the state in which the act has been committed, the government cannot pursue him into another state, and apprehend him there, but must demand him from the executive power of that other state. If congress were to be considered merely as the local legislature for the fort or other place in which the offence might be committed, then this principle would apply to them as to other *429] local *legislatures, and the felon who should escape out of the fort, or other place, in which the felony may have been committed, could not be apprehended by the marshal, but must be demanded from the executive of the state. But we know that the principle does not apply; and the reason is, that congress is not a local legislature, but exercises this particular power, like all its other powers, in its high character, as the legislature of the Union. The American people thought it a necessary power, and they conferred it for their own benefit. Being so conferred, it carries with it all those incidental powers which are necessary to its complete and effectual execution.

Whether any particular law be designed to operate without the district or not, depends on the words of that law. If it be designed so to operate, then the question, whether the power so exercised be incidental to the power of exclusive legislation, and be warranted by the constitution, requires a consideration of that instrument. In such cases, the constitution and the law must be compared and construed. This is the exercise of jurisdiction. It is the only exercise of it which is allowed in such a case. For the act of congress directs, that "no other error shall be assigned or regarded as a ground of reversal, in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before-mentioned questions of validity or construction of the said constitution, treaties," &c. The whole merits of this case, then, consist in the construction of the constitution and *430] the act of congress. *The jurisdiction of the court, if acknowledged, goes no further. This we are required to do, without the exercise of jurisdiction.

The counsel for the state of Virginia have, in support of this motion, urged many arguments of great weight against the application of the act of congress to such a case as this; but those arguments go to the construction of the constitution, or of the law, or of both; and seem, therefore, rather calculated to sustain their cause upon its merits, than to prove a failure of jurisdiction in the court.

After having bestowed upon this question the most deiberate consideration of which we are capable, the court is unanimously of opinion, that the objections to its jurisdiction are not sustained, and that the motion ought to be overruled.

Motion denied.

March 2d. The cause was this day argued on the merits.

D. B. Ogden, for the plaintiffs in error, stated, that the question of conflict between the act of congress and the state law, which arose upon the record, depended upon the 8th section of the first article of the constitution, giving to congress the exclusive power of legislation, in all cases whatsoever, over the district which had become the seat of the government of the United States, by cession from the states to which it formerly belonged.

Under this power, congress has authorized the establishment of a lottery at the seat of government. Can *the state of Virginia prevent the sale of [*431 tickets in that lottery within her territory, consistently with the constitution? This question must depend upon the nature of the constitutional power of congress, and of the law by which it is exercised. It was said by the counsel for the defendant in error, on the former argument, that the power is municipal, to be exercised over the district only, and, of course, confined in its operation to the limits of the district. But in order determine whether this is the true interpretation of the clause in question, we must more minutely examine what is the nature of the authority granted. The clause was not intended to give to congress an unlimited power to legislate in all cases, without reference to other provisions of the constitution; otherwise congress might pass bills of attainder and *ex post facto* laws, and exercise a despotic authority over the district of Columbia, and its citizens would thus be deprived of their rights entirely. Nor was it intended to authorize the exercise by congress of its general powers as a national legislature, within the district; nor to exempt the district from the operation of those general powers. But the clause was inserted for the purpose of securing the independence of the national legislature and government, from state control. The object in view was, therefore, strictly a national object. The district was created only for national purposes, and every law passed for its government is peculiarly a national law. The words, "exclusive *legislation [*432 in all cases whatsoever," were meant to exclude all state legislative power; and to vest in congress, in addition to its general powers over the whole Union, all possible powers of legislation over the district. The law in question, is the expression of the national will, on a national object. It is, then, an act of the general legislative power of the Union, and its operation must be co-extensive with the limits of the Union, unless it is limited to the district of Columbia, in express terms, or from the nature of the power itself being incapable of acting without the district. That the whole Union has an interest in the city of Washington, as the national capital, is shown by the contemporaneous exposition of the constitution by its framers, and by the subsequent acts of the national legislature, providing for its improvement and embellishment. It is admitted, that some of the provisions of the law now in question, are local in their very nature, and therefore, confined to the city, or the district, in their operation. But the power of the corporation to establish lotteries, with the consent of the president, is not of this nature. Lottery-tickets are an article of commerce, vendible in every part of the Union, as well as in the district of Columbia. A state law which forbids a citizen to sell or buy a ticket in a lottery, legally established by the national legislature, for national purposes, infringes the constitutional rights of the citizen, and tends to impede and defeat the exercise of this national power. He cannot be punished by a state, for selling or buying that which congress *has, in the exercise of a great national [*433 power, authorized to be bought and sold. The authority of establishing this lottery, so far as being confined to the city, could not be conveniently or effectually exercised, without extending the salable quantity of tickets, throughout the Union. As a source of revenue, it would be inadequate to the objects for which it was established, without this extension. It is not one of the ordinary sources of revenue, for the mere municipal

wants of the city. It is a national grant, for national purposes, to be used in each particular instance, with the approbation of the president. It is, then, a national law, enacted for a national purpose, and has no other limits in its operation than the limits of the legislative power itself. If congress had intended to confine its operation within the district of Columbia, they would have expressed that intention. If, then, congress have a right to raise a revenue, for any national purpose, by establishing a lottery, they had a right to establish this lottery; and no state law can defeat this, any more than the exercise of any other national power. But even supposing that it is not a tax or duty, such as congress have the express power of establishing; yet if it be necessary and proper, in the judgment of the court, to carry into effect any power expressly granted, such as that of establishing and governing the city, it may be exercised throughout the Union. Congress have the same power to establish lotteries for this purpose, as the state legislatures,
*434] and every other legislature, have. The only difference is, that *with congress, it is the exercise of a national power, and must, therefore, be co-extensive in its operation with the Union, although the money to be raised by it cannot be applied to the use of any other city in the Union than that which is the national capital, and in which, consequently, all the states, and all the people, have a common interest.

Webster, contrà, insisted, that congress had not the power, under the constitution, of establishing a lottery in the district of Columbia, for municipal purposes, and of forcing the sale of the tickets throughout the Union, in contravention of the state laws; and, that even if they had the power, the law now in question did not purport to authorize the corporation of the city of Washington thus to force the sale of the tickets. It is clear, that congress, as a legislative body, exercise two species of legislative power: the one, limited as to its objects, but extending all over the Union: the other, an absolute, exclusive legislative power over the district of Columbia The preliminary inquiry in the case now before the court, is, by virtue of which of these authorities was the law in question passed? When this is ascertained, we shall be able to determine its extent and application. In this country, we are trying the novel experiment of a divided sovereignty between the national government and the states. The precise line of division between these is not always distinctly marked. Government is a moral, not a mathematical science; and the power of such a government
*435] especially, cannot be defined with mathematical *accuracy and precision. There is a competition of opposite analogies. We arrive at a just conclusion, by reasoning from these analogies, and by a general regard to the objects and purposes to this scheme of government. With a view to the present question, it may, perhaps, be safely admitted, that there are certain acts of legislation, passed by congress, with a local reference to this district, which proceed from the general powers with which congress are invested. They are local in their immediate operation and effect, but they are passed in virtue of general legislative powers. Such are the acts appropriating moneys for constructing the navy yard and the capitol. Some other acts are of a mixed nature. There are others clearly local, and passed in virtue of the local, exclusive jurisdiction. And of this latter class, is the act now under consideration. It is for the establishment of a local city

government, which arises from the exclusive power of legislation; and the clause authorizing the establishment of lotteries, is combined with other clauses of a mere municipal character: *noscitur a sociis.* Every act of legislation must be limited by its subject-matter, and there is nothing to show that this power is to be exercised more extensively than the other powers of the corporation; nothing to show that this municipal power is to be carried beyond the city. It may be exercised within the city alone, and congress has not said, and the court cannot intend, that it is to be exercised in other parts of the Union. Congress could not give such a charter to any other city in the Union, and if every federal *power granted in the constitution were destroyed, this power would remain. It exists [*436 independently, and the legislative powers of the states can never conflict with it, because it can never operate within the states. Being a case of mere local legislation, it is not a *casus fœderis* within that clause of the constitution, which declares that the laws of the United States shall be the supreme law of the land. There can be no question of supremacy and subordination, where there is no connection or conflict. The constitution makes this provision, because other legislative powers were to operate throughout the Union; the congress and the states were to legislate over the same subjects, and over the same territory; and therefore, there might be conflict. It was because the two codes were to prevail in the same places, and over the same persons. But the provision cannot extend to laws enacted by congress for the mere local municipal government of the city, because the reason on which it is founded does not extend to a case where all legislation is necessarily exclusive. There was no more reason, in this instance, to provide for a conflict of the two authorities, than in the case of the laws of a foreign state, which, except in the familiar example of questions relative to the *lex loci contractûs*, cannot come in collision with our own laws, because they cannot operate extra-territorially. So here, from the very nature of things, there can arise no conflict between the local laws of the district of Columbia, and those of the states, because each code is confined to its own territory. Any sound interpretation of the law *in question, must limit it to the city of [*437 of Washington. It does not even extend to the other municipal corporations within the district of Columbia, because it contains provisions expressly for the government of Washington alone, and does not profess to extend any of them beyond the limits of that city. A law cannot exceed the authority of the law-giver, and that does not extend beyond the district, and is limited in its actual exercise to the city. There is no authority showing that a grant of power of this kind to a municipal corporation, extends beyond the local limits of the city.

The *Attorney-General*, for the plaintiffs in error, in reply, contended, that congress, in passing the law under consideration, acted in the name of the whole nation, and for a great national object. Congress did not, as contended in the argument on the jurisdiction of the court, succeed, by the cession, merely to the legislative powers of Maryland and Virginia, over this district. They are not the trustees of those states only; they are the trustees of the whole Union. The cession was to the congress and government of the United States. The jurisdiction over the territory belongs to the entire people of the United States. It is not the power of Maryland

and Virginia which congress represents, but the power of all the states; and the territory ceded is to be looked at, not with reference to its origin, not as still forming ideally a part of Maryland and Virginia, but is to be regarded as if incorporated into every state in the Union. The question is not, then, to be solved, by asking *what those states could do with *438] respect to this territory, but what each state of the Union could do with regard to its own territory: because, to borrow an expression from the municipal law, each state of the Union is seised jointly with all the rest, *per my et per tout*, of the whole jurisdiction over this territory. The acts of the congress in legislating for the district of Columbia are the acts of all the people of all the states. It is, therefore, a fallacy in argument, to represent congress as succeeding merely to the same degree of power which Maryland and Virginia formerly had over this territory. Could those states have taxed the other states, or borrowed money on their credit, for the improvement of this territory, as congress have done? Although the jurisdiction of the states who formerly held the sovereignty and domain of this territory has been supplanted by congress, the substituted jurisdiction is far more extensive than that which they held. It is a jurisdiction, which, in the instances mentioned, and many others which might be enumerated, is capable of affecting all the states. It cannot be denied, that the character of the jurisdiction which congress has over the district, is widely different from that which it has over the states; for, over them, congress has not exclusive jurisdiction. Its powers over the states are those only which are specifically given, and those which are necessary to carry them into effect: whilst over the district, it has all the powers which it has over the states, and in addition to these, a power of legislation exclusive of *all the states. But *439] although the jurisdiction over the district is of a different and more extensive character, yet it is not so circumscribed, that it may not incidentally affect the states, although exerted for a local purpose, as it is called. Such is sometimes the delusive effect of single words and phrases, that the position, that in legislating for the district of Columbia, congress is a local legislature, for local purposes, and therefore, cannot affect the states by its laws, has almost become an aphorism with indolent or prejudiced inquirers. But in what sense can that be called a local government, which proceeds from the whole body of the nation? And how can that be termed a local object, which is closely and inseparably connected with the general interest of the whole people of the Union? As well might it be asserted, that congress acted as a local legislature, when it established offices for the sale of lands in the western states, or fortifications at particular points on the seacoast. It will not be pretended, that the first establishment of the seat of government in this district, was an act done by congress in its character of a local legislature, and for local purposes. How then can the subsequent acts for the improvement and embellishment of the city be so regarded? The act of May 6th, 1796, authorized the commissioners for erecting the public buildings, to borrow money for that purpose. Would it have been competent for the legislatures of the states to have impeded this loan, by punishing their citizens for subscribing to this stock? And could the states prohibit the sale of the city lots, within their territory, and thus arrest *the improvement of the city? And if they could not, is it not, because *440] what congress in the legitimate exercise of its powers has made it

lawful to sell, the states cannot make it unlawful to buy? Let us test by these considerations, the question before the court: and let us distinguish between congress legislating for the municipal government of the city, and congress, in its national character, providing the means of adding necessary public improvements to the national capital. Congress has itself made this distinction. When a regulation for the mere internal police of the city is to be made, it is done by the corporation, or some other inferior agent, without the interference of the president of the United States. But when an alteration of the plan of the city, or a public improvement affecting the whole of the city in a national point of view, is to be made, it is uniformly subjected to the control of the president. So here, the specific purpose in view, and for which the lottery was authorized by the president, was, the establishment of a city-hall, a necessary consequence of the establishment of the city, which last was also a necessary consequence of the establishment of the seat of government.

March 5th, 1821. The opinion of the court was delivered by MARSHALL, Ch. J.—This case was stated in the opinion given on the motion for dismissing the writ or error for want of jurisdiction in the court. It now comes on to be decided, on the question, whether the borough court of Norfolk, in overruling the defence set up under *the act of congress, [*441 has misconstrued that act. It is in these words: "The said corporation shall have full power to authorize the drawing of lotteries, for effecting any important improvement in the city, which the ordinary funds or revenue thereof will not accomplish; provided, that the sum to be raised in each year shall not exceed the amount of $10,000; and provided also, that the object for which the money is intended to be raised shall be first submitted to the president of the United States, and shall be approved of by him."

Two questions arise on this act. 1st. Does it purport to authorize the corporation to force the sale of these lottery-tickets in states where such sales may be prohibited by law? If it does, 2d. Is the law constitutional? If the first question be answered in the affirmative, it will become necessary to consider the second. If it should be answered in the negative, it will be unnecessary, and consequently, improper, to pursue any inquiries, which would then be merely speculative, respecting the power of congress in the case.

In inquiring into the extent of the power granted to the corporation of Washington, we must first examine the words of the grant. We find in them no expression which looks beyond the limits of the city. The powers granted are all of them local in the nature, and all of them such as would, in the common course of things, if not necessarily, be exercised *within [*442 the city. The subject on which congress was employed when framing this act, was a local subject; it was not the establishment of a lottery, but the formation of a separate body for the management of the internal affairs of the city, for its internal government, for its police. Congress must have considered itself as delegating to this corporate body powers for these objects, and for these objects solely. In delegating these powers, therefore, it seems reasonable to suppose, that the mind of the legislature was directed to the city alone, to the action of the being they were creat-

ing within the city, and not to any extra-territorial operations. In describing the powers of such a being, no words of limitation need be used. They are limited by the subject. But, if it be intended to give its acts a binding efficacy beyond the natural limits of its power, and within the jurisdiction of a distinct power, we should expect to find, in the language of the incorporating act, some words indicating such intention. Without such words, we cannot suppose that congress designed to give to the acts of the corporation any other effect, beyond its limits, than attends every act having the sanction of local law, when anything depends upon it which is to be transacted elsewhere.

If this would be the reasonable construction of corporate powers generally, it is more especially proper, in a case where an attempt is made so to exercise those powers as to control and limit the penal laws of a state. This
*443] is an operation which was not, *we think, in the contemplation of the legislature, while incorporating the city of Washington. To interfere with the penal laws of a state, where they are not levelled against the legitimate powers of the Union, but have for their sole object the internal government of the country, is a very serious measure, which congress cannot be supposed to adopt lightly or inconsiderately. The motives for it must be serious and weighty. It would be taken deliberately, and the intention would be clearly and unequivocally expressed. An act, such as that under consideration, ought not, we think, to be so construed as to imply this intention, unless its provisions were such as to render the construction inevitable.

We do not think it essential to the corporate power in question, that it should be exercised out of the city. Could the lottery be drawn in any state of the Union? Does the corporate power to authorize the drawing of a lottery, imply a power to authorize its being drawn without the jurisdiction of a corporation, in a place where it may be prohibited by law? This, we think, would scarcely be asserted. And what clear legal distinction can be taken between a power to draw a lottery, in a place where it is prohibited by law, and a power to establish an office for the sale of tickets, in a place where it is prohibited by law? It may be urged, that the place where the lottery is drawn, is of no importance to the corporation, and therefore, the act need not be so construed as to give power over the place, but that the right to sell tickets throughout the United
*444] *States is of importance, ane therefore ought to be implied. That the power to sell tickets in every part of the United States might facilitate their sale, is not to be denied; but it does not follow, that congress designed, for the purpose of giving this increased facility, to overrule the penal laws of the several states. In the city of Washington, the great metropolis of the nation, visited by individuals, from every part of the Union, tickets may be freely sold to all who are willing to purchase. Can it be affirmed, that this is so limited a market, that the incorporating act must be extended beyond its words, and made to conflict with the internal police of the states, unless it be construed to give a more extensive market?

It has been said, that the states cannot make it unlawful to buy that which congress has made it lawful to sell. This proposition is not denied; and therefore, the validity of a law punishing a citizen of Virginia for purchasing a ticket in the city of Washington, might well be drawn into ques-

tion. Such a law would be a direct attempt to counteract and defeat a measure authorized by the United States. But a law to punish the sale of lottery-tickets in Virginia, is of a different character. Before we can impeach its validity, we must inquire whether congress intended to empower this corporation to do any act within a state, which the laws of that state might prohibit.

*In addition to the very important circumstance, that the act contains no words indicating such intention, and that this extensive construction is not essential to the execution of the corporate power, the court cannot resist the conviction, that the intention ascribed to this act, had it existed, would have been executed by very different means from those which have been employed. Had congress intended to establish a lottery for those improvements in the city which are deemed national, the lottery itself would have become the subject of legislative consideration. It would be organized by law, and agents for its execution would be appointed by the president, or in such other manner as the law might direct. If such agents were to act out of the district, there would be, probably, some provision made for such a state of things, and in making such provisions, congress would examine its power to make them. The whole subject would be under the control of the government, or of persons appointed by the government. [*445

But in this case, no lottery is established by law, no control is exercised by the government over any which may be established. The lottery emanates from a corporate power. The corporation may authorize, or not authorize it, and may select the purposes to which the proceeds are to be applied. This corporation is a being intended for local objects only. All its capacities are limited to the city. This, as well as every other law it is capable of making, is a by-law, and, from its nature, is only co-extensive with the city. It is not probable, that *such an agent would be employed in the execution of a lottery established by congress; but when it acts, not as the agent for carrying into effect a lottery established by congress, but in its own corporate capacity, from its own corporate powers, it is reasonable to suppose, that its acts were intended to partake of the nature of that capacity and of those powers; and like all its other acts, be merely local in its nature. [*446

The proceeds of these lotteries are to come in aid of the revenues of the city. These revenues are raised by laws whose operation is entirely local, and for objects which are also local; for no person will suppose, that the president's house, the capitol, the navy-yard, or other public institution, was to be benefited by these lotteries, or was to form a charge on the city revenue. Coming in aid of the city revenue, they are of the same character with it—the mere creature of a corporate power.

The circumstances, that the lottery cannot be drawn without the permission of the president, and that this resource is to be used only for important improvements, have been relied on as giving to this corporate power a more extensive operation than is given to those with which it is associated. We do not think so. The president has no agency in the lottery. It does not originate with him, nor is the improvement to which its profits are to be applied to be selected by him. Congress has not enlarged the corporate power by restricting its exercise to cases of which the president might approve.

*We very readily admit, that the act establishing the seat of government, and the act appointing commissioners to superintend the public buildings, are laws of universal obligation. We admit, too, that the laws of any state to defeat the loan authorized by congress, would have been void, as would have been any attempt to arrest the progress of the canal, or of any other measure which congress may adopt. These, and all other laws relative to the district, have the authority which may be claimed by other acts of the national legislature; but their extent is to be determined by those rules of construction which are applicable to all laws. The act incorporating the city of Washington is, unquestionably, of universal obligation; but the extent of the corporate powers conferred by that act, is to be determined by those considerations which belong to the case.

Whether we consider the general character of a law incorporating a city, the objects for which such law is usually made, or the words in which this particular power is conferred, we arrive at the same result. The corporation was merely empowered to authorize the drawing of lotteries; and the mind of congress was not directed to any provision for the sale of the tickets beyond the limits of the corporation. That subject does not seem to have been taken into view. It is the unanimous opinion of the court, that the law cannot be construed to embrace it.

Judgment affirmed.

*448] *JUDGMENT.—This cause came on to be heard, on the transcript of the record of the quarterly session court for the borough of Norfolk, in the commonwealth of Virginia, and was argued by counsel: on consideration whereof, it is adjudged and ordered, that the judgment of the said quarterly session court for the borough of Norfolk, in this case, be and the same is hereby affirmed, with costs.

GIBBONS *v.* OGDEN.

Error to state court.—Final judgment.

A decree of the highest court of equity of a state, affirming the decretal order of an inferior court of equity of the same state, refusing to dissolve an injunction granted on the filing of the bill is not a final decree, within the 25th section of the judiciary act of 1789, from which an appeal lies to this court.

APPEAL from the Court for the Trial of Impeachments and the Correction of Errors of the State of New York.

This was a bill filed by the plaintiff below (Ogden) against the defendant below (Gibbons) in the court of chancery of the state of New York, for an injunction to restrain the defendant from navigating certain steam-boats on the waters of the state of New York, lying between Elizabethtown, in the *449] state of New Jersey, and the city of New York; *the exclusive navigation of which with steam-boats had been granted, by the legislature of New York, to Livingston and Fulton, under whom the plaintiff below claimed as assignee. On this bill, an injunction was granted by the chancellor, and on the coming in of the answer, which set up a right to navigate with steam-boats between the city of New York and Elizabethtown, under a license to carry on the coasting trade, granted under the laws of the United States, the defendant below moved to dissolve the injunction, which

motion was denied by the chancellor. The defendant below appealed to the court for the trial of impeachments and the correction of errors; the decretal order, refusing to dissolve the injunction, was affirmed by that court; and from this last order, the defendant below appealed to this court, upon the ground, that the case involved a question arising under the constitution, laws and treaties of the United States.

March 8th, 1821. The cause was opened for the appellant, by *D. B. Ogden;* but on inspecting the record, it not appearing that any final decree in the cause, within the terms of the 25th section of the judiciary act of 1789, had been pronounced in the state court, the appeal was dismissed for want of jurisdiction.

DECREE.—This cause came on to be heard, on the transcript of the record of the court for the trial of impeachments and the correction of errors of *the state of New York: on inspection whereof, it is ordered, that the appeal, in this cause, be and the same is hereby dismissed, it not [*450 appearing from the record that there was a final decree in said court for the correction of errors, &c., from which an appeal was taken.(a)

SULLIVAN *et al. v.* FULTON STEAMBOAT COMPANY.

Averments to sustain the jurisdiction.

In order to maintain a suit in the circuit court, the jurisdiction must appear on the record; as if the suit is between citizens of different states, the citizenship of the respective parties must be set forth.[1]

APPEAL from the Circuit Court for the Southern District of New York. This was a bill in equity, filed in the court below, in which Sullivan, one of the plaintiffs, was described as a citizen of Massachusetts, and others of the plaintiffs, as citizens of Connecticut and Vermont, and the defendants were described as a corporate body incorporated by the legislature of the *state of New York, for the purpose of navigating, by steam-boats, the waters of the East river, or Long Island sound, in said state. [*451

The object of the bill was to obtain an injunction to prevent the defendants from so exercising the privileges granted to them by the said act, and by an assignment from Livingston and Fulton of their rights under certain other acts of the legislature of New York, as to obstruct the plaintiffs in the right claimed by them under the constitution and laws of the United States, and under a coasting license, of employing a certain steam-boat belonging to the plaintiffs, in the transportation of goods and passengers, in the waters of the states of Connecticut and New York. The defendants demurred to the bill, and a decree dismissing it, was entered *pro formâ*, by consent, and the cause was brought by appeal to this court.

March 8th, 1821. *Webster*, for the appellants, opened the record, from which it not appearing that the court below had jurisdiction, as the respective

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(a) See 4 Johns. Ch. 150, and 17 Johns. 488, where the learned reader will find the case reported, as decided in the state courts.

[1] See note to Emory v. Grenough, 3 Dall. 369.

parties were not described as citizens of different states, the decree, dismissing the bill, was affirmed.

DECREE.—On motion of the appellants, by their counsel, and on inspection of the transcript of the record of the circuit court of the southern district of New York, it is decreed and ordered, that the decree of the said circuit court, in this case, be and the same is hereby affirmed, it not appearing from the record, that the said circuit court had jurisdiction *in said cause. The said affirmance to be without prejudice to the complainants on the merits of the case.

*452]

The JONQUILLE.

Dismissal of appeal.

An admiralty suit, where an appeal has been taken from the circuit court to this court, but not prosecuted, will be dismissed, upon producing a certificate from the court below, that the appeal has been taken, and not prosecuted.

March 8th, 1821. *Wheaton*, for the respondents, moved to docket and dismiss the appeal in the case, which was a prize cause, commenced in the circuit court of North Carolina, in which a decree for costs and damages had been entered against the captors, from which they appealed, but had not prosecuted their appeal. He produced a certificate from the court below to that effect.

THE COURT stated, that the case was within the spirit of the 20th rule of court, although that rule applied, in terms, only to writs of error.

Motion granted.(*a*)

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*453] *HUGHES *v.* BLAKE.

Equity pleading.

A decree cannot be pronounced, on the testimony of a single witness, unaccompanied by corroborating circumstances, against a positive denial, by the defendant, of any matter directly charged by the bill, in the defendant's answer, or answer in support of his plea.[1]

A replication to a plea, is an admission of the sufficiency of the plea, as much as if it had been set down for argument and allowed; and all that the defendant has to do, is to prove it in point of fact, and a dismissal of the bill, on the hearing, is then a matter of course.[2]

Under what circumstances, a plea of a former judgment at law, for the same cause of action, is a good bar in equity.

Hughes *v.* Blake, 1 Mason 515, affirmed.

APPEAL from the Circuit Court of Massachusetts.

The object of the bill in equity filed in this case, was, to recover from the defendant, Blake, a sum of money arising from the sale of a tract of land, called Yazoo lands, alleged to have been made in 1795, by the defendant, as

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(*a*) See new rule of court of the present term, *ante*, Rule 32.

[1] Union Bank *v.* Geary, 5 Pet. 99; Carpenter *v.* Providence Washington Ins. Co. 4 How. 185; Parker *v.* Phetteplace, 1 Wall. 684; Tobey *v.* Leonards, 2 Id. 423; and see Godden *v.* Kimmell, 99 U. S. 206–7.

[2] Rhode Island *v.* Massachusetts, 14 Pet. 210.

agent of certain persons named in the bill, in which lands the plaintiff, Hughes, claimed an equitable interest, in common with the immediate principals of the defendants, and therefore, to be entitled to a proportion of the proceeds resulting from the sale. The bill also charged, that the defendant had rendered himself distinctly liable for a specific sum of money, in virtue of a certain order, having reference to the plaintiff's interest in the lands, drawn by one Gibson, in September 1796, in favor of the plaintiff, and accepted by the defendant, with certain modifications and conditions, as particularly expressed in the acceptance.

*The defendant pleaded in bar, both to the relief and the discovery sought by the bill, a former verdict and judgment at law, rendered in his favor, in the supreme court of Massachusetts, in the year 1810, upon a suit commenced against him by the present plaintiffs, in 1804, being long before the exhibition of the present bill, for the same cause of action. The plea averred, that the judgment at law was still in force; that the matters in controversy, and the parties in both suits, were the same; that the whole merits of the case, as stated by the bill, were fully heard, tried and determined in the action at law, and in a court of competent jurisdiction; and that the judgment was obtained fairly, and without fraud, covin or misrepresentation, or the taking any undue advantage. It was also averred by the plea, that no evidence had come to the plaintiff's knowledge, since the trial at law, respecting any of the facts alleged in the bill, and which he did not, or might not have produced on such trial: and further, that the defendant had, at no time, as alleged in the bill, obtained of a certain E. Williams, any allowance or payment, for, or on account of, his, the defendant's, being liable as bail for Gibson, in the plaintiff's bill mentioned, and for which liability he had claimed in the action at law an indemnity out of a fund, on the credit of which he had accepted the order in favor of the plaintiff. The defendant, then, without waiving his plea, proceeded to answer and deny the matters alleged in the bill, as circumstances of equity to avoid the effect of the proceedings at law, and which he had already denied by the averment in his plea. [*454

*To this plea and answer, the plantiff filed a general replication, in the usual form, and witnesses were examined by both parties. [*455

At the hearing, the indentity of the causes of action were sought to be established, without the aid of collateral proof, from a comparison of the matters set forth in the bill, with the averments contained in the several counts of the plaintiff's declaration; it appearing, moreover, that, in the trial at law, the plaintiff had submitted to the jury, in support of these counts, the depositions of the same witnesses, on whose evidence he relied, in support of his bill. The principal other question of fact related to the subject of the negotiation respecting the lands before mentioned, alleged in the plaintiff's bill to have taken place in 1814, between the defendant and E. Williams, whose testimony respecting it, was insisted by the plaintiff, not to be sufficient to outweigh the effect of the positive denials contained in his plea and answer.

The cause being heard on the issue joined, and the proofs taken in it, the court below decreed that the plea was sufficiently proved, and therefore, dismissed the bill with costs, and the cause was brought by appeal to this court.

February 19th. *Pinkney*, for the appellant, stated three questions for the consideration of the court: 1. Whether the plea was in itself sufficient, supposing its sufficiency to be now an open question? 2. Whether it has been proved? 3. Whether its sufficiency, supposing it is proved, is now
*456] open for *inquiry? The first of these questions being answered negatively, and the the third affirmatively, would produce a reversal of the decree: and let them be answered as they might, if the second be answered negatively, a reversal would equally follow.

1. The plaintiff's allegations must be taken to be true, except so far as the averments in the plea, snd the answer in support of the plea, deny them. Coop. Eq. Pl. 231; 2 Atk. 155; Gilb. Ch. 158. And if the plea does not deny whatever is alleged, and if true, would make the plea no bar, it is no plea. Coop. Eq. Pl. 226, 266. The result of an examination of the allegations in the bill will be found to be, that the defendant was the legal owner of the notes taken for the sale of the lands, by taking and holding them in his own name; that the plaintiff, and the other persons interested, were *cestuis que trust*, according to their respective interests, explained and known to the defendant; that the defendant's conditional acceptance of the order in the plaintiff's favor, so far as it affected to authorize him to apply the plaintiff's interest as an indemnity for his liability as Gibson's bail, being without the plaintiff's consent, did not destroy the defendant's character of trustee. That when he afterwards sold the plaintiff's interest (it being still a merely equitable one, in the view of chancery, the conditional acceptance being of no force in equity), in order to apply the money to the wrongful purpose of the conditional acceptance, the defendant still remained answer-
*457] able, in equity, upon the foundation *of the original trust. That the defendant knew all the material facts charged in the bill, out of which arose the trust, and breach of trust, and his alleged continuing accountability. That the defendant insisting upon thus misapplying the money, the plaintiff, mistaking the proper *forum*, sued the defendant at law, and a verdict and judgment passed against him; and the bill charges the defendant's breaches of trust, and abuse of his power as legal owner, in taking advantage of the plaintiff, and the impossibility of his obtaining a full and fair trial of the whole merits law, as reasons why the verdict and judgment should not be suffered to prevent relief in equity. The defendant, notwithstanding all this, pleads the verdict and judgment in bar of the relief and discovery. The plea leaves uncontradicted whatever in the bill showed a mere equitable trust, and undue advantage taken of the defendant's character of legal owner and holder of the fund. Since, then, the plaintiff could obtain relief nowhere, but upon the mere trust, which was properly cognisable in chancery; and even if it were barely possible, that a court of law could relieve, and that great difficulties only stood in the way, arising out of the nature of the subject, this miscarriage at law ought not to oust a court of equity of its power of relief, in a matter appertaining to its jurisdiction.

It cannot be denied, on the other side, that a judgment at law may be relieved against in equity, upon equitable inducements of various kinds. Cases of this sort furnish the familiar and ordinary business of the court of
*458] *chancery. Coop. Eq. Pl. 141; Tothill 231; 1 Ch. Cas. 56. The only question, therefore, is, upon what grounds will it relieve? I admit, with Lord Chancellors Eldon and Redesdale, that mere inattention,

omission or neglect, however fatal the consequences may be, shall not, of itself, be a ground of equitable relief against a judgment at law. *Ware* v. *Harwood*, 14 Ves. 31; *Bateman* v. *Willoe*, 1 Sch. & Lef. 201. But where the matter is cognisable in equity, although also cognisable at law, and effectual cognisance has not, and cannot be taken at law, chancery will relieve against a judgment at law; especially, if the matter is better adapted to equitable cognisance, and forms a favorite subject of that jurisdiction. The instances put by Lord REDESDALE, of cases in which equity will interfere, although a verdict and judgment have been obtained at law, are only put by way of example. 1 Sch. & Lef. 204. They are not all the excepted cases: and the case actually before him, where he refused to interfere, was a case of *crassa negligentia* on the part of the defendant at law. If there has been no such gross negligence, and if the court of law be not only of competent jurisdiction, but competent to do justice in the case, from the nature of the subject, and its mode of proceeding, doubtless, its judgment is conclusive. But this does not exclude the right of equity to control the judgment of a court of law, for equitable purposes. It is no just reproach to a court of law, that it cannot do complete justice, in all cases where it may have jurisdiction. The *question is, whether it has adequate [*459
jurisdiction: and if it has not, equity will and ought to interfere: as in the case of a bond given for the purchase-money of lands, and a suit at law brought upon it; and after judgment, a fatal defect discovered in the title; a court of equity will enjoin and relieve against the judgment, although it has no natural jurisdiction over a suit brought for a specialty or simple-contract debt. In the view of a court of equity, a party who elects an incompetent *forum*, is not concluded by its judgment. The question still recurs, had he, and could he have, justice there?

The terms of the averment of the present plea, are also important to be considered. The plea alleges, that the merits were fully and fairly tried. But if it appears that, in the nature of things, there were inherent difficulties in opposition to a full trial of the real merits, the plea cannot be true. The general rule, that whatsoever might have been, and was, litigated at law, is concluded, need not be denied, if taken with this qualification, that it be fully and fairly litigated, and there be no equitable reason why the judgment should be set aside. But if there be new evidence discovered, or fraud, or an unconscientious advantage taken by the opposite party, or matters of equity which a court of law could not effectually investigate and decide, then the judgment at law is not conclusive.

Let us now see, whether this case, as it appears on the bill, and the record pleaded as a bar, was properly and effectually relievable at law. And in order to do this, it is necessary to examine the counts of *the plain- [*460
tiff's declaration in the suit at law, which a court of equity will do with a hypercritical eye, when it becomes necessary to inquire whether a judgment of a court of law is fit to bar its own jurisdiction. It does not act on such an occasion, as an appellate court: but it looks to the case with a view to see whether justice could be effectually done by the court of law. Lord REDESDALE, in the case before alluded to, inquired what was *open* before the jury (1 Sch. & Lef. 204); and an examination of the counts in this declaration has the same object, and the further object, to ascertain whether any judgment could have been recovered upon them.

The learned counsel here entered into a minute analysis of the counts, in order to show that complete justice could not be done in the action at law upon the equitable merits of the case, considered as a case of trust, complicated accounts, and fraud.

The original trust was never tried, and could not be tried. A declaration could not be framed to try it fully and effectually. A complicated account may, indeed, be examined at law. There is no defect of jurisdiction; but there is an insurmountable difficulty in doing justice. A court of law is not adapted, although it has jurisdiction, to arrive at a just result on such a subject; and as matters of account are a proper subject of equitable jurisdiction, equity will interpose, on the mere ground of that difficulty, notwithstanding there has been a trial at law. The want of the defendant's oath, *461] which this bill, in seeking *relief, calls for, was alone an insurmountable obstacle. This is not a bill for discovery merely; if it was, it could not be maintained; for then it would not be a case for equitable cognisance, and the plaintiff should have come here for a discovery, during the *lis pendens* at law. But although it is a bill for relief, discovery is most important to that relief. The relief was always in the power of a court of equity, and one of the reasons why this court ought not to be satisfied with what has been done at law, is, that at law, there could be no discovery. The examination into the trust, and its abuses, could not be complete, without the defendant's oath. If the plaintiff had come into equity, seeking discovery and relief, while the suit was depending at law, the court of equity would have taken the whole cause under its care, and would have determined it, as now required to do; and the principle is not altered, by the suit at law having proceeded to judgment, since the cause has not yet been decided upon the defendant's oath. Where a bill alleges that a verdict has been obtained, on a matter of equitable cognisance, against the defendant's knowledge of the merits, a reliance upon such verdict is as much against conscience as to that defendant, as the alleged breach of trust itself. In this case, the plea is no bar to the relief, if the defendant's knowledge makes the verdict unconscientious. A judgment may, indeed, be pleaded in bar, where the matter has been fully tried, and where the judgment is not impeached through the conscience of the defendant. If the bill alleges nothing, that if *462] true, convicts the defendant of knowledge that his *verdict is against conscience, the plea is good. But a court of equity ought not to relinquish its jurisdiction, until the defendant has maintained the verdict, on a matter of equitable cognisance, by his oath.

2. It has already been shown, that the merits of the cause could not have been fully and fairly tried at law, and the judge's charge shows that they were not. But it is said, that the plaintiff ought then to have moved for a new trial: and certainly, upon a matter which a court of law only had a right to dispose of, this would have been the proper course: but this is a matter of equity, and if the party will set up a trial at law, as a bar to equitable relief, he must show it, as he alleges it to be, a full and fair trial, and that the equitable merits were really left open to the jury.

3. But supposing the plea to be proved, is its sufficiency now open for inquiry? And certainly, the general rule would exclude that inquiry: pleas are not usually forestalled by the bill; but if the bill shows what, if true, would invalidate the plea, taking issue on it does not cure the defect. Coop.

Eq. Pl. 227. But it has been before shown, that this bill does allege such matter, and the plea admits the whole of it, by not denying it. It is true, that the defendant cannot amend his plea, but he may be ordered to answer, reserving him the benefit of his plea at the hearing, and in that mode justice will be done.

* *Webster* and *Jones*, contrà, insisted, that no question could arise on the sufficiency of the plea in point of law, for by going to issue on [*463 the facts alleged in the plea, the parties have waived all objections of that nature: or, in the words of GILBERT, "if a party replies to a plea, before it comes on to be argued, this is as full an admission of the plea, as if it had been argued and allowed; for the plea, by this replication, is allowed to be good; only the defendant is put to the proof thereof; and so he may be, when it is argued and allowed. But if he proves his plea, the bill must be dismissed at the hearing." Gilb. For. Rom. 98. (Mitf. Eq. Pl. 244; Beames' Eq. Pl. 317; 2 Eq. Cas. Abr. 79; Wyatt's Pr. Reg. 376; 1 Sch. & Lef. 725.) Thus, if the defendant, in pleading a purchase for a valuable consideration, omits to deny notice; if the plaintiff replies to it, all that the defendant has to do, is to prove his purchase; and even if the plaintiff proves notice, it is immaterial; for it is the plaintiff's own fault, if he does not set down the plea to be argued, in which case it would be overruled. *Harris* v. *Ingleden*, 3 P. Wms. 95. So here, if the plea had been bad, the plaintiff should have set it down for argument. The plea consists of two material parts; it alleges a judgment at law, for the same cause of action, in a court of competent jurisdiction; and it avers that there is no ground to impeach that judgment, and no new evidence discovered to enable the plaintiff to go behind it. There is the same strictness of pleading in equity, as at law (2 Atk. 632); but if the rule were not so, this plea is *sufficient. The general prin- [*464 ciple is clear, that a judgment in a competent court, is a bar to a proceeding for the same cause of action in any other court. It is conclusive as to every matter which might have been litigated and decided in the first suit. The rule in equity is the same in this respect as at law. 3 Atk. 626. Nor does it make any difference, that the case is proper, in itself, for equity jurisdiction. If so, a judgment at law could never be pleaded in bar of a suit in equity. Questions of fraud and trust are not the peculiar and exclusive subjects of equity jurisdiction. Whenever courts of common law can reach these subjects, they dispose of them effectually and conclusively. 1 Burr. 396; Mitf. Eq. Pl. 90; 3 Bl. Com. 431; 2 P. Wms. 156; 1 Ibid. 154. If a particular subject is common to the two jurisdictions, the judgment of that tribunal which first appropriates it to itself, must necessarily be conclusive, otherwise, the party might speculate upon his chances of recovery in both: and as the courts of the Union are now constituted, we should be presented with the novel spectacle of a party suing on both sides of the circuit court for the same cause of action. Here, the judgment is as good a bar to the discovery as to the relief. Mitf. Eq. Pl. 193. So, a plea of the statute of limitations, or the statute or frauds, is a bar to discovery as well as relief. Coop. Eq. Pl. 251, 255, 257; 1 Bro. C. C. 305. And it is now the settled course of proceeding, that if a bill is filed for discovery and relief, *and the plea is sufficient to bar the relief; it is held sufficient to bar the discovery. 9 Ves. 75. It is the general rule, that a plea confesses [*465

and avoids; but that principle does not apply in this case, where the defendant denies every allegation of the bill, and supports his denial by the former trial and verdict. Had it been a plea of payment, or release, or of the statute of frauds, or limitations, the rule might be applicable. The real defence is, that this matter has been before tried, and found against the plaintiff. If the defendant had answered more, he would have overruled his own plea.

Where is the authority for asserting, that it is no objection to the present bill, that a discovery was not sought *pendente lite?* What use could now be made of a discovery? It could not aid any proceeding elsewhere: and could only be used as a ground for relief in the present suit. The whole of the argument on the other side, on this point, rests on the notion, that the plaintiff may sue at law, and being defeated there, may, of course, file a bill in equity for the same matter. The unavoidable consequence of that doctrine would be, that in no case could the judgment of a court of law be pleaded in bar to a suit in equity. Here, the cause of action is equally within the jurisdiction of a court of law, which has pronounced upon it, and whose judgment must, therefore, be conclusive in all other courts; and the argument against its conclusiveness, in this case, goes on the supposition, that
*466] the defendant cannot set up *the judgment, without undertaking to prove, that it was a correct judgment on the merits, or, in other words, without going through the whole process of trial again. The plaintiff had to choose between three different courses. He might sue in equity; he might sue at law, and file a bill for discovery, *lite pendente;* or he might bring an action at law, and go to trial, without the aid of a discovery. He elected the latter course, and must be bound by it. The verdict and judgment constitute a flat bar. The plaintiff is not now entitled to a discovery, unless he is entitled to relief; he is not entitled to relief, because it is a *res judicata.* A court of equity cannot try over again, the merits which were fully tried in the former cause. To revise the merits of a cause, which has been once tried between the same parties, and in a competent court, is the province of an appellate court, and not of a co-ordinate tribunal, or one of a different jurisdiction. Parties must prosecute their rights in due time, and before the proper *forum;* and having once elected their *forum,* the decision is conclusive, not only as to the matter actually adjudged, but as to every matter which might have been litigated and decided. *La Guen* v. *Gouverneur,* 1 Johns. Cas. 436, *per* KENT, C. J.; *Bateman* v. *Willoe,* 1 Sch. & Lef. 201. In the action at law, the judge's charge might have been excepted to, if erroneous, and a new trial granted, which is, in itself, a sort of equitable right; but if the charge was correct, no injustice has been done. The present bill avows it to be for the same cause of action, and does not allege any
*467] *incompetency in the jurisdiction of the court of law. It sets up no new right, but merely contends, that the plaintiff had a right then, on matter discovered since, but existing at the time. The question now is, not as to the goodness of the counts in the plaintiff's declaration, but whether the merits have been substantially tried upon them: not intending, however, to admit, that the counts were not sufficient. The regular course of the court of chancery, in such a case, is to refer them to the master, to report whether the cause of action be substantially the same. 1 Vern. 310, note (Raithby's Ed.).

As to the principles which govern courts of equity in setting aside verdicts as against equity, it must be shown, that at the time of the trial at law, some material fact existed, within the defendant's own knowledge, different from the finding of the jury. *Williams* v. *Lee*, 3 Atk. 224. Here, there is no such fact: and even if there had been, if it was also within the plaintiff's knowledge, he should have filed a bill of discovery, *lite pendente*, to obtain the defendant's answer on oath. Supposing the testimony of E. Williams to be true, it establishes no fact, existing at the time, which is essential to entitle the plaintiff to relief in equity. *Standish* v. *Radley*, 2 Atk. 178. But his testimony is explicitly contradicted by the defendant's answer: and the plea must, therefore, stand, being supported by the answer, and contradicted by the testimony of a single witness only, unsupported *by circumstances to strengthen its credibility. *Walton* v. *Hobbes*, 1 Atk. [*468 19, and the cases there cited; 2 Ves. jr. 243; 1 Bro. C. C. 52; 1 Johns. Ch. 459; 3 Ves. jr. 170. The transactions between the parties took place more than twenty years ago. The plaintiff had an opportunity of establishing his pretended claim, in the tribunal which he had elected, and in which he failed; and the defendant has a just right to avail himself of that failure as a bar to any further proceedings, in a case where, besides the solemn trial which has already been had at law, he has now purged his conscience of the allegations of fraud, which have been made against him, without the slightest foundation in the facts and circumstances of the case.

March 10th, 1821. LIVINGSTON, Justice, delivered the opinion of the court, and after stating the pleadings, proceeded as follows:—In examining whether there be any error in the decree of the court below, we shall have to inquire, whether the plea of the respondent is proved; and if so, whether any other decree, except that of dismissing the bill, could have been made by the court below.

In examining the question of fact, that is, whether the plea were proved or not, it will be borne in mind, that no decree can be made against a positive denial of the defendant, of any matter directly charged in the bill, on the testimony of a single witness, unaccompanied by some corroborating circumstance. *There is no pretence, that there is anything untrue in any of the averments which the plea contains, on the subject of the [*469 proceedings at law—such as, that a judgment was obtained by the respondent; that the same is in full force, &c. The first averment in the plea, which will require a more particular consideration, is the one denying that the respondent had at any time obtained from E. Williams, any allowance or payment, for or on account of his being bail for Gibson, in an action brought against him by one Evans. The respondent had been permitted, as appears by the facts of the case, to retain out of a fund, on which the appellant had a claim, a considerable sum, to save him harmless against this responsibility, and which was, in all probability, allowed to him, on the trial at law. If, therefore, it could have been shown, that Blake had been fully indemnified, or paid, for this liability, from any other quarter, and that this fact had come to the appellant's knowledge, since the judgment at law, it would seem no more than equitable, notwithstanding these proceedings, thus far to open the account between them. But has this been done? The allegation of the bill, in substance, is, that Blake has been twice indemnified for

the same loss, or in other words, that he had been twice reimbursed the moneys which he paid as the bail of Gibson. This fraud, which is so unhesitatingly charged upon the respondent, is not made out by any testimony in the cause. Independent of Blake's positive and absolute denial, which is equivalent to the testimony of one witness, there is nothing in the deposition
*470] of Williams, who is the only *witness to this point, to establish the fact, as stated in the bill. This gentleman has been twice examined, once in the year 1805, as a witness in the trial at law; and again, as a witness in this cause. On his first examination, he stated, that he was informed by Blake, that he held in his hand about $6300, which had been received of Henry Newman, as an indemnity for his having become bail for Gibson, in an action for some person whose name he did not recollect, on which pretence, Blake refused to pay him this sum. In his second deposition, which was taken in this cause, he swears that he was informed by Blake, that he had received from Newman about $6000, which he should retain, in consequence of his liability to Evans, as the bail of Gibson; and that he, Williams, allowed the respondent to apply this money for that purpose. Now, admitting that Blake retained these moneys, and with the consent of Williams, who, it appears however, had no interest in, or control over, them, with intent to apply them in this way, where is there any proof whatever, in contradiction of Blake's answer, that he ever did make that use of them. He might have securities of Gibson, of various kinds, the avails of which he might have a right to retain for the same object, but if he actually made only one appropriation for such object, no one could complain. That the fund spoken of by Williams, which arose out of Newman's note, was not applied to the indemnity which has so often been mentioned, appears not only by an averment in Blake's plea to that effect, but by the testimony of
*471] Gibson *himself, a witness of the appellant, who declares, that the note of Newman was subject to his order; that no privity existed between Williams and Blake respecting the same; and that it had not been placed in Blake's hands, as an indemnity for becoming his bail. It follows, therefore, that Blake could not have obtained from Williams any allowance or payment on account of this responsibility; and we accordingly find, from the bill itself, that on a settlement which took place between Blake and Gibson, in November 1796, about two months after the acceptance in favor of the appellant, the former fell in debt to the latter a sum exceeding $2000, the payment of which, by Blake, is one subject of complaint in the appellant's bill. Now, it is more than probable, that in this settlement, Gibson received a credit for the very money of which Williams speaks, as Gibson acknowledges it to have been a final settlement of all the accounts between him and Blake.

The court, therefore, is entirely satisfied, that the averment in the respondent's plea, which it has just been considering, is fully established, and that the proof is such as to leave no room whatever to believe, that Baker was ever repaid the moneys he advanced as the bail of Gibson, from any other fund than that which the appellant had consented should stand pledged for that purpose. As little truth is there in the allegation, that what Williams could testify on this subject, was unknown to Hughes, during
*472] the pendency of the action at law; for Williams, who is examined as a witness for the *plaintiff in this suit, swears to the very fact,

which he had been been produced to prove in the action at law, respecting the declarations of Blake concerning Newman's note; and this he does, without any variation from his former testimony, materially affecting the present suit. The other averment, therefore, in the plea, that no new evidence has come to the appellant's knowledge respecting the matters in litigation, is fully and satisfactorily established.

The truth of the plea being thus made out, what is to be the consequence? If the rule of courts of equity, in England, is to be applied, there can be no doubt. If a plea, in the apprehension of the complainant, be good in matter, but not true in fact, he may reply to it, as has been done here, and proceed to examine witnesses, in the same way as in case of a replication to an answer; but such a proceeding is always an admission of the sufficiency of the plea itself, as much so, as if it had been set down for argument and allowed; and if the facts relied on by the plea are proved, a dismissal of the bill, on the hearing, is a matter of course. Whatever objection there may be, to adhering strictly to this course of proceeding, in every description of cases, it is considered as the long and established practice of a court of equity, which ought not lightly to be departed from. It is not perceived, that any serious mischief can arise from it. Counsel will generally be able to decide on the merits of any defence which may be spread on a plea, and if insufficient, it is not probable, they will not do otherwise than set it down for argument. *Nor will they ever take issue on it, but in a case which presents a very clear and sufficient defence, if the facts be [*473 proved. If a replication should be filed, inadvertently, the court would have no difficulty in permitting it to be withdrawn. But if the plaintiff will persevere in putting the defendant to the trouble and expense of proving his plea, it must be from an entire conviction, that it contains a substantial defence, and in such case, there is no hardship in a court's considering it in the same light. But without applying the rule which has been mentioned, to the present case, the court has no difficulty in saying, that the matters set forth in this plea, which has been drawn with great care and judgment, constitute a complete defence to the present action, and that the appellant has failed to in showing any good cause why the judgment at law should not be conclusive on all the matters stated in the bill. Whatever claim he may, at one time, have had on Blake, for one-fourth of $75,000, secured by Barrel's notes, if Blake knew, at the time of taking them, of his interest to that extent, or for not taking a note for that amount in the name of Hughes himself, it is very certain, that with a full knowledge on his part, that Blake utterly denied a liability to account with any one but Gibson, he came to a settlement with him, by allowing him to accept of Gibson's draft, in his favor, in such way as to charge the fund on which it was drawn, with so many deductions as entirely to exhaust it. And when he is apprised of this conditional acceptance by his agent, or the person who *presented the draft, instead of returning it, or making any complaint, he acquiesces [*474 in it for seven or eight years, and then brings an action to enforce this very contract of acceptance, which, he must have known, put it in the power of the acceptor to make all the deductions from the fund in his hands, which were designed in the act of acceptance. After six years' litigation in a court of law, it is now attempted to revive the same controversy, at least, in part, on an allegation that Blake received a compensation, in some other way than

out of the fund on which the bill in his favor was drawn, for one of the liabilities mentioned in the acceptance. That this was not the case, is abundantly proved. But if Blake had other funds of Gibson, beside the note of Barrel, which he also considered as under Gibson's exclusive control, out of which his indemnity as bail might have been obtained, what right has Hughes now to complain, that such other funds were not applied in that way, after he had agreed or consented, that this indemnity should come out of those funds of Gibson, in the hands of Blake, out of which he was to be paid. Having come into the arrangement, Blake might well think himself at liberty, as it seems he did, to apply the other funds of Gibson in any other way which he and Gibson might think proper. Whether Gibson be liable to the appellant for the subtraction of any part of his fund for the payment of his debt, is a question not before the court; but we cannot see that an application of them in express conformity with the agreement of
*475] *the parties to this suit, can give the appellant any claim on the respondent. At any rate, the plea having denied all the allegations which were relied on as grounds for removing the bar which it was anticipated would be interposed to the appellant's bill, and all the matters stated in the plea, on which issue was taken, having been fully proved, the court is of opinion, that the decree of the circuit court must be affirmed, with costs.

Decree affirmed.

Bartle *v.* Coleman.

Bail.

Under the act of assembly of Virginia, the defendant may enter special bail, and defend the suit, at any time before the entering up of judgment upon a writ of inquiry executed; and the appearance of the defendant, or the entry of special bail, before such judgment, discharges the appearance bail.

If the defendant does not appear, or give special bail, the appearance bail may defend the suit, and is liable to the same judgment as the defendant would have been liable to; but the defendant cannot appear, and consent to a reference, the report and judgment on which is to bind the appearance bail, as well as himself. Such a joint judgment is erroneous, and will be reversed as to both.

Error to the Circuit Court for the District of Columbia.

*476] March 8th, 1821. This cause was argued by *Swann*, for the *plaintiff in error, citing *Dunlops* v. *Laporte*, 1 Hen. & Munf. 22; *Grays* v. *Hines*, 4 Ibid. 437; *Fisher* v. *Riddle*, 1 Ibid. 329: and by *Jones* and *Taylor*, for the defendant in error, citing *Holdip* v. *Otway*, 2 Wms. Saund. 106, and the cases there cited; *Gould* v. *Hammersley*, 4 Taunt. 148.

March 10th. Marshall, Ch. J., delivered the opinion of the court.—This is a writ of error to a judgment rendered by the circuit court for the district of Columbia and county of Alexandria, against Andrew Bartle and Samuel Bartle, on a writ issued by George Coleman against Andrew Bartle, on the service of which, Samuel Bartle became bail for his appearance. The defendant in the court below, not having entered its appearance, a conditional judgment was entered, at the rules held in the clerk's office, against the defendant and his appearance bail. This being an action on the case, the

judgment at the rules was for no specific sum, but for the damages which the plaintiff in that suit has sustained, which damages are to be inquired into, and ascertained by a jury. After this writ of inquiry shall be executed, and not till then, a final judgment for the damages assessed by the jury is rendered by the court. In the meantime, the cause stands on the court docket for trial.

The act of assembly respecting this subject is in these words: "And every judgment entered in the office, against a defendant and bail, or against a defendant *and sheriff, shall be set aside, if the defendant, at the succeeding court, shall be allowed to appear without bail, put in good bail, being ruled so to do, or surrender himself in custody, and shall plead to issue immediately." "If the defendant shall fail to appear, or shall not give special bail, being ruled thereto by the court, the bail for appearance may defend the suit, and shall be subject to the same judgment and recovery, as the defendant might or would be subject to, if he had appeared and given special bail." [*477

The courts of Virginia have never construed this act strictly as to time. Although the absolute right given to the defendant to appear and set aside the judgment rendered in the office, is limited to "the succeeding court," he has always been allowed to appear, and set it aside, at any time before it came final. In all actions which sound in damages, the judgment cannot become final, until the damages shall be ascertained for which it is to be rendered. In other respects, too, this law which authorizes a judgment against the appearance or common bail, without the service of process on him, has been construed with great liberality. The cases which have been cited, show that the decisions in the court of appeals of Virginia, have settled principles which seem to decide this case. It has not only been determined, that the defendant may enter special bail, and defend the suit, at any time before a final judgment, but also, that if he appears and pleads, without giving special bail, or appears and confesses judgment, the appearance bail is discharged. *It is also well known, to be the settled practice of Virginia, if special bail be given, to discharge the appearance bail, although the defendant should not appear, but the judgment should become final, either on his default, or on the execution of a writ of inquiry. [*478

It is then settled, that the appearance of the defendant, or the entry of special bail, before final judgement, discharges the appearance bail. Let these principles be applied to the case before the court. While the writ of inquiry was depending, we find this entry on the record. "In the case of George Coleman, plaintiff, and Andrew Bartle, defendant; and Andrew Bartle, plaintiff, and George Coleman, defendant; by consent of parties this case is referred to Joseph Deane," &c. Could this rule be made, without consent? Or could this consent be given, without the appearance of the party, by himself or his attorney? Both these questions must be answered in the negative. What party, then, did appear and give this consent? Was it Andrew Bartle, the defendant in the cause, who is named as the party, or was it Samuel Bartle, his appearance bail, who is not named? In addition to the omission of the name of Samuel Bartle, an omission which could not have been made, had he actually appeared, and been a party to the rule, it is to be observed, that he had no power to consent to it. The law

allows him to defend the suit, but does not allow him to refer it to arbitrators. We do not hazard much in saying, that no court would or ought to permit such a rule as this to be made, without the consent of the defendant, *479] given in persons, or by his attorney. *But were it even supposed to be in the power of Samuel Bartle to refer the suit of Coleman against Andrew Bartle, he could not refer that of Andrew Bartle against Coleman; and this suit also is embraced in the same rule. It is then apparent, that it is Andrew Bartle who consented to this rule.

It has been contended, that the consent of Samuel Bartle must also be implied. We do not think so. It is reasonable to suppose, that his name would have appeared, had he been a party to the rule. But is was not necessary, that he should be a party to it. Andrew Bartle was himself competent to make this reference, and the appearance bail never comes into court, unless it be to defend the suit, in consequence of the non-appearance of the defendant. But were it even true, that the consent of Samuel Bartle could be inferred, it would, nevertheless, be also true, that Andrew Bartle appeared, by the admission of the plaintiff; and such appearance, according to the decisions in Virginia, discharges his bail.

In the mode pursued by the clerk, in making his entry, the usual form of saying "this day came the parties," &c., is not pursued. But this is immaterial, because the parties perform an act in court, which could not be performed, without appearing; they consent to a rule which implies appearance, and the form of the entry cannot affect its substance. Were it otherwise, the appearance of the defendant is entered in the usual form, before *480] final judgment. On the return of the *award, the following entry is made: "And now here, &c., at this day, &c., came, as well the plaintiff aforesaid, by his said attorney, as the said defendant, by Thomas Swan, his attorney, and the following award was returned," &c. The award is then recited, which shows, that the arbitrators proceeded on notice to Andrew Bartle only, and the judgment of the court is immediately rendered for the amount of the award against "Andrew Bartle, the defendant, and Samuel Bartle, the security for his appearance." Yet the appearance of Andrew Bartle is formally entered on the record, previous to this judgment. If, instead of entering the judgment, in pursuance of the award, it had been entered in pursuance of the confession of the defendant, this would have been the very case cited from 1 Hen. & Munf. 329. And what distinction can be taken between this case and that? The counsel for the defendant in error says, that a judgment by confession is a different judgment from that entered in the office, and therefore, must be a substitute for it received by consent of the plaintiff. And is not this also a different judgment from that rendered in the office? And is it not entered at the instance of the plaintiff?

Where it necessary to pursue this argument further, we should all be of opinion, that judgment could not be rendered against the appearance bail, on this award, and without executing the writ of inquiry, unless by his consent. But as we are of opinion, that the appearance of the defendant has *481] discharged his bail, it is unnecessary to pursue the subject *further. The judgment against Samuel Bartle is erroneous, and as it is joint, it must be reversed against both.

Judgment reversed.

PREVOST *v.* GRATZ *et al.*

GRATZ *et al.* v. PREVOST.

Proof of trust.—Presumption of extinguishment.

To establish the existence of a trust, the *onus probandi* lies on the party who alleges it.

In general, length of time is no bar to a trust, clearly established to have once existed; and where fraud is imputed and proved, length of time ought not to exclude relief.[1]

But as length of time necessarily obscures all human evidence, and deprives parties of the means of ascertaining the nature of the original transaction, it operates, by way of presumption, in favor of innocence, and against imputation of fraud.

The lapse of forty years, and the death of all the original parties, deemed sufficient to presume the discharge and extinguishment of a trust, proved once to have existed, by strong circumstances; by analogy to the rule of law, which, after a lapse of time, presumes the payment of a debt, surrender of a deed, and extinguishment of a trust, where circumstances require it.

Prevost *v.* Gratz, Pet. C. C. 364; s. c. 3 W. C. C. 434, reversed.

APPEAL from the Circuit Court of Pennsylvania.

This was a bill in chancery, filed in the court below, by the plaintiff, George W. Prevost, as administrator *de bonis non*, with the will annexed, of *George Croghan, deceased, against the defendants, Simon Gratz, Joseph Gratz and Jacob Gratz, administrators of the estate of [*482 Michael Gratz, deceased, for a discovery and account of all the estate of G. Croghan, which had come to their hands or possession, either personally, or as representatives of M. Gratz, who was one of the executors of G. Croghan, who died in August 1782, having appointed M. Gratz, B. Gratz, T. Smallman, J. Tunis and W. Powell executors of his last will and testament.

All the executors, except W. Powell, died before the commencement of the suit. B. Gratz died in 1800, and M. Gratz in 1811. W. Powell was removed from his office as executor, in the manner prescribed by the laws of Pennsylvania, after the death of M. Gratz; and the plaintiff was, thereupon, appointed administrator *de bonis non*, with the will annexed.

The bill charged M. Gratz and B. Gratz (the representatives of B. Gratz not being made parties) with sundry breaches of trust, in respect to property conveyed to them in the lifetime of the testator, and with other breaches of trust in relation to assets of the testator, after his decease; and also charged the defendants with neglect of duty, in relation to the property and papers of G. Croghan, which had come to their hands, since the decease of M. Gratz.

The first ground of complaint, on the part of the plaintiff, related to a tract of land lying on Tenederah river, in the state of New York, which was conveyed by G. Croghan to M. Gratz, as containing 9050 acres, by deed, dated the 2d of March 1770, for the consideration expressed in the [*483 *deed of 1800*l.* The deed was, upon its face, absolute, and contained the covenants of general warranty, and for the title of the grantor, which are usual in absolute deeds. At the time of the execution of the deed, G.

[1] Oliver *v.* Piatt, 3 How. 333. But a court of equity will not interfere to establish a stale trust, except it be clearly proved, and the facts have been fraudulently and successfully concealed, by the trustee, from the knowledge of the *cestui que trust*. Badger *v.* Badger, 2 Wall. 87; s. c. 2 Cliff. 137.

Croghan was in the state of New York, and M. Gratz was at Philadelphia. The land, thus conveyed, was, in the year 1795, and after the death of G. Croghan, sold by M. Gratz, to one Lawrence, in New York, for a large sum of money. The plaintiff alleged, that this conveyance, made by G. Croghan to M. Gratz, though in form absolute, was in reality a conveyance upon a secret trust, to be sold for the benefit of the grantor; and he claimed to be allowed the value of the lands, at the time the present suit was brought, upon the ground of a fraudulent or improper breach of trust by the grantee, or, at all events, to the full amount of the profits made upon the sale in 1795, with interest up to the time of the decree. This trust was denied by the defendants, in their answer, so far as respects their own knowledge and belief; and if it did ever exist, they insisted, that the land was afterwards purchased by M. Gratz, with the consent of G. Croghan, for the sum of 850*l.* 15*s.* 5*d.* New York currency.

It appeared from the evidence, that G. Croghan, and B. & M. Gratz, were intimately acquainted with each other, and a variety of accounts were settled between them, from the year 1769, to a short period before the death of G. Croghan; that he was involved in pecuniary embarrassments, and extensively engaged in land speculations; and some portions of his property were
*484] conveyed to one or *both the Messrs. Gratz, upon express and open trusts. It also appeared, that in an account which was settled at Pittsburgh, in May 1775, between B. & M. Gratz, and G. Croghan, there was the following item of credit:

August, 1774. By cash received of Howard, for 9000 acres of land on Tenederah, sold him for 850*l.* 15*s.* New York currency, is here, ...	£797 12 6
Interest on 797*l.* 12*s.* 6*d.* from August 1774, to May 1775, is eight months, at 6 per cent.	31 18 1
	£829 10 7

Upon the back of another account between B. & M. Gratz and G. Croghan, which was rendered to the latter, in December 1779, there was a memorandum, in the handwriting of G. Croghan, in which he enumerated the debts then due by him to B. & M. Gratz, amounting to 1220*l.* 1*s.* 2*d.*, and then added the following words: "paid of the above 144*l.*, York currency, besides the deed for the land on the Tenederah river, 9000 acres patented:" which memorandum appeared to have been made after the conveyance of the land to M. Gratz. It also appeared, that the value of the land, as fixed in the account of May 1775, was its full value; which was proved by public sales of adjoining lands, at the same period when Howard was asserted to
*485] have purchased the land. A counterpart of the account of 1775 *was also in the possession of M. Gratz, in which the word Howard was crossed out with a pen, but so that it was still perfectly legible, and the name of Michael Gratz, in his own handwriting, written over it. M. Gratz continued in possession of the Tenederah land, paid great attention to it, and incurred great expenses in making improvements on it, after the year 1786. The mother of the plaintiff was the heir of G. Croghan, and it was proved, that his father had unreserved and frequent access to the papers of G. Croghan, and resided several years in Philadelphia, with the view of

investigating the situation of the estate, and finally abandoned all hopes of deriving any benefit from it. The account of May 1775, from which the alleged trust was sought to be proved, was delivered over to him by the representatives of M. Gratz, among the other papers of G. Croghan.

The second principal ground of the plaintiff's complaint respected a judgment obtained by the representatives of one W. McIlvaine, against G. Croghan, which was purchased by B. Gratz, during the lifetime of G. Croghan, and was by him assigned to S. Gratz, one of the defendants, who, under one or more executions issued on that judgment, became the purchaser of certain lands belonging to G. Croghan. It appeared, that on the 30th of March 1769, G. Croghan gave his bond to W. McIlvaine, for the sum of 400*l.*, which debt, by the will of McIlvaine, became, on his death, vested in his widow, who afterwards intermarried with J. Clark. A judgment was obtained upon the bond, against G. Croghan, in the name of W. *Humphreys, executor of McIlvaine, in the court of common pleas in Westmoreland county, Pennsylvania, at the October term 1774, upon which a *fi. fa.* issued, returnable to the April term of the same court, in 1775. On the 8th of March preceding the return day of the *fi. fa.*, Bernard Gratz purchased this judgment from Clark, and received an assignment of it, for which he gave his own bond for 300*l.*, and interest. About this time, G. Croghan was considerably embarrassed and several suits were depending against him. Bernard Gratz, having failed to pay his bond, was sued by Clark, and in 1794, a judgment was recovered against him for 89*l.* 6*s.* 10*d.*, the balance then due upon the bond, which sum was afterwards paid by M. Gratz. The judgment of Humphreys against G. Croghan was kept alive, from time to time, until 1786, and in that year, on the death of Humphreys, J. Bloomfield was appointed administrator *de bonis non*, with the will annexed, of Humphreys, and revived the judgment, and it was kept in full force, until it was finally levied on certain lands of G. Croghan. In the year 1800, B. Gratz assigned this judgment to his nephew, S. Gratz, one of the defendants, partly in consideration of natural affection, and partly in consideration of the above sum of 89*l.* 6*s.* 10*d.*, paid towards the discharge of the bond of B. Gratz, by his (Simon's) father, M. Gratz. S. Gratz, having thus become the beneficial owner of the judgment, proceeded to issue execution thereon, at different times, between September 1801, and November 1804, caused the same to be levied on sundry tracts of land *of G. Croghan, in Westmoreland and Huntingdon counties, or five of which he, being the highest bidder at the sale, became the purchaser. The tracts thus sold, contained upwards of 2000 acres, and were sold for little more than $1000. The title to some part of this land was still in controversy. [*486 [*487

Shortly after the assignment of the judgment to B. Gratz, on the 16th of May 1775, G. Croghan, by two deeds of that date, conveyed to B. Gratz, for a valuable consideration therein expressed, about 45,000 acres of land. A declaration of trust was executed by B. Gratz, on the 2d of June 1775, by which he acknowledged that these conveyances were in trust to enable him to sell the same, and with the proceeds to discharge certain enumerated debts of G. Croghan, and among them the debt due on the McIlvaine bond, and to account for the residue to G. Croghan. The bill charged, that the assignment of this judgment was procured by B. and M. Gratz, or both of them, after the death of G. Croghan, and that nothing was due upon the judg-

ment; or if anything was due, it was paid, upon the assignment, out of moneys belonging to the estate of G. Croghan. But the evidence disproved these charges, and showed, that the assignment was made to B. Gratz, in the lifetime of G. Croghan, and that the judgment never was paid or satisfied by G. Croghan, or out of his estate.

The defendants, in their answer, denied, to their best knowledge and belief, all the material charges of the bill; and upon replication, the cause was heard in the court below upon the bill, answer, evidence *and *488] exhibits; and a decree was pronounced, dismissing the bill as to all the charges, except that respecting the lands lying on Tenederah river; and as to this, a decree was pronounced in favor of the plaintiff for all the profits made upon a sale of those lands by M. Gratz. From this decree, both parties appealed to this court.

February 28th. *Webster* and *D. B. Ogden*, for the plaintiff, argued: 1. That not only ought M. Gratz to be considered as a trustee of the Tenederah lands, but a decree ought to have been given for the value of the lands, at the date of the decree, instead of the amount for which the lands were sold by him. They insisted, that the original existence of the trust was fully proved by the evidence, and being thus clearly established, the burden of proof was on the defendants, to show how, and by what means, it had been discharged. M. Gratz being a trustee to sell, he could not buy. 10 Ves. 423; 1 Ves. sen. 9; 2 Bro. C. C. 400; 2 Johns. Ch. 252; 5 Ves. 794; 4 Ibid. 497; 6 Ibid. 631. This is the universal, inflexible rule of a court of equity: and even if the trust is to pay a debt due to the trustee himself, still he is a trustee for the surplus, subject to the same prohibition; and in this case, never having sold the land in execution of the trust, he must now be regarded as still holding it, and ought to be accountable for its value at the present time, and not at the time of the pretended sale. If he now held the land, the court would compel him to account for its present value, *or to reconvey it; but he does hold it, in equity, and no act of *489] his ought to prejudice the *cestui que trust*. The lapse of time is nothing, unless it appear that he knew the purchase by the trustee, and must, therefore, be presumed to have acquiesced. 12 Ves. But here no such knowledge is proved, and therefore, no such acquiescence can be presumed.

2. They insisted, that S. Gratz had no right to purchase the lands sold at the sheriff's sale under the McIlvaine judgment; but under the circumstances of the case, ought to be considered as holding them in trust for the plaintiff. This being a proceeding without any notice to the party interested, cannot be sustained. The notice given by the *scire facias* was only to B. Gratz, the executor of G. Croghan: that is, the owner of the judgment revived it, by notice to himself. It is a settled principle, that an executor cannot purchase the property of his testator (2 Johns. Ch. 252), and the purchaser of an equity takes it subject to all claims. Besides, this is a judgment which the law would presume to be satisfied from length of time; which is attempted to be executed by the judgment-creditor, who has in his own hands the funds with which it was to be satisfied, and thus attempts to convert a legal right into an instrument of injustice, which forms a strong ground for equitable relief. 3 Ves. 170.

Pinkney and *Sergeant*, contrà, contended: 1. That the present plaintiff had no right, alone, to call the defendants to account for the alleged trust *as to the Tenederah lands, nor jointly with other parties, as the administrator *de bonis non*, with the will annexed, or G. Croghan. [*490 Equitable estates descend as well as legal estates. Mrs. Prevost, the heir of Croghan, died, while the supposed trust existed, leaving several children, besides the plaintiff, who ought also to have been made parties, if he is to be considered as suing as a parcener. The sale of the trust-estate, indeed, extinguishes the right of the heirs to the land, but it entitles them to the money for which it was sold, which now represents and stands in the place of the land. Nor has Croghan's will any effect upon the matter. The will empowers a majority of his executors (of whom B. Gratz during his life was always to be one) to sell such of his lands as they should think fit, for the payment of his debts. It does not devise to the executors to be sold, but gives them a naked authority to sell and convey. Even admitting that the Tenederah lands fell within the authority, the executors could only have sold the equitable estate of Croghan, which, on his death, descended to his heir. But this supposes that very equitable estate, for the existence of which we contend. But the executors did not sell that equitable estate. M. Gratz, though one of those executors, did not sell under the will; he sold, not the equitable interest merely, but the whole estate, and threw the equitable claimants under Croghan, upon the surplus of the proceeds which he could not appropriate. To sell under the will, he must have had the sanction of the other executors, which he had not; and the plaintiff, as administrator *de bonis non*, *could not have authorized it, because he did not become administrator, until M. Gratz had rendered a sale, by his orders or [*491 consent, impossible. The will, therefore, did not reach the case, and cannot now, in any degree, control it. Nor does the interest which creditors may have in the proceeds, make it personal estate in Croghan, or subject it to the control of his administrator *de bonis non*.

2. The counsel argued, that there was no sufficient proof of the existence of any such trust, as that alleged respecting the Tenederah lands, but that M. Gratz became the absolute owner of the lands, with the knowledge and consent of Croghan. Fraud is never to be presumed, especially, after such a lapse of time; and even if the trust ever existed, equity will rather presume it to be satisfied, than indulge a presumption of fraud, where the parties are dead, and the evidence respecting the transaction is lost. 12 Ves. 261, 374; 2 Ibid. 581; 3 P. Wms. 266; 2 Atk. 67; 3 Ibid. 105; 3 Bro. C. C. 640; 2 Sch. & Lef. 41, 71. Even if there was here a trust to sell, it was a trust to sell for a fixed price, created by a person of full age, and full knowledge of the circumstances, for the benefit only of the trustee and himself. The reason of the rule, that a trustee cannot purchase, is, that the trustee might be tempted from his duty, and buy at an inadequate price. Where the power is general, or, where other persons are interested in the execution of the trust, it may be conceived to be a salutary rule, though sometimes operating severely. But where the trustee is a creditor, *where the price is fixed, and no one else is interested, it would be difficult to [*492 assign any good reason why the trustee might not be the purchaser.

3. As to the McIlvaine judgment, they principally relied upon the same grounds which are stated in the opinion of the court below (*infra*, p. 507 n.).

March 13th, 1821. STORY, Justice, delivered the opinion of the court, and after stating the proceedings in the court below, proceeded as follows:— The first point upon which the cause was argued, respects the tract of land, on the Tenederah river. It appears from the evidence, that this tract of land, containing 9050 acres, was conveyed by Col. Croghan to Michael Gratz, by a deed bearing date on the 2d of March 1770, for the consideration expressed in the deed of 1800*l.* The deed is, upon its face, absolute, and contains the covenants of general warranty, and for the title of the grantor, which are usual in absolute deeds; but are unnecessary in deeds of trust. At the time of the execution of the deed, Col. Croghan was in the state of New York, and Michael Gratz was at Philadelphia. The land was, after the death of Col. Croghan, and in the year 1795, sold by Michael Gratz, to a Mr. Lawrence, in New York, for a large sum of money. The plaintiff contends, that this conveyance made by Col. Croghan to Michael Gratz, though in form absolute, was, in reality, a conveyance upon a secret trust, to be sold for the benefit of the grantor; and in this view of the case, he contends further,
*493] that he is entitled to be *allowed the full value of the lands, at the time that the present suit was brought, upon the ground of a fraudulent or improper breach of trust by the grantee, or at all events, to the full amount of the profits made upon the sale in 1795, with interest up to the time of the decree. The attention of the court will, therefore, be directed, in the first place, to the consideration of the question, whether this was a conveyance in trust? and if so, of what nature that trust was? and in the next place, whether that trust was ever lawfully discharged or extinguished? If there be still a subsisting trust, there can be no doubt, that the plaintiff is entitled to some relief.

It appears from the evidence, that Col. Croghan, and Bernard and Michael Gratz, were intimately acquainted with each other, and a variety of accounts was settled between them, from the year 1769, to a short period before the death of Col. Croghan. During all this period, Col. Croghan appears to have had the most unbounded confidence in them; and particularly, by his will, made in June 1782, a short time before his decease, he named them among his executors, and gave to Michael Gratz, in consideration of services rendered to him, five thousand acres of land, and to his daughter, Rachel Gratz, one thousand acres of land on Charter creek, with an election to take the same number of acres in lieu thereof, in any other lands belonging to the testator, The situation of the parties, therefore, was one in which secret trusts might, probably, exist, from the pecuniary embar-
*494] rassments in which *Col. Croghan appears to have been involved, as well as from his extensive land speculations. And in point of fact, some portions of his property were conveyed to one or both of the Messrs. Gratz, upon express and open trusts.

Still, however, the burden of proof to establish the trust in controversy, lies on the plaintiff. The circumstances on which he relies are, in our judgment, exceedingly strong in his favor; and sufficient to repel any presumption against the trust, drawn from the absolute terms of the deed. In an account which was settled at Pittsburgh, in May 1775, between Bernard and Michael Gratz, and Col. Croghan, is the following item of credit:

August, 1774. By cash received of Howard, for 9000 acres of land, at Tenederah, sold him for 850*l.* 15*s.* New York currency, is here, ...	£797 12 6
Interest on 797*l.* 12*s.* 6*d.*, from August 1774, to May 1775, is eight months, at 6 per cent.	31 18 1
	£829 10 7

There is no question of the identity of the land here stated to be sold to Howard, with the tract conveyed to Michael Gratz by the deed, in 1770, If the conveyance to Michael Gratz had been originally made for a valuable consideration, then paid, it seems utterly impossible to account for the allowance of this credit, upon any sale at a subsequent period. It seems *to us, therefore, that the only rational explanation of this transaction is, [*495 that the conveyance to Michael Gratz, though absolute in form, was in reality, a trust for the benefit of Col. Croghan. What the exact nature of this trust was, it is, perhaps, not very easy now to ascertain with perfect certainty. It might have been a trust to sell the lands for the benefit of Col. Croghan, and to apply the proceeds in part payment of the debts due from him to Bernard and Michael Gratz; or, it might have been a sale of the lands directly to Michael Gratz, in part payment of the same debt, at a price thereafter to be agreed upon, and fixed by the parties; and in the mean time, there would arise a resulting trust, in favor of Col. Croghan, by operation of law.

Time, which buries in obscurity all human transactions, has achieved its accustomed effects upon this. The antiquity of the transaction, the death of all the original parties, and the unavoidable difficulties as to evidence attending all cases where there are secret trusts and implicit confidences between the parties, render it, perhaps, impossible to assert, with perfect satisfaction, which of the two conclusions above suggested, presents the real state of the case. Taking the time of the credit only, it would certainly seem to indicate that the trust was, unequivocally, a trust to sell the land. But there are some other circumstances, which afford considerable support to the other conclusion. Upon the back of an account between B. & M. Gratz, and Col. Croghan, which appears to have been rendered to the latter, in December 1769, there is a memorandum *in the handwriting of [*496 Col. Croghan, in which he enumerated the debts then due by him to B. & M. Gratz, amounting to 1220*l.* 1*s.* 2*d.*, and then adds the following words: "paid of the above 144*l.*, York currency, besides the deed for the land on the Tenederah River, 9000 acres patented." This memorandum must have been made, after the conveyance of the land to M. Gratz, and demonstrates that the parties intended it to be a part payment of the debt due to B. & M. Gratz, and not a trust for any other purpose. The circumstance too, that the word "paid" is used, strongly points to a real sale to M. Gratz, rather than a conveyance for sale to any third person. And if the sale was to be to M. Gratz, at a price thereafter to be fixed between the parties, the transaction could not be inconsistent with the terms of the credit, in the account of 1775. It will be recollected, that M. Gratz, resided at Philadelphia, and the conveyance was executed by Col. Croghan, at Albany. There is no evidence that the consideration stated in the deed of 1800*l.*, or

any other consideration, was ever agreed upon between the parties; and the circumstance that no sum is expressed in the memorandum of Col. Croghan, shows, that at the period when it was made, no fixed price for the land had been ascertained between the parties. If, then, it remained to be fixed by the parties, whenever that value was agreed upon, and settled in account, the resulting trust in Col. Croghan would be completely extinguished. It is quite possible, and certainly consistent with the circumstances in proof, that
*497] B. & M. Gratz might not have been acquainted with the *real value of the land, or might be unwilling to take it at any other value than what, upon a sale, they might find could be realized. From the situation of Col. Croghan, his knowledge of the lands, and his extensive engagements in land speculations, ignorance of its value can scarcely be imputed to him. If, therefore, M. Gratz afterwards sold it to Howard, and Col. Croghan was satisfied with the price, there is nothing unnatural in stating the credit in the manner in which it stands in the account in 1775. It would agree with such facts, and would by no means repel the presumption, that the land was not originally intended to be sold to M. Gratz. It would evidence no more than that the parties were willing that the sale, so made, should be considered the standard of the value; and that M. Gratz should, upon his original purchase, be charged with the same price for which he sold. Upon this view of the case, the resulting trust would be extinguished by the consent of the parties, and no want of good faith could be fairly imputed to either.

But it is said, that there is no proof that any such purchase was ever made by Howard; and the trust being one established, the burden of proof is shifted upon the other party, to show its extinguishment; and if this be not shown, the trust travels along with the property and its proceeds down to the present time. It is certainly true, that length of time is no bar to a trust, clearly established; and in a case where fraud is imputed and proved,
*498] length of time ought not, *upon principles of eternal justice, to be admitted to repel relief. On the contrary, it would seem, that the length of time, during which the fraud has been successfully concealed and practised, is rather an aggravation of the offence, and calls more loudly upon a court of equity to grant ample and decisive relief.

But length of time necessarily obscures all human evidence; and as it thus removes from the parties all the immediate means to verify the nature of the original transactions, it operates by way of presumption, in favor of innocence, and against imputation of fraud. It would be unreasonable, after a great length of time, to require exact proof of all the minute circumstances of any transaction, or to expect a satisfactory explanation of every difficulty, real or apparent, with which it may be incumbered. The most that can fairly be expected, in such cases, if the parties are living, from the frailty of memory, and human infirmity, is, that the material facts can be given with certainty to a common intent; and if the parties are dead, and the cases rest in confidence, and in parol agreements, the most that we can hope is, to arrive at probable conjectures, and to substitute general presumptions of law, for exact knowledge. Fraud or breach of trust, ought not lightly to be imputed to the living; for the legal presumption is the other way; and as to the dead, who are not here to answer for themselves, it would be the height of injustice and cruelty, to disturb their ashes, and violate the

sanctity of the grave, unless the evidence of fraud be clear, beyond a reasonable doubt.

Now, disguise the present case as much as we may, *and soften the harshness of the imputation as much as we please, it cannot escape [*499 our attention, that if the plaintiff's case be made out, there was a meditated breach of trust, and a deliberate fraud practised by M. Gratz, or Bernard Gratz, with the assent of M. Gratz, upon Col. Croghan. If the sale to Howard was merely fictitious, it is an imposition upon Col. Croghan, designed to injure his interest, and violate his confidence; if the fraud were clearly made out, there would certainly be an end to all inquiry as to the motives which could lead to so dishonorable a deed between such intimate friends. But the fraud is not clearly made out; it is inferred from circumstances, in themselves equivocal, and from the absence of proofs, which it is supposed must exist, if the sale were real, and could now be produced.

In the view which the court is disposed to take of this case, it must consider that Howard was a real, and not a fictitious person. It is then asked, why are not the facts proved, who Howard was, where he lived, and the execution of the deed to him. It is to be recollected, that this proof is called for, about forty years after the transaction; when all the parties, and all who were intimately acquainted with the facts, are dead. It is called for, too, from persons, some of whom were unborn, and some very young at the period to which they refer. They cannot be supposed to know, and they absolutely deny, all knowledge of the fact. What reason is there to suppose, that Col. Croghan did not know who Howard was? He had a deep interest in *the value of the property, and could not be presumed to be indifferent to such inquiries, as every considerate man [*500 would be likely to make, in such a case. And after this lapse of time, it is fair to presume, that he did know the purchaser, and was satisfied with the purchase. But it is said, that no deed is produced. Now, it does not necessarily follow, that if a sale was made to Howard, that the contract was consummated by an actual conveyance of the land. If M. Gratz was the *bonâ fide* owner of the land, he might sell it to Howard, by an executory contract, and take a bond or other security for the purchase-money, and from a failure to comply with the contract, M. Gratz might afterwards have refused to give a deed to Howard. And in this case, if in the intermediate time, the settlement was made with Col. Croghan, the credit must have been allowed in that account as it stands, and having been once allowed, M. Gratz could not, on a rescision of the sale, have been entitled to countermand that credit. He would have been bound to take the land, at the sum which he had elected to allow for it, and for which he had sold it. On the other hand, supposing a deed actually to have passed to Howard, the latter may have become dissatisfied with his bargain, or have failed to pay the consideration-money, and have yielded it back to Gratz, and dissolved the purchase. But this circumstance could not have varied the situation of Gratz, in respect to the settlement with Col. Croghan. All that was important, or useful, or necessary, as between them, upon the supposition that the trust was merely a resulting trust, until the price *was fixed, was, that the price should [*501 have been satisfactorily ascertained and agreed to between them. In this view of the transaction, there could be no ground to impute fraud to M. Gratz; nor could his conduct involve a violation of trust. In the absence

of all contrary evidence, is it not just, is it not reasonable, to presume such to have been the reality of the case? That there is no evidence to the contrary, may be safely affirmed.

In addition to this, it may be asked, whether M. Gratz had any adequate motive for practising a deception in this case. Men do not usually act under circumstances such as are imputed to M. Gratz, unless from some strong inducement of interest. It cannot be presumed, that any man of fair character, such as M. Gratz is proved to have been, could perpetrate a fraud or deception, without some motive that should overbalance all the ordinary influence of prudence and honor. If there be anything, beyond all doubt, established in this case, it is, that the value of the land, as fixed in the account of 1775, was its full value. It is proved, by public sales of adjoining tracts, at the very period when Howard is asserted to have purchased the land; and so far from there being any chance of an immediate rise in value, the state of the country, on the very eve of the revolutionary war, forbade the indulgence of any such hope, and must have dissolved every dream of speculation. So far, then, as we can investigate motives, by referring to the general principles of human actions, there does not seem to have been any motive for disguise or concealment, on the part of Michael
*502] *Gratz towards Col. Croghan. The reasonable conclusion, therefore, would certainly be, that no such disguise or concealment was practised.

There is one circumstance also which has been thought to have thrown some cloud over this part of the case, that upon the opinion already indicated, would admit of a favorable exposition; it is this: In the possession of M. Gratz, a counterpart of the account of 1775 is found, in which the word Howard is crossed out with a pen, but so that it is perfectly legible, and the name of Michael Gratz, is, in his own handwriting, written over it. The writing seems to be of great antiquity, and supposing that there was a real sale to Howard, which was afterwards abadoned, it is not unnatural, that M. Gratz should, after the event, have communicated the fact to Colonel Croghan, and with his consent, altered the account, so as to conform to it. Or, the interlineation might have been made in the account, after the failure of the contract with Howard, in order to show against which of the firm of B. & M. Gratz this sum ought to be charged, in the adjustment of their partnership concerns. It adds some force to these considerations, that Col. Croghan continued, during the residue of his life, to entertain the same friendship and confidence in M. Gratz; and this, at least, demonstrated his belief that the Tenederah lands had not been unjustly sacrificed by him.

If we look to the subsequent conduct of M. Gratz, in relation to the Tenederah lands, his great expenses in making improvements on it, after the
*503] year 1786, and his diligent attention to it, it leads to the *conclusion, that he always considered himself as the real *bonâ fide* owner. His posssession of it must have been known to the parents of the plaintiff, whose mother was the heir of Col. Croghan; and it is proved, that his father had the most unreserved and frequent access to the papers of Col. Croghan; and that the actually resided several years in Philadelphia, with the express view of examining the estate, and finally abandoned all hopes of deriving any benefit from the fragments that were left of it. The very account now produced by the plaintiff, by which this trust is brought to light,

was delivered over to him by the representatives of M. Gratz, among the other papers of Col. Croghan; and yet, if there had been anything false or foul in the transaction, it seems almost incredible, that M. Gratz, into whose possession it came, as early as 1782, should have suffered it to remain as a monument of his own indiscretion, and an evidence of his want of good faith.

If, on the other hand, the trust is to be considered as a trust to sell, and apply the proceeds to the payment of the debt due to B. & M. Gratz, most of the considerations already stated will apply with equal force. If the sale was real, and Howard did not comply with the terms of sale, Col. Croghan, having knowledge of the fact, might have been well satisfied to let M. Gratz hold the land, at the price thus fixed by the sale. To him, it must have been wholly immaterial, who was the purchaser, if the full value was obtained; and that it was obtained, in Col. Croghan's own judgment, seems undeniable. The only *question is, whether such knowledge can be inferred; and after such a length of time, under all the circumstances of this case, we are clearly of opinion, that it ought to be inferred. Col. Croghan had it in his power to make inquiries on the subject; if he did, and was satisfied, his acquiescence was conclusive; if he did not, he considered, that the sale, as between himself and Gratz, was consummated, when the price was fixed, and was willing that the trust should be deemed extinguished for ever. If, after the lapse of forty years, and the death of all the original parties, we were to come to a different conclusion, it would be pressing doubtful circumstances, with uncommon rigor, against unblemished characters; where the confidence reposed was so intimate, that the whole evidence could not be presumed to be before us. We should indulge in opinions which might be erroneous, and might, in an attempt to redeem the plaintiff from a conjectural fraud, inflict upon others the most gross injustice. We think, therefore, that the true and safe course is, to abide by the rule of law, which, after a lapse of time, will presume payment of a debt, surrender of a deed, and extinguishment of a trust, where circumstances may reasonably justify it. The doctrine in *Hillary* v. *Waller* (12 Ves. 261, 266), on this subject, meets our entire approbation. It is there said, that general presumptions are raised by the law, upon subjects of which there is no record or written instrument, not because there are the means of belief or disbelief, but because mankind, judging of matters of antiquity from the infirmity and necessity of their *situation must, for the preservation of their property and rights, have recourse to some general principle, to take the place of individual and specific belief, which can hold only as to matters within our own time, upon which a conclusion can be formed from particular and individual knowledge. In our judgment, the trust in the Tenederah lands, such as it was, must be now presumed to have been extinguished by the parties, in the lifetime of Col. Croghan. There is no ground, then, for relieving the plaintiff, as to this part of his claim. [*504 [*505

The remaining point in this case repects the McIlvaine bond and judgment. On the 30th of March 1769, Col. Croghan gave his bond to Wm. McIlvaine, for the sum of 400*l.* which debt, by the will of McIlvaine, became, on his death, vested in his widow, who afterwards intermarried with John Clark. A judgment was obtained upon this bond against Col. Croghan, in

the name of Wm. Humphreys, executor of McIlvaine, in the court of common pleas, in Westmoreland county, in Pennsylvania, at the October term 1774, upon which a *fi. fa.* issued, returnable to the April term of the same court in 1875. On the 8th of March preceding the return day of the *fi. fa.*, Bernard Gratz purchased this judgment from Clark, and received an assignment of it, for which he gave his own bond for 300*l.* and interest. About this period, Col. Croghan appears to have been considerably embarrassed in his pecuniary affairs, and several suits were depending against him. Bernard Gratz having failed to pay his bond, was sued by Clark, and in 1794, a judg-
*506] ment *was recovered against him for 89*l.* 6*s.* 10*d.*, the balance then due upon the bond, which sum was afterwards paid by M. Gratz. The judgment of Humphreys against Col. Croghan, was kept alive from time to time, until 1786, and in that year, on the death of Humphreys, Joseph Bloomfield was appointed administrator *de bonis non*, with the will annexed, of Humphreys, and revived the judgment; and it was kept in full force, until it was finally levied on certain lands of Col. Croghan, as hereafter stated. Some time in the year 1800, Bernard Gratz assigned this judgment to his nephew, Simon Gratz, one of the defendants, partly in consideration of natural affection, and partly in consideration of the above sum of 89*l.* 6*s.* 10*d.* paid towards the discharge of the bond of Bernard Gratz, by his (Simon's) father, Michael Gratz. Simon Gratz having thus become the beneficial owner of the judgment, proceeded to issue executions on the same, and at different times between September 1801, and November 1804, caused the same executions to be levied on sundry tracts of land of Col. Croghan, in Westmoreland and Huntingdon counties, of five of which he, being the highest bidder at the sale, became the purchaser. The tracts so sold, contained upwards of 2000 acres, and were sold for little more than $1000. The title to some part of the land so sold, appears to be yet in controversy.

Shortly after the assignment of the McIlvaine judgment to Bernard Gratz, on the 16th of May 1775, Col. Croghan (probably, having knowledge
*507] of the assignment, though the fact does not appear), *by two deeds of that date, conveyed to B. Gratz, for a valuable consideration expressed therein, about 45,000 acres of land. A declaration of trust was executed by Bernard Gratz, on the 2d of June 1775, by which he acknowledged, that these conveyances were in trust to enable Bernard Gratz to sell the same, and with the proceeds to discharge certain enumerated debts of Col. Croghan, and among them, the debt due on the McIlvaine bond, and to account for the residue with Col. Croghan.

The subject of the McIlvaine judgment was very minutely considered in the court below, by the learned judge who decided the cause, and the principal grounds on which the plaintiff relied for a decree were so fully answered there, that a complete review of them does not seem to be neces-
*508] sary in this court.(*a*) It is observable, that the bill charges that *the assignment of this judgment was secretly procured by Bernard or

(*a*) The following is that part of the opinion of Mr. Justice WASHINGTON in the court below, here alluded to:—

"Upon these facts, it is contended by the complainant's counsel, that B. Gratz ought to be considered by this court, as having purchased the above judgment with

Michael Gratz, or both of them, after the death of Col. Croghan, and that nothing *was due upon the judgment; or if anything was due, it was paid upon the assignment, out of moneys belonging to the estate [*509

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the trust funds, and consequently, for the benefit of G. Croghan; and that even if it was purchased with his own money, still, being a trustee for Croghan, the purchase should be considered as having been made for his benefit, entitling B. Gratz to claim no more than the sum which he actually paid, and to retain the same out of G. Croghan's estate, the whole of which is charged with the payment of his debts. That Simon Gratz, being an assignee of this judgment, with notice of the trust, and without a valuable consideration paid for the same, can stand in no better situation than the assignor did, and ought, therefore, to be treated as a trustee for the estate of G. Croghan, of the lands which he purchased under the executions issued on that judgment, and be entitled to claim merely the sum actually paid by B. Gratz, with interest. It is to be observed, in the first place, that there is not the slightest evidence on which to ground a presumption, that this judgment was purchased with trust funds. B. Gratz gave his own bond for the 800*l.*, at which time he and M. Gratz were considerably the creditor of G. Croghan; and it further appears by the exhibits in the cause, that the accounts between these parties, were regularly settled from time to time, leaving at each settlement a balance against G. Croghan. Neither did any funds arise from the trust property, no part of the same having at any time been sold by the trustee.

As to the argument predicated upon the admission, that the purchase was made upon the credit and with the funds of B. Gratz, I hold it to be altogether untenable. B. Gratz became the purchaser, some months before the date of the conveyances to him, of the 45,000 acres of land, and I am yet to learn, upon what principle of equity it is, that a creditor, who, after he is so, becomes a trustee for his debtor, does by that act impair or affect rights which he had antecedently acquired against him. I admit the soundness of the doctrine laid down by the complainant's counsel, that if a trustee, executor or agent buy in debts due by his *cestui que trust*, testator or principal, for less than their nominal amount, the benefit gained thereby belongs not to him, but to the person for whom he acted. A court of equity will not permit a person, acting as a trustee, to create in himself an interest opposite to that of his *cestui que trust* or principal. But this doctrine is inapplicable to the case of a fair *bonâ fide* creditor, who became so, prior to the assumption of his fiduciary character. In such a case, he is entitled to claim the full amount of what was due from his *cestui que trust*, &c., and the latter has no right to inquire how much the former paid for it; so too, the trustee, &c., may pursue all legal remedies for enforcing payment of the debt, which would have been open to him if he had not become a trustee.

It is said, however, that the declaration of trust of the 2d of July 1775, contains a promise to discharge this very debt, out of the trust property, as soon as the same could be disposed of. But it was not disposed of, and there are the strongest reasons for believing that it was altogether unsalable. Independent of the doubts which clouded the title, it would seem sufficient to observe, that B. Gratz had the strongest temptations to sell, and even to sacrifice, this property, if it had been possible to dispose of it upon any terms.

It is further contended, that the power of attorney given by G. Croghan, to B. & M. Gratz, dated the 10th of July 1772, constituted them trustees of all his lands, with unlimited power to sell them, and to pay off his debts. It is in this part of the case, that I experience the difficulty of deciding satisfactorily to myself, in consequence of the antiquity of these transactions, and the death of all those who might have explained them. What became of this power of attorney, and why it was never acted upon, are questions which no evidence in the cause enables me to resolve. There are, however, strong reasons for presuming, that the powers vested in these agents, were found unproductive of any useful results; and that the instrument which bestowed them was afterwards delivered back to G. Croghan, or remaining with the Gratzs, was considered

of Col. Croghan. The bill *asserts no other ground for relief on this subject. The proof in the cause completely establishes the material charges in the bill to be false. The assignment *was made to Bernard Gratz, in the
*511] lifetime of Col. Croghan; the judgment never was paid or satisfied by Col. Croghan, or out of his estate; and no fraud is pretended in the bill, to have taken place, in the levy of the judgment on Col Croghan's lands, independently of the legal inference to be deduced from the facts charged in the bill. If Bernard Gratz was not, at the time, in the situation of a trustee of Col. Croghan, there is no pretence to say, that he might not rightfully and lawfully purchase the judgment. And there are very strong reasons to believe, that it was purchased, with the knowledge, and for the relief, of Col. Croghan. It was somewhat insisted upon in the court below, that by a power of attorney of the 10th of July 1772, Col. Croghan constituted Bernard and Michael Gratz trustees of all his lands, with unlimited power to sell them and pay of his debts. But this ground has not been insisted upon here, and, indeed, for the best reasons. There is the strongest presumptive evidence, that this power was never acted upon, or was revoked, and held a nullity, before the time of the assignment in question.

The ground that has been principally relied upon here, is, that Bernard Gratz, having taken the two trust deeds, in 1775, already referred to, in trust for the payment of this very debt out of the proceeds of the sale of the lands conveyed by those deeds, could not proceed to satisfy the judgment out of any other lands, without notice to Col. Croghan, or his representatives.

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by all the parties as a blank paper. This conjecture is strongly countenanced by the fact, that this paper, as well as the deeds of May 1775, was found among the papers of G. Croghan, after his death. These very deeds furnish themselves the most persuasive evidence in support of this presumption. For if the general power to sell the whole of G. Croghan's lands, continued in force up to the year 1775, there could have been no necessity for giving to one of those agents, an authority to sell a part of them. The fact, that no part of those lands was sold by the agents, or by Croghan himself, without a complaint having been uttered by the latter, that appears, is nearly conclusive to prove that they were unsalable.

Another point insisted upon by the complainant's counsel, under this head, is, that G. Croghan was not in reality a debtor to McIlvaine, inasmuch as there was found amongst Croghan's papers, a bond of McIlvaine to him, dated the 5th of March 1769, with condition that McIlvaine should by a certain day recover to Croghan, certain lands lying in Virginia, which Croghan had conveyed to McIlvaine, in trust for the payment of a particular debt, or in case it should not be in his power to make such conveyance, then to pay to Croghan the sum of 400*l.* It was contended, that this bond being found uncancelled amongst the papers of the obligee, proves that neither of the conditions had been performed. The short, but conclusive, answer to this argument is, that the condition of this bond was to be performed in the year 1770, and that if it was broken by the failure of McIlvaine to make the re-conveyance, McIlvaine became, in that year, a debtor to G. Croghan, in the sum of 400*l.* the equivalent; yet Croghan suffered judgment to pass against him, and execution to issue, in the year 1775, after which he lived about seven years, without having brought a suit on the bond, or asserted, in any manner whatever, a right to the money. If, after a lapse of so many years, and under these strong circumstances, the court is not bound to presume against the existence of this debt, I know of no instance in which such a presumption ought to be made. If, in truth, the debt was really due, the charge of neglect is fairly imputable to Croghan, but not to his executors. Upon the whole, I am of opinion, upon this point, that the complainant is entitled to no relief." Pet. C. C. 372.

But there is not the least evidence in the cause, to show, that any of the lands *conveyed by either of these deeds ever turned out productive. [*512
And there are the strongest presumptions in the case, and it seems, indeed, to be on all sides conceded, that either the title to these lands wholly failed, or became altogether unsalable. There is no reason to suppose, that these facts lay more peculiarly in the knowledge of one party than the other; and if the trust became utterly frustrated and inert, there could not be any necessity of giving a formal notice, that Bernard Gratz must look to other property, and particularly to the property in Westmoreland county, upon which alone, it is understood by the laws of Pennsylvania, the lien of the judgment attached.

There is no proof, that any assets ever came to the hands of Bernard Gratz or Michael Gratz, out of which this judgment was, or could be satisfied. Bernard Gratz was alone interested in it; and it was kept alive, from time to time, until the levies in question were made. It will be recollected also, that even if Michael Gratz were disposed to connive, after the death of his brother, in the levies of his son Simon, William Powell, who was another executor, had no such motive. And it is not shown, that by any law or usage in Pennsylvania, any notice is required to be given to any other persons than the personal representatives of the deceased, of the execution of any such judgment on lands, so that *laches* could be fairly imputed to the executors, for neglect to give notice to the heirs of Col. Croghan of the sale. The very length of time during which this judgment remained unsatisfied, is evidence of the desperate state *of Col. Croghan's affairs; [*513
and the record abounds with corroborations of the great embarrassments attending all his concerns, and of apparent insolvency at the time of his decease. No evidence has been submitted to us, to establish that the levies on the lands, under the judgment, were fraudulently conducted by the sheriff, or that they did not sell for the full value of the title, such as it was, which Col. Croghan had in them. It appears, that the title, as to some part of them, is still in controversy. And Simon Gratz, the judgment-creditor, had as much right, if the sale was *bonâ fide* conducted, to become the purchaser, if he was the highest bidder, as any other person.

Upon the whole, the majority of the court entirely concurs in the opinion of the circuit court upon this part of the case. But, as to the decree respecting the proceeds of the Tenederah lands, we are all of opinion, that it ought to be reversed.

If the court had felt any doubts as to the merits, it would have been proper to have given serious consideration to the very able argument made at the bar, respecting the defect of proper parties to the bill. But, as, upon the merits, the court is decidedly against the plaintiff, it seemed useless to send back the cause upon this objection, if it should be found tenable, when, after all, the case furnished no substantial ground for relief in equity.

DECREE.—These causes, being cross-appeals, *came on to be heard [*514
at the same time, and were argued by counsel: On consideration whereof, it is ordered and decreed, that the decree of the circuit court for the district of Pennsylvania in the premises, be and the same is hereby reversed. And this court proceeding to pass such decree as the said circuit should have passed, it is farther ordered and decreed, that the complainant's

bill, as to all the matters contained therein, be and the same is hereby dismissed; and that a mandate issue to the said circuit court, to dismiss the same accordingly, without costs.

Bowie *v.* Henderson *et al.*

Statute of limitations.

The third section of the act of congress, of March 30th, 1803, for the relief of insolvent debtors in the District of Columbia, does not create any express or implied exception to the operation of the statute of limitations, by making the insolvent a trustee for his creditors, in respect to his future property, or by making any demand, included in the schedule of his debts, a debt of record.

The including of a demand in the schedule of the insolvent's debts, is sufficient evidence to sustain an issue on a replication of a new promise to the plea of the statute of limitations, if the period of limitation has not elapsed after the date of the schedule.[1]

*515] Appeal from the Circuit Court of the District of Columbia. *This suit was instituted by the appellant against the respondents, on the chancery side of the circuit court of the district of Columbia, for the county of Alexandria, under the local law giving a process in chancery in the nature of a foreign attachment.

The bill charged a debt due on bills of exchange, from the defendant, Henderson, to the complainant; that the debtor was an absentee; that he had funds in the hands of the defendant Auld; and prayed a condemnation of those funds, to answer the complainant's demand. The defendant, Henderson, pleaded the statute of limitations, *non assumpsit infra quinque annos.* To this plea, the complainant filed the following replication:

And the said W. Bowie saith, that he ought not to be precluded from having and maintaining his bill aforesaid, by any thing alleged by the defendant, Henderson, in his plea aforesaid; because he saith, that the said A. Henderson, on the 8th of May 1806, in the county of Alexandria, before N. F., one of the judges of the district of Columbia, did take the benefit of the act for the relief of insolvent debtors within the district of Columbia, and did then and there give a schedule of his estate, and a list of his creditors; and in the said list of his creditors so given in, he, the said Henderson, did state, that the said complainant was a creditor of his, to the amount of $4586.39; which said list of creditors, so given in, he, the said Henderson, did state, was entered of record in the clerk's office of the court of the county of Alexandria, as by reference to the records of the said court

*516] will fully and at large appear, and which said debt *so given in, is the debt for which the complainant has instituted his suit aforesaid.

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[1] Bryan *v.* Willcocks, 3 Cow. 159. Contrà, Christy *v.* Flemington, 10 Penn. St. 129; Brown *v.* Bridges, 2 Miles 424; Georgia Insurance and Trust Co. *v.* Ellicott, Taney's Dec. 130; Ex parte Kingsley, 1 Lowell 216; Ex parte Ray, 2 Ben. 61. This is so, upon principle, because the debtor does not make out his schedule with any view to the payment, but to the discharge of his debts; and besides, the creditors have a right to plead the statute as well as he, and they are not bound by his schedule. Richardson *v.* Thomas, 13 Gray 381; Roscoe *v.* Hale, 7 Id. 274; Stoddard *v.* Doane, Id. 387; Ex parte Kingsley, 1 Lowell 221. So, in the Georgia Insurance and Trust Co. *v.* Ellicott, *ut supra*, Chief Justice Taney says, such admission cannot, upon any just construction, be held to imply that the defendants are willing or intend to pay the debt to its full extent; on the contrary, the very object of the petition, and of the list of debts and other papers that accompany it, is to be discharged, without full payment.

And the said complainant saith, that the moneys and effects which the said complainant seeks, in his bill aforesaid, to subject to the payment of his debt aforesaid, were obtained and acquired by the said defendant, Henderson, long subsequent to his taking the oath of insolvency aforesaid. And the said complainant saith, that as soon as he, the said complainant, obtained any knowledge of the said defendant, Henderson, having obtained the funds aforesaid, and within the period of six months after he obtained a knowledge thereof, he, the said complainant, did institute his aforesaid bill in chancery, to subject the funds to the payment of his said debt, all which, &c. The defendant demurred to this replication, and the court below, on hearing, adjudged the demurrer good.

The question in this case turned upon the construction of the third section of the act of congress, for the relief of insolvent debtors within the district of Columbia, passed March 3d, 1803, which is in these words: "And be it further enacted, that upon the petitioning debtor's executing a deed or deeds to the said trustee, conveying all his property, real, personal and mixed, and all his claims, rights and credits, agreeably to the oath or affirmation of the said debtor, and on delivering all his said property which he shall have in his possession, together with his books, papers and evidences of debts of every kind, to the said trustee, and the said trustees certifying the same to the said judge in writing, it shall be lawful *for the said [*517 judge to make an order to the marshal, jailer or keeper of the prison, in which said debtor is then confined, commanding that the said debtor shall be thenceforth discharged from his imprisonment; and he shall be immediately discharged, and the said order shall be a sufficient warrant therefor: Provided, that no person who has been guilty of a breach of the laws, and who has been imprisoned for or on account of the same, shall be discharged from imprisonment: And provided likewise, that any property which the debtor may afterwards acquire (except the necessary wearing-apparel and bedding for his family, and his tools, if a mechanic or manufacturer), shall be liable to the payment of his debts, anything herein to the contrary notwithstanding."

March 12th, 1821. This cause was argued by *Swann* and *Jones*, for the appellant, and by *Taylor*, for the respondents. The former insisted, that the above section of the insolvent act created an exception to the general operation of the statute of limitations, in favor of those demands on which the insolvent's person was discharged under that section. They argued that the insolvent, after his discharge, was to be considered, in respect to his future property, as a trustee for his creditors, and that the statute of limitations does not run against a trust: and also, that this debt was to be considered as excepted out of the statute of limitations, because it was made a debt of record, by being included in the list of creditors under the insolvent act.

*Marshall, Ch. J., delivered the opinion of the court, and after [*518 stating the case, proceeded as follows:—It is perfectly clear, that no such exception is contained in the statute of limitations, or in the act of congress concerning insolvent debtors. If it is to be created at all, it must be by implication It is contended, in the first place, that the insolvent debtor,

after his discharge, is to be considered, in respect to his future property, as a trustee for his creditors; and the statute of limitation does not run against a trust. If he is a trustee for his creditors, is he a trustee for those creditors only, who were such at the time he obtained the benefit of the act? or, is he a trustee for those who afterwards become his creditors? It will not be pretended, that he is exclusively a trustee for the former; and if he be a trustee for the benefit of all his creditors, then this suit should have been brought for the benefit of all, and not for the benefit of a single creditor: The proviso of the section respecting the liability of the future property of the insolvent, has been supposed to aid the argument that he is a trustee; but we are all of a different opinion; the previous part of the section having exempted his person from imprisonment, the object of the proviso was, to make all his future effects liable, and to retain all the remedies against it, in the same manner as if his person had not been discharged. The act, therefore, did not intend to create any new liability, or any new trust.

It is further insisted, that this is to be considered as an exception out of the statute of limitations, because *it is a debt of record. But a debt of record, in the sense of the common law, is a debt or contract created of record; such as a statute-staple, or statute-merchant, and not one whose previous existence is only admitted of record. The effect of recording this debt was merely an admission of its existence, and not a change of its nature. It would have been sufficient evidence, if five years had not elapsed after recording, to have sustained an issue on a replication of a new promise to the plea of the statute of limitations. But more than five years having elapsed, it could have no application in this case. It is the opinion of the court, that the demurrer to the replication is sustained, and that judgment ought to be given for the defendant.

*519]

Decree affirmed.

SPRING *et al. v.* SOUTH CAROLINA INSURANCE COMPANY.

Sale pendente lite.

In an equity cause, the *res* in litigation may be sold by order of the circuit court, and the proceeds invested in stocks, notwithstanding the pendency of an appeal to this court.

March 19th, 1821. *Hunt*, for the respondents, moved to docket and dismiss the appeal in this case, which was a suit in chancery, commenced in the Circuit Court of South Carolina, no transcript of the record having been lodged by the appellants with the clerk of this court, within the first six days of the term, according to the rule.

*520]

Wheaton, for the appellants, opposed the motion, upon the ground, that no certificate was produced from the clerk of the court below, stating that an appeal had been taken, according to the rule.

THE COURT denied the motion, but stated that as the object of the respondents was to have the proceeds of the property in litigation, which had been sold by order of the court below, invested in stocks, such invest-

ment might be made by the court below, notwithstanding the pendency of the appeal in this court.

Motion denied.(*a*)

UNITED STATES *v.* SIX PACKAGES OF GOODS : TOLER, Claimant.

Entry of goods.—Seizure.

Under the 67th section of the collection act of the 2d of March 1799, c. 128, where goods were entered by an agent of the owner on his behalf, and the entry included only a part of the goods which the *packages contained, and the owner subsequently made a further, or post entry of the residue of the goods ; and the packages being opened, several days afterwards, and examined by the collector, in the presence of two merchants, and their contents found to agree with the two entries taken together, but to differ materially from the first entry ; *held*, that the collector was not precluded from making a seizure of the goods, after the second entry, for a variance between the contents of the packages and the first entry, and that such seizure must be followed by confiscation, unless it should appear, that such difference proceeded from accident and mistake, and not from an intention to defraud the revenue. [*521

APPEAL from the Circuit Court of the Southern District of New York. This was a libel of information filed in the court below against certain goods imported from London in the ship Isabella, at the port of New York, as forfeited under the 67th section of the collection act of the 2d of March 1799, c. 128.

March 12th, 1821. The cause was argued by the *Attorney-General* and *Pinkney*, for the United States ; and by *D. B. Ogden* and *Wheaton*, for the claimant.

March 14th. LIVINGSTON, Justice, delivered the opinion of the court.— This is a libel under the 67th section of the collection law, passed the 2d of March 1799. This section provides, that it shall be lawful for the collector, naval officer, or other officers of the customs, after entry made of any goods, wares or merchandise, on suspicion of fraud, to open and examine, in the presence of two or more reputable merchants, any package or packages thereof, and if, upon examination, they shall be found to agree with *the entries, the officer making such seizure and examination, shall cause the same to be repacked, and delivered to the owner or claimant forthwith ; and the expense of such examination shall be paid by the said collector or other officer, and allowed in the settlement of their accounts ; but if any of the packages, so examined, shall be found to differ in their contents from the entry, then the goods, wares or merchandise contained in such package or packages, shall be forfeited : provided, that the said forfeiture shall not be incurred, if it shall be made appear to the satisfaction of the collector and naval officer of the district where the same shall happen, if there be a naval officer, and if there be no naval officer, to the satisfaction of the collector, or of the court in which a prosecution for the forfeiture shall be had, that such difference arose from accident or mistake, and not from an intention to defraud the revenue. [*522

These goods being claimed by Hugh K. Toler, of the city of New York, merchant, were condemned by the district court of the United States for the

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(*a*) See new rule of court of the present term, *ante*, Rule 32.

southern district of New York, which sentence being reversed by the circuit court for that district, an appeal from the last sentence has been taken to this court.

Before we examine the facts of the case, or whether they establish a fraud, without which the prosecution under this section cannot be sustained, it will be necessary to dispose of a question of law, which has been made by the counsel for the claimant.

It is conceded on all hands, that on the 3d of November 1810, the six *523] packages which are libelled *were entered at the custom-house, by Thomas Ash, on behalf of the claimant, and that the entry covered only a part of the goods which the packages contained. That two days after, Toler himself completed the entry of the residue of the goods which were in these packages, and which had not been previously entered by Ash. Several days after, the packages were opened and examined by the collector, in presence of two merchants, and their contents were found not to differ, but to agree with the two entries, taken together; but to differ very materially from the first entry made by Ash; upon which, the collector made a seizure of them. On these facts, about which there is no dispute, it is denied, that the collector had any right to seize, inasmuch as, when the inspection took place, there was no difference between the goods found in the packages, and those mentioned in the invoices. It is said, that the collector, if he suspected a fraud, ought to have made a seizure, before the second entry, in which case, the difference which would have existed between the goods on which a duty was secured, and those in the packages, would have justified such an act, but that by waiting until a second entry was made, the fraud, if any committed, was purged. In support of this position, it is said, that the collection law provides for a post-entry of this kind, and that the very oath which is taken, when an entry is made, imposes on the party who makes it, the duty, in case he shall afterwards discover any other goods in a package than those first entered by him, of immediately informing the collector, and making a further entry thereof.

*This provision, and the form of the oath, suppose no more than *524] that a deficient or defective entry may be made innocently, and under a mistake, without any certain knowledge, at the time, of the contents of the packages entered. For, if the party making any entry, knows, at the time, of other goods, such other goods cannot be entered afterwards, and the oath usual on such occasions cannot be taken, without admitting that a perjury had been committed at the time of the first entry. The court is, therefore, of opinion, that, although the seizure was not made, until after the second entry, the collector had a right to seize for any variance between the contents of the packages, and the first entry, and that such seizure will be valid, and must be followed by sentence of condemnation, unless it shall turn out that such difference proceeded from accident or mistake, and not from an intention to defraud the revenue. Whether the case of the claimant be entitled to this favorable interpretation, the court will now proceed to inquire.

A great deal of testimony, which was not produced in the circuit court, and which might easily have been (as all the witnesses resided in the city of New York), has been taken since the appeal; and it is on this testimony,

as well as on that which was there taken, that the sentence of that court must now be reviewed.

It is in proof, and indeed, admitted by the claimant, that a very imperfect entry of the goods contained in these packages was made on Saturday, the 3d day of November 1810, by Thomas Ash, who had been employed by Toler to enter the same; and that *the residue of the goods therein [*525
contained, was not entered by the claimant, until the 5th day of the same month. To escape from the consequences of the first entries not being complete, and to repel the imputation of its originating in fraud, the plaintiff has endeavored to prove that the letter covering the invoices of the goods contained in the second entry, was not received by him, when the first entry was made. To establish this fact, his clerk, Mr. Crane, has been examined as a witness, and admitting that he has told the truth, there would be some reason to believe, that such were the fact; but there are many circumstances which now appear in this cause, which compel us to withhold from Mr. Crane the credit which might otherwise be due to him. The usual course of business, as testified to by several very respectable merchants, stands opposed to his relation, that invoices of only part of the goods contained in those packages, were inclosed in a letter to H. K. Toler & Co., and invoices of the other goods in a letter to J. K. Jaffray, which had been forwarded to that gentleman, at Albany. It appears from all the testimony, that if a package, consigned to one person, contain goods belonging to different persons, it is customary, and some of the witnesses say, indispensable, to send to the consignee of the package, invoices of all the goods which it contains, or to refer, in the main invoice of the consignee, to the invoice of the other goods; and that the withholding such invoices or information, would be considered as strong evidence of an intention to defraud the revenue. Another circumstance which *detracts much from the credit of this [*526
witness, is, that it is more than probable, that at the time of this consignment, a copartnership subsisted between the claimant and the Jaffrays of London. This appears not only from an advertisement of a dissolution of such copartnership, which has been published since the decree of the circuit court, in one of the New York papers, but from other testimony in the cause, and from no contrary proof being furnished by Mr. Toler. Now, if such partnership really existed, which cannot well be disbelieved, it is most extraordinary, indeed, that all the invoices of the goods in that package should not have been sent to the partner residing permanently in the city of New York, but that an invoice of part of them should be transmitted to him, and of another, and of the most valuable part, to a partner who might or might not have reached this country when the Isabella arrived. If merchants, who must be presumed to know how to manage their business, will act in a manner so contrary to the general practice of commercial men, they must expect, and cannot complain, if such deviation from established usage create suspicions unfavorable to the integrity of the particular transaction. It would have added something to the value of the testimony of Mr. Crane, if the name of the merchant at Albany, to whose care the letter for Mr. Jaffray had been transmitted, or if the letter itself, with the post-marks, had been produced. The importance of the testimony of Mr. Ash, as delivered before the circuit court, is much weakened by that of Judge Van [*527
Ness, *who has also been examined since the appeal; for instead of

being simply told at the custom-house, when he asked for a permit, that he must call again, it appears he stated, on his examination in the district court, that when he applied for a permit, on the 3d of November, he was told at the custom-house, that "they wished to examine the goods before they were delivered;" and that although he did not see Mr. Toler until Monday, he communicated to his clerk, Mr. Crane, what had passed, who, doubtless gave the same information to his principal, which will account for the solicitude which he discovered, so early on Monday morning, to enter the goods which had been omitted in the entry of Mr. Ash. There are other circumstances in this case, that are not here noticed, which render the explanation given by Mr. Toler, to say the least, extremely questionable.

The court cannot dismiss this cause, without expressing its surprise, that more than ten years have elapsed since the filing of the libel in the district court. As all the witnesses who have been examined since the appeal, reside in the city in which the cause was tried, they might, and ought, to have been examined in that court, and if their testimony had there been reduced to writing, and used in the circuit court, a final decision might have been had many years ago, and before the insolvencies which it is suggested have happened, and have rendered the further prosecution of these proceedings of little or no importance to the parties.

*528] *The decree of the circuit court is reversed, and the sentence of condemnation pronounced by the district court affirmed.

Brashier *v.* Gratz *et al.*

Specific performance.

The general rule is, that time is not of the essence of a contract of sale; and a failure on the part of the purchaser, or vendor, to perform his contract, on the stipuluated day, does not, of itself, deprive him of his right to a specific performance, when he is able to comply with his part of the engagement.

But circumstances may be so changed, that the object of the party can no longer be accomplished, and he cannot be placed in the same situation as if the contract had been performed in due time; in such a case, a court of equity will leave the parties to their remedy at law.

Part performance will, under some circumstances, induce the court to relieve.

But where a considerable length of time has elasped, where the party demanding a specific performance has failed to perform his part of the contract, and the demand is made after a great change in the title and the value of the land, and there is a want of reciprocity in the obligations of the respective parties, a court of equity will not interfere.[1]

Appeal from the Circuit Court of Kentucky.

This cause was argued by *B. Hardin*, for the appellant, citing 1 Fonbl. Eq. 227; 9 Ves. 415; 2 P. Wms. 243; 4 Bro. C. C. 329, 469, 391; 1 Ves. jr. 221; 1 Atk. 12; and by *Sergeant*, for the respondents, citing Sugd. Vend. 246; 5 Ves. 720, note; 1 Ves. jr. 450; 9 Cranch 456; 8 Ibid. 471.

*529] *March 14th, 1821. Marshall, Ch. J., delivered the opinion of the court.—This is an appeal from a decree of the circuit court for the

[1] Taylor *v.* Longworth, 14 Pet. 172; Ahl *v.* Johnson, 20 How. 511; Harkness *v.* Underhill, 1 Black 316.

district of Kentucky, dismissing a bill brought by the appellant against the heirs of Michael Gratz, for the specific performance of a contract.

Michael Gratz, who resided in Philadelphia, had purchased from John Craig, of Kentucky, a tract of land containing, by the survey, 1000 acres, for which no patent had then issued. Subsequent to this purchase, the patent issued in the name of Craig, who sold a part of the land to Keyser, and a suit had been brought in the federal court of Kentucky by Gratz, against Craig and Keyser, to compel a conveyance of the land. Michael Gratz had, in the meantime, sold 824 acres, part of this tract, to Robert Barr. While the suit against Craig and Keyser was depending, Walter Brashier, the plaintiff, who resides in Kentucky, came to Philadelphia on business, and on the 2d day of March, in the year 1807, purchased the residue of the land from Gratz. Brashier had married the daughter of Robert Barr.

The residue of the land was estimated by the parties at 302 acres, for which Brashier agreed to give the sum of $6795, in his negotiable notes, payable in six, twelve and eighteen months. From this sum was, however, deducted $250, "allowed to the said Walter Brashier, towards the costs and expenses of prosecuting the suits now depending, for the recovery of the lands hereby contracted for, which is accepted *by the said Walter, [*530
as a full satisfaction for all costs, trouble and expense which he may be at, in prosecuting the said suits, and which he hereby agrees and undertakes to manage at his own costs and expense. And it is hereby agreed, that a correct and accurate survey shall be made, at the expense of the said Michael, of all the said residue of the above-mentioned tract of land, lying within the limits of the orignial survey thereof, not sold to the said Robert Barr; and if, upon such survey, it shall be found, that the said residue doth not contain the quantity of 302 acres, then, for every one deficient, the said Michael Gratz, his heirs, executors or administrators, shall pay or allow to the said Walter Brashier, his executors, administrators or assigns, the sum of $22.50; and if any part of the said residue shall be lost, in all, or any of the said suits now depending, or that may be instituted hereafter, for any part of the said residue, the said Michal Gratz, his heirs, executors or administrators, shall only be liable to refund to him, the said Walter Brashier, his executors, administrators or assigns, the sum of $11.25, for each and every acre so lost. It being hereby declared, that the said Walter Brashier has purchased the title of the said Michael Gratz, at his own risk and hazard, and so that he shall have no recourse against the said Michael Gratz, for want of, or for any defect in the, title to the said residue, or any part thereof, save only the price of $11.25 per acre, for every acre which shall be lost as aforesaid. And the said M. G. for himself, his heirs, executors and administrators, *doth convenant and agree, that he or they [*531
shall and will, at any time after payment of the notes aforesaid, when thereunto required, by a good and sufficient deed, conveyance or assurance in the law, convey and assure unto the use of him, the said Walter Brashier, his heirs and assigns for ever, all his, the said Michael Gratz's estate, right, title and interest, of and in all the said residue of the above-mentioned tract of land.

Mr. Brashier executed his notes, in conformity with this contract, and returned to Kentucky, where he requested his brother-in-law, Thomas T.

Barr, to attend to the prosecution of the suits then depending. Mr. Barr resided near the place where the court was held, and Mr. Brashier at the distance of sixty or seventy miles. Mr. Barr immediately employed Mr. Bledsoe, a lawyer of eminence, to assist Mr. Hughes, who had been engaged by Mr. Gratz, and some time afterwards, spoke to Mr. Wickliffe, but did not pay him a fee. No progress, however, seems to have been made in these suits, and the plaintiff failed to pay the fees of the officers of the court, which were demanded and received from Michael Gratz, in the year 1811, and afterwards from his representatives. The notes for the purchase-money were protested for non-payment, and have not been paid.

In 1811, Mr. Brashier came to Philadelphia, when Gratz offered to convey the land, on his paying his notes. Mr. Brashier being unable to pay them, Gratz offered to rescind the contract, which Brashier declining to do, the question was referred *to arbitrators, who were of opinion, that *532] the contract was still binding. About this time, Brashier, who had been for some time much embarrassed, appears to have become notoriously insolvent. In the autumn of 1811, Gratz departed this life, and in July 1812, his heirs again offered to convey, on payment of the notes which Brashier had given for the purchase-money. Payment not being made, the heirs of Gratz took the management of the suits again into their own hands, which were prosecuted with vigor, and in 1813, were finally determined by a decree in their favor. About this time, the land rose suddenly to about $80 or $100 per acre. After the decision of the cause, and after this rise in the value of the land, Brashier, in November 1813, entered into an agreement with Lewis Saunders, by which he was to convey to Saunders half the land purchased of Gratz, in consideration of Saunders paying, or tendering to the heirs of Gratz, the full amount of the notes he had given for the purchase. Saunders immediately offered his contract to the heirs of Gratz, and requested them, if they were willing to take it, and to indemnify him, to acknowledge a tender of the money, which the contract bound him to tender. They avowed their opinion, that the contract of Michael Gratz with Brashier was of no validity, but consented to take the contract with Saunders, and acknowledged the tender. When in possession of this acknowledgment, Brashier instituted his suit in the court of Kentucky for a specific performance of the contract of the 2d of March 1807. The defendants removed this suit *into the circuit court of the United States, where *533] they filed their answer, insisting, that the court ought not to decree a specific performance, because the plaintiff had totally failed to perform his part of the contract, until there was such a change of circumstances as materially to affect the rights of the parties. The circuit court dismissed the bill, and from that decree, the plaintiff has appealed to this court.

The appellant insists, that in equity, time is not of the essence of the contract; that it is in part performed; and that his failure to pay the purchase-money, until December 1813, when the tender was made, is justified by the circumstances of the case.

The rule, that time is not of the essence of a contract, has certainly been recognised in courts of equity; and there can be no doubt, that a failure on the part of a purchaser or vendor, to perform his contract on the stipulated day, does not, of itself, deprive him of his right to demand a specific performance, at a subsequent day, when he shall be able to comply with his

part of the engagement. It may be in the power of the court to direct compensation for the breach of contract in point of time, and in such case, the object of the parties is effectuated, by carrying it into execution. But the rule is not universal. Circumstances may be so changed, that the object of the party can be no longer accomplished, that he who is injured by the failure of the other contracting party, cannot be placed in the situation in which he would have stood, had the contract been performed. Under such circumstances, it would be iniquitous, to *decree a specific performance, and a court of equity will leave the parties to their remedy at law. [*534

It is true, that he who has been ready to perform, may at any time file his bill in chancery, requiring the other party to perform his contract, or to rescind it; and the court will rescind the contract, if he who has failed cannot, or will not, perform it. But this is not always necessary, and would not be always an adequate remedy. If, then, a bill for a specific performance be brought by a party who is himself in fault, the court will consider all the circumstances of the case, and decree according to those circumstances.

A consideration always entitled to great weight, is, that the contract, though not fully executed, has been in part performed. The plaintiff claims the benefit of this principle, and alleges, that by prosecuting and managing, at his own expense, the suits depending in Kentucky, he has performed that part of the agreement. If this allegation be supported by the fact, it will, undoubtedly, have great influence in the decision of the cause.

The evidence is, that the plaintiff, soon after his return to Kentucky, employed a gentleman of the bar, in addition to the counsel previously engaged by Mr. Gratz, and paid him his fee. It is also in evidence, that finding the business did not advance, he spoke to other counsel; but his application was not accompanied with a fee, and was not much regarded. It appears, that a survey was necessary, and that the deposition of a Mr. William Morton was indispensable *to the successful termination of the cause. Yet the survey was not made, and the deposition of Mr. [*535 Morton, though its importance had been communicated to Brashier, was not taken. The fees to the officers of the court were not paid, and Mr. Gratz was required to pay them. From March 1807, when the contract was made, to the autumn of 1811, when Mr. Gratz died, the suit did not advance. The clerk informs us, that during this time, no other step was taken in the cause, than to move for leave to amend the bill and to continue it. The embarrassment of Mr. Brashier's affairs, and his insolvency, added to this experience of his neglect of the cause, were but little calculated to inspire confidence in its future progress, or in his future attention to it. In 1812, the heirs of Mr. Gratz took the management of the business into their own hands. The deposition of Mr. Morton was taken, the survey was made, and and in 1813, a decree was obtained in their favor. We think, this cannot be considered as such a performance of his undertaking, "to manage the suits at his own expense," as to entitle him to call on the vendor for an execution of the contract.

It has also been contended, that by the agreement between the parties, Mr. Gratz was bound to survey the land, and that this was a preliminary step to be taken by him, before he could justly require Mr. Brashier to pay his notes for the purchase-money. Although this could not, at law, be pleaded to

notes importing an absolute promise to pay money, it will readily be admitted, that if the understanding of the parties had been, that Mr. Gratz should
*536] make *the survey, and that it should precede the payment of the notes, such understanding would account for the non-payment of the notes, and would place the demand for a specific performance of the contract on very strong ground. But the agreement does not indicate the expectation, that Mr. Gratz should make the survey, although the expense of it would be chargeable to him, and as it might be of advantage to Mr. Brashier, and could be of none to Mr. Gratz, as Mr. Brashier was a resident of Kentucky, and Mr. Gratz, of Philadelphia, the expectation was not unreasonable, that Mr. Brashier would cause it to be made. He might be expected to move in this business, and to require Mr. Gratz to attend to it. His not having done so, is a proof that he did not suppose the survey to be of any consequence, because he did not intend to pay so much of the purchase-money as the survey would show he ought to pay.

But the articles of agreement, far from showing that the survey was to precede the payment of the notes, contain expressions indicating the intention, that their payment was not to depend on the survey. The parties stipulate, that for every acre which the survey shall show the tract to contain less than 302 acres, Gratz "shall pay or allow" to Brashier the sum of $22.50. That is, shall "pay" him, if the notes shall have been received, shall "allow" to him, if the deficiency shall appear before payment of the notes. Had Mr. Brashier been able and willing to pay his notes as they became due,
*537] he had sufficient motives *for surveying the land. He had reason to believe, that there would be a deficiency. On his return from Philadelphia, in 1807, Mr. Barr, who lived upon the land, and was acquaiuted with its boundaries, told him that there could not possibly be the quantity he had purchased. He knew, too, that the land had been actually surveyed in October 1807, by a son of Mr. Gratz, and had reason to believe, that this survey must have disclosed a deficiency. His omission to make any inquiries of Mr. Gratz, or to make a survey, or to demand one, show that his conduct respecting his notes did not depend on a survey. We do not think, then, that Mr. Brashier is justified in whitholding the payment of the purchase-money, by the fact that the quantity of land was not ascertained; nor does the evidence support the opinion, that this fact had any influence on his conduct.

The plaintiff also attempts to justify the non-payment of the purchase-money by the inability of Mr. Gratz to make him a title. But this excuse entirely fails him. He knew perfectly the state of the title, and the articles of agreement show that he knew it. They expressly declare, that "the said Walter Brashier has purchased the title of the said Michael Gratz, at his own risk and hazard;" and that if any part of the land be lost, the said Michael "shall only be liable to refund to him the sum of $11.25 for each acre that may be lost." The contract states that suits were depending for the land, which suits Brashier undertook to manage; and all the testimony in the
*538] cause shows, that he knew those *suits were brought for the legal title. With this full knowledge, he purchases the title of Gratz, and stipulates that, after the payment of the purchase-money, Gratz shall convey, not the land, or a good and sure title to it, but "all his the said Michael Gratz's

estate, right, title and interest, of and in all the said residue of the above-mentioned tract of land."

It is then an essential ingredient in this contract, that the purchase-money shall be paid, without waiting for the termination of the cause. Brashier takes the whole risk upon himself, except as to half the price of every acre which may be lost; and he is not to retain even that portion of the purchase; but it is to be "refunded" to him, whenever the loss shall take place. He had, then, no right to withhold the payment of the purchase-money, until the suits should be determined; and any attempt to do so, was a violation of the letter and the spirit of his contract. The state of the title furnishes no sort of apology for this violation. Gratz was able to make the conveyance which he had contracted to make, and which Brashier had contracted to receive; and his want of the legal title furnished no excuse for the non-payment of the purchase-money.

The situation of the parties, and the circumstances in which the property was placed, deserve serious consideration. The contract was made, while a suit for the title was depending, and there is reason to suppose, that this circumstance had some influence on the price of the article. We perceive, that if any part of the land should be lost, one-half the purchase-money *should be lost by Brashier. While the suits were depending, and the purchase-money unpaid, Brashier became insolvent. Conse- [*539 quently, should the land be recovered, it would be the property of Brashier at the stipulated price; should it be lost, Brashier could not pay that portion of the price which he was to pay in the event of loss. Under such circumstances, had a suit in chancery been brought to have the contract rescinded, unless he would pay the purchase-money, no court could have hesitated to decree according to the prayer of the bill. No court could allow one party to hold the other bound, while the obligation was not reciprocal; or to hold himself prepared to avail himself of all favorable contingencies, without being affected by those which were unfavorable.

Mr. Brashier, then, if he did not execute his part of the contract with punctuality, ought to have executed it, before a great change of circumstances took place; before the doubts which hung over the title, and under which he had purchased, were dissipated. That he did not do so, and was unable to do so, that in the event of an unfavorable termination of the suits he would be totally unable to comply with his contract, weakens very much the claim to a specific performance, which he sets up after the removal of the difficulties which attended the title.

Another circumstance which ought to have great weight, is the change in the value of the land. It was purchased at $22.50 per acre. Mr. Brashier failed to comply, and was unable to comply with his engagements. More than five years *after the last payment had become due, the land suddenly rises to the price of $80 per acre. Then he tenders the [*540 purchase-money, and demands a specific performance. Had the land fallen in value, he could not have paid the purchase-money. This total want of reciprocity gives increased influence to the objections to a specific performance, which are furnished by this great alteration in the value of the article.

Both parties have sought to avail themselves of the transaction with Mr. Saunders, by whom the purchase-money was tendered, in December 1813. The defendants say, that Brashier was still unable to comply with his con-

tract, and that the tender was made, in consequence of an arrangement by which Saunders was to advance the whole purchase-money, and to receive half the land. But it was unimportant to them, whose money was tendered, or how it was obtained. Of this circumstance, therefore, they cannot avail themselves. The plaintiff insists, that the contract between the defendants and Saunders was a fraud on him, because he had a right to consider Saunders as his friend and agent. But the tender of the purchase-money was the only service he was to expect from Saunders, and this service has been performed. He is precisely in the same situation, as if the contract between Saunders and the defendants had never been made.

It has been also contended, that the concealment of the survey made by Joseph Gratz, in October 1807, and the demand of the whole amount of his *541] *notes, after a knowledge of the deficiency in the quantity of land, were fraudulent on the part of the defendants. Mr. Brashier knew that the survey had been made, and had reason to believe, that it disclosed a deficiency in the quantity of land. He has sustained no injury, by the omission to make a full communication to him. It is certainly true, that after the knowledge of this deficiency, Mr. Gratz, in his lifetime, and his heirs, since his decease, ought not to have demanded the full amount of his notes. The court, therefore, allows them no advantage from their repeated offers to convey, on receiving the whole amount of the notes; but considers the case as if no such offers had ever been made.

This, then, is a demand for a specific performance, after a considerable lapse of time, made by a person who has failed totally to perform his part of the contract; and it is made, after a great change, both in the title, and in the value, of that which was the subject of the contract; and by a person who could not have been compelled to execute his part of it, had circumstances taken an unfavorable direction. In such a case, we are of opinion, that a court of equity ought to leave the parties to their remedy at law.

Decree affirmed.

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*542] *United States *v.* Daniel.

Division of opinion.

A division of the judges of the circuit court, on a motion for a new trial, in a civil or a criminal case, is not such a division of opinion as is to be certified to this court for its decision, under the 6th section of the judiciary act of 1802, c. 291.

This was an indictment in the Circuit Court of South Carolina, against Lewis Daniel, charging him with having knowledge of the actual commission of the crime of wilful murder, committed on the high sea, by John Furlong; and with unlawfully, wickedly and maliciously, concealing the same, &c.

The indictment set forth, at large, the indictment and conviction of John Furlong, for wilful murder on the high seas, and then charged Lewis Daniel with the knowledge and concealment of that murder, and with not having disclosed the same, in the words of the act of congress. The prisoner was tried on the plea of not guilty. It was proved, that some of the persons present on board, when the principal felony was committed, had, in conversation, stated the fact of the murder to the defendant, who advised

them to escape, promised secrecy, offered them the means of escape, and actually assisted one of them in escaping; but there was no evidence that the defendant knew of any fact, which would have constituted legal evidence on the trial of the principal felon. The judge charged the jury, that the concealment, under the circumstances, was sufficient to convict the defendant, and the jury found a verdict *of guilty. The defendant then moved [*543 in arrest of judgment, and for a new trial, on the following grounds. That a person is not liable to be indicted and convicted under the 5th section of the act of April 1790, c. 36, for the punishment of certain crimes against the United States, unless he has such knowledge of the felony as will enable him to testify in court, at the trial of the principal felon, and particularly, that in this case, the evidence did not prove the defendant guilty of misprision of murder, according to the terms of the said act. The motion was also supported by an alleged misdirection of the court to the jury. The judges being divided in opinion on this motion, it was ordered to be certified to this court.

March 6th. *Hunt*, for the prisoner, argued: 1. That to constitute the offence of misprision of felony, under the 5th section of the crimes act of 1790, c. 36, the accused must be proved to have had such a direct and positive knowledge of the actual commission of the felony, as would be legal evidence on the trial of the principal felon. Here, the offence is, what, in law, is termed negative misprision. 4 Bl. Com. c. 9; 3 Inst. 140. All the definitions of misprision imply such a personal knowledge of the fact as would be legal evidence. 4 Jac. Law Dict. 295; Staundf. P. C. lib. 1, c. 19; Hawk. P. C. c. 20, § 4; 1 Hale's P. C. 375; Termes de la Ley 291; 3 Inst. 36; 1 Chitty's Crim. Law, 2. But here there was no such knowledge; and if the court, upon a review of the whole case, is satisfied that the *defendant has not been found guilty of any legal offence, the judg- [*544 ment will be arrested. 1 East's P. C. 146; 1 Chitty's Crim. Law 663; 1 Hargr. St. Tr. 290. In order to bring a case within the intention of a statute, its language must include the case; it is not sufficient, that it is within the reason or mischief, or that the crime is of equal atrocity, and of an analogous character. *United States* v. *Wiltberger*, 5 Wheat. 96. The prisoner could not have been a witness against the principal felon. The law never credits the bare assertion of any one, however high his rank or pure his morals, but always requires the sanction of an oath: and it also requires his personal attendance in court, that he may be examined and cross-examined by the different parties. The few instances in which this rule has been departed from, and in which hearsay evidence has been admitted, will be found, on examination, to be such as, from their very nature, are incapable of positive and direct proof.

2. This court has decided, that the refusal of the circuit court to grant a new trial, is not matter for which a writ of error lies. But in those cases the judges of the court below were unanimous in refusing the new trial: here a division of opinions is certified, and this court is bound to decide, by the express words of the judiciary act of 1802, c. 291.

The *Attorney-General*, contrà, insisted: 1. That there was no ground for arresting the judgment, or *granting a new trial. The evidence [*545 brought the case completely within the crimes act of 1790, c. 36.

The object of the act was the prompt detection and punishment of the crimes enumerated. The degree of knowledge required to bring a party within the misprision described, is such as is sufficient to justify an arrest; and well-founded suspicion is sufficient for that purpose. Chit. Cr. Law 10, 27; 4 Bl. Com. 290.

2. The motion in the court below, in arrest of judgment, combined with a motion for a new trial, is novel and unprecedented. But this combination cannot vary the legal character of these two motions, which is entirely distinct. A motion in arrest of judgment must be confined to objections which arise upon the face of the record itself, and which make the proceedings apparently erroneous: therefore, no defect in evidence, or improper proceedings at the trial, can be urged as a ground for arresting the judgment. 4 Chit. Cr. Law 539. The exceptions in arrest of judgment are to the indictment. 4 Bl. Com. 375. On the other hand, a motion for a new trial is for causes other than defects in the pleadings; and the circumstance that the verdict was obtained, because the pleadings were defective, will not be permitted to operate on this motion. 1 Chit. Cr. Law 535. On inspection of the record in this case, it will be found, that the only grounds assigned in support of the joint motion are such as are entirely inapplicable to the motion for a new trial. These grounds are the misdirection of *the judge, and that the verdict was obtained on insufficient evidence. The court will, therefore, throw out of view, the motion to arrest the judgment, and consider this as a motion for a new trial, on which the judges of the court below were divided in opinion. And if so, there is no question before this court: since it has repeatedly decided, that the granting or refusal of a new trial, is mere matter of discretion in the court below; and hence the refusal of a new trial, even though the grounds on which the motion was founded are spread on the record, is no sufficient cause for a writ of error from this court.(a) In a civil case, if the court below be divided on such a motion, the motion falls. Nor is it otherwise in a criminal case. This court has no appellate criminal jurisdiction. It is only by virtue of the 6th section of the judiciary act of 1802, that a criminal case can ever be brought to this court. That section was not, however, made exclusively for criminal cases. The provision is general: and it is only by reason of its generality, that a question in a criminal case can ever reach this court. But being general, it must have the same construction in all cases. If, then, in a civil case, a division of the judges on the mere discretionary question of a new trial, would bring no question here; neither will it, in a criminal case.

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March 15th, 1821. MARSHALL, Ch. J., delivered the opinion of the court. —*The indictment in this case is certainly sufficient to sustain a judgment, according to the verdict, and all the other proceedings are regular. There is, therefore, no cause for arresting the judgment.

*547]

The motion for a new has never before been brought to this court on a division of opinion in the circuit court. It had been decided, that a writ of error could not be sustained to any opinion on such motion, and the reasons for that decision seemed entitled to great weight, when urged against

(a) 2 Wheat. Dig. tit. Practice, XV, a.

determining such a motion in this court, in a case where the judges at the circuits were divided on it. When we considered the motives which must have operated with the legislature for introducing this clause into the judiciary act of 1802, we were satisfied, that it could not be intended to apply to motions for a new trial.

Previous to the passage of that act, the circuit courts were composed of three judges, and the judges of the supreme court changed their circuits. If all the judges were present, no division of opinion could take place. If only one judge of the supreme court should attend, and a division should take place, the cause was continued until the next term, when a different judge would attend. Should the same division continue, there would then be the opinion of two judges against one; and the law provided, that in such case, that opinion should be the judgment of the court. But the act of 1802, made the judges of the supreme court stationary, so that the same judge constantly attends the same circuit. This great improvement of the pre-existing system, *was attended with this difficulty. The court being always composed of the same two judges, any division of [*548 opinion would remain, and the question would continue unsettled. To remedy this inconvenience, the clause under consideration was introduced. Its application to motions for a new trial seems unnecessary. Such a motion is not a part of the proceedings in the cause. It is an application to the discretion of the court, founded on evidence which the court has heard, and which may make an impression not always to be communicated by a statement of that evidence. A division of opinion is a rejection of the motion, and the verdict stands. There is nothing, then, in the reason of the provision which would apply it to this case.

Although the words of the act direct, generally, "that whenever any question shall occur before a circuit court, upon which the opinion of the judges shall be opposed, the point upon which the disagreement shall happen shall" be certified, &c., yet it is apparent, that the question must be one which arises in a cause depending before the court, relative to a proceeding belonging to the cause. The first proviso is, "that nothing herein contained shall prevent the cause from proceeding, if, in the opinion of the court, further proceedings can be had, without prejudice to the merits."

It was also contended, that under the second proviso, Lewis Daniel ought to be discharged; that proviso is in these words: "And provided also, that imprisonment shall not be allowed, nor punishment in any case be inflicted, where the judges of the said *court are divided in opinion upon the question touching the said imprisonment or punishment." A motion [*549 for a new trial is not "the question touching the said imprisonment or punishment." That question must arise on the law, as applicable to the case; and is not, it would seem, to be referred to this court. The proviso, if applicable to such a case as this, would direct the circuit court not to certify their division of opinion to this court, but, in consequence of that division, to enter a judgment for the defendant. This court can only decide the question referred to it, and certify its opinion upon that question to the circuit court, who will then determine what judgment it is proper to render.

CERTIFICATE.—This cause came on to be heard, on the transcript of the record; and on the points on which the judges in the circuit court were

divided in opinion, and was argued by counsel: On consideration whereof this court is of opinion, that there is no error in the record and proceedings of the circuit court, for which judgment ought to be arrested. And this court is further of opinion, that a division of the judges of the circuit court, on a motion for a new trial, is not one of those divisions of opinion which is to be certified to this court for its decision, under the act, entitled, "an act to amend the judicial system of the United States." All which is ordered to be certified to the United States court for the sixth circuit and district of South Carolina.

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*550] *KERR *et al. v.* WATTS.

Decree.—Bonâ fide purchaser.

The decision of this court, in Massie *v.* Watts, 6 Cranch 148, revised and confirmed.
Who are necessary parties in equity.
The rule applied in equity to the relief of *bonâ fide* purchasers, without notice, is not applicable to the case of purchasers of military land-warrants, under the laws of Virginia.
Such purchasers are considered as affected with notice, by the record of the entry, and also of the survey; and subsequent purchasers are considered as acquiring the interest of the person making the entry; so that purchases under conflicting entries are considered as purchasing under distinct rights; in which case, the rule as to innocent purchasers, does not apply.
The principle, that only parties or privies, or purchasers *pendente lite*, are bound by a decree in equity, how applied to this case.
The surveys actually made on the military land-warrants in Virginia, have not the force of judicial acts, or of acts done by the deputations of officers, as general agents of the continental officers.

APPEAL from the Circuit Court of Ohio.

Ferdinando O'Neal was owner of a Virginia military warrant for 4000 acres of land, dated the 17th of July 1783, and employed Nathaniel Massie, a deputy-surveyor, to locate it, and to survey and return the plats. John Watts purchased the right of O'Neal, and on the 7th of January 1801, paid Massie 50*l.*, in full satisfaction for locating and surveying the warrant. On the 3d of August 1787, Massie made an entry on part of O'Neal's warrant for 1000 acres. On *the same day, an entry had been made for 1000 acres for Robert Powell, which was purchased by Massie.

*551]

On the 27th of January 1795, Massie made an entry in his own name, for 2366 acres, and the bill filled in the court below, by the respondent, Watts, against the appellants, Kerr and others, charged, that on the 26th of April 1796, Massie fraudulently made a survey for O'Neal, for 530 acres, purporting to be made upon his said entry of 1000 acres; but, in fact, on different land, having fraudulently appropriated to himself the land covered by O'Neal's entry, by surveys made on Powell's and his own entries, having purchased Powell's warrant and entry, before the surveys were made. The bill further stated, that Massie had obtained grants upon his survey.

Watts commenced a suit in chancery against Massie, in the state court of Kentucky, claiming a conveyance of the legal title, and proceeded to a final hearing upon the merits, in the circuit court of Kentucky, to which it had been removed; which last court, in the November term 1807, made an interlocutory decree, in favor of Watts, and directed the proper surveyor to lay off the several entries, in the manner pointed out in that decree, and to report to the court, in order to a final decree in the premises. The cause was finally

decided, by a decree directing Massie to convey the 1000 acres to Watts, according to certain metes and bounds reported, and to deliver possession, &c.; and upon performance of *the decree by Massie, Watts was directed to transfer to him 1000 acres of O'Neal's warrant. Massie [*552 appealed to this court, where the decree of the circuit court was affirmed, at February term 1810. (6 Cranch 148.)

Massie refused to convey or deliver possession, when demanded; and in the meantime, part of the property recovered had been laid out into lots of the town of Chilicothe, and the bill charged the appellants, and others, who were made defendants in the present suit, with having in possession, respectively, part of the complainant's property, and claiming to hold the same by titles derived under Massie. The record of the proceedings in Kentucky, and in the supreme court, were referred to, and made part of the bill in this case. The entries before mentioned are as follows:

"No. 503: Captain Robert Powell enters 1000 acres of land, &c. Beginning at the upper corner, on the Scioto, of Mayor Thomas Massie's entry, No 480, running up the river 520 poles, when reduced to a straight line, thence, from the beginning, with Massie's line, so far that a line parallel to the general course of the river shall include the quantity."

"No. 509: Captain Ferdinand O'Neal enters 1000 acres, &c. Beginning at the upper corner, on the Scioto, of Robert Powell's entry, 503, running up the river 500 poles, when reduced to a straight line, and from the beginning, with Powell's line, so far that a line parallel with the general course of the river will include the quantity."

*"No. 2462: Nathaniel Massie enters 2366 acres, &c., on the bank [*553 of Scioto, corner to Robert Powell's survey, No. 503, thence, with his line, south 43° east, 293 poles; south 80° east, to the upper back corner of Thomas Massie's survey, No. 480, thence, with his line, south 10° west, to Paint creek, thence, up the creek, to the corner of Thomas Lawes's survey, thence, with his line, and from the beginning, up the Scioto, to the lower corner of Daniel Stull's survey, thence, with his line, so far that a line south 10° west, will include the quantity."

But these entries depended on one which preceded them on the entry-book, made by Thomas Massie, as follows:

"No. 480: 1787, August 3d. Thomas Massie enters 1400 acres, &c. Beginning at the junction of Paint creek with the Scioto, running up the Scioto, 520 poles, when reduced to a straight line, thence, off, at right angles, with the general course of the river, so far that a line parallel thereto will include the quantity."

This court, in the case referred to, decided, that Thomas Massie's survey ought to commence at the mouth of Paint creek; and that the upper corner on the river should be placed at the termination of a right line, at the distance of 520 poles, and the survey extended out at right angles with the general course of a right line supposed, from the beginning to the upper corner: and that, from the upper corner of Thomas Massie's survey, a point on the river, at the distance of 520 poles, on a right line, should be *ascertained for the upper corner of Powell's, and that the real course [*554 of a right line from Thomas Massie's corner to Powell's upper corner, should be considered as a base, from which Powell's survey should be extended, by lines at right angles therewith, except only so far as the lower

line might interfere with Thomas Massie's property. The survey of O'Neal to depend upon the same principles in relation to the survey of Powell.

The object of the present suit was, to carry into execution against the defendants, who had acquired Massie's title, the decree against him in Kentucky, affirmed in this court. The court below, by their decree, gave relief against each, for the specific property claimed by the answer of each, construing the entries according to the principles of the former decision, except in varying the complainant's survey, by a decision, that a piece of land, called an Island in the river, was part of the main shore, when the entries were made, and included as a part of the bank. The defendants all submitted to the decree, except Kerr, Doolittle, Joseph Kirkpatrick, sen., Joseph Kirkpatrick, jun., and the heirs of James Johnston, who appealed to this court.

February 15th. The *Attorney-General* and *Scott*, for the appellants, argued: 1. That the survey made for Powell ought to be established, because made under the superintendance of officers to whom the state of Virginia had deputed the sovereign and exclusive authority to regulate such
*555] surveys, similiar to the *powers of commissioners to adjust pre-emption rights: and that their determination was conclusive, being an inseparable condition annexed to the grant from the state. 2 Vent. 365; 3 Ch. Cas. 135. The existence and power of these agents has been recognised by the court. *Wallace* v. *Anderson*, 5 Wheat. 291.

2. The appellant, Kerr, is an innocent purchaser without notice, who holds the legal estate, with superior equity, and therefore, cannot be disturbed by the alleged equity of Watts. The cause having been set down for hearing, on the bill and answers, his answer is conclusive evidence as to every fact which it states (Wheat. Dig. tit. Chancery, pl. 142; *Leeds* v. *Marine Ins. Co.*, 2 Wheat. 380), and it does state, that at the filing of the bill, he had the legal title; and that, before either party purchased, the entries had been surveyed, and become matters of record. A survey returned and recorded is notice. 3 Binn. 118. He is not affected by the supposed fraud of Massie, in making Powell's survey. Massie was only one of several mesne purchasers of Powell's rights; and if Powell, the original holder, was innocent, a subsequent purchaser under him has a right to the shield of his innocence, even though such purchaser had notice. 2 Atk. 242; 11 Ves. 478; Sugd. on Vend. 438. Nor is the appellant a *lite pendente* purchaser, because the former suit was brought in Kentucky, out of the jurisdiction where the land lies. 2 P. Wms. 482. The rule is borrowed from the common
*556] *law; and its analogies must, therefore, be pursued. A verdict and judgment at law, or a decree in equity, affecting the title to land, are local in their nature. The *lis pendens* must be on the question of title directly, and not incidentally. The principle is confined to those who attempt to originate a title *pendente lite*; and is never extended to those who had acquired a title previously, and who ought, therefore, to have been made parties to the *lis pendens*. Its policy is to prevent the parties from alienating, and thus evading the justice of the court. Even if the appellant had no legal title, but had only the better right to call for it, he could not be affected in equity by the pendency of the former suit. 2 Vern. 599. Nor is he bound as privy to the former decree. No person can be bound as such, who ought to

have been made a party: as to all who ought to have been parties, such a decree is considered as a fraud. 1 Binn. 217; 2 Ibid. 40, 455; 3 Ibid. 114. Those only are privies, who acquire this interest subsequent to the institution of the suit, by the decree in which they are sought to be affected. Besides, the question here is substantially different from that which arose in the former case. There, it was as to the responsibility of an agent to his principal, for an alleged fraud. Here, it is as to the dispossession of a *bonâ fide* purchaser.

Doddridge and *Hardin*, contrà, stated, that they should not examine the correctness of the *decision in the former case, nor the question whether the appellants were bound by the decree against Massie, [*557 under whom they claim; since, whether they were bound by it as a *res judicata* or not, the court would not change the application of the former adjudication, unless the appellants showed themselves to be purchasers for a valuable consideration, without notice, or unless the respondent had been guilty of some gross negligence. The defence of being a purchaser, without notice, can never be set up by or against one claiming under a different original title. It is admitted to be the general rule, that where the cause is set down for a hearing, on the bill and answer, the answer of the defendant is conclusive: but where the answer proceeds upon the ground of making the defendant an innocent purchaser, and the records, &c., made part of the bill, show that he cannot be such, there, the law charging him with notice from the registry, forms an exception to the rule. The title of the respondent is an imperfect legal title; and his claim being a matter of record, cannot be treated as a latent equity, for negligence in prosecuting which, he shall lose his property. In the system of land laws which has been established in this country, land titles commence by a record, and the very first step confers an inchoate legal title.

March 16th, 1821. JOHNSON, Justice, delivered the opinion of the court. —This cause has its origin in the case decided in this court between *Watts* and *Massie*, in the year 1810. *That suit came up from the Kentucky district, and was prosecuted there because Massie, the defendant, [*558 who then resided in that state, and either was, or was supposed to be actually seised of the land in question. Since that decision, it has been ascertained, that the present defendants are in possession of the land, or the greater part of it; and Massie having changed his residence to Ohio, this suit has become necessary, both to enforce the former decree against him, and to obtain relief against the actual possessors of the land.

In the course of discussion, the court has been called on to review its decision in *Watts* v. *Massie*, and it has patiently heard, and deliberately considered, the able and well-conducted argument on this subject. But after the maturest reflection, it adheres to the opinion, that, whether the case be viewed with reference to the time, intent and meaning of the calls, to analogy to decided cases, or convenience in the voluntary adoption of a principle of the most general application; that laid down in the case of *Watts* v. *Massie*, for running the lines of the land called for, cannot be deviated from. So far, therefore, as Massie himself, and his privies in estate, are concerned, Watts is now entitled to the full benefit of that decision.

But there are various other defendants, and several grounds of defence assumed in this case, which are unaffected by the decision referred to. It is contended, in the first place, that there is a radical defect of parties. That *559] the representatives *of O'Neal and Scott, through whom the complainant claims, and those of Powell and Thomas Massie, supposed to be hostile to his interests, ought to have been made parties. On this point, there may be given one general answer. No one need be made a party complainant, in whom there exists no interest, and no one party defendant, from whom nothing is demanded. Watts rests his case upon the averment that all the interests once vested in O'Neal and the Scotts, now centre in himself, and provided he can recover the land now in possession of those actually made defendants, he is contented afterwards to meet the just claims of any others who are not made defendants. No rights will be affected by his recovery, but those of the actual defendants, and those claiming through them. As to the supposed interference of the lines ordered to be surveyed, with those of Thomas Massie, or Powell, the former is merely hypothetical, by way of reference, or imaginary; and the latter is only asserted, on the ground that Massie had acquired all the interest in Powell's survey that Powell ever had. There was, therefore, nothing to demand of Powell, as the case is exhibited by the record. It must be subject to these modifications, that the *obiter dictum* of the court, in the case of *Simms* v. *Guthrie*, 9 Cranch 25, is to be understood.

It is next contended, in behalf of Kerr, and several other defendants, that they claim through purchasers who were *bonâ fide* purchasers, without notice, for a valuable consideration. And at first view, it would seem, that *560] the principles so often applied to the relief *of innocent purchasers, are applicable to the case of these defendants, wherever the facts sustain the defence. But it will not do, at this day, to apply this principle to the case of purchasers of military land-warrants, derived under the laws of Virginia. In all the courts in which such cases have come under review, the purchasers have been considered as affected by the record notice of the entry, and also of the survey, such as it legally ought to be made, as incident to, or bound up in, the entry. It is altogether a system *sui generis*, and subsequent purchasers are considered as acquiring the interest of the enterer, and not necessarily that of the state. So that purchasers under conflicting entries are considered as purchasing under distinct rights, in which case, the principle here contended for does not apply; since the ignorance of a purchaser of a defective title, cannot make that title good, as against an independent and better right. These principles may safely be laid hold of, to support a doctrine which, however severe, occasionally, in its operation, was perhaps indispensable to the protection of the interests acquired under military land-warrants, when we take into consideration, the facility with which such interests might otherwise, in all cases, have been defeated by early transfers.

It is further contended, that the defendants are not bound by the decree in the case of *Watts* v. *Massie*, because neither parties, nor privies, nor *pendente lite* purchasers. That those who come not into this court, in any one *561] of those characters, are not subject to the direct *and binding efficacy of an adjudication, is unquestionable. But it is not very material, as to the principal question in this case, whether the parties are to be affected

by the former adjudication directly, or by the declared adherence of this court to the doctrines established in that case. The consequence to the parties on the merits of the case is the same.

But in one view, it is material, and that is, with regard to the proof of the exhibits, through which Watts, the complainant, deduces his title through the Scotts, from O'Neal. As Massie, in the former case (the record of which is made a proof of this), acquiesced in this deduction of Watts's title, we are of opinion, that it is, as to him and his privies in estate, a point conceded. As to parties and privies, the principle cannot be contested; and as to *pendente lite* purchasers, it is not necessary to determine the question, since the only defendants who have appealed from the decision below, to wit, Kerr, the Kirkpatricks, Doolittle and the Johnsons, claim under purchases made long anterior to this scrip, in Kentucky. Those defendants certainly were entitled to a plenary defence, and where they have, by their answers, put the complainant upon proof of his allegations, as to his deduction of title, the question arises, whether it appears from the record, that the deduction of title was legally proved.

There can be no doubt that this question passed *sub silentio* in the court below, but it does not appear from anything on the record, that the point was waived; and we are not at liberty to look beyond *the record, for the evidence on which the deduction of title was sustained. Although [*562 we entertain no doubt, that exhibits may, on the trial, be proved by parol testimony, yet a note on the minutes, or on the exhibits, became indispensable to transmit the fact to this court; and as the case furnishes no such memorandum, we must consider the assignments through which Watts derived his title from O'Neal, as not having been established by evidence. Such was the decision of this court in the case of *Drummond* v. *McGruder*, 9 Cranch 122. But Kerr is the only one of these appellants who has expressly put the complainant on proof of his title. The rest of the appellants having passed over this subject, without any notice, in their answer, the question is, whether they waived their right to call for evidence to prove these exhibits. We are of opinion, they have not; and that the complainant is always bound to prove his title, unless it be admitted by the answer.

There are two principles of a more general nature, of which all the appellants claim the benefit, and which, as the cause must go back, will require consideration. It is contended, that Nathaniel Massie was the acknowledged agent of both O'Neal and Watts, and that the complainant is precluded by his acts done in that capacity. This argument is resorted to, as well to fasten on Watts the survey made in his behalf, above the town of Chilicothe, as a relinquishment of all claim to a location at the place now contended for in his behalf. But in neither of these views *can this court apply this principle in favor of the defendants; for, it follows from the [*563 principles established for surveying O'Neal's entry, that the survey made by Massie on O'Neal's entry, was illegal and void; and, certainly, when employed in locating the entries made in favor of Powell and himself, Massie was not acting as the agent of O'Neal or Watts, but as the agent of Powell, or, in fact, in his own behalf. The survey, on which this argument rests, was at best partial, and it is conclusive against it, to observe, that the powers of Massie, as agent of Watts, were limited to the entry and mechan-

ical acts of the survey. The recording of that survey, and all those solemn acts which give it legal validity, it does not appear that his powers extended to. Watts never recognised that survey, or assumed the obligatory effects of it, by any act of his own, and in fact, in the event (though not a material circumstance to the result we come to), it has since been ascertained, that it was not only made off Watts's entry, but on land appropriated by another.

But it has been contended also, that all these surveys actually made on the military land-warrants of Virginia, derive the authenticity and force of judicial acts, or of acts done by the general agents of the continental officers, respectively, from the superintending and controlling powers vested in the deputations of officers, as the law denominates them, appointed by themselves to superintend the appropriation of the military reserves set apart for their use. It is to be presumed, it is contended, that every
*564] survey made by their authorized surveyors, was *made under their control and direction. This court does not feel itself authorized to raise any such presumption. The powers actually exercised by those commissioners, were limited to very few objects. The surveying of entries, at a very early period, became a judicial subject; and the commissioners, or rather deputations of officers, never assumed a right to adjust the conflicting interests of individuals upon the locating and surveying of such entries. To appoint surveyors, to superintend and direct the drawing of lots for precedence among the locators, to direct the survey for officers and soldiers, not present or not represented, and to determine when the good lands between the Cumberland and Tennessee should be exhausted, comprehended all the powers with which they were vested. As individual agents, capable of binding their principals, they appear in one case, and only one, which was, when the officer or soldier was absent and unrepresented. And as to judicial powers, there is no provision of the act that vests them with a semblance of such a power, unless it be to judge of the right of priority as determined by lot. But here, also, they appear more properly in the character of ministerial officers, discharging a duty without the least latitude of judgment or discretion. Their powers in nothing resemble that of the courts of commissioners established through the back counties of Virginia. As to the subjects submitted to the boards so constituted (of which military warrants were no part), those boards were expressly vested with judicial power. But the powers of the deputations of officers were purely minis-
*565] terial. *And if it be admitted, that they might have exercised the power of defining the principles on which surveys should have been made, yet it is certainly incumbent on him who would avail himself of that power, to show that it was exercised, and to bring himself within the rules prescribed by their authority.

Decree reversed as to these appellants, and sent back for further proceedings.

LEEDS *et al. v.* MARINE INSURANCE COMPANY.[1]

Equitable set-off.

Application of the law of set-off and lien in equity, under peculiar circumstances.

Where an agent effected two policies of insurance, and gave his own note for the premium, in an action on one policy, the underwriters may set off the amount of the premium on the other policy.

Having been prevented from doing so, by injunction, equity will compel the principal to allow the amount to be deducted from the judgment.

APPEAL from the Circuit Court for the District of Columbia. This was a suit in equity, commenced in the court below, by the respondents against the appellants, in which the injunction obtained on the filing of the bill was made perpetual. The facts are stated in the opinion of the court.

March 9th, 1821. This cause was argued by *Swann* and *Jones*, for the appellant, and by the *Attorney-General* and *Lee*, for the respondents.

*March 10th. JOHNSON, Justice, delivered the opinion of the court.—This case involves a great many questions, both of law and fact, but we will consider it as it is affected by those circumstances, concerning which there is no dispute. [*566

Leeds and Straas being engaged in commercial enterprizes, Straas employed Hodgson to effect insurance on the Sophia and her cargo. A note of Hodgson, with Patton and Dykes as indorsers, is taken for the premium. Another adventure on the brig Hope, grows out of the first, on the Sophia; and the same agent, at the request of the same principal, effects insurance upon this also, with the same company. The Sophia arrives in safety, but though one of the indorsers is unquestionably sufficient, the premium note remains unpaid. The Hope is lost, and Hodgson, professedly suing for the use of Straas and Leeds, has recovered judgment against the underwriters for the amount of the policy. From this amount, the premium note connected with that policy was discounted, but that growing out of the insurance on the Sophia, was not pleaded, notwithstanding the identity of the legal plaintiff in that action, with the debtor to the company in the transaction on the Sophia. The note taken for the insurance on the Sophia, is now set up against the policy on the Hope, in a different form. This bill is filed to compel the parties in interest, Hodgson, Leeds and Straas, to discount it from the judgment against the underwriters. The equity of this demand is now to be tested.

*The right to the discount, considered with reference to identity of parties, was clearly a legal one. And had not the company been enjoined in the chancery of Virginia, during the pendency of the suit upon the policy, they must have lost all claim to the interposition of this court, by failing to assert their legal rights in the court to which they properly belonged. But the chancery of Virginia might have considered the company in contempt, had they set up in discount a claim then pending, and then enjoined in the courts of that state. And therefore, we may now be justified in considering the legal rights of the company, against the policy on the Hope, as derived through the premium note on the Sophia, under all [*567

[1] See 5 Cranch 100; 7 Id. 333; 9 Id. 104; 2 Wheat. 380.

the advantages that it would have possessed, if pleaded as a set-off to the action at law. The bill, it is true, does not explicitly rest on this, as the ground of its equity, but the facts are so set out, and may be properly considered as making up the case.

What was the state of right, as it stood at law? Hodgson, as holder of the policy which he had effected, was, to the amount of his commissions, advances, or even liability incurred in the transaction, a privileged creditor, and that possession could not be violated, until he was indemnified or compensated. If he be considered as the legal plaintiff, in the action on the policy, and, in fact, the legal owner of the money recovered for the use of others, the law would not suffer him to be deprived, by transactions between Straas and Leeds, to which he never assented, of any *legal advantage derived from possession of that money.

*568]

Suppose, to come up to the very case before us, the company had pleaded this note as a set-off to the suit on the policy, and Hodgson, the legal plaintiff, had tendered a replication, admitting the plea, in what manner could the company or himself have been deprived of the benefit of its being thus disposed of? That Hodgson was entitled to indemnity for Straas, at least, against this note, is unquestionable; and he would, as against Straas, have, under any circumstances, been entitled to retain a sufficient sum to cover his liability. Then, how could he, by the act of Straas, either by assigning away his interest, or by impeding, by an injunction, that act in a third person, which would have secured him in its consequences, be deprived of the benefit of compelling the admission of this set-off? The case in equity, as it now stands, is precisely that which would have arisen at law, upon the state of things supposed. For, Hodgson, in his answer to this bill, admits this set-off, and solicits the court to enforce the admission of it by Leeds, who, in the right of Straas, is thus endeavoring to deprive him of his legal right to indemnity. The case in no part contests the reality of this state of facts, but the defendant, Leeds, in every part of it, rests his defence upon the ground, that Straas has succeeded in defeating the claims of Hodgson, and deprived the company of the benefit incident to the assertion of those claims; first, by tying the hands of the company in a court of chancery, in a suit in which he finally failed, and then by a transfer of a *chattel interest, the evidence of which, or the contract itself, was in the hands of Hodgson, and legally subject to his control, until the money due on it was reduced into possession.

*569]

It is true, that had this set-off been pleaded at law to Hodgson's suit upon the policy, and the equitable interest of others been set up against such plea, or against Hodgson's admission of it, the court of common pleas must, according to modern practice, have heard the parties on affidavit, before it determined to admit Hodgson's replication on its files. But supposing the case to have been presented on affidavit, such as it now appears to this court, that court would not have taken upon itself to deprive the legal plaintiff of a legal advantage, in favor of an assignee of a *chose in action*, where the equity of the case was so strong in the favor of the legal plaintiff.

It is obvious, that the principal difficulties in this case arise from the inverted and peculiar state of the parties. Hodgson (and with him his indorser) who is really the party to be relieved, appears in the character of defendant, and the question presents itself, why should the underwriters be

at liberty to quit their hold upon their note for indemnity, and come upon the judgment holder on the policy, for satisfaction in the first instance? But to this several answers present themselves.

Why, if the underwriters had several remedies, should they, by the act of the opposite party, be deprived of any one of them? Why, if they might *legally have availed themselves of their remedy by discount, should they now be deprived of it, because they were prevented, unconscientiously, by their antagonist, from asserting it in its proper place? And why, if they can in this way certainly save their money, should they be put to the risk and labor of prosecuting a recovery upon their note? [*570

But the case affords another answer, of a more general nature. Notwithstanding Hodgson's insolvency, his claims upon this policy remain unpaid, if it be only for the purpose of shielding his indorsers; and notwithstanding his appearance here as a co-defendant, it is obvious, that dismissing this bill must give rise to new suits between the persons liable to pay this note, and the assignee of Straas's interest under the policy. This consideration affords the additional reason, that entertaining this suit terminates litigation, and the reverse would be the consequence of dismissing this bill. If having been deprived by his antagonist of his remedy at law, is a sufficient ground for entertaining the suit of the complainant, it is certainly no objection to it, that relief is at the same extended to one who, though nominally a co-defendant, is essentially a co-plaintiff, and might have been made such.

Had he been made such, the case would have presented fewer difficulties. If Straas himself could not have demanded of Hodgson this policy, or the money recovered on it, without securing him against the premium note, neither can his assignee. Even the courts of law have recognised the lien of a broker *on a *chose in action*, for a general balance of account, and much more so ought a court of equity, in the application of a principle so peculiarly its own, as that which gives effect to a transfer by assignment of a *chose in action*, not in its nature negotiable. [*571

The parties in this case sue only to be restored to their legal advantages; as that cannot be done specifically, they certainly have a claim on this court to secure to them all the beneficial consequences that would have resulted from them. And as Straas's interest in the Hope would have been amply sufficient to enable Hodgson to pay this premium note, had the money on the policy come into his hands, there is nothing unreasonable in making it, in the hands of the officer of this court, subject to be disposed of in the same manner.

Let it be distinctly understood, that the court does not, in this decision, countenance the idea, that a separate debt may be set off to a joint action. The debtor and creditor at law are the same. And upon Hodgson's reducing the money into possession, the same identity of parties would exist. For Leeds and Straas do not appear in the case at all, in the relation of copartners in trade, but Leeds himself represents them, as holding distinct interests, although in the same subject. Leeds's defence rests altogether on Straas's assignment, not on their blended rights; nor does he pretend to ignorance of the off-set now contended for, when he took the assignment, but only observes, with a view, it is presumed, to show he had no reason to believe it to be a subsisting debt, *that it was at that time enjoined [*572

before the chancellor of Virginia. This is setting up a wrong in Straas, to support a right in his assignee.

Decree affirmed.

Union Bank *v.* Hyde.

Promissory note.— Waiver of demand and notice.—Parol evidence.

A protest of an inland bill, or promissory note, is not necessary; nor is it evidence of the facts stated in it.

The following undertaking of the indorser of a promissory note, "I do request that hereafter any notes that may fall due in the Union Bank, in which I am, or may be, indorser, shall not be protested, as I will consider myself bound in the same manner as if the said notes had been, or should be, legally protested," held to be ambiguous, as to whether it amounted to a waiver of demand and notice; and parol proof admitted, to show that it was the understanding of the parties, that the demand and notice required by law to charge the indorser should be dispensed with.

Error to the Circuit Court for the District of Columbia.

March 14th, 1821. This cause was argued by *Jones*, for the plaintiff in error, and by *Swann* and *Key*, for the defendant in error.

March 16th. Johnson, Justice, delivered the opinion of the court.—This *573] cause turns upon the construction of a written *instrument, in these words:

"I do request that hereafter any notes that may fall due in the Union Bank, on which I am, or may be indorser, shall not be protested, as I will consider myself bound, in the same manner, as if the said notes had been, or should be, legally protested.

(Signed) Thomas Hyde."

Two constructions have been contended for: the one, literal, formal, vernacular; the other, resting on the spirit and meaning, as a mercantile and bank transaction. The former has been sustained in the court below, and the correctness of that opinion is now to be examined.

The defendant, it appears, became indorser to one Foyles, and the note was discounted in the Union Bank: on its falling due, it is admitted, that no demand was made on the maker, or notice given to the indorser.

The case presents the right of the plaintiffs under two aspects: 1st. Upon the just construction of the written instrument: 2d. The practical exposition of it by the defendant himself: and it might also have presented a third—the specific waiver of demand and notice on the note in suit. By some assumed analogy, or mistaken notion of law, this practice of protesting inland bills, has now become very generally prevalent; and since the inundation of the country with bank transactions, and the general resort to this mode of exposing the breaches of punctuality which occur upon notes, a *574] solemnity, cogency *and legal effect have been given to such protests, in public opinion, which certainly has no foundation in the law-merchant. The nullity of a protest on the legal obligations of the parties to an inland bill, is tested by the consideration, that independently of statutory provision (if any exists anywhere) or conventional understanding, the protest on an inland bill is no evidence in a court of justice of either of the incidents which convert the conditional undertaking of an indorser, into an

absolute assumption. The protest belongs altogether to foreign mercantile transactions, upon which, on the contrary, it is an indispensable incident to making a drawer of a bill, or indorser of a note, liable. On foreign bills, it is the evidence of demand, and an indispensable step towards the legal notice of non-payment, in consequence of which the undertaking of the drawer or indorser becomes absolute. Hence, as to foreign transactions, it is justly predicted of a protest, that it has a legal or binding effect.

But the writing under consideration has reference, exclusively, to inland bills, and as to them, the protest has no legal or binding effect. The indorser became liable, only on demand and notice, and of these facts, the protest is no evidence. How, then, shall the waiver of the protest be adjudged a waiver of demand and notice, or, in effect, convert his conditional into an absolute undertaking? Had the defendant omitted one word from his undertaking, it would have been difficult to maintain an affirmative answer to this proposition. But what *are we to understand him to [*575
intend, when he says, "I will consider myself bound in the same manner as if said notes had been, or should be, *legally* protested?" Except as to foreign bills, a protest has no legal binding effect, and as to them, it is evidence of demand, and incident to legal notice. It either, then, had this meaning, or it had none.

This reasoning, it may be said, goes no further than to a waiver of the demand, but what effect is to be given to the word bound? It must be, to pay the debt, or it means nothing. But to cast on the indorser of a foreign bill an obligation to take it up, protest alone is not sufficient; he is still entitled to a reasonable notice, in addition to the technical notice, communicated by the protest. To bind him to pay the debt, all these incidents were indispensable, and may, therefore, be well supposed to have been in contemplation of the parties, when entering into this contract.

It is not unworthy of remark, that the writing under consideration asks a boon of the plaintiff for which it tenders a consideration. It requests to be exempted from an expense, exposure or mortification, on the one hand; and on the other, what is tendered in return? The intended object and conceived effect of the protest, on the one hand, is to convert his undertaking into an unconditional assumption, and the natural return is, to make his undertaking at once absolute, as the effectual means of obtaining the benefit solicited.

If this course of reasoning should not be held conclusive, it would, at least, be sufficient to prove the *language of the undertaking equivocal; [*576
and that the sense in which the parties used the words in which they express themselves, may fairly be sought in the practical exposition furnished by their own conduct, or the conventional use of language established by their own customs or received opinions. On this point, the evidence proves, that, by the understanding of both parties, this writing did dispense with demand and refusal, that the company, on the one hand, discontinued their practice of putting the notes indorsed by defendant in the usual course for rendering his assumption absolute, and the defendant, on the other, continued, up to the last moment, to acquiesce in this practice, by renewing his indorsements, without ever requiring demand or notice. This was an unequivocal acquiescence in the sense given by the company to his undertaking, and he cannot be permitted to lie by, and lull the company into a state of

security, of which he might, at any moment, avail himself, after making the most of the credit thus acquired.

Judgment reversed, and *venire facias de novo* awarded.

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*577] *CLARK *et al. v.* GRAHAM.

Execution of power.—Lex loci rei sitæ.—Deeds.—Parol exchange.

A power to convey lands must possess the same requisites, and observe the same solemnities, as are necessary in a deed directly conveying the lands.[1]

A title to lands can only by acquired and lost, according to the laws of the state in which they are situate.

The laws of Ohio require all deeds of land to be executed in the presence of two witnesses, and a deed executed in the presence of one witness only, is void.

A parol exchange of lands, or parol evidence that a conveyance should operate as an exchange, will not convey any estate or interest in lands.[2]

ERROR to the Circuit Court for the district of Ohio.

March 16th, 1821. TODD, Justice, delivered the opinion of the court in this cause, which was submitted without argument.

This is an action of ejectment, brought in the circuit court for the district of Ohio. At the trial, the plaintiff proved a title sufficient in law, *primâ facie*, to maintain the action. The controversy turned altogether upon the title set up by the defendants. That title was as follows: A letter of attorney, purporting to be executed by John Graham, bearing date the 23d of September 1805, authorizing Nathaniel Massie to sell all his estate, &c., in all his lands in Ohio. This power was executed in the presence of two witnesses, in Richmond, in Virginia, and was there acknowledged by Graham, before a notary-public. *Nathaniel Massie, by a deed dated the 7th
*578] day of June 1810, and executed by him in Ohio, in his own right, as well as attorney to John Graham, conveyed to one Jacob Smith, under whom the defendants claimed the land in controversy. This deed was executed in the presence of one witness only, and was duly acknowledged and recorded in the proper county in Ohio. The deed and letter of attorney, so executed and acknowledged, were offered in evidence by the defendants, and were rejected by the court, upon the ground, that they were not sufficient to convey lands, according to the laws of Ohio.

The defendants also offered in evidence, a deed from Jacob Smith and wife, to the said Graham, dated the 7th of March 1811, duly witnessed acknowledged and recorded, conveying a certain tract of land in Ohio, and offered further to prove, that the tract of land so conveyed was given in exchange for and in consideration of the lands conveyed by the deed first mentioned to Smith. This evidence also was rejected by the court. A bill of exceptions was taken to these proceedings, by the defendants; and the jury found a verdict for the plaintiff, upon which a judgment was entered for the plaintiff, and the present writ of error is brought by the defendants to revise that judgment.

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[1] Piatt v. McCullough, 1 McLean 69.

[2] Purcell v. Miner, 4 Wall. 513.

The principal question before this court is, whether the deed so executed by Massie was sufficient to convey lands, by the laws of Ohio. If not, it was properly rejected; if otherwise, the judgment should be reversed. Two objections have been taken to the *execution of this deed; first, that the power of attorney was not duly acknowledged, as every deed is [*579 required to be in Ohio, in order to convey lands; and if so, then the subsequent conveyance is void, for it is a general principle, that a power to convey lands must possess the same requisites, and observe the same solemnites, as are necessary in a deed directly conveying the lands. On this objection, which is apparently well founded, it is unnecessary to dwell, as another objection is fatal; that is, the deed of Massie was executed in the presence of one witness only, whereas, the law of Ohio requires all deeds for land to be executed in the presence of two witnesses. It is perfectly clear, that no title to lands can be acquired or passed, unless according to the laws of the state in which they are situate. The act of Ohio regulating the conveyance of lands, passed on the 14th of February 1805, provides, "that all deeds for the conveyance of lands, tenements and hereditaments, situate, lying and being within this state, shall be signed and sealed by the grantor, in the presence of two witnesses, who shall subscribe the said deed or conveyance, attesting the acknowledgment of the signing and sealing thereof; and if executed within this state, shall be acknowledged by the party or parties, or proven by the subscribing witnesses, before a judge of the court of common pleas, or a justice of the peace in any county in this state." Although there are no negative words in this clause, declaring all deeds for the conveyance of lands, executed in any other manner, to be void; yet this must be necessarily inferred from the *clause, in the absence of all words indicating [*580 a different legislative intent, and in point of fact, such is understood to be the uniform construction of the act in the courts of Ohio. The deed, then, in this case, not being executed according to the laws of the state, the evidence was properly rejected by the circuit court.

The remaining point, as to the rejection of the evidence of the deed from Smith to Graham, and the proof to show, that it was given in exchange for the land in controversy, has not been much relied on in this court. It is, indeed, too plain for argument, that if a deed, imperfectly executed, would not convey any estate or interest in the land, a parol exchange, or parol proof of an intention to convey the same in exchange, cannot be permitted to have any such effect.

Judgment affirmed, with costs.

Preston's Heirs *v.* Bowmar.

Land-law of Kentucky.

It is a universal rule, that course and distance yield to natural and ascertained objects.
But where these objects are wanting, and the course and distance cannot be reconciled, there is no universal rule, that obliges the court to prefer the one to the other.
Cases may exist, in which the one or the other may be preferred, according to the circumstances.
In a case of doubtful construction, the claim of the party in actual possession ought to be maintained, especially, where it has been upheld by the decisions of state tribunals.
Preston's Heirs *v.* Bowmar, 2 Bibb 493, affirmed.

*581] *Error to the Circuit Court of Kentucky. This was an ejectment, brought in the court below, in which the lessor of the plaintiff claimed title under a patent, describing the survey as "beginning at an ash, in the middle of a line of Glenn's land, and with it, north 20 degrees east, 800 poles, crossing three branches to a hoop-wood and sugar tree, corner to Moffat's land, and with a line thereof, north 70 degrees west, 100 poles, crossing the creek to a sugar tree, south 33 degrees west, 820 poles, crossing three forks of the creek, to two sugar trees, south 70 degrees east, 300 poles, to the beginning." The question arising upon the construction of this patent, is stated in the opinion of the court.

March 12th, 1821. This cause was argued by *B. Hardin*, for the plaintiff, and by *Talbot*, for the defendant.

March 16th. Story, Justice, delivered the opinion of the court.—Whatever might be our opinion (and we wish to be understood as expressing none), if the question in this case were entirely new, it cannot be affirmed, that there has been such a clear mistake of construction, as that justice and law require us to depart from the decision of the local tribunals. The question here is, whether the third and fourth lines of this patent (following the order of the lines as they are given in the patent) are to be continued upon the courses called for by the patent, until they intersect, or whether the fourth line is to be extended from the beginning to the distance called for by *the patent, and then, the closing line is to be drawn, so as to strike the termination of the second and fourth lines, at the patent distances. In the former case, the fourth line will be longer than the distance called for by the patent; in the latter, the third line will vary from the course called for by the patent. The counsel have stated, that the question resolves itself into this, whether the course shall yield to distance, or distance to the course.

*582]

It may be laid down as an universal rule, that course and distance yield to natural and ascertained objects. But where these are wanting, and the course and distance cannot be reconciled, there is no universal rule that obliges us to prefer the one or the other. Cases may exist, in which the one or the other may be preferred, upon a minute examination of all the circumstances. In the present case, whichever construction is adopted, the plaintiffs will hold a larger portion of land than their patent calls for. We must consider, that the construction of the patent is somewhat doubtful. That it is susceptible of two constructions, each of which has some reasons to support it. If it be doubtful, it would seem reasonable, not to press the broadest construction, against a party, who is now in actual possession under a per-

fectly good legal title. That possession ought not to be ousted, without a clear title in the other party, especially, where it has been upheld by the state tribunals. This very case, between the same parties, has been already adjudicated in the court of appeals of Kentucky; and that court, upon full deliberation, decided *in favor of the defendant. *Preston's Heirs* v. *Bowmar*, 2 Bibb 493. It would be a great mischief, for the same [*583 title to be in perpetual litigation from the conflict of opinion between the courts of the state and the federal courts; and we, therefore, acquiesce in the opinion of the court of appeals, upon the ground, that the point is one of local law, has been fully considered in that court, and is a construction which cannot be pronounced unreasonable, or founded in clear mistake.

Judgment affirmed.

OTIS *v.* WALTER.

Embargo.

Under the embargo act of the 25th April 1808, c. 170, if a vessel, not actually arriving at her port of original destination, excite an honest suspicion in the mind of the collector, that her demand of a permit to land the cargo was merely colorable, this is not a termination of the voyage, so as to preclude the right of detention.

Under what circumstances, the collector has a right to land the cargo of the vessel thus detained.

ERROR to the Supreme Judicial Court of Massachusetts.

March 12th, 1821. This cause was argued by the *Attorney-General*, for the plaintiff in error, and by *Webster* and *Wheaton*, for the defendant in error, citing *Otis* v. *Bacon*, 7 Cranch 596; *Crowell* v. *McFadden*, 8 Ibid. 98; *Slocum* v. *Mayberry*, 2 Wheat. 11.

*March 16th. LIVINGSTON, Justice, delivered the opinion of the [*584 court.—This is an action of trover, brought by the defendant in error, against the plaintiff and others, in the court of common pleas, held at Boston, within and for the county of Suffolk, to recover the value of eighty-six barrels of flour, and sundry other articles, in which judgment was recovered against the plaintiff in error, from which judgment there was an appeal to the supreme judicial court, which is the highest court of law in the commonwealth of Massachusetts, in which judgment was rendered against the plaintiffs in error, for the sum of $2488.75, and costs of suit, and in favor of the other defendants. On the judgment, the defendant below, William Otis, has prosecuted a writ of error to this court, under the 25th section of the judiciary act of the United States; and we are now to decide, whether there was any error in the direction given by the judge before whom this action was tried, and which appears on the bill of exceptions attached to the record in this cause.

The property in question had been seized by William Otis, as deputy-collector of the customs for the port and district of Barnstable, in the commonwealth of Massachusetts, under the 11th section of an act in addition to the act, entitled, "an act laying an embargo on all ships and vessels in the ports and harbors of the United States," and the several acts supplementary

thereto, and for other purposes, passed the 25th April 1808. On the bill of exceptions, the following facts appear :

*535] On the part of the *plaintiff, Lynde Walter, it was proved, that the goods mentioned in the declaration were his property ; that they were put on board of the sloop Ten Sisters, at Ipswich, in Massachusetts, bound for the port of Yarmouth ; that it was agreed or understood between Walter and Hallett, who was master of the sloop, that the latter was to carry said goods to Barnstable, or to a place called Bass river, in Yarmouth, with orders to sell the same, provided he could obtain a certain price fixed by Walter, otherwise to deliver them to Freeman Baker, of Yarmouth ; that said sloop, on the 19th November 1808, cleared out at Ipswich, to proceed to the port of Yarmouth, as expressed in the clearance obtained from the collector at that place ; that said sloop proceeded round Cape Cod to Hyannis, in the town and district of Barnstable, and the master applied to William Otis, a deputy-collector for that port and district, for a permit to land the cargo, which he refused to give, but ordered him not to discharge anything from the sloop, until he should have a permit so to do. That in a day or two afterwards, Otis came on board the sloop with four men, and seized sloop and cargo, and putting a pilot and crew on board, he sent her to Falmouth, in the district of Barnstable, where Otis had the cargo discharged and stored, in and under a dwelling-house in Falmouth : the master forbidding Otis to meddle with the sloop or cargo. The master also exhibited to Otis his manifest, and swore to the correctness of the same.

On the part of Otis, it was proved, that he was deputy-collector for

*586] Barnstable ; that on the 29th November *1808, he duly reported to the president of the United States, the detention of this sloop and her cargo, under and by virtue of the act above mentioned, which detention was confirmed and approved by the president, on the 8th of December 1808. That the sloop, when seized, lay at anchor, about half a mile from the shore or beach, which is in the town and port of Barnstable, near the centre thereof, six miles distant from Bass river, on which Freeman Baker's house and store are situated, and about five miles from the harbor of Yarmouth. That Freeman Baker's landing is situate above a quarter of a mile from the mouth of Bass river, on said river, in the town of Yarmouth, about six miles and an half by water, from where the sloop was seized, and lies to the eastward of Point Gammon. Hyannis, where the vessel was seized, is westward of Point Gammon, and in the town of Barnstable. That the sloop, when seized, had not arrived at the harbor of Yarmouth, but was lying in the port or harbor of Barnstable, about three miles from the harbor of Yarmouth, which lies east-north-east from the port of Barnstable, and the sloop, on her way from Ipswich to the place where she was seized, passed the place for which she was cleared, because the weather would not permit the master to get her either into the harbors of Bass river, or Gage's wharf, and because he lived near Hyannis, and wished to see his family, and to lay his vessel in a safe place, and to land certain articles of bedding, &c., from the vessel, as it was his intention to strip the vessel, when she arrived at

*587] Yarmouth. After the master arrived in *Hyannis Bay, it was his intention to land his cargo at Gage's wharf, which is in the town of Yarmouth ; about three rods distant from the line of Barnstable, and about six miles and an half from the place where the sloop was anchored, when

seized. Between Yarmouth harbor, or Bass river harbor, and Hyannis, or Barnstable harbor, where the vessel was seized, is a long point of land, called Point Gammon, extending several miles into the sea, and the distance by the nearest course of the ship-channel, or deep water, from Bass river to Hyannis, is ten miles, and in going from Ipswich to Hyannis, the sloop passed Bass river harbor, or Yarmouth harbor and Point Gammon. The cargo, when stored by the collector, was, some of it, in bad and perishable condition, and was put in better order, by coopering, &c., before being stored.

On this evidence, the jury were charged, that under the clearance, the master had a right to go to any part of Yarmouth with his vessel, notwithstanding it might have been the intention of him and the owner, that she should go to Bass river in that town: that if she had been carried beyond Bass river, by force of the winds, and contrary to the master's intention, and came to anchor in Hyannis bay, within the limits of the town of Barnstable, for that cause, still, if the jury believed that, in consequence of this state of things, the master had concluded to give up his intention of going to Bass river, and in lieu thereof, to carry his vessel to Gage's wharf, which is within the town of Yarmouth, on the same side of Point Gammon as Barnstable, and to all substantial *purposes, the same harbor; and for this purpose, was waiting only for a proper opportunity to take the vessel [*588 into that wharf, they might justly and fairly determine that the voyage was terminated, at the time Otis took possession of the vessel.

Whether this part of the charge were correct, will depend on the true construction of the 11th section of the act of congress, under which this seizure was made, and which has already been referred to. Its language is, "that the collectors of the customs be and they are hereby respectively authorized to detain any vessel, ostensibly bound with a cargo to some other port of the United States, whenever, in their opinion, the intention is to violate or evade any of the provisions of the acts laying an embargo, until the decision of the president of the United States be had thereupon."

Of the ostensible destination of the Ten Sisters, at the time of her leaving Ipswich, there can be no doubt. This, from the manifest and clearance was Yarmouth or Bass river. What better evidence, then, could Otis have of this fact, than that which he acquired from an inspection of these papers. If, then, such was her ostensible destination, at the time of her sailing from Ipswich, and she had not arrived at Yarmouth or Bass river, at the time of seizure, it would seem, that he would have a right, under the provisions of this section, to detain the Ten Sisters, if, in his opinion, an intention existed of violating the embargo laws. It is not pretended, that this was not his real opinion, or that, for an honest exercise of such an opinion, he ought to be punished. There *is a confidence placed in the discretion of a collector, in cases of this kind, which may be abused, but which ought [*589 to protect him from loss, when there is no reason to believe, as there is not, in this case, that the detention proceeded from sinister motives, and not from a conscientious desire of discharging his duty. To subject a collector, or any public officer, to such an imputation, when acting under a discretion thus reposed in him, the circumstances ought to be such as almost to preclude the possibility of his having acted, but from some unworthy or dishonorable motive. The court is much mistaken, if the facts in this case are

such as to lead to this conclusion. The only question, then, is, whether the circumstances were such, at the time of seizure, as to confer on the collector, or his deputy, the right of acting under the influence of an opinion, that such illegal intention existed.

But it is supposed, that the Ten Sisters had substantially terminated her voyage, or that, being driven beyond Point Gammon into Hyannis bay, she might lawfully terminate her voyage, and land her cargo at Barnstable. If a permit had been obtained to land her cargo at Barnstable, this argument would be entitled to much consideration; but when the master of a vessel, bound by her papers to one port, applies for a permit to land her cargo at another place, he cannot, in that way, deprive the collector of considering the vessel as still *in itinere* to her original port of destination, and if he suspects such application to be a mere pretence to conceal some illicit object, he has as good a right to make the seizure, as if a permit had not been
*590] *applied for. In the case of *Otis* v. *Bacon*, 7 Cranch 596, a permit to land the cargo had been granted, before any seizure took place, which was considered by the court as evidence of the termination of the voyage, and that she could not, thereafter, be considered as actually or ostensibly bound to any other port. Nor can the exhibition of the manifest, or swearing to its contents, be considered as equivalent to a permit to land the goods. It might, on the contrary, furnish evidence, as it did here, of an ostensible destination from one port of the United States to another, where she had not yet arrived, and in which case, the collector had authority to act; nor was he bound to believe, merely from that circumstance, or from the then situation of the vessel, that such destination was abandoned. On a former trial of this cause,[1] no clearance was produced, and the only testimony on this subject came out, on the examination of the master, who declared, that the vessel was bound to Yarmouth or Barnstable.

Upon the whole, this court is of opinion, that the learned judge who tried the cause committed an error, in telling the jury that they might fairly and justly determine the voyage was terminated, at the time of seizure, if they believed the master had given up his intention of going to Bass river, and had determined to land his cargo at Gage's wharf, which, though within the boundary of Yarmouth, is, in fact, in the harbor of Barnstable, and that he was waiting only for a proper opportunity to take the vessel into that wharf. Now, this was placing the termination of the voyage, not on the fact of its
*591] having *actually ended, but on an intention of the master, of which it was impossible the collector could know anything with certainty, who was to judge of his right and duty to make the seizure only from the papers of the vessel, and the situation in which she was found, which is admitted to have been short of her destined port. But if a secret intention of the master be permitted to be set up as a ground of decision, and this, too, contrary to the written evidence in the cause, on which alone a public officer can act with safety, he would always be exposed to risks which might deter him from acting altogether. The jury, therefore, should have been left to decide, from the other evidence in the cause, independent of any secret, or even declared, intention in the mind of the master, whether the ostensible voyage was terminated or not; and it seems difficult to conceive,

[1] See 2 Wheat. 18.

how their decision could have been otherwise than favorable to Otis. In this part of the charge, therefore, the court is of opinion, there is error.

Another part of the court's instruction to the jury is also complained of: it is that, in which the chief justice remarks, that the collector had no authority, without the consent of the master, or person having the care of the cargo, to unlade it from the vessel and store it. It is not known what influence this opinion had on the jury; but in the unqualified terms in which the collector's right to unlade the cargo is denied, this court does not concur. We have already decided, that, with the consent of the master, or agent of the owner, the cargo may be landed, but it was not intended to say, that in no other case *could such landing and storing be justifiable. If it appear that the collector, during the detention of the vessel, shall, *bonâ fide*, think it will tend to the security and preservation of the property, to unlade it, and will do it, at his own expense, it is not perceived, why he may not do so, but at the peril of such an act being regarded, *per se*, as a conversion of the property. At any rate, this consequence ought not to follow, unless it shall appear, that the property was lost or injured, in consequence of such landing. That not appearing to have been the case here, it is not necessary to say, what effect such a circumstance could have had in this suit. All that it is intended to say here, is, that a landing for the purposes, and under the circumstances which appear on this record, is not of necessity, or in itself, a conversion. [*592

Judgment reversed, and a *venire facias de novo* awarded.(*a*)

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*Goszler v. Corporation of Georgetown. [*593

Power to grade streets.

The power given to the corporation of Georgetown, by the act of Maryland, of November 1797, c. 56, to grade the streets of that city, is a continuing power, and the corporation may, from time to time, alter the grade so made.

The ordinance of May 1799, by which the corporation of Georgetown first exercised the power of grading the streets, is not in the nature of a compact, and may be altered by the corporation.

Error to the Circuit Court for the District of Columbia.

March 15th, 1821. This cause was argued by *Key*, for the appellant, and by *Jones*, for the respondent.

March 16th. Marshall, Ch. J., delivered the opinion of the court.—This is an appeal from a decree of the circuit court of the United States for the county of Washington, in the district of Columbia, on the following case:

In the year 1797, the legislature of Maryland, among certain additional powers given to the corporation of Georgetown, enacted, that they "shall have full power and authority to make such by-laws and ordinances for the graduation and levelling of the streets, lanes and alleys within the jurisdiction of the same town, as they may judge necessary for the benefit thereof." (Act of November 1797, c. 56, § 6, p. 35.) In pursuance of this authority, the corporation *passed an ordinance, in May 1799, for the graduation of certain streets the first section of which appoints commis- [*594

(*a*) For a further decision in this cause, see 11 Wheat. 192.

sioners, and authorizes them "to make the level and graduation of the streets;" and the second is in these words: "And be it ordained, that the said level and graduation, when signed by the said commissioners, or a majority of them, and returned to the clerk of this corporation, shall be for ever thereafter considered as the true graduation of the streets so graduated, and be binding upon this corporation, and all other persons whatever, and be for ever thereafter regarded in making improvements upon said streets."

The plaintiff in error owned lots upon one of these streets, and made improvements thereon, according to the graduation made and returned to the clerk of the corporation, under the directions of this ordinance. In September 1816, the corporation passed another ordinance, directing the level and graduation of this street to be altered; and the commissioners appointed, being about to cut down the street by the plaintiff's house, were enjoined from proceeding, by a bill filed by the plaintiff against them and the corporation. Upon the final hearing of this case, the circuit court dismissed the bill, being of opinion, that the corporation had the power asserted in their answer, of altering the level and graduation of a street, graduated under the former ordinance of May 1799.

The counsel for the appellant contends, that the circuit court erred in dismissing his bill, because, 1st. The power to graduate streets as given by *595] *the legislature of Maryland, was not a continuing power, but was completely executed by the ordinance of May 1799, and has never been renewed. 2d. The ordinance of May 1799, is in the nature of a compact, and is unalterable.

1. The language of the act certainly does not imply that the power it confers is exhausted in its first exercise. The power is not "to graduate and level the streets," or "to make a by-law for the graduation and levelling of the streets;" but "to make such by-laws and ordinances for the graduation and levelling of the streets, &c., within the jurisdiction of the same town, as they may judge necessary for the benefit thereof." The act seems to contemplate a continuance of the power, and a repetition of the by-laws and ordinances, as the corporation "may judge necessary for the benefit of the town." It gives a power to legislate on the subject, and to pass more than one by-law and ordinance respecting it. Unless, then, there be, in the nature of the operation, something which forbids its repetition, the words of the act import no such prohibition.

There can be no doubt, that the power of graduating and levelling the streets ought not to be capriciously exercised. Like all power, it is susceptible of abuse. But it is trusted to the inhabitants themselves, who elect the corporate body, and who may, therefore, be expected to consult the interests of the town. Although this power may be oppressively repeated, *596] the possession of it cannot be pronounced so improper *or so dangerous, as to control, essentially, the words which confer it. The graduation and levelling of the streets, is not, necessarily, a single operation. There may be circumstances to produce a general desire to vary the graduation, to bring the streets more nearly on a level, than was contemplated in the first ordinance: and if this may occur, we cannot say, that the legislature could not intend to give this power of varying the graduation, when the words they employ are adapted to the giving of it.

Two acts of congress for amending the charter of Georgetown have been relied on. That passed in January 1805, empowers the corporation "to open and extend, and regulate streets, within the limits of the said town, provided they make to the person or persons who may be injured by such opening, extension or regulation, just and adequate compensation, to be sustained by the verdict of an impartial jury, summoned," &c., "who shall proceed in like manner, as has been usual in other cases, where private property has been condemned for public use."

For the corporation, it has been contended, that the word "regulate" implies some operation on the streets themselves, or is entirely senseless; and if it implies any such operation, it must comprehend their graduation. The objection made by counsel to this argument, is, the improbability that the word "regulate," would be substituted for "graduate," if it were used in the same sense; and the words directing the duty of the jury. They are to "proceed in like manner, as has been usual in other cases, where private property has *been condemned for public use." The word "regulate," then, it is said, is shown by this expression, to be applicable only to those cases in which private property is condemned to public use, which is not done in graduating a street. [*597

This construction is supposed to be strengthened by the act of 1809, which again empowers the corporation "to lay out, open, extend and regulate streets, lanes and alleys," but confines the use of the jury for assessing damages for those sustained "by reason of opening or extending any street, lane or alley." The opinion that the original power continues, after its first exercise, renders it unnecessary to decide on the extent which may and ought to be given to the word "regulate."

2. The second point presents a question of some difficulty. One object of the ordinance probably was, to give as much validity to the graduation made by the commissioners, as if it had been made under the direct superintendence of the corporate body. But it cannot be disguised, that a promise is held forth to all who should build on the graduated streets, that the graduation should be unalterable. The court, however, feels great difficulty in saying, that this ordinance can operate as a perpetual restraint on the corporation. When a government enters into a contract, there is no doubt of its power to bind itself to any extent not prohibited by its constitution. A corporation can make such contracts only as are allowed by the acts of incorporation. The power of this body to make *a contract, which should so operate as to bind its legislative capacities for ever thereafter, and disable it from enacting a by-law, which the legislature enables it to enact, may well be questioned. We rather think, that the corporation cannot abridge its own legislative power. [*598

Decree affirmed.

McClung *v.* Silliman.

Mandamus.

A state court cannot issue a *mandamus* to an officer of the United States.

Error to the Supreme Court of Ohio.

March 12th, 1821. This cause was argued by *Harper*, for the plaintiff in error, and by *Doddridge*, for the defendant.

March 16th. Johnson, Justice, delivered the opinion of the court.—This case presents no ordinary group of legal questions. They exhibit a striking specimen of the involutions which ingenuity may cast about legal rights, and an instance of the growing pretensions of some of the state courts over the exercise of the powers of the general government.

*599] The plaintiff in error, who was also the plaintiff *below, supposes himself entitled to a pre-emptive interest in a tract of land in the state of Ohio, and claims of the register of the land-office of the United States, the legal acts and documents upon which such rights are initiated. That officer refuses, under the idea, that the right is already legally vested in another; and that he possesses, himself, no power over the subject in controversy. A *mandamus* is then moved for in the circuit court of the United States, and that court decides, that congress has vested it with no such controlling power over the acts of the ministerial officers in the given case. (2 Wheat. 369.) The same application is then preferred to the state court for the county in which the subject in controversy is situated. The state court sustains its own jurisdiction over the register of the land-office, but on a view of the merits of the claim, dismisses the motion. From both these decisions appeals are made to this court, in form of a writ of error.

In the case of *McIntire* v. *Wood*, 7 Cranch 504, decided in this court, in 1813, the *mandamus* contended for was intended to perfect the same claim, and in point of fact, the suit was between the same parties. The influence of that decision on these cases, is resisted, on the ground, that it did not appear in that case, that the controversy was between parties who, under the description of person, were entitled to maintain suits in the courts of the United States; whereas, the averments in the present cases show, that the

*600] parties litigant are citizens of different states, and *therefore, competent parties in the circuit court. But we think it perfectly clear, from an examination of the decision alluded to, that it was wholly uninfluenced by any considerations drawn from the want of personal attributes of the parties. The case came up on a division of opinion, and the single question stated is, "whether that court had power to issue a writ of *mandamus* to the register of a land-office in Ohio, commanding him to issue a final certificate of purchase to the plaintiff, for certain lands in the state?"

Both the argument of counsel, and the opinion of the court, distinctly show, that the power to issue the *mandamus* in that case, was contended for as incident to the judicial powers of the United States. And the reply of the court is, that though, *argumenti gratiâ*, it be admitted, that this controlling power over its ministerial officers, would follow from vesting in its courts the whole judicial power of the United States, the argument fails here, since the legislature has only made a partial delegation of its judicial powers

to the circuit courts; that if the inference be admitted, so far as the judicial power of the court actually extends, still, cases arising under the laws of the United States, are not, *per se*, among the cases comprised within the jurisdiction of the circuit court, under the provisions of the 11th section; jurisdiction being in such cases reserved to the supreme court, under the 25th section, by way of appeal from the decisions of the state courts. There is, then, no just inference to be drawn from the decision in the case of *McIntire* v. *Wood*, in favor *of a case in which the circuit courts of the United States are vested with jurisdiction under the 11th section. The idea [*601 is in opposition to the express words of the court, in response to the question stated, which are, "that the circuit court did not possess the power to issue the *mandamus* moved for."

It is now contended, that as the parties to this controversy are competent to sue, under the 11th section, being citizens of different states, that this is a case within the provisions of the 14th section, and the circuit court was vested with power to issue this writ, under the description of a "writ not specially provided for by statute," but "necessary for the exercise of its jurisdiction." The case certainly does present one of those instances of equivocal language, in which the proposition, though true in the abstract, is, in its application to the subject, glaringly incorrect. It cannot be denied, that the exercise of this power is necessary to the exercise of jurisdiction in the court below; but why is it necessary? Not because that court possesses jurisdiction, but because it does not possess it. It must exercise this power, and compel the emanation of the legal document, or the execution of the legal act by the register of the land-office, or the party cannot sue.

The 14th section of act under consideration, could only have been intended to vest the power now contended for, in cases where the jurisdiction already exists, and not where it is to courted or *acquired, by means of the writ proposed to be sued out. Such was the case brought up [*602 from Louisiana, in which the judge refused to proceed to judgment, by which act the plaintiff must have lost his remedy below, and this court have been deprived of it appellate control over the question of right.

The remaining questions bear a striking analogy to that already disposed of. The state court having decided in favor of its own jurisdiction over the register, the appellant, so far, had nothing to complain of. It is only where a state court decides *against* the claim set up under the laws of the United States, that appellate jurisdiction is given from the state decisions. But in the next step of his progress, he was not equally fortunate. The state court rejected his application on the merits of his claim, and appears to have decided, that an entire section might be divided into fractions, by the river Muskingum, in a legal sense. Of this he now complains, and contends that the decision is contrary to the laws of the United States.

From this state of facts, the following embarrassment arises. The United States officer, the defendant, can have no inducement to contest a jurisdiction that has given judgment in his favor: and the plaintiff in error must sustain its jurisdiction, or relinquish all claim to the relief sought for through its agency. And thus this court, with its eyes upon to the defect in the jurisdiction of the court below, is called upon to take cognisance of the merits of the question, both parties being thus equally interested in sustaining the jurisdiction asserted by that court.

*Let the course which this court ought to pursue, be tested by consequences. The alternative is, to give judgment for or against the plaintiff. If it be given for him, this court must invoke that court to issue the writ demanded, or, pursuing the alternative given by the 25th section, it must itself proceed to execute the judgment which that court ought to have given. Or, in other words, to issue the writ of *mandamus*, in a case to which it is obvious, that neither the jurisdiction of that court, nor this, extends. No argument can resist such an obvious *deductio in absurdum*.

It is not the first time, that this court has encountered similar difficulties, in its advance to questions brought up from other tribunals. It has avoided them, by deciding that it is not bound to encounter phantoms. The party who proposes to avail himself of a defective jurisdiction, has nothing to complain of, if he is left to take the consequences. His antagonist might have had caused to complain—he can have none. And notwithstanding express evidence of the contrary, this court feels itself sanctioned, in referring the decision of the state court, in this case, to the ground on which it ought to have been made, instead of that on which it appears to have been made. The question before an appellate court is, was the judgment correct, not the ground on which tbe judgment professes to proceed.

Whether a state court generally possesses a power to issue writs of *mandamus*, or what modifications of its powers may be imposed on it, by the laws which constitute it, it is correctly argued, that this court *can- *604] not be called upon to decide. But when the exercise of that power is extended to officers commissioned by the United States, it is immaterial, under what law that authority be asserted, the controlling power of this court may be asserted on the subject, under the description of an exemption claimed by the officer over whom it is exercised.

It is not easy to conceive, on what legal ground, a state tribunal can, in any instance, exercise the power of issuing a *mandamus* to the register of a land-office. The United States have not thought proper to delegate that power to their own courts. But when, in the cases of *Marbury* v. *Madison*, and that of *McIntire* v. *Wood*, this court decided against the exercise of that power, the idea never presented itself to any one, that it was not within the scope of the judicial powers of the United States, although not vested by law in the courts of the general government. And no one will seriously contend, it is presumed, that it is among the reserved powers of the states, because not communicated by law to the courts of the United States?

There is but one shadow of a ground on which such a power can be contended for, which is, the general rights of legislation which the states possess over the soil within their respective territories? It is not now necessary to consider that power, as to the soil reserved to the United States, in the states respectively. The question in this case is, as to the power of the state courts, over the officers of the general government, employed in disposing of that land, under the laws passed for that purpose. And here it is obvious, that *he is to be regarded either as an officer of that govern- *605] ment, or as its private agent. In the one capacity or the other, his conduct can only be controlled by the power that created him; since, whatever doubts have from time to time been suggested, as to the supremacy of the United States, in its legislative, judicial or executive powers, no one has ever contested its supreme right to dispose of its own property in its own

way. And when we find it withholding from its own courts, the exercise of this controlling power over its ministerial officers, employed in the appropriation of its lands, the inference clearly is, that all violations of private right, resulting from the acts of such officers, should be the subject of actions for damages, or to recover the specific property (according to circumstances), in courts of competent jurisdiction. That is, that parties should be referred to the ordinary mode of obtaining justice, instead of resorting to the extraordinary and unprecedented mode of trying such questions on a motion for a *mandamus*.

JUDGMENT.—This cause came on to be heard, on the transcript of the record of the supreme court of the state of Ohio, for Muskingum county, and was argued by counsel: On consideration whereof, it is adjudged and ordered, that the judgment of the said supreme court of the state of Ohio, be and the same is hereby affirmed, with costs; it being the opinion of this court, that the said supreme court of the state of Ohio had no authority to issue a *mandamus* in this case.

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*MUTUAL ASSURANCE SOCIETY *v.* FAXON *et al.* [*606

Mutual insurance.

Under the laws in relation to the Mutual Assurance Society of Virginia, property offered for insurance, on which the premium has not been paid, and which is sold, without notice, is not liable for the premium, in the hands of the vendee.

APPEAL from the Circuit Court for the district of Columbia.

March 16th, 1821. JOHNSON, Justice, delivered the opinion of the court. —This case first came up on a difference of opinion certified from the circuit court of Alexandria, but the writ of error was dismissed, because that court could not, in law, or the nature of things, certify such a difference to this court.[1] It has since passed to a final decree, and although the sum on the record is small, a special permission to appeal has been granted, on cause shown; it being a case affecting many others similarly situated.

The question is, whether property offered for insurance, on which the premium has not been paid, and which has been sold, without notice, remains liable for the premium, in the hands of the vendee? The case of the *Mutual Assurance Society* v. *Executors of Watts*, decided in February 1816 (1 Wheat. 279), in this court, is relied on as authority for maintaining the affirmative. It is to be regreted, that the case referred to had *not [*607
been more fully reported. As it is not preceded by any statement of facts, abstracts of the history and laws of this society, or the arguments of counsel, the insulated unexplained opinion of the court, as it is printed, must be very unintelligible to all descriptions of readers, except those whose professional duties lead them to the study of the novel and extensive institution whose interests are involved in it.

But there is enough exhibited, to show that it affords no precedent for the claim set up in this case. It is true, that the court occasionally uses the term premium, when speaking of the *quota*; but in every instance, it will

[1] Ross v. Triplett, 8 Wheat. 600.

be found to be used when reasoning upon the *quota* as the purchase-money, in part of the right of the insured to compensation, which, by analogy to other cases of insurance, is, in that sense, denominated a premium.

But there exists no analogy, under the laws of the company, between the liability of property insured for a premium and a *quota*. The first is the sum paid down before the contract is entered into; the second, the occasional contribution, exacted of individuals, to make up the losses from time to time sustained. The 6th section of the act of December 22d, 1794, gives an express lien for the *quota*, and takes no notice of the premium, but as the rule for graduating the respective *quotas*. In the case alluded to, it was decided, that the lien thus created, had its origin in contract, although enforced by statute, and continued a mortgage on the premises, until vacated according to the provisions of the several laws which regulate the company.

*608] *But the very reasons upon which that decision was placed, are fatal to the pretensions set up in this. There is no express lien created in any of the laws of the company, and there are no provisions in any of those laws, from which it could be inferred (if it were possible ever to infer a lien), but those which authorize a sale of land to satisfy a premium. But a right to sell the land is completely satisfied, by subjecting it to such sale, while in the hands of the first holder, and there are two of the by-laws of the company, which expressly negative every pretence for carrying it any further. The first is the 8th section, 4th article, of the act of January 29th, 1805, which requires immediate payment of the premium, upon the acceptance of the declaration, and the second is, the 6th section of the 5th article, which declares, that insurance shall not commence until the premium be paid.

Decree affirmed.

APPENDIX.

NOTE I.

To the case of The Amiable Isabella, *ante*, p. 1.

Articles of the Spanish treaty of 1795, referred to in the argument of the case.

Art. 15. It shall be lawful for all and singular the subjects of his Catholic Majesty, and the citizens, people and inhabitants of the said United States, to sail with their ships, with all manner of liberty and security, no distinction being made who are the proprietors of the merchandises laden thereon, from any port, to the places of those who now are, or hereafter shall be, at enmity with his Catholic Majesty or the United States. It shall be likewise lawful for the subjects and inhabitants aforesaid, to sail with the ships and merchandises afore mentioned, and to trade with the same liberty and security from the places, ports and havens of those who are enemies of both or either party, without any opposition or disturbance whatsoever, not only directly from the places of the enemy afore mentioned, to neutral places, but also from one place belonging to an enemy, to another place belonging to an enemy, whether they be under the jurisdiction of the same prince or under several; and it is hereby stipulated, that free ships shall also give freedom to goods, and that every thing shall be deemed free and exempt which shall be found on board the ships belonging to the subjects of either of the contracting parties, although the whole lading, or any part thereof, should appertain to the enemies of either; contraband goods being always excepted. It is also

Art. 15. Se permitirá á todos y á cada uno de los subditos de S. M. Catolica, y á los ciudadanos pueblos y habitantes de dichos Estados, que puedan navegar con sus embarcaciones con toda libertad y seguridad sin que haya la menor excepcion por este respeto, aunque los propietarios de las mercaderias cargadas en las referidas embarcaciones vengan del puerto que quieran, y las traygan destinadas á qualquiera plaza de una potencia actualmente enemiga ó que lo sea despues, asi de S. M. Catolica como de los Estados Unidos. Se permitirá igualmente a los subditos y habitantes mencionados navegar *con [*4
sus buques y mercaderias, y frequentar con igual libertad y seguridad las plazas y puertos de las potencias enemigas de las partes contratantes, ó de una de ellas sin oposicion ú obstaculo, y de comerciar no solo desde los puertos de dicho enemigo á un puerto neutro directamente, si no tambien desde uno enemigo á otro tal, bien se encuentre baxo su jurisdicion, ó baxo la de muchos; y se estipula tambien por el presente tratado que los buques libres asegurarán igualmente la libertad de las mercaderias, y que se juzgarán libres todos los efectos que se hallasen á bordo de los buques que perteneciesen á los subditos de una de las partes contratantes, aun quando el cargamento por entero ó darte de el fuese de los enemigos de una de las dos, bien entendido sin embargo due

agreed, that the same liberty be extended to persons who are on board a free ship, so that, although they be enemies to either party, they shall not be made prisoners or taken out of that free ship, unless they are soldiers, and in actual service of the enemies.

*5] *Art. 16. This liberty of navigation and commerce shall extend to all kinds of merchandises, excepting those only which are distinguished by the name of contraband; and under this name of contraband or prohibited goods, shall be comprehended, arms, great guns, bombs with the fuses, and the other things belonging to them, cannon ball, gunpowder, match, pikes, swords, lances, spears, halberds, mortars, petards, grenades, saltpetre, muskets, musket ball, bucklers, helmets, breast-plates, coats of mail, and the like kinds of arms, proper for arming soldiers; musket-rests, belts, horses, with their furniture, and all other warlike instruments whatever. These merchandises which follow, shall not be reckoned among contraband or prohibited goods; that is to say: all sorts of cloths, and all other manufactures woven of any wool, flax, silk, cotton or any other materials whatever; all kinds of wearing-apparel, together with all species whereof they are used to be made;

*6] gold and silver, as well coined *as uncoined; tin, iron, latten, copper, brass, coals, as also wheat, barley and oats, and any other kind of corn and pulse; tobacco, and likewise all manner of spices, salted and smoked flesh, salted fish, cheese and butter, beer, oils, wines, sugars, and all sorts of salts: and in general, all provisions which serve for the sustenance of life: furthermore, all kinds of cotton, hemp, flax, tar, pitch, ropes, cables, sails, sailcloths, anchors, and any parts of anchors, also ships' masts, planks, and wood of all kind, and all other things proper either for building or repairing ships, and all other goods whatever, which have not been worked into the form of any instrument prepared for war, by land or by sea, shall not be reputed contraband; much less, such as have been already wrought and made up for any other use; all which shall be

el contrabando se exceptua siempre. Se ha convenido asi mismo que la propia libertad gozaran los sugetos que pudiesen encontrarse â bordo del buque libre, aun quando fuesen enemigos de una de las dos partes contratantes; y por lo tanto no se podrá hacerlos prisioneros ni separarlos de dichos buques â menos que no tengan la qualidad *de militares, y esto hallandose en aquella sazon empleados en el servicio del enemigo.

Art. 16. Esta libertad de navegacion y de comercio debe extenderse â toda especie mercaderias exceptuando solo las que se comprehenden baxo el nombre de contrabando, ô de mercaderias prohibidas, quales son las armes, canones, bombas con sus mechas, y demas cosas pertenecientes â lo mismo, balas, polvora, mechas, picas, espados, lanzas, dardos, alabardas, morteros, petardos, granadas, salitre, fusiles, balas, escudos, casquetes, corazas, cotas de malla, y otras armas de esta especie propias para armar â los soldados, portamosquetos, bandoleras, caballos con sus armas, y otros instrumentos de guerra sean los que fueren. Pero los generos y mercaderias que se nombrarán ahora, no se comprehenderán entre los de contrabando o cosas prohibidas, â saber: toda especie de paños y qualesquiera otras telas de lana, lino, seda, algodon, ù otras qualesquiera materias, toda especie de vestidos con las telas de que se acostumbran hacer, el oro y la plata labrada en moneda ô no, el estaño, hierro, laton, cobre, bronce, carbon, del mismo modo que la cevada, el trigo, la avena y qualquiera otro genero de legumbres. El tabaco y toda la especieria, carne salada y ahumada, pescada salado, queso y manteca, cerbeza, aceytes, vinos, azucar, y toda especie de sal, y en general todo genero de provisiones que sirven para el sustento de la vida. Ademas toda especie de algodon, cañamo, lino, alquitran, pez, cuerdas, cables, velas, telas para velas, ancoras, y partes de que se componen. Mastiles, tablas, maderas de todas especies, y qualesquiera otras cosas que sirvan para la construccion y reparacion de los buques, y otras qualesquiera materias que no tienen la forma de un instrumento preparado para la guerra por tierra ô por mar, no serán reputadas de contrabando, y menos las que están ya preparadas para otros usos. Todas las cosas que se acaban

wholly reckoned among free goods: as likewise, all other merchandises and things which are not comprehended and particularly mentioned in the foregoing enumeration of contraband goods: so that they may be transported and carried in the freest manner by the subjects of both parties, even to places belonging to an enemy, such towns or places being only excepted, as are at that time besieged, blocked up or invested. And, except the cases in which any ship of war, or squadron, shall, in consequence of storms or other accidents at sea, be under the necessity of taking the cargo of any trading vessel or vessels, in which case they may stop the said vessel or vessels, and furnish themselves with necessaries, giving a receipt, in order that the power to whom the said ship of war belongs, may pay for the articles so taken, according to the price thereof, at the port to which they may appear to have been destined by the ship's papers: and the two contracting parties engage, that the vessels shall not be detained longer than may be absolutely necessary for their said ships to supply themselves with necessaries. That they will immediately pay the value of receipts, and indemnify the proprietor for all losses which he may have sustained in consequence of such transaction.

Art. 17. To the end, that all manner of dissentions and quarrels may be avoided and prevented on one side and the other, it is agreed, that in case either of the parties hereto, should be engaged in war, the ships and vessels belonging to the subjects or people of the other party, must be furnished with sea-letters or passports, expressing the name, property and bulk of the ship, as also the name and place of habitation of the master or commander of the said ship, that it may appear thereby, that the ship really and truly belongs to the subjects of one of the parties; which passport shall be made out and granted according to the form annexed to this treaty. They shall likewise be recalled every year, that is, if the ship happens to return home, within the space of a year.

It is likewise agreed, that such ships being laden, are to be provided, not only with passports as above mentioned, but also with certificates, containing the sev-

de nombrar deben ser comprehendidas entre las mercaderias libres, lo mismo que todas las demas mercaderias y efectos que no estan comprehendidos y nombrados expresamente en la enumeracion de los generos de contrabando, de manera que podran ser transportados y *conducidos con la mayor libertad por los subditos [*7 de las dos partes contratantes a las plazas enemigas, exceptuando sin embargo las que se hallasen en la actualidad sitiadas, bloqueadas, ô embestidas, y los casos en que algun buque de guerra ô esquadra que por efecto de averia, ú otras causas se halle en necesidad de tomar los efectos que conduzca el buque ô buques de comercio, pues en tal caso podra detenerlos para aprovisionarse, y dar un recibo para que la potencia cuyo sea el buque que tome los efectos los pague segun el valor que tendrian en el puerto adonde se dirigiese el propietario, segun lo expresen sus cartas de navegacion: obligandose las dos partes contratantes á no detener los buques mas de lo que sea absolutamente necesario para aprovisionarse, pagar inmediatamente los recibos, y indemnizar todos los daños que sufra el propietario á consequencia de semejante suceso.

Art. 17. A fin de evitar entre ambas partes toda especie de disputas y quejas, se ha *convenido que en el caso de que una de las dos potencias se hallase empeña [*8 da en una guerra, los buques y bastimentos pertenecientes á los subditos ô pueblos de la otra, deberán llevar consigo patentes de mar ô pasaportes que expresen el nombre, la propiedad, y el porte del buque, como tambien el nombre y morada de su dueño y comandante de dicho buque, para que de este modo conste que pertenece real y verdaderamente á los subditos de una de las dos partes contratantes; y que dichos pasaportes deberán expedirse segun el modelo adjunto al presente tratado. Todos los años deberán renovarse estos pasaportes en el caso de que el buque buelva á su pais en el espacio de un año.

Igualmente se ha convenido en que los buques mencionados arriba, si estuviesen cargados, deberan llevar no solo los pasaportes sino tambien certificados que contengan el pormenor del cargamento, el

eral particulars of the cargo, the place whence the ship sailed, that so it may be known whether any forbidden or contraband goods be on board the same; which certificates shall be made out by the officers of the place whence the ship sailed,
*9] in the accustomed form; and if any *one shall think it fit or advisable to express in the said certificates the person to whom the goods on board belong, he may freely do so; without which requisites, they may be sent to one of the ports of the other contracting party, and adjudged by the competent tribunal, according to what is above set forth, that all the circumstances of this omission having been well examined, they shall be adjudged to be legal prizes, unless they shall give legal satisfaction of their property, by testimony entirely equivalent.

Art. 18. If the ships of the said subjects, people or inhabitants of either of the parties, shall be met with, either sailing along the coasts or on the high seas, by any ship of war of the other, or by any privateer, the said ship of war or privateer, for the avoiding of any disorder, shall remain out of cannon-shot, and may send their boats aboard the merchant ship, which they shall so meet with, and may enter her, to the number of two or three men only, to whom the master or commander of such ship or vessel shall exhibit his passports, concerning the property
*10] *of the ship, made out according to the form inserted in this present treaty, and the ship, when she shall have showed such passport, shall be free and at liberty to pursue her voyage, so as it shall not be lawful to molest or give her chase in any manner, or force her to quit her intended course.

lugar de donde ha salido el buque, y la declaracion de las mercaderias de contrabando que pudiesen hallarse â bordo; cuyos certificados deberan expedirse en la forma acostumbrada por los oficiales empleados en el lugar de donde el navio se hiciese â la vela, y si se juzgase util y prudente expresar en dichos pasaportes la persona propietaria de las mercaderias se podra hacer libremente, sin cuyos requisitos será conducido â uno de los puertos de la potencia respectiva, y juzgado por el tribunal competente, con arreglo â lo arriba dicho, para que exâminadas bien las circunstancias de su falta, sea condenado por de buena presa si no satisfaciese legalmente con los testimonios equivalentes en un todo.

Art. 18. Quando un buque perteneciente â los dichos subditos, pueblos y habitantes de una de las dos partes fuese encontrado navegando â lo largo de la costa ô en plena mar por un buque de guerra de la otra ô por un corsario, dicho buque de guerra ô corsario, â fin de evitar todo desorden, se mantendrá fuera del tiro de cañon, y podrá enviar su chalupa â bordo del buque mercante, hacer entrar en el dos ô tres hombres à los quales enseñara el patron ô comandante del buque su pasaporte y demas documentos, que deberan ser conformes â lo prevenido en el presente tratado, y probara la propiedad del buque; y despues de haber exhibîdo semejante paseporte y documentos, se les dejàra seguir libremente su viage, sin que les sea licito el molestarle ni procurar de modo alguno darle caza, ô obligarle a dejar el rumbo que siguia.

The treaty with Spain, of 1819, contains the following article:

Art. 12. The treaty of limits and navigation of 1795, remains confirmed in all and each one of its articles, excepting the 2d, 3d, 4th, 21st and the second clause of the 22d article, which, having been altered by this treaty, or having received their entire execution, are no longer valid.

With respect to the 15th article of the same treaty of friendship, limits and navigation, of 1795, in which it is stipulated,

Art. 12. El tratado de limites y navegacion de 1795, queda confirmado en totos y cada uno de sus articulos, excepto los articulos 2, 3, 4, 21, y la segunda clausula del 22, que habiendo sido alterados por este tratado, ó cumplidos enteramente no pueden tener valor alguno.

Con respecto al articulo 15 del mismo tratado de amistad, limites y navegacion de 1795 en que se estipula, que la bandera

that the flag shall cover the property, the two high contracting parties agree that this shall be so understood with respect to those powers who recognise this principle; but if either of the two contracting parties shall be at war with a third party, and the other neutral, the flag of the neutral shall cover the property of enemies, whose government acknowledge this principle, and not of others.

cubre la propiedad, han convenido las dos altas partes contratantes en que esto se entienda asi con respecto á aquellas potencias que reconozcan este principio; pero que, si una de las dos partes contratantes estuviere en guerra con una tercera, y la otra *neutral, la bandera de esta neutral cubrirá la propiedad e los [*11 enemigos, cuyo gobierno reconozca este principio, y no de otros.

Articles of the treaty with Algiers of 1795, referred to in the above case.

Art. 3. The vessels of both nations shall pass each other, without any impediment or molestation; and all goods, moneys or passengers, of whatsoever nation, that may be on board of the vessels belonging to either party, shall be considered as inviolable, and shall be allowed to pass unmolested.

Art. 4. All ships of war belonging to this regency, on meeting with merchant vessels belonging to citizens of the United States, shall be allowed to visit them, with two persons only beside the rowers; these two only permitted to go on board said vessel, without obtaining express leave from the commander of said vessel, who shall compare the passport, and immediately permit said vessel to proceed on her voyage unmolested. All ships of war belonging to the United States of North America, on meeting with an Algerine cruiser, and shall have seen her passport and certificate from the consul of the United States of North America, resident in this regency, shall be permitted to proceed on her cruise unmolested: no passport to be issued to any ships but such as are absolutely the property of citizens of the United States: and eighteen months shall be the term allowed for furnishing the ships of the United States with passports.

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*NOTE II. [*12

To the case of The Amiable Isabella.

In some of the cases which were adjudged by the Council of Prizes, at Paris, during the late European wars, several questions occurred, respecting the form and effect of passports, analogous to those which were discussed in the case of the Isabella, in the text. Among the points, determined by that tribunal, in the case alluded to, were the following: 1. That a mere certificate that a ship was built at Stettin, in a certain year, and was the property of Prussians, was not (properly speaking) a passport. 2. That the authority by which a passport shall be issued is regulated by the law and usage of the country where it is issued,—and that it is unnecessary that it should be granted or signed by the supreme magistrate of the state, unless so required by the local usage. 3. That a passport is not valid for more than one voyage, without being renewed. 4. That under the treaty of 1778, between the United States and France, it was not necessary to express the name of the owner of the ship in the passport, but it was sufficient to state generally, that it was French or American property. 5. That the signature of the public officer, and of the ship-owner, to the oath annexed to the passport provided by the French treaty of 1788, is essential to the validity of the passport. 6. That the passport provided by the treaties of 1778 and 1800, which is substantially the same, in this respect, with the Spanish treaty of 1795 (except that the form of passport was actually annexed to the French treaties), is not conclusive evidence of the propri-

etary interest of the ship; but if shown by other papers found on board, or the depositions of the captured persons, to have been obtained by fraud and perjury, it will not give the protection intended by the treaty, but the case must be adjudged by the ordinary rules of the prize court.

*13] *In the case of The Carolina Wilhelmina, it appears, that the ship had a certificate from the "First Inspector, Ordinary Inspector, and Controller of the Chamber of Imposts, in Pomerania," that the ship was built at Stettin, in 1796, and was the property of Prussians, which it was alleged by the captors, was not sufficient to satisfy the requisitions of the French ordinances, which provide that the *congé* or passport of a neutral vessel shall express the name of the master, that of the shtp, her bulk and lading, and the place of her departure and destination, and shall be renewed every voyage. M. PORTALIS, in his *Conclusions* in this case, speaking of the document in question, says:

"Il est impossible de reconnâitre dans cette acte la nature et les caracteres d'un veritable passe-port. On objecte que, dans la Poméranie, Prussienne, on est dans l'usag constant de naviguer sans autre précaution, et qu'il faut respecter les usages de chaque pays. Mais distinguoes les cas. Je sais que dans la Baltique, mer close, *mare clausum* on voyage sans passe-port; et on le peut sans danger. Faut-il en conclure que les navires qui sortent de cette mer pour aller alleurs, peuvent se passer d'un congé ou passe-port proprement dit? La pratiqne de toutes les nations qui ont des ports sur la mer Baltique, suppose le contraire. Tous les navires Danois, Suédois, qui voyagent dans nos mers on dans les mers générales, se munissent d'un vrai passe-port. Pour la Prusse, nous pouvons citer l'art. 2 d'un réglement de S. M. Prussienne du 18 Septembre 1796, pour ses consuls généraux, consuls, agens et vice-consuls dans les ports étrangers. Il porte: 'Le consul doit veiller d'abord à ce que, conformément aux réglemens qui, a différentes reprises, sont émanés des nos chambres, les capitaines, &c. se présentent au consulat, y produisent leurs passe-ports, &c. Il s'assurera de l'authenticité des passe-ports qui lui ont été produits, et au besoin les visera gratis.' Or, l'obligation de produire des passe-ports présupposant nécessairement l'obligation d'en avoir, on doit conclure que les Capitaines Poméraniens ne se conforment pas aux réglements de leur prince, lorsqu'ils naviguent sans passe-port hors de la Baltique."

*14] *After some further observations to the same purpose, he proceeds: "Il n'est sans doute pas nécessaire que les formes accidentelles d'un acte soient les mêmes par-tout; il est au contraire certain que, par-tout elles peuvent être différentes. De là c'est un principe que la forme de tous les actes quelqueconques dépend des coutumes reçues dans les lieux où ces actes sont faites; *locus regit actum.* Il y a des maximes générales, parce qu'il y a une raisson commune. Mais les formes varient selon les liens et les temps, parce qu'elles n'appartient point à la raison universelle, et qu'elles ne tiennent point à la raison universelle, et qu'elles ne tiennent qu'aux pratiques on aux mœurs particulières de chaque peuple.

"Ainsi, dans certains pays, les passe-ports sont expédiés par le premier magistrat de l'etat; dans d'autres, ils le sont par un magistrat moins élevé en dignité. Ici, on met plus de solemnité dans la rédaction on dans l'être extérieur de l'acte; ailleurs, on en met moins. Il, suffit dans tous les cas, que le passe-port expédié, le soit par l'autorité compétente et dans la forme usitée: car c'est une maxime du droit des gens, que ce qui est authentique dans un pays, l'est pour tous. La jurisdiction d'un etat ne peut s'étendre au delà de son territoire; mais le caractère public qu'un etat attache on donne à la forme des actes qui se font en son nom par ses officiers, ne peut être méconnu nulle part: s'il en était autrement, toute communication réglée entre les peuples deviendrait impossible. De là, c'est une maxime incontestable, que tout acte authentique, et reconnu tel dans le pays où il a été rédigé, faît preuve parmi nous dans les affaires politiques et civiles. On a sentit qu'il était nécessaire, pour les relations qui existent dans les divers gouvernemes, de communiquer aux formes particulières des actes faits dans chaque pays, la force de la foi dublique.

"Conséquement, s'il apparaissait, dans les circonstances présentes, un véritable passe-port, et s'il ne s'agissait pas de confronter les formes accidentelles et extrinsèques de

cette pièce avec les réglemens du pays dans lequel elle a été expédiée, toute difficulté serait levée, si l'acte se trouvait conforme à ces reglemens. Mais nous ne sommes pas dans un telle hypothese. Il ne s'agit de savoir si la pièce présentée comme *passe-port, est revêtue des formes usitées en Prusse; il s'agit d'examiner si cette pièce est un vrai passe-port. La question n'est pas uniquement relative à [*15 la forme de l'acte; elle frappe tout entière sur le fond et la substance de l'acte même.

" Il est évident pour les hommes de tous les pays, qu'un simple certificat de construction et de propriété Prussienne, n'est point un passe-port: cela résulte de la nature et de l'essence même des choses. Si un tel certificat peut suffire pour voyager dans la Baltique, ce n'est pas parce qu'il équivaut à un passe-port, mais parce qu'on peut voyager dans la Baltique sans passe-port. Aussi nous trouvons à bord des navires Prussiens qui sortent de la Baltique, des passe-ports veritables et proprement dits comme nous en trouvons sur tous les navires Danois et Suédois qui sortent de cette mer close pour navigeur allieurs.

" Il serat du plus grand danger de transporter hors de la Baltique, des usages particuliers dont on pourrait si facilement abuser contre la sûreté des autres nations. Nous voyons que les puissances du Nord ont toujours respecté, à cet ègard, le droit commun de tous les peuples,—qu'elles n'ont jamais négligé de donner des passé-port à ceux de leurs sujets qui viennent dans nos mers, ou dans les mers générales; et que l'on, ne peut imputer qu'à la negligence du capturé le défaut de passe-port, qui a été un des principaux motifs de son arrestation."

He then proceeds to examine the *role d'equipage*, which he pronounces to be defective, and adds: " En principe, il suffit que la propriété neutre soit prouvée, pour qu'il n'y ait pas lieu à la confiscation; et la propriété neutre peut être prouvée, indépendamment de certaines irrégularités de forme: mais il faut alors que les preuves de neutralité que l'on présenté, sorent assez concluantes pour supplier à celles qui manquent.

" Dans les circonstances actuelles, on exhibe, par example, des pièces qui constatent que navire dont il s'agit, est de construction Prussienne, et qu'il appartenait à des Prussiense, lorsque le point de propriété a été vérefié par l'inspecteur de la douane à Stettin; mais, postérieurement, une propriété originairement Prussienne a pu devinir ennemie. Quelle assurance *avons nous que cela n'est pas? C'est au capturé [*16 à prouver la propriété neutre par le passe-port, par le rôle d'équipage, et autres pieces de bord. Toutes les presomptions sont contre lui, s'il n'est point en règle.

" Des pieces nulles ne vicient pas les autres pieces; elles peuvent même quelquefois concourir à la preuve de la vérite; *ex acta nullo etiam el icitur veritas;* mais, selon les occurences, le défaut absolu de certaines pieces, et la nature des vices que l'on remarque dans d'autres, ont une influence générale sur toute la cause.

" Le passe-port est la preuve spécifique que l'on n'est pas l'homme de l'ennemi, et que l'on voyage sous la protection d'une puissance neutre; il prouve que le pavillon n'est point un masque, que la propriété du navire n'est pas devenue ennemie, et que le capitaine continue de voyager sous les lois et la tutelle de son prince. Supprimez le passe-port: c'est en vain que vous prouveriez la neutralité originaire du navire et du capitaine, vous n'avez plus aucune preuve légale de la neutralité actuelle; et c'est pourtant à ce point qu'il faut se fixer." Code des Prises, par Dufriche Foulaines, tom. 2, p. 929, *et seq.*

In the case of The Republican, which ship was taken sailing under American colors, it was insisted by the captors, among other grounds of condemnation: 1. That the vessel having been transferred from the former proprietor to the present claimant, the bill of sale ought to be produced. 2. That the ship was not provided with a passport according to the 25th article of the treaty of 1778, between France and the United States, because the name of the owner was not specified in the passport, and the oath annexed. To this it was answered by the claimant: 1. That the vessel not being enemy built, and never having been enemy owned, it was unnecessary to produce the evidence of her transfer from one American citizen to another. 2. That the treaty of 1778 did not require the name of the owner to be expressed in the passport, but that it was sufficient to state that the vessel was American property.

French Prize Decisions.

*In his *Conclusions*, M. PORTALIS, proceeded as follows: "Il est de principe que la propriété neutre du navire et de la cargaison doit être prouvée, et que cette preuve, est à la charge du capturé. C'est une autre vérité, que la preuve de la propriété neutre a été déterminée par les réglemens. Dans l'hypothèse présente, la neutralité du navire, le Republicain et de sa cargaison est elle constatée?

"Je ne m'arrêterai point à l'objection déduite de ce que le changement de propriété du navire, qui, dit on, apparenaît autrefois à des propriétaires autres que les propriétaires actuels, n'est point prouvée par des actes authentiques. Je conviens, d'après le réglement de 1778, qu'une telle précaution ne serait nécessaire que dans le cas d'un navire originairement de construction ou de propriété ennemie.

"Je ne m'arrêterai pas non plus à la circonstance que le nom du propriétaire ou des propriétaires du navire n'est point spécifiquement désigné dans le passe-port. Le traité de 1778, passé entre la France et les Etats Unis d'Amerique, exige seulment que le navire soit reconnu propriété Américaine, sans une designation particulière du nom du propriétaire.

"Mas je decouvre dans le passe-port un vice qui m'a para essentiel. Le capturé avoue, dans le mémoire manuscrit qui m'a été remis, que le capitaine, avant son depart, doit preter serment, entre les mains des officiers de la marine, que le navire appartient à un ou plusieurs sujets des Etats Unis, sans autre designation; il avoue encore que par la formule annexée au traité de 1778, cette affirmation assermentée doit être à la suite du passe-port.

"Or, j'ai vérifié qu'à la suite du passe-port dont le capturé était porteur, il n'existe qu'une déclaration d'affirmation, sans aucune signature ni de l'officier publique devant lequel l'affirmation assermentée a dû être faite, ni de la partie même qui est censée avoir prêtée le serment. On ne s'est donc point conformé au traité de 1778.

"Un acte n'est rien s'il n'est signé, c'est la signature qui fait tout. Jusque la je vois moins un acte qu'un simple projet, c'est à dirè, une rédaction qui n'a été ni pré-
*18] cédée ni suive d'aucun *effet reèl. Je suis donc autorisé à conclure que l'affirmation assermentée, prescrite par le traité de 1778, n'a point été faite.

"Le traité de 1778, dit-on, n'a point prescrit les formalitiés du passe-port à peine de nullité, mais seulement dans l'objet d'arreter et de prévenir de part ou d'autre toutes dissensions et querelles. Le vice que j'ai découvert dans le passe-port du navire le Republicain, ne tient pas uniquement à la forme de l'acte; il tient à sa substance: car un acte non signé n'existe pas. Dans un cas pareil, la nullité n'a pas besoin d'être prononcée par la loi à titre de peine; elle est inhérente à la chose même.

"Vainement objecterait-on qu'un acte nul prouve tojours la bonne foi de celui que en est porteur, puisqu'il prouve au moins le desir que l'on aviat de se le procurer. Cela est vrai, quand l'acte n'est qu' irrègulier; mais la thèse change, s'il s'agit d'un acte imparfait et non consommé. Un tel acte, n'ayant aucune existence, ne peut produire aucun effet.

"On prétend que la seule nullité, du passe-port ne peut extraîner la confiscation si d'ailleurs la propriété neutre est constatée par les autres pièces. Je conviens du principe géneral; mais je crois que ce principe doit être appliqué avec discernement. Il n'est exactement et rigoureusement vrai, que lors qu'il n'est question que qui d'une nullité qui ne peut faire suspecter la foi de la personne. Dans la cause actuelle, le défaut de signature de l'officier public et dela partie, est de nature à faire presumer qu'on n'a osé affirmer à serment la neutralité du navire. Ce défaut n'influe pas seulement sur le plus ou sur le moins de sollennité de l'acte; il emporte l'acte même, et il fait suspecter la bonne volanté de celui qui était tenu de le raporter."

He then proceeds to state the other defects in the proofs of proprietary interest, the destination of the ship to an enemy's port, combined with the possession of false papers, and other circumstances of suspicion, and concludes for the condemnation of the ship and cargo. Ibid., p. 927.

*In the case of The Quintus, a Swedish vessel, the grounds on which the
*19] captors insisted are stated by M. PORTALIS, as follows: "On prétend que le passe-port, n'étant signé par le roi de Suede, n'est point authentique; qu'il n'indique

point la destination précise du navire, puisqu'il est expédié pour aller dans la mer occidentale et plus loin; qu'enfin, dans la supposition ou un tel passe-port pourrait être légal, le capturé y aurait contrevenu par son retour à Alicante, où il était déjà venu une premiere fois dans le même voyage.

"Examinons ces objections. Nul doute que dans chaque pays, les passe-ports doivent être expédiés par l'autorité compétente; mais celui dont il s'agit, l'a été par le college royal de commerce de Suède: il est expédié au nom du roi; mais nous ne voyons nulle part que la signature du roi fût requise. En général, dans les monarchies, le nom du roi est à la tête de tous les actes publics; mais la signature du roi n'est opposée qu'aux actes déterminés par les lois de chaque pays.

" Dire que le passe-port n'indiquait point une destination précise, c'est ne rien dire d'utile ou de concluant. Tous les voyages de mer ne se ressemblent pas. On distingue les voyages extraordinaires d'avec les voyages ordinaires; ceux de long cours d'avec la simple caravane; le petit cabotage, do grand cabotage. Tous ceux qui ont écrit sur les affaires maritimes nous avertissent que les passe-ports diffèrent dans leur énonciation, selon les différentes espéces de voyages.

" Il est impossible, par exemple, qu'un passe-port pour un voyage de long cours et pour aller dans un lieu déterminé soit conçu dans les mêmes termes qu'un passe-port pour la caravane ; car la caravane, selon la définition de l'auteur du *Traité des Assurances*, " est une multiplicité de petits voyages qu'un capitaine fait dans le cours de sa navigation. Il se nolise pour un port, où, étant arrivé, il décharge la marchandise, exige le nolis, se nolisse pour un autre endroit où il aborde, fait les mêmes opérations, ainsi successivement d'un port à l'autre jusqu' à ce qu'il revienne au port d'où il était parti. Ces *divers petits voyages, pris cumulativement, ne forment qu'un voyage unique et principale." [*20

" On comprend que par la nature même des choses, un passa-port pour la caravane ne peut designer avec précision, un lieu plutôt qu'un autre ; mais les règlemens et les coutumes de chaque pays détermine la caravane, et pour l'espace que l'on peut parcourir en faisant ces sortes de voyages, et pour le tems pendant lequel on peut demeurer en mer avant de retourner au lieu du départ. Ainsi, l'on sait qu'en France, le petit cabotage comprend tous les ports depuis Bayonne jusqu'à Dunkerque inclusivement ; que le grand cabotage s'étend à toute autre navigation plus éloignée, qui n'est pas declarée voyage de long cours. On sait encore que, par nos règlemens Français, la grande caravane peut durer 2 ans sans que l'on ait besoin de se munir d'un nouveau congé. On sait, enfin que les congés ou passe-ports sont rédigés différement, selon qu'il s'agit d'un voyage de long cours ou d'une simple caravane.

" Dans les circonstances de la cause, il ne s'agissait que d'une simple caravane : cela est convenu. Le passe-port devait donc être conforme à la nature du voyage que l'on entregrenoit. De-là, nous lisons dans ce passe-port, *ad mare occidentale et ulterius, ad ordinationem.* Les mots, *ad mare occidentale et ulterius* sont indéfinis, parceque dans un passe-port pour une caravane, il est impossible de désigner un lieu déterminé. Mais on adjoute, *ad ordinationem*, pour annoncer qu'on ne peut pas abuser de la latitude donnée, par le passe-port, et excéder le temps et l'éspace fixés par l'usage ou par règlemens relativement à ces sortes de voyages.

" Aucune loi n'a prohibé aux neutres la caravane en tems de guerre ; car la neutralité d'une nation, qui n'est pour cette nation que la continuation de l'état de paix, doit lui garantir tous les avantages attachés à cet état. Le capturé était donc muni d'un passe-port régulier, légal et conforme à l'éspèce de voyage qu'il avait entrepris.

" A-t-il contrevenu à ce passe-port ? On le prétend ; mais on ne le prouve pas. Peu importe qu'après avoir été une premiere fois à Alicante, il y soit retourné ou qu'il en ait eu *l'intention. Dans la caravane, on peut aller, venir et retourner au même port, pourvu qu'on ne fasse pas dégénérer la caravane en voyage de long [*21 cours, ou que, sans cause légitime et constatée, ou ne voyage pas au-delà du tems determiné par les règlemens ou par la coutume.

" Or, ici la conduite du capitaine ne pouvait être suspecte, ni par rapport à la durée

de son voyage. Donc point de contravention au passe-port. Il est donc évident que la prise est invalide." Ibid. p. 935.

In the case of The Molly, taken under American colors, after the ratification of the treaty of 1800 between the United States and France, the ship was provided with a passport, as stipulated by the treaty, but which was falsified by other papers found on board, showing the property to be British.

In his conclusions, M. DURAND, after stating the facts, prceeded as follows : "La preuve resultant d'un acte public, tel qu'un passe-port, est fondée sur la confiance réciproque que se doivent les Gouvernemens amis, il a été nécessaire au mantien de l'harmonie qui règne entre les nations, qu'on se contentâ de part et d'autre des preuves fournies par des actes revêtus de signature d'officiers publics préposés pour cet effet. Ces officiers publics de leur côtes, ont été obligés, dans la plupart des cas, de s'en rapporter à la bonne foi de ceux qui s'adressent à eux pour obtenir leur attache, et sans doute leur confiance est quelquefois trompée. Il leur est difficile, pour ne pas dire impossible, de discerner les propriétés des administrés. Il faut donc qu'ils s'en rapportent à leur déclaration. Par example, à la suite du passe-port du Capit. Borrowdale, on trouve l'acte du serment qu'il a preêté, que le navire qu'il commande actuellement est un batiment des Etats-Unis d'Amérique, et qu'aucun citoyen ou sujet des Puissances presentement en guerre n'y a aucune part ou intéret, soit directement soit indirectement. C'est sur la foi de cet exposé que le gouvernement Américain le prend sous sa sauvegarde, et lui accorde sa protection. Ce gouvernement est trop loyal pour ne pas être indigné de la fraude et de l'imposture qu'on ne craint pas de mettre en usage pour
*22] surprendre un passe-port qui couvre la propriété Anglaise. Il le punirait *n'en doutons pas, s'il avait connaisance de la surprise faite à sa bonne-foi.

" Plus il est facile d'abuser de la confiance qu'un gouvernement est obligé d'accorder à ses négocians plus on doit accueillier je ne dis pas las présomptions, mais au moins les preuves des supercheries auxqueiles ceux-ci peuvent avoir recours pour le tromper. Si donc le hasard en présente, et qu'elles sont de nature à faire suspecter les pièces de bord, il n'est pas douteux que le conséil n'ait le droit de les peser dans la balance impartiale de la justice, et de les faire prévaloir sur les preuves légales, lorsqu'elles sont telles qu'elles ne peuvent se concilier avec elles.

" Les lois et les usages prescrivent de recueillir les déclarations des capturés, de les interroger. A quoi ces précautions serviroient-elles, s'il n'était pas permis de chercher la vérité à travers tous les détours dans lesquels se cachent les négocians que la cupidité porte à favoriser l'ennemie par les moyens les moins délicats ?

" Une lettre est encore moins suspecte qu'un déclaration, et elle ne doit pas avoir moins de force ; il est impossible de supposer que celui qui en était le dèpositaire, suppose un titre qui lui porte préjudice: on doit donc ajouter foi à son contenu, et croire, lorsqu'elle presente des résultat, contraires au pièces de bord, que celles-ci sont l'ouvrage de la simulation, et qu'elles ont été obtenues sur un faux exposé. Je pourrais maintenant examiner de plus près les connaisemens, et l'on trouverait peut-être, en les comparant les uns aux autres et avec la lettre citée, que la plus grande partie de la cargaison est ennemie ; mais s'il est prouvé que le batiment appartient aux Anglais c'est une consequence nécessaire que la cargaison soit confisquée. Tel est le droit consacré par nos traités, particulièrement par le dernier (art. 15.) avec les Etats-Unis d'Amérique." Ibid. p. 985.

*NOTE III.

To the case of The Amiable Isabella.

Articles of the French treaties referred to in the text.

Art. 4. The subjects, people and inhabitants of the said United States, and each of them, shall not pay, in the ports, havens, roads, isles, cities and places under the domination of his most Christian Majesty, in Europe, any other or greater duties or imposts, of what nature soever they may be, or by what name soever called, than those which the most favored nations are or shall be obliged to pay; and they shall enjoy all the rights, liberties, privileges, immunities and exemptions in trade, navigation and commerce, whether in passing from one port in the said dominions, in Europe, to another, or in going to and from the same, from and to any part of the world, which the said nations do or shall enjoy.

Art. 12. The merchant ships of either of the parties which shall be making into a port belonging to the enemy of the other ally, and concerning whose voyage, and the species of goods on board her, there shall be just grounds of suspicion, shall be obliged to exhibit, as well upon the high seas, as in the ports and havens, not only her passports, but likewise certificates, expressly showing that her goods are not of the number of those which have been prohibited as contraband.

Art. 13. If, by the exhibiting of the above said certificates, the other party discover there are any of those sorts of goods which are prohibited and declared contraband, and consigned for a port under the obedience of his enemies, it shall not be lawful to break up the hatches of such ship, or to open any chest, coffers, packs, casks, or any other vessels found therin, or to remove the smallest parcels of her goods, whether such ship belongs to the subjects of France, or the inhabitants of the said United States, unless the lading be brought on shore in the presence of the officers of the court of admiralty, and an inventory thereof made; but there shall

Art. 4. Les sujets, peuples et habitans des dits Etats Unis, et de chacun d'iceux, ne paieront dans les ports, havres, rades, iles, villes et places de la domination de sa Majesté très Chrétienne en Europe, d'autres ni plus grands droits ou impôts de quelque nature qu'ils puissent être et quelque nom qu'ils puissent avoir que les nations les plus favorisées sont, ou seront tenuës de païer, et ils jouiront de tous les droits, libertés, privilegés et exemtions en fait de négoce, navigation et commerce soit en passant d'un port à un autre des dits etats du roi très chrétien en Europe, soit en y allant ou en revenant de quelque partie ou pour quelque partie du monde que ce soit, dont les nations susdites jouissent ou jouiront.

Art. 12. Les navires marchands des deux parties qui seront destinés pour des ports appartenants à une puissance ennemie de l'autre allié, et dont le voïage ou la nature des marchandises dont ils seront *chargés donneroit de justes soupçons, seront tenus d'exhiber soit en [*24 haute mer, soit dans les ports et havres, non seulement leurs passe-ports mais encore les certificats qui constateront expressement que leur chargement n'est pas de la qualité de ceux qui sont prohibés comme contrebande.

Art. 13. Si l'exhibition des dits certificats conduit à découvrir que le navire porte des marchandises prohibées et reputées contrebande, consignés pour un port ennemi il ne sera pas permis de briser les écoutilles des dits navires, ni d'ouvrir aucune caisse, coffre, malle, ballots, tonneaux et autres caisses qui s'y trouveront, ou d'en déplacer et détourner la moindre parti des marchandises soit que les navire appartienne aux sujets du roi très chrétien aux habitans des Etats Unis, jusqu' à ce que la cargaison ait été mise à terre en présence des officiers des Cours d'Amirauté, et que l'inventaire en ait été fait; mais on ne permettra pas de vendre,

be no allowance to sell, exchange or alienate the same, in any manner, until after that due and lawful process shall have been had against such prohibited goods,

*25] *and the court of admiralty shall, by a sentence pronounced, have confiscated the same: saving always as well the ship itself, as any other goods found therein, which by this treaty are to be esteemed free, neither may they be detained on pretence of their being as it were infected by the prohibited goods, much less shall they be confiscated as lawful prize: but if not the whole cargo, but only part thereof, shall consist of prohibited or contraband goods, and the commander of the ship shall be ready and willing to deliver them to the captor, who has discover them, in such case, the captor, having received those goods, shall forthwith discharge the ship, and not hinder her by any means, freely to prosecute the voyage on which she was bound. But in case the contraband merchandises cannot be all received on board the vessel of the captor, then the captor may, notwithstanding the offer of delivering him the contraband goods, carry the vessel into the nearest port, agreeable to what is above directed.

*26] *Art. 14. On the contrary, it is agreed, that whatever shall be found to be laden by the subjects and inhabitants of either party on any ship belonging to the enemies of the other, or to their subjects, the whole, although it be not of the sort of prohibited goods, may be confiscated, in the same manner as if it belonged to the enemy, except such goods and merchandises as were put on board such ship, before the declaration of war, or even after such declaration, if so be it were done, without knowledge of such declaration, so that the goods of the subject and people of either party, whether they be of the nature of such as are prohibited, or otherwise, which, as is aforesaid, were put on board any ship belonging to an enemy, before the war, or after the declaration of the same, without the knowledge of it, shall no ways be liable to confiscation, but shall well and truly be restored, without delay, to the proprietors demanding the same; but so as that, if the said merchandises be contraband, it shall not be any ways lawful to

échanger ou aliéner les navires ou leur cargaison en manière quelconque, avant que le procés ait été fait et parfait légalement pour declarer la contrebande, et que les cours d'amirauté auront prononcé leur confiscation par jugement, sans prejudice néanmoins des navires, ainsi que des marchandises qui en vertu du traité doivent être censées libres. Il ne sera pas permis retenir ces marchandises sous pretexte qu'elles ont été etachées par les marchandises de contrebande et bien moins encore de les confisquer comme des prises legales. Dans le cas où une partie seulement et non la totalité du chargement consisteroité en marchandises de contrebande, et que le commandant du vaisseau consente à les delivrer au corsaire qui les aura déeouverts, alors le capitaine qui aura fait la prise, après avoir reçu ces marchandises doit incontinent relâcher le navire et ne doit l'empêcher en aucune manière de continuer son voyage. Mais dans le cas où les marchandises de contrebande ne pourroient pas être toutes chargées sur le vaisseau capteur, alors le capitaine du dit vaisseau sera le maître, malgre l'offre de remettre la contrebande, de conduire le patron dans le plus prochain port, conformént à ce qui est préscrit plus haut.

Art. 14. On est convenu au contraire, que tout ce qui se trouvera chargé par les sujets respectifs sur des navires appartenants aux ennemis de l'autre partie ou à leurs sujet, sera confisqué sans distinction des marchandises prohibées ou non prohibées, ainsi et de même que si elles appartenoient à l'ennemi, à l'exception toute fois, des effets et marchandises qui auront été mis à bord des dits navires avant la déclaration, de guerre ou même après la dite déclaration, si aumoment du chargement on a pu l'ignorer de manière que les marchandises des sujets des deux parties, soit qu'elles se trouvent du nombre de celles de contrebande ou autrement, les quelle comme il vient d'être auront été mises a bord d'un vaisseau appartenant à l'ennemi avant la guerre ou même après la dite declaration, l'orsqu'on l'ignoroit ne seront en aucune manière, sujetes à confiscation, mais seront fidelement et de bonne foi renduës sans delai à leurs proprietaires, qui lés réclameront; bien entendu néanmoins, qu'il ne soit pas permis de porter dans les ports ennemis les

carry them afterwards to any ports belonging to the enemy. The two contracting parties agree, that the term of two months being passed after the declaration of war, their respective subjects, from whatever part of the world they come, shall not plead the ignorance mentioned in this article.

Art. 15. And that more effectual care may be taken for the security of the subjects and inhabitants of both parties, that they suffer no injury by the men of war or privateers of the other party, all the commanders of the ship of his most Christian Majesty and of the said United States and all their subjects and inhabitants, shall be forbid doing any injury or damage to the other side; and if they act to the contrary, they shall be punished, and shall moreover be bound to make satisfaction for all matter of damage, and the interest thereof, by reparation, under the pain and obligation of their person and goods.

Art. 23. It shall be lawful for all and singular the subjects of the most Christian King, and the citizens, people and inhabitants of the said United States to sail with their ships with all manner of liberty and security, no distinction being made who are the proprietors of the merchandises laden thereon from any port to the places of those who now are, or hereafter shall be, at enmity with the most Christian King, or the United States. It shall likewise be lawful for the subjects and inhabitants aforesaid, to sail with the ships and merchandises afore mentioned, and to trade with the same liberty and security from the places, ports and havens of those who are enemies of both or either party, without any opposition or disturbance whatsoever, not only directly from the places of the enemy afore mentioned to neutral places, but also from one place belonging to an enemy to another place belonging to an enemy, whether they be under the jurisdiction of the same prince, or under several. And it is hereby stipulated, that free ships shall also give a freedom to goods, and that everything shall be deemed to be free and exempt which shall be found on board the ships belonging to the subjects of either of the confederates, although the whole lading, or any other part thereof, marchandises qui seront de *contrebande. Les deux parties contractantes conviennentque le terme de deux mois passés depuis la declaration de guerre, leurs sujets respectifs, de quelque partie du monde qu'ils viennent, ne pourront plus alléguer l'ignorance dont il est question dans le présent article.

Art. 15. Et afin de pourvoir plus efficacement à la sûreté des sujets des deux parties contractantes, pour qu'il ne leur soit fait aucun prejudice par les vaisseaux de guerre de l'autre partie, ou par des armateurs particuliers, il sera fait defense à tous capitaines des vaisseaux de sa Majesté très Chrétienne et des dits Etats Unis et à tous leurs sujets de faire aucun dommage ou insulte à ceux de l'autre partie, et au cas où ils y contreviendroient, ils en seront punis et de plus ils seront tenus et obligés en leurs personnes et en leurs biens de réparer tous les dommages et intérêts.

Art. 23. Il ser permis à tous et un chacun des sujets do roi très chrétien et aux citoïens, peuple et habitans des susdits Etats Unis, de naviguer avec leurs bâtimens avec toute liberté et sureté, sans qu'il *puisse être fait d'exception à [*28 cet égard, à raison des propriétaires des marchandises chargées sur les dits bâtimens, venant de quelque port que ce soit et destinés pour quelque place d'une puissance actuellement ennemie, ou qui pourra l'être dans la suite de sa majesté très chrétienne ou des Etats Unis. Il sera permis également aux sujets et habitans susmentionnés de naviguer avec leurs vaisseaux et marchandises et de frequenter avec la même liberté et sureté les places, ports, et havres des puissances ennemies des deux parties contractantes ou d'une d'entre elles sans opposition ni trouble, et de faire le commerce non seulemant directement des ports de l'ennemi susdit à un port neutre, mais aussi d'un port ennemi à un autre port ennemi, soit qu'il se trouve sous sa jurisdiction ou sous celle de plusieurs; et il est stipulée par le présent traité que les bâtimens libres assureront également la liberté des marchandises, et qu'on jugera libres toutes les choses qui se trouveront abord des navires apartenants aux sujets d'une des parties contractantes, quand même le chargement ou partie d'icelui apartiendroit aux ennemis de l'une des

should appertain to the enemies of
*29] *either contraband goods being always excepted. It is also agreed in like manner, that the same liberty be extended to persons who are on board a free ship, with this effect, that although they be enemies to both or either party, they are not to be taken out of that free ship, unless they are soldiers, and in actual service of the enemies.

Art. 24. This liberty of navigation and commerce shall extend to all kinds of merchandises, excepting those only which are distinguished by the name of contraband; and under this name of contraband or prohibited goods shall be comprehended arms, great guns, bombs with the fuses, and other things belonging to them, cannon ball, gunpowder, match, pikes, swords, lances, spears, halberds, mortars, petards, granades, saltpetre, muskets, musket ball, bucklers, helmets, breast-plates, coats of mail, and the like kinds of arms, proper for arming soldiers, musket-rests, belts, horses with their furniture, and all other warlike instruments whatever. These
*30] merchandises which *follow, shall not be reckoned among contraband or prohibited goods: that is to say, all sorts of cloths, and all other manufactures woven of any wool, flax, silk, cotton or any other materials whatever, all kinds of wearing-apparel, together with the species whereof they are used to be made, gold and silver, as well coined as uncoined, tin, iron, latten, copper, brass, coals; as also wheat and barley, and other kind of corn and pulse; tobacco, and likewise all manner of spices; salted and and smoked flesh, salted fish, cheese and butter, beer, oils, wines, sugars, and all sorts of salts; and in general, all provisions which served for the nourishment of mankind and the sustenance of life; furthermore, all kinds of cotton, hemp, flax, tar, pitch, ropes, cables, sails, sail-cloths, anchors, and any parts of anchors, also ships' masts, planks, boards and beams of what trees soever; and all other things, proper either for building or repairing ships, and all other goods whatever which have not been worked in to the form of any instrument or thing prepared for war, by
*31] land or by sea, shall not be reputed contraband, *much less such as

deux; bien entendu néanmoins que le contrebande sera toujours exceptée. Il est également convenu que cette même liberté s'étendroit aux personnes qui pourroient se trouver abord du bâtiment libre quand même elles seroient ennemies de l'une des deux parties contractantes, et elles ne pourront être enlevées des dits navires á moins qu'elles ne soient militaires et actuellement au service de l'ennemi.

Art. 24. Cette liberté de navigation et de commerce doit s'étendre sur toutes sortes de marchandises, à l'exception seulement de celles qui sont designées sous le non de contrebande: Sous ce nom de contrebande ou de marchandises prohibées doivent être compris les armes, canons, bombes avec leurs fusées et autres choses y relatives, boulets, poudre à tirer, méches, piques, epées, lances, dards, hallebardes, mortiers, petards grenades, salpêtre, fusils balles, boucliers, casques, cuirasses, cote de mailles, et autres armes de cette espée, propres à armer les soldats, portemousqueton, baudriers, chevaux avec leurs équipages, et tous autres instrumens de guerre quelconques. Les marchandises denommées ci-après ne seront pas comprises parmi la contrebande ou choses prohibées, savoir toutes sortes de draps et toutes autres étoffes de laine, lin soye, coton ou d'autres matières quelquoques; toutes sortes de vetemens avec les etoffes dont on a coutume de les faire, l'or et l'argent monnoïé ou non l'etain, le fer laiton, cuivre, airain, charbons de même que le froment et l'orge, es toute autre sorte de bleds et legumes; le tabac et toutes les sortes d'epiceries, la viande salée et fumée, poisson sale, fromage et beurre, bierre, huiles, vins, sucres, et toute espéce de sel et en général toutes provisions servant pour la nourriture de l'homme et pour le soutien de la vie. De plus, toutes sortes de coton, de chanvre, lin, goudron poix, cordes, cables, voiles, toiles, à voiles, ancres, parties d'ancres, mats, planches, madriers, et bois de toute espéce, et toutes autres choses propres à la construction et reparation des vaisseaux et autres matières quelconques qui n'ont pas la forme d'un instrument préparé, pour la guerre par terre comme par mer, ne seront pas reputées contrebande et encore moins celles qui sont déja preparées

have been already wrought and made up for any other use: all which all which shall be wholly reckoned among free goods; as likewise all other merchandises and things which are not comprehended and particularly mentioned in the foregoing enumeration of contraband goods; so that they may be transported and carried, in the freest manner, by the subjects of both confederates, even to places belong to an enemy, such towns or places being only excepted, as are at that time besieged, blocked up or invested.

Art. 25. To the end that all manner of dissensions and quarrels may be avoided and prevented, on the one side and the other, it is agreed, that in case either of the parties hereto should be engaged in war, the ships and vessels belonging to the subjects or people of the other ally, must be furnished with sea-letters or passports, expressing the name, property and bulk of the ship, as also the name and place of habitation of the master or commander of the said ship, that it may appear thereby, that the ship really and truly belongs to the subjects of one of the parties, which passport shall be made out and granted according to the form annexed to this treaty; they shall likewise be recalled every year, that is, if the ship happens to return home within the space of a year. It is likewise agreed, that such ships, being laden, are to be provided not only with passports as above mentioned, but also with certificates, containing the several particulars of the cargo, the place whence the ship sailed, and whither she is bound, that so it may be known, whether any forbidden or contraband goods be on board the same; which certificates shall be made out by the officers of the place whence the ship set sail, in the accustomed form; and if any one shall think it fit and advisable to express in the said certificates the person to whom the goods on board belong, he may freely do so.

Art. 26. The ships of the subjects and inhabitants of either of the parties, coming upon any coasts belonging to either of the said allies, but not willing to enter into port, or being entered into port, and not willing to unload their cargoes, or break bulk, they shall be treated

pour quelqu' autre usage: Toutes les choses denommées cidessus doivent être comprises parmi les marchandises, libres, de même que toutes les autres marchandise et effets qui ne sont pas compris et particulièrement nommsé dans l'énumération des marchandises de contrebande; de manière qu'elles pourront être transportées et conduites de la manière la plus libre par les sujets des deux parties contractantes dans des places ennemies, à l'exception néanmoins de celles qui se trouveroient actuellement assiegées, bloquées ou investies.

Art. 25. A fin d'écarter et de prevenir de partéet d'autre toutes discussions et querelles il a été convenu que dans le cas où l'une des deux parties se trouveroit engagée dans une guerre, les vaisseaux et bâtimens apartenans aux sujets ou peuple de l'autre allié devront être pourvus de lettres de mer ou passe-ports, lesquels exprimeront le nom, la propriété et le port du navire, ainsi que le nom et la demeure du maître ou commandant du dit vaisseau, afin qu'il aparoisse par la que le même, vaisseau apartient réellement et véritablement aux sujets de l'une des deux *parties [*32
contractantes; lequel passe-port, devra être éxpedié selon le modelle annexé au present traité. Ces passe-ports devront éngalement être renouvelles chaque année dans le cas ou le vaisseau retourne chez lui dans l'espace d'une année. Il a été convenu également que les vaisseaux susmentionnés dans le ces où ils seroient chargés devront être pourvus non seulement de passe-ports mais aussi de certificats, contenant le detail de la cargaison, le lieu d'où le vaisseau est parti, et la declaration des marchandises de contrebande qui pourroient se trouver abord; lesquels certificats devront être éxpediés dans la forme accoutumeé par les officiers du lieu d'où le vaisseau aura fait voile, et s'il étoit jugé utile ov prudent d'exprimer dans les dits passe-ports la personne à laquelle les marchandises apartiennent, on pourra le faire librement.

Art. 26. Dans le cas oú les vaisseaux des sujets et habitans de l'une des deux parties contractantes aprocheroient des côte de l'autre, sans ce pendant avoid le dessein d'entrer dans le port, ou après être entré, sans avoir le dessein de décharger la cargaison, ou *rompre [*33

according to the general rules prescribed, or to be prescribed, relative to the object in question.

Art. 27. If the ships of the said subjects, people or inhabitants of either of the parties shall be met with, either sailing along the coasts, or on the high seas, by any ship of war of the other, or by any privateers, the said ships of war or privateers, for the avoiding of any disorder, shall remain out of cannon-shot, and may send their boats aboard the merchant ship which they shall so meet with, and may enter her, to the number of two or three men only, to whom the master or commander of such ship or vessel shall exhibit his passport concerning the property of the ship, made out according to the form inserted in this present treaty, and the ship, when she shall have showed such passport, shall be free and at liberty to pursue her voyage, so as it shall not be lawful to molest or search her in any manner, or to give her chase, or force her to quit her intended course.

Art. 28. It is also agreed, that all *34] goods when once put *on board the ships or vessels of either of the two contracting parties, shall be subject to no farther visitation; but all visitation or search shall be made beforehand, and all prohibited goods shall be stopped on the spot, before the same be put on board, unless there are manifest tokens or proofs of fraudulent practice; nor shall either the persons or goods of the subjects of his most Christian Majesty or the United States, be put under any arrest, or molested by any other kind of embargo, for that cause; and only the subject of that state to whom the said goods have been, or shall be, prohibited, and who shall presume to sell or alienate such sort of goods, shall be duly punished for the offence.

leur charge, on se conduira à leur êgard suivant les réglemens genéreaux prescrits ou à prescrire relativement à l'objet dont il est question.

Art. 27. Lorsqu'un bâtsment apartenant aux dits sujets, peuple et habitans de l'une des deux parties, sera recontré naviguant le long des côtes ou en pleine mer, par un vaisseau de guerre de l'autre, ou par un armateur, le dit vaisseau de guerre, éu amateur, afin d'éviter tout désordre, se tiendra hors de la portoe du canon, et pourra envoíer sa chaloupe abord du bâtiment marchand, et y faire entrer deaux ou trois hommes, aux quels le maître où commandant du bâtiment montrera son passe-port, lequel devra êtré conformé à la formule annexé au present traité, et constatera la propriété du bâtiment, et apriés que le dit bâtiment aura exhibé une pareil passe-port, il lui sera libre de continuër son voïage et il ne sera pas permis de le molester ni de chercher en aucune manière, de lui donner la chasse, ou de le forcer de quitter la coruse qu'il s'éteit proposeé.

Art. 28. Il est covenu que lorsque les marchandises auront été chargées sur les vasseaux ou bâtimens de l'une des deux parties contractantes, elles ne pourront plus être assujeties à aucune visite; toute visite et recherche devant être faite avant le chargement, et les merchandises prohibées devant être arrêtées et saises sur la plage avant de pouvoir être embarquées à moins qu'on n'ait des indices manifestes ou des preuves de versements frauduleux. De même aucun des sujets de sa majesté très chrétienne ou des Etats Unis, ni leurs mart chandises, ne pourront être arretés ni molestés pour cette cause, par aucune espèce d'embargo ; et les seuls sujets de l'etat anxquels les dites marchandises auront été prohibées, et qui se seront emancipés à vendre et aliéner de pareilles marchandises, seront duëment punis pour cette contravention.

Treaty with Holland of 1782.

Art. 10. The merchant ships of either of the parties, coming from the port of an enemy, or from their own, or a neutral port, may navigate freely towards any port of an enemy of the other ally ; they shall be, nevertheless, held, whenever it shall be required, to exhibit, as well upon the high seas, as in the ports, their sea-letters and other documents, described in the twenty-fifth article, stating expressly, that their effects are not of the number of those which are prohibited, as contraband;

*and not having any contraband goods for an enemy's port, they may freely, and without hindrance, pursue their voyage towards the port of an enemy. Nevertheless, it shall not be required to examine the papers of vessels convoyed by vessels of war, but credence shall be given to the word of the officer who shall conduct the convoy.

Art. 11. If, by exhibiting the sea-letters, and other documents, described more particularly in the twenty-fifth article of this treaty, the other party shall discover there are any of those sorts of goods, which are declared prohibited and contraband, and that they are consigned for a port under the obedience of his enemy, it shall not be lawful to break up the hatches of such ship, nor to open any chest, coffer, packs, casks or other vessels found therein, or to remove the smallest parcel of her goods, whether the said vessel belongs to the subjects of their High Mightinesses the States General of the United Netherlands, or to the subjects or inhabitants of the said United States of America, unless the lading be brought on shore, in presence of the officers of the court of admiralty, and an inventory thereof made; but there shall be no allowance to sell, exchange or alienate the same, until after that due and lawful process shall have been had against such prohibited goods of contrabaud, and the court of admiralty, by a sentence pronounced, shall have confiscated the same, saving always as well the ship itself, as any other goods found therein, which are to be esteemed free, and may not be detained, on pretence of their being infected by the prohibited goods, much less shall they be confiscated as lawful prize; but on the contrary, when, by the visitation at land, it shall be found that there are no contraband goods in the vessel, and it shall not appear by the papers, that he who has taken and carried in the vessel has been able to discover any there, he ought to be condemned in all the charges, damages and interests of them, which he shall have caused, both to the owners of vessels, and to the owners and freighters of cargoes with which they shall be loaded, by his temerity in taking and carrying them in; declaring most expsessly the free vessels shall assure the liberty of the effects with which they shall be loaded, and that this liberty shall extend *itself equally to the persons who shall be found in a free vessel, who may not be taken out of her, unless they are military men, actually in the service of an enemy. [*36

Art. 12. On the contrary, it is agreed, that whatever shall be found to be laden by the subjects and inhabitants of either party, on any ship belonging to the enemies of the other, or to their subjects, although it be not comprehended under the sort of prohibited goods, the whole may be confiscated in the same manner as if it belonged to the enemy, except, nevertheless, such effects and merchandises as were put on board such vesssel, before the declaration of war, or in the space of six months after it, which effects shall not be, in any manner, subject to confiscation, but shall be faithfully, and without delay, restored in nature to the owners who shall claim them, or cause them to be claimed, before the confiscation and sale, as also their proceeds, if the claim could not be made but in the space of eight months after the sale, which ought to be public; provided, nevertheless, that if the said merchandises are contraband, it shall by no means be lawful to transport them afterwards to any port belonging to enemies.

The form of the Passport, which shall be given to ships and vessels, in consequence of the 25th article of this Treaty.

To all who shall see these presents, greeting: Be it known, that leave and permission are hereby given to ——, master or commander of the ship or vessel, called ——, of the burden of —— tons, or thereabouts, lying at present in the port or haven of ——, bound for ——, and laden with ——, to depart and proceed with his said ship or vessel on his said voyage, such ship or vessel having been visited, and the said master and commander having made oath before the proper officer, that the said ship or vessel belongs to one or more of the subjects, people or inhabitants of ——, and to him or them only.

In witness whereof, we have subscribed our names to these presents, and affixed the seal of our arms thereto, and caused the same to be countersigned by ——, at ——, this ——day of ——, in the year of our Lord Christ ——.

Treaty with Sweden.

* Form of the Certificate which shall be given to ships or vessels, in consequence of the 25th article of this Treaty.

We, ——, magistrates, or officers of the customs, of the city or port of ——, do certify and attest, that on the —— day of ——, in the year of our Lord ——, C. D., of ——, personally appeared before us and declared, by solemn oath, that the ship or vessel called ——, of —— tons, or thereabouts, whereof ——, of ——, is, at present, master or commander, does rightfully and properly belong to him or them only; that she is now bound from the city or port of ——, to the port of ——, laden with goods and merchandises, hereunder particularly described and enumerated, as follows:

In witness whereof, we have signed this certificate, and sealed it with the seal of our office, this —— day of ——, in the year of our Lord Christ ——.

Form of the Sea-Letter.

Most serene, serene, most puissant, puissant, high, illustrious, noble, honorable, venerable, wise, and prudent lords, emperors, kings, republics, princes, dukes, earls, barons, lords, burgomasters, schepens, councillors; as also, judges, officers, justiciaries and regents, of all the good cities and places, whether ecclesiastical or secular, who shall see these patents or hear them read:

We, burgomasters and regents, of the city of ——, make known, that the master of ——, appearing before us, has declared, upon oath, that the vessel called ——, of the burden of about —— lasts, which he at present navigates, is of the United Provinces, and that no subject of the enemy have any part or portion therein, directly nor indirectly; so may God Almighty help him. And as we wish to see the said master prosper in his lawful affairs, our prayer is to all the before-mentioned, and to each of them separately, where the said master shall arrive with his vessel and cargo, that they may please to
*38] receive the said master with goodness, and to treat *him in a becoming manner, permitting him, upon the usual tolls and expenses, in passing and repassing, to pass, navigate, and frequent the ports, passes and territories, to the end, to transact his business, where, and in what manner, he shall judge proper: whereof we shall be willingly indebted. In witness, and for cause whereof, we affix hereto the seal of this city.

(In the Margin.)

By Ordinance of the high and mighty lords the States General of the United Netherlands.

Treaty with Sweden of 1783.

Art. 7. All and every the subjects and inhabitants of the kingdom of Sweden, as well as those of the United States, shall be permitted to navigate with their vessels in all safety and freedom, and without any regard to those to whom the merchandises and cargoes may belong, from any port whatever; and the subjects and inhabitants of the two states shall likewise be permitted to sail and trade with their vessels, and with the same liberty and safety, to frequent the places, ports and havens of powers, enemies to both or either of the contracting parties, without being in any wise molested or troubled, and to carry on a commerce, not only directly from the ports of an enemy to a neutral port, but even from one port of an enemy to another

Art. 7. Il sera permis a tous et un chacun des sujets et habitans du royaume de Suede, ainsi qu' à ceux des Etats Unis, de naviguer avec leurs bâtimens en toute sureté et liberté et sans distinction de ceux à qui les marchandises et leurs chargemens appartiendront, de quelque port que ce soit. Il sera permis également aux sujets et habitans des deux etats de naviguer et de négocier avec leurs vaisseaux et marchandises, et de frequenter avec la même liberté et sureté, les places, ports et havres des puissances ennemies des deux parties contractantes, on de l'une d'elles, sans être aucunement inquiétés ni troublés, et de faire le commerce non seulement directement des ports de l'ennemi à un port neutre, mais encore d'un port ennemi à un

port of an enemy, whether it be under the jurisdiction of the same or of different princes. And as it is acknowledged by this treaty, with respect to ships and merchandises, that free ships shall make merchandise free, and that everything which shall be on board of ships belonging to subjects of the one or the other of the contracting parties, shall be considered as free, even though the cargo, or a part of it, should belong to the enemies of one or both; it is, nevertheless, provided, that contraband goods shall always be excepted; which being intercepted, shall be proceeded against according to the spirit of the following articles. It is likewise agreed, that the same liberty be extended to persons who may be on board a free ship, with this effect, that although they be enemies to both or either of the parties, they shall not be taken out of the free ship, unless they are soldiers in the actual service of the said enemies.

Art. 8. This liberty of navigation and commerce shall extend to all kinds of merchandises, except those only which are expressed in the following article, and are distinguished by the name of contraband goods:

Art. 9. Under the name of contraband or prohibited goods, shall be comprehended arms, great guns, cannon balls, arquebuses, muskets, mortars, bombs, petards, grenadoes, saucisses, pitch-balls, carriages for ordnance, musket-rests, bandoliers, cannon powder, matches, saltpetre, sulphur, bullets, pikes, sabres, swords, morions, helmets, cuirasses, halberds, javelins, pistols and their holsters, belts, bayonets, horses with their harness, and all other like kinds of arms and instruments of war for the use of troops.

Art. 10. Those which follow shall not be reckoned in the number of prohibited goods, that is to say: all sorts of cloths, and all other manufactures of wool, flax, silk, cotton, or any other materials, all kinds of wearing-apparel, together with the things of which they are commonly made, gold, silver, coined or uncoined, brass, iron, lead, copper, latten, coals, wheat, barley, and all sorts of corn or pulse, tobacco, all kinds of spices,

autre port *ennemi; soit qu'il se trouve sous la jurisdiction d'un même ou de différents princes. Et comme il est reçu par le présent traité par rapport aux navires et aux marchandises, que les vaisseaux libres rendront les marchandises libres, et que l'on regardera comme libre tout ce qui sera à bord des navires appartenants aux sujets d'une ou de l'autre des parties contractantes, quand même le chargement, ou partie d'ice lui appartiendroit aux ennemis de l'une des deux; bien entendu néanmoins que les marchandises de contreband seront toujours exceptées; les quelles étant interceptées, il sera procédé conformement à l'esprit des articles suivants. Il est également convenu que cette même liberté s'étendra aux personnes qui naviguent sur un vaisseau libre; de manière que quoi qu'elles soient ennemies des deux parties ou de l'une d'elles, elles ne seront point tirées du vaisseau libre, si ce n'est que ce fussent des gens de guerre actuellement au service des dits ennemis.

Art. 8. Cette liberté de navigation et de commerce s'étendra à toutes sortes de marchandises, à la reserve seulement de *celles qui sont exprimées dans l'article suivant et designées sous [*40 le nom de marchandises de contrebande:

Art. 9. On comprendra sous ce nom de marchandises de contrebande ou défendues, les armes, canons, boulets, arquebuses, mousquets, mortiers, bombes, petards, grenades, saucisses, cercles poissés, affûts, fourchettes, bandoulières, poudre à cannon, méches, salpetre, souffre, balles, piqus, sabres, epées, morions, casques, cuirasses, halbardes, javelines, pistolets et leurs fourreaux, baudriers, bayonettes, chevaux avec leurs harnois, et tous autres semblables genres d'armes et d'instruments de guerre servant à l'usage des troupes.

Art. 10. On ne mettra point au nombre des marchandises défendues celles qui suivent, sçavoir, toutes sortes des draps, et tous autres ouvrages de manufactures de laine, de lin, de soye, de coton et de toute autre matière tout genre d'habillement avec les choses qui servent ordinairement à les faire; or, argent monoyé ou non monnoyé, etain, fer, plomb, cuivre, laiton, charbon à fourneau, bled, orge, et toute autre sorte de grains et de légumes, la nico-

*salted and smoked flesh, salted fish, cheese, butter, beer, oil, wines, sugar, all sorts of salt and provisions which serve for the nourishment and sustenance of man, all kinds of cotton, hemp, flax, tar, pitch, ropes, cables, sails, sail-cloth, anchors, and any parts of anchors, ship-masts, planks, boards, beams, and all sorts of trees and other things proper for building or repairing ships; nor shall any goods be considered as contraband, which have not been worked into the form of any instrument or thing for the purpose of war, by land or by sea, much less such as have been prepared or wrought up for any other use: all which shall be reckoned free goods, as likewise all others which are not comprehended and particularly mentioned in the foregoing article; so that they shall not, by any pretended interpretation, be comprehended among prohibited or contraband goods; on the contrary, they may be freely transported by the subjects of the King and of the United States, even to places belonging to an enemy, such places only excepted as are besieged, blocked or invested; and those

*42] places *only shall be considered as such, which are nearly surrounded by one of the belligerent powers.

Art. 11. In order to avoid and prevent on both sides all disputes and discord, it is agreed, that in case one of the parties shall be engaged in a war, the ships and vessels belonging to the subjects or inhabitants of the other shall be furnished with sea-letters or passports, expressing the name, property and port of the vessel, and also the name and place of abode of the master or commander of the said vessel, in order that it may thereby appear that the said vessel really and truly belongs to the subjects of the one or the other party. These passports, which shall be drawn up in good and due form, shall be renewed every time the vessel returns home in the course of the year. It is also agreed, that

*43 the said vessels, when loaded, *shall be provided not only with sea-letters, but also with certificates containing a particular account of the cargo, the place

tiane, vulgairement appellée tabac, toutes sortes d'aromates, chaires salées et fumées, poissons salés, fromage et beurre, bierre, huile, vins, sucres, toutes sortes de sels et de provisions servant à la nourriture et à la subsistance des hommes; tous genres de coton, chanvre, lin, poiq, tant liquide que séche, cordages, cables, voiles, toiles, propres à faire des voiles, ancres, et parties d'ancres quelles qu'elles puissent être, mats de navire, planches, madriers, poutres et toute sorte d'arbres, et toutes autres choses nécessaires pour construire ou pour radouber les vaisseaux. On ne regardera pas non plus comme marchandises de contrebande, celles qui n'auront pas pris la forme de quelque instrument ou attirail, servant à l'usage de la guerre sur terre ou sur mer; encore moins celles qui sont preparées ou travaillées pour tout autre usage. Toutes ces choses seront censées marchandises libres, de même que toutes celles qui ne sont point comprises et spécialement designées dans l'article précédent, de sorte qu'elles ne pourront sous aucune interprétation pretendue d'icelles, être comprises sous les effects prohibés, ou de contrebande; au contraire elles pourront être librement transportées par les sujets du roi et des Etats Unis, même dans les lieux ennemis, excepté seulement dans les places assiegées, bloquées, ou investies; et pour telles, seront tenues uniquement les places entourées de prés par quelqu 'une des puissances belligérantes.

Art. 11. Afin d'écarter et de prévenir de part et d'autre toutes sortes de dicussions et de discorde, il a été convenu que dans le cas où l'une des deux parties se trouveroit engagée dans une guerre, les vaisseaux et bâtimens appartenants aux sujets ou habitans de l'autre devront être munis de lettres de mer ou passeports, exprimant le nom, la propriété et le port du navire, ainsi que le nom et la demeure du maître ou commandant du dit vaisseau afin qu'il apparoisse par là, que le dit vaisseau appartient réellement et veritablement aux sujets de l'une ou de l'autre partie. Ces passeports qui seront dressés et expédiés en due et bonne forme, devront également être renouvellés toutes les fois que le vaisseau revient chez lui dans le cours de l'an. Il est encore convenu que ces dits vaisseaux chargés devront être pouvûs non seulement de lettres de mer,

from which the vessel sailed, and that of her destination, in order that it may be known whether they carry any of the prohibited or contraband merchandises mentioned in the 9th article of the present treaty; which certificates shall be made out by the officers of the place from which the vessel shall depart.

Art. 12. Although the vessels of the one and of the other party may navigate freely and with all safety, as is explained in the 7th article, they shall, nevertheless, be bound, at all times, when required, to exhibit, as well on the high sea as in port, their passports and certificates above mentioned. And not having contraband merchandise on board for an enemy's port, they may freely, and without hindrance, pursue their voyage to the place of their destination. Nevertheless, the exhibition of papers shall not be demanded of merchant ships under the convoy of vessels of war, but credit shall be given to the word of the officer commanding the convoy.

Art. 13. If, on producing the said certificates, it be discovered, that the vessel carries some of the goods which are declared to be prohibited or contraband, and which are consigned to an enemy's port, it shall not, however, be lawful to break up the hatches of such ships, nor to open any chest, coffers, packs, casks or vessels, nor to remove or displace the smallest part of the merchandises, until the cargo has been landed in the presence of officers appointed for the purpose, and until an inventory thereof has been taken; nor shall it be lawful to sell, exchange or alienate the cargo, or any part thereof, until legal process shall have been had against the prohibited merchandises, and sentence shall have passed, declaring them liable to confiscation, saving, nevertheless, as well the ships themselves, as the other merchandises which shall, have been found therein, which, by virtue of this present treaty, are to be esteemed free, and which are not to be detained on pretence of their having been loaded with prohibited merchandise, and much less confiscated as lawful prize. And in case the contraband merchandise be only a part of the cargo, and the master of the vessel agrees, consents and offers to deliver them

mais aussi de certificats contenant les détails de la cargaison, le lieu d'ou le vaisseau est parti et celui de sa destination, afin que l'on puisse connoitre s'ils ne portent aucune des marchandises défendues où de contrebande specifiées dans l'article 9 du présent traité, lesquels certificats seront également expediés par les officiers du lieu d'ou les vaisseau sortira.

Art. 12. Quoique les vaisseaux de l'une et de l'autre partie pourront naviguer librement et avec toute sureté comme il est expliqué à l'article 7, ils seront néanmoins tenus toutes les fois qu'on l'exigera, d'exhiber tant en pleine mer que dans les ports, leurs passe-ports et certificats cidessus mentionnés. Et n'ayant pas chargé des marchandises de contrebande pour un port ennemi, ils pourrons librement et sans empêchement poursuivre leur voyage vers le lieu de leur destination. Cependant on n'aura point le droit de demander l'exhibition des papiers aux navires marchands *convoyés par des vaisseaux [*44
de guerre; mais on ajoutera foi à la parole de l'officier commandant le convoi.

Art. 13. Si en produisant les dits certificats il fut découvert que le navire porte quelques une de ces effets qui sont declarés prohibés ou de contrebande, et qui sont consignés pour un port ennemi, il ne sera cependant pas permis de rompre les écoutilles des dits navires, ni d'ouvrir aucune caisse, coffre, malle, ballot et tonneau, ou d'en déplacea, ni d'en détourner la moindre partie des marchandises, jusqu' à ce que la cargaison ait été mise á terre en présence des officiers préposés à cer éffet, et que l'inventaire en ait été fait. Encore ne serat-il pas permis de vendre, échanger ou aliéner la cargaison ou quelque partie d'icelle, avant qu'on aura procédé légalement au sujet des marchandises prohibées et qu'elles auront été declarées confiscables par sentence: à la reserve néanmoins, tant des navires même que des autres marchandises qui y auront été trouvées et qui en vertu du présent traité doivent être censées libres; lesquelles ne peuvent être retenues sous *prétexte qu'elles ont été chargées [*45
avec des marchandises défendues,
et encore moins être confisquées comme une prise légitime. Et supposé que les dites marchandises de contrebande, ne faisant qu'une partie de la charge, le patron du navire agréat, consentit et offrit de les

to the vessel that has discovered them, in that case the latter, after receiving the merchandises which are good prize, shall immediately let the vessel go, and shall not by any means hinder her from pursuing her voyage to the place of her destination. When a vessel is taken and brought into any of the ports of the contracting parties, if upon examination, she be found to be loaded only with merchandises declared to be free, the owner or he who has made the prize, shall be bound to pay all costs and damages to the master of the vessel unjustly detained.

Art. 14. It is likewise agreed, that whatever shall be found to be laden by the subjects of either of the two contracting parties, on a ship belonging to the enemies of the other party, the whole effects, although not of the number of those declared contraband, *shall be confiscated as *46] if they belonged to the enemy, excepting, nevertheless, such goods and merchandises as were put on board, before the declaration of war, and even six months after the declaration, after which term none shall be presumed to be ignorant of it; which merchandises shall not in any manner be subject to confiscation, but shall be faithfully and specifically delivered to the owners, who shall claim or cause them to be claimed, before confiscation and sale, as also their proceeds, if the claim be made within eight months, and could not be made sooner after the sale, which is to be public: provided, nevertheless, that if the said merchandises be contraband, it shall not be in any wise lawful to carry them afterwards to a port belonging to the enemy.

livrer au vaisseau qui les aura découvertes; en ce cas, celui-cy, après avoir recu les marchandises, de bonne prise, sera tenu de laisser aller aussi-tôt le bâtiment, et en l'empêchera en aucune manière de poursuivre sa route vers le lieu de sa destination.

Tout navire pris et amené dans un des ports des parties contractantes, sous prétexte de contrebande, qui se trouve par la visite fait n'être chargé que de marchandises declarées libres, l'armateur ou celui qui aura fait la prise, sera tenu de payer tous les frais et dommages au patron du navire retenue injustement.

Art. 14. On est également convenu que tout ce qui se trouvera chargé par les sujets d'une des deux parties dans un vaisseau appartenant aux ennemis de l'autre partie, sera confisqué en entier, quoique ces effets ne soient pas au nombre de ceux déclarés de contrebande, comme si ces éffets appartenoient à l'ennemi même; à l'exception néanmoins des effets et marchandises qui auront été chargées sur des vaisseaux ennemis avant la déclaration de guerre, et même six mois après la déclaration, après lequel terme, l'on ne sera pas censé d'avoir pû l'ignorer; les quelles marchandises ne seront en aucune manière sujettes à confiscation, mais seront rendues en nature fidèlement aux propriétaires pui les réclameront ou feront réclamer avant la confiscation et vente; comme aussi leur provenu, si la réclamation ne pouvoit se faire que dans l'intervalle de huit mois après la vente, laquelle doit être publique; bien entendu néanmoins, que si les dites marchandises sont de contrebande, il ne sera nullement permis de les transporter ensuite à aucun port appartenant aux ennemis.

Treaties with Prussia, of 1785 and 1799.

Art. 12. If one of the contracting parties should be engaged in war with any other power, the free intercourse and commerce of the subjects or citizens of the party remaining *neuter, with the *47] belligerent powers, shall not be interrupted. On the contrary, in that case, as in full peace, the vessels of the neutral party may navigate freely to and from the ports, and on the coasts of the belligerent parties, free vessels making free goods, insomuch that all things shall be adjudged

Art. 12. Si l'une des parties contractantes étoit en guerre avec une autre puissance, la libre correspondance et le commerce des citoyens ou sujets de la partie qui demeure neutre envers les puissances belligérantes, ne seront point interrompus. Au contraire, et dans ce cas, comme en pleine paix, les vaisseaux de la partie neutre, pourront naviguer en toute sûreté dans les ports et sur les côtes des puissances belligérantes, les vaisseaux libres rendant les marchandises libres, en

free, which shall be on board any vessel belonging to the neutral party, although such things belong to an enemy of the other; and the same freedom shall be extended to persons who shall be on board a free vessel, although they should be enemies to the other party, unless they be soldiers in actual service of such enemy.

Art. 13. And in the same case of one of the contracting parties being engaged in war with any other power, to prevent all the difficulties and misunderstandings that usually arise respecting the merchandise heretofore called contraband, such as arms, ammunition, and military stores of every kind, no such articles carried in the vessels, or by the subjects or citizens of one of the parties to the enemies of the other, shall be deemed contraband, so as to induce confiscation or condemnation, and a loss of property to individuals. Nevertheless, it shall be lawful to stop such vessels and articles, and to detain them for such length of time as the captors may think necessary to prevent the inconvenience or damage that might ensue from their proceeding; paying, however, a reasonable compensation for the loss such arrest shall occassion to the proprietors: and it shall further be allowed to use, in the service of the captors, the whole, or any part of the military stores so detained, paying the owners the full value of the same, to be ascertained by the current price at the place of its destination. But in the case supposed, of a vessel stopped for articles heretofore deemed contraband, if the master of the vessel stopped will deliver out the goods supposed to be of contraband nature, he shall be admitted to do it, and the vessel shall not, in that case, be carried into any port, nor further detained, but shall be allowed to proceed on her voyage.

Art. 14. And in the same case, where one of the parties is engaged in war with another power, that the vessels of the neutral party may be readily and certainly known, it is agreed, that they shall be provided with sea-letters, or passports, which shall express the name, the property and burden of the vessel, as also the name and dwelling of the master,

tant qu'on regardera comme libre tout ce que sera à bord d'un navire appartenant à la partie neutre, quand même ces effets appartiendroient à l'ennemi de l'autre. La même liberté s'étendra aux personnes qui se trouveront à bord d'un vaisseaux libre, quand mêmes elles seroient ennemis de l'autre partie, excepté que ce fussent des gens de guerre, actuellement au service de l'ennemi.

Art. 13. Dans le cas où l'une des parties contractantes se trouveroit en guerre avec une autre puissance, il a été convenu que pour prevenir les difficultés et les discussions qui surviennent ordinairement parrapport aux marchandises cidevant appellées de contrebande, telles qu'armes, munitions, et autres provisions de guerre de toute espèce, aucum de ces articles, chargés à bord des vaisseaux des [*48
*citoyens ou sujets de 'une des parties, et destinés pour l'ennemi de l'autre, ne sera censé de contrebande, au point d'impliquer confiscation ou condamnation, et d'entrainer la perte de la propriété des individus. Néanmoins il sera permis d'arrêter ces sortes de vaisseaux et effets et de les retenir pendant tout le temps que le preneur croira nécessaire pour prévenir les inconveniens et le dommage qui pourroient en resulter autrement; mais dans ce cas on accordera une compensation raisonable pour les pertes qui auront été occasionnées par la saisie. Et il sera permis en outre aux preneurs d'employer a leur service, en tout, ou en partie, les munitions militaires détenues, en payant aux propriétaires la pleine valeur, à déterminer sur le prix qui aura cours à l'endroit de leur destination; mais que dans le cas énoncé, d'un vaisseau arrêté pour des articles ci-devant appellés contrebande, si le maître du navire consentoit à delivrer les marchandises suspectes, il aura liberté de la faire, et le navire ne sera plus amené dans le port, ni détenu plus longtemps, mais aura toute libertè de poursuivre sa route.

*Art. 14. Dans le cas où l'une des [*49
deux parties contractantes se trouveroit engagée dans une guerre avec une autre puissance, et afin que les vaisseaux de la partie neutre soyent promptement et surement reconnus, on est convenu qu'ils qevront être munis de lettres de mer ou passe ports exprimant le nom, le propriétaire, et le port du navire, ainsi que le nom

which passports shall be made out in good and due form (to be settled by conventions between the parties, whenever occasion shall require), shall be renewed as often as the vessel shall return into port; and shall be exhibited whensoever required, as well in the open sea as in port. But if the said vessels be under convoy of one or more vessels of war, belonging to the neutral party, the simple declaration of the officer commanding the convoy, that the said vessel belongs to the party of which he is, shall be considered as establishing the fact, and shall relieve both parties from the trouble of further examination.

*50] *Art. 15. And to prevent entirely all disorder and violence in such cases, it is stipulated, that when the vessels of the neutral party, sailing without convoy, shall be met by any vessel of war, public or private, of the other party, such vessel of war shall not approach within cannon shot of the said neutral vessel, nor send more than two or three men, in their boat, on board the same, to examine her sea-letters or passports. And all persons belonging to any vessel of war, public or private, who shall molest or injure, in any manner whatever, the people, vessel or effects of the other party, shall be responsible in their persons and property for damages and interest, sufficient security for which shall be given by all commanders of private armed vessels, before they are commissioned.

et la demeure du maître. Ces passe-ports, qui seront expédiés en bonne et due forme (à déterminer par des conventions entre les parties, lorsque l'occasion le requerra) devront être renouvellés toutes les fois que le vaisseau retournera dans son port, et seront exhibés à chaque requisition tant en pleine mer que dans le port. Mais si le navire se trouve sous le convoi d'un ou plusieurs vaisseaux de guerre appartenants à la partie neutre, il suffira que l'officier commandant du convoi déclare que le navire est de son parti moyennant quoi cette simple déclaration sera censée établir le fait, et dispensera les deux parties de toute visite ultérieure.

Art, 15. Pour prévenir entièrement tout désordre et toute violence en pareil cas, il a été stipulé que lorsque des navires, de la partie neutre, navigans sans convoi, rencontreront quelque vaisseau de guerre public ou particulier de l'autre partie, le vaiseau de guerre n'approachera le navire neutre qu'au delà de la portée du canon, et n'enverra pas plus de deux ou trois hommes dans sa chaloupe à bord, pour examiner les lettres de mer ou passeports. Et toutes les personnes appartenantes à quelque vasseau de guerre public ou particulier, qui molesteront ou insulteront en quelque manière que ce soit l'équipage, les vaisseaux ou effets de l'autre partie, seront responsables en leurs personnes et en leurs biens, de tous dommages et intérêts; pour lesquels il sera donné caution suffisante part ous les commandans de vaisseaux armés en course, avant qu'ils reçovient leurs commissions.

Treaty with Prussia of 1799.

Art, 12, Experience having proved, that the principle adopted in the twelfth *51] article of *the treaty of 1785, according to which free ships make free goods, has not been sufficiently respected, during the two last wars, and especially, in that which still continues, the two contracting parties propose, after the return of a general peace, to agree, either separately between themselves, or jointly with other powers alike interested, to concert with the great maritime powers of Europe, such arrangements and such permanent principles, as may serve to consolidate

Art. 12, L'experience ayant demontré, que le principe adopté dans l'article 12, du traité de 1785, selon lequel les vaisseaux libres rendent aussi les marchandises libres, n'a pas été suffisament respecté dans les deux dernières guerres, et mommément dans celle qui dure encore. les deux parties contractantes se reservent de s'entendre après le retour de la paix générale, soit séparement entr'elles, soit conjointement avec d'autres puissances cointeressés pour concerter avec les grandes puisances maritimes de l'Europe, tels arrangements et tels principes permanens,

the liberty and the safety of the neutral navigation and commerce in future wars. And if, in the interval, either of the contracting parties should be engaged in a war, to which the other should remain neutral, the ships of war and the privateers of the belligerent power shall conduct themselves towards the merchant vessel of the neutral power, as favorably as the course of the war then existing may permit, observing the principles and rules of the law of nations, generally acknowledged.

qui puissent servir à consolider la liberté et la sûreté de la navigation et du commerce neutres dans les guerres futures. Et si, pendant cet intervalle, l'une des parties contractantes se trouve engagée dans une guerre à laquelle l'autre reste neutre, les vaisseaux de guerre et les armateurs de la puissance belligerente, se comporteront, à l'égard de batimens marchands de la puissance neutre, aussi favor ablement que la raison de guerre, pourlors existante pourra le permettre, en observant les principes et les régles du droit des gens généralement reconnus.

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*NOTE IV. [*52

To The Amiable Isabella.

Copy of the Convention with the Court of London, signed at St. Petersburg, the 5th (17th) of June 1801.

In the name of the Most Holy and Undivided Trinity.

The mutual desire of his Majesty the Emperor of all the Russias, and of his Majesty, the King of the United Kingdom of Great Britain and Ireland, being not only to come to an understanding between themselves with respect to the differences which have lately interrupted the good understanding and friendly relations which subsisted between the two states; but also to prevent, by fraud and precise explanations upon the navigation of their respective subjects, the renewal of similar altercations and troubles which might be the consequence of them; and the object of the solicitude of their said majesties, being to settle, as soon as can be done, an equitable arrangement of those differences, and an invariable determination of their principles upon the rights of neutrality, in their application to their respective monarchies, in order to unite more closely the ties of friendship and good intercourse, of which they acknowledge the utility and the benefits, have named and chosen for their plenipotentiaries, viz., his Majesty, the Emperor of all the Russias, the Sieur Niquita, Count de Panen, his counsellor, &c., his Majesty, the King of the United Kingdom of Great Britain and Ireland, Alleyen, Barons St. Helens, privy counsellor, &c., who, after having communicated their full powers, and found them in good and due form, have agreed upon the following points and articles:

Art. I. There shall be hereafter between his Imperial Majesty of all the Russias, and his Britannic Majesty, their subjects and the states and countries under their domination, good and unalterable friendship and understanding; and all the political, commercial and other relations of common utility between *the respective subjects, shall subsist as formerly, without their being disturbed or troubled in any manner whatever. [*53

II. His Majesty the Emporor and his Britannic Majesty declare, that they will take the most especial care of the execution of the prohibitions against the trade of contraband of their subjects with the enemies of each of the high contracting parties.

III. His Imperial Majesty of all the Russias, and his Britannic Majesty, having resolved to place under a sufficient safeguard the freedom of commerce and navigation of their subjects, in case one of them shall be at war, whilst the other shall be neuter, have agreed:

Convention between Russia and England.

1. That the ships of the neutral power shall navigate freely to the ports and upon the coasts of the nations at war.

2. That the effects embarked on board neutral ships shall be free, with the exception of contraband of war, and of enemy's property; and it is agreed, not to comprise in the number of the latter, the merchandise of the produce, growth or manufacture of the countries at war, which should have been acquired by the subjects of the neutral power, and should be transported for their account, which merchandise cannot be excepted in any case from the freedom granted to the flag of the said power.

3. That in order to avoid all equivocation and misunderstanding of what ought to be qualified as contraband of war, his Imperial Majesty of all the Russias and his Britannic Majesty declare, conformably to the 11th article of the treaty of commerce concluded between the two crowns on the 10th (21st) February 1797, that they acknowledge as such only the following objects, viz., cannons, mortars, fire-arms, pistols, bombs, grenades, balls, bullets, fire-locks, flints, matches, powder, saltpetre, sulphur, helmets, pikes, pouches, swords, sword belts, saddles and bridles, excepting, however, the quantity of the said articles which may be necessary for the defence of the ship and of those who compose the crew; and all other articles whatever, not enumerated here, shall not be reputed warlike and naval ammunition, nor be subject to confiscation, and of course, shall pass freely, without being subjected to the *smallest
*54] difficulty, unless they be considered enemy's property in the above-settled sense. It is also agreed, that which is stipulated in the present article shall not be to the prejudice of the particular stipulations of one or the other crown, with other powers, by which objects of a similar kind should be reserved, prohibited or permitted.

4. That in order to determine what characterises a blockaded port, that determination is given only to that, where there is, by the disposition of the power which attacks it, with ships stationary, or sufficiently near, an evident danger in entering.

5. That the ships of the neutral power not be stopped, but upon just causes and evident facts; that they be tried without delay, and that the proceeding be always uniform, prompt and legal.

In order the better to insure the respect due to these stipulations, dictated by the sincere desire of conciliating all interests, and to give a new proof of their loyalty and love of justice, the high contracting parties enter here into the most formal engagement to renew the severest prohibitions to their captains, whether of ships of war or merchantmen, to take, keep or conceal on board their ships any of the objects which, in the terms of the present convention, may be reputed contraband, and respectively to take care of the execution of the orders which they shall have published in their admiralties, and wherever it shall be necessary.

Art. IV. The two high contracting parties, wishing to prevent all subject of dissention in future, by limiting the right of search of merchant ships, going under convoy, to the sole causes in which the belligerent power may experience a real prejudice by the abuses of the neutral flag, have agreed.

1. That the right of searching merchant ships belonging to the subject of one of the contracting powers, and navigating under convoy of a ship of war of the said power, shall only be exercised by ships of war of the belligerent party, and shall never extend to the fitters out of privateers, or other vessels, which do not belong to the imperial or royal fleet of their majesties, but which their subjects shall have fitted out for war.

*2. That the proprietors of all merchant ships belonging to the subjects of
*55] one of the contractiug sovereigns, which shall be destined to sail under convoy of a ship of war, shall be required, before they receive their sailing orders, to produce to the commander of the convoy their passports and certificates, or sea-letters, in the form annexed to the present treaty.

3. That when such ship of war, and every merchant ship under convoy, shall be met with by a ship or ships of war of the other contracting party, who shall then be in a state of war, in order to avoid all disorder, they shall keep out of cannon-shot, unless the situation of the sea, or the place of meeting, render a nearer approach necessary; and the commander of the ship of the belligerent power shall send a sloop on board the

convoy, where they shall proceed reciprocally to the verification of the papers and certificates that are to prove on one part, that the ship of war is authorised to take under its escort such or such merchant ships of its nation, laden with such a cargo, and for such a port; on the other part, that the ship of war of the belligerent party belongs to the imperial or royal fleet of their majesties.

4. This verification made, there shall be no pretence for any search, if the papers are found in due form, and if there exist no good motive for suspicion. In the contrary case, the captain of the neutral ship of war (being duly required thereto by the captain of the ship of war, or ships of war, of the belligerent power) is to bring to and detain his convoy, during the time necessary for the search of the ships which compose it, and he shall have the faculty of naming and delegating one or more officers to assist at the search of the ships, which compose it, and he shall have the facilty of naming and delegating one or more officers to assist at the search of the said ships, which shall be done in his presence, on board each merchant ship, conjointly with one or more officers selected by the captain of the ship of the belligerent party.

5. If it happen that the captain of the ship or ships of war of the power at war, having examined the papers found on board, and having interrogated the master and crew of the ship, shall see just and sufficient reason to detain the merchant ship, in order to proceed to an ulterior search, he shall notify that intention *to the captain of the convoy, who shall have the power to order an officer to remain on [*56
board the ship thus detained, and to assist at the examination of the cause of her detention. The merchant ship shall be carrried immediately to the nearest and most convenient port belonging to the belligerent power, and the ulterior search shall be carried on with all possible diligence.

Art. V. It is also agreed, that if any merchant ship, thus convoyed, should be detained without just and sufficient cause, the commander of the ship or ships of war of the belligerent power, shall not only be bound to make to the owners of the ship and of the cargo a full and perfect compensation for all the losses, expenses, damages and costs, occasioned by such a detention, but shall further be liable to an ulterior punishment for every act of violence or other fault which he may have committed, according as the nature of the case require. On the other hand, no ship of war, with a convoy, shall be permitted, under any pretext whatsoever, to resist by force the detention of a merchant ship or ships, by the ship or ships of war of the belligerent power; an obligation which the commander of a ship of war, with convoy, is not bound to observe towards privateers and their fitters out.

Art. VI. The high contracting powers shall give precise and efficacious orders, that the sentences upon prizes made at sea shall be conformably with the rules of the most exact justice and equity; that they shall be given by judges above suspicion, and who shall not be interested in the matter. The government of the respective states shall take care that the said sentences shall be promptly and duly executed, according to the forms prescribed. In case of the unfounded detention, or other contravention of the regulations stipulated by the present treaty, the owners of such a ship and cargo shall be allowed damages proportioned to the loss occasioned by such detention. The rules to observe for these damages, and for the case of unfounded detention, as also the principles to follow for the purpose of accelerating the process, shall be the matter of additional articles, which the contracting parties agree to settle between them, and which shall have the same force and validity *as if they were inserted in the present act. For this effect, their [*57
Imperial and Britannic Majesties mutually engage to put their hand to the salutary work, which may serve for the completion of these stipulations, and to communicate to each other, without delay, the views which may be suggested to them by their equal solicitude to prevent the least grounds for dispute in future.

VII. To obviate all the inconveniences which may arise from the bad faith of those who avail themselves of the flag of a nation, without belonging to it, it is agreed to establish, for an inviolable rule, that any vessel whatever, to be considered as the property of the country the flag of which it carries, must have on board the captain

of the ship, and one-half of the crew of the people of that country, and the papers and passports in due and perfect form; but every vessel which shall not observe this rule, and which shall infringe the ordinances published on that head, shall lose all rights to the protection of the contracting powers.

VIII. The principles and measures adopted by the present act, shall be alike applicable to all the maritime wars in which one of the two powers may be engaged, whilst the other remains neutral. These stipulations shall, in consequence, be regarded as permanent, and shall serve for a constant rule to the contracting powers, in matter of commerce and navigation.

IX. His Majesty the King of Denmark, and his Majesty the King of Sweden, shall be immediately invited by his Imperial Majesty, in the name of the two contracting parties, to accede to the present convention, and at the same time, to renew and confirm their respective treaties of commerce with his Britannic Majesty; and his said majesty engages, by acts which shall have established that agreement to render and restore to each of the powers, all these prizes that have been taken from them, as well as the territories and countries under their domination, which have been conquered by the arms of his Britannic Majesty since the rupture, in the state in which those possessions were found, at the period at which the troops of his Britannic Majesty entered them.

*58] The orders of his said majesty for the *restitution of those prizes and conquests shall be immediately expedited, after the exchange of the ratification of the acts by which Sweden and Denmark shall accede to the present treaty.

X. The present convention shall be ratified by the two contracting parties, and the ratifications exchanged at St. Petersburgh, in the space of two months at farthest, from the day of the signature. In faith of which, the respective plenipotentiaries have caused to be made two copies perfectly similar, signed with their hands, and have sealed with their arms.

Done at St. Petersburgh the 5th (17th) June 1801.

(L. S.) N. Count de Panin.
(L. S.) St. Helens.

Formula of the Passports and Sea-Letters which ought to be delivered in the respective Admiralties of the States of the two High Contracting Parties to the ships of war, and merchant vessels, which shall sail from them, conformable to Article IV. of the present treaty.

Be it known, that we have given leave and permission to N——, of the city or place of N——, master or conductor of the ship N——, belonging to N——, of the port of N——, of —— tons, or thereabouts, now lying in the port or harbor of ——, to sail from thence to N——, laden with N——, on account of N——, after the said ship shall have been visited before its departure in the usual manner by the officers appointed for that purpose; and the said N——, or such other as shall be vested with powers to replace him, shall be obliged to produce in every port or harbor, which he shall enter with the said vessel, to the officers of the place, the present license, and to carry the flag of N——, during his voyage.

In faith of which, &c.

*NOTE V.

To the case of The Bello Corrunes, *ante*, p. 156.

Decision du Conseil des Prises sur les Precautions Conservatories du Produit des Prises.

Au nom de la république Française, une et indivisible, le conseil a rendu la décision suivante:

Vu le mémoire présenté au conseil par le commissaire général des relations commerciales de sa majesté Danoise près la république Française; vu les conclusions du commissaire du gouvernement laissées cejourd'hui sur le bureau, et dont la teneur suit:

Le commissaire-général des relations commerciales de sa majesté Danoise a présenté au conseil des prises, le 13 floréal présent mois, un mémoire par lequel il demande la mise en sûreté ou le cautionnement du produit des ventes, dans les contestations sur la validité des prises Danoises, antérieure au 4 nivôse dernier, sans excepter celles qui se trouvaient pendantes au tribunal de cassation. Il se dit particulièrement chargé des intérêts des négocians Danois.

J'ai pris connaissance de ce mémoire, d'après l'invitation que le conseil m'a faite, par sa délibération du 23 floréal, de donner mes conclusions par écrit, conformément à l'article 13 de l'arreté des consuls, du 6 germinal an. 8, contenant réglement sur la manière de statuer relativement aux prises maritimes.

Avant de m'occuper de la demande, il m'a paru important d'examiner si le commissaire Danois avait qualité la former. Ce commissaire est un agent politique. Dès qu' il est reconnu par le gouvernement franagis, il peut incontestablement remplir les fonctions attachées à son mandat; mais, peut-il, par des actions ou par des demandes, intervenir dans des contestations particulières, mues entre des négocians Français et des négocians de sa nation?

L'article 13 de l'arrêté du 6 germinal, n'admet que les parties *ou leurs défen- [*60
seurs qui justifieront préalablement de leurs droits et de leurs pouvoirs. Le commissaire Danois ne se montre pas pour son intérêt propre, mais comme chargé des intérêts d'autrui. Il n'est point partie; il ne prétend exercer que le ministère de défenseur. Justifie-t-il de son droit et de son pouvoir?

Il est vraisemblable qu'il n'agit qu'en vertu de son titre de commissaire-général des relations commerciales. Il est possible qu'on l'ait autorisé, par ce titre, à donner une attention particulière aux contestations dans lesquelles il se dit chargé des intérêts des négocians Danois.

Mais tout titre, que le commissaire Danois ne tiendrait que de son gouvernement, ne saurait le rendre le véritable représentant des parties. Au gouvernement appartient la protection, et aux parties seules, la propriété. Un propriétaire peut disposer de son bien et exercer ses droits par lui-même ou par autrui. Mais, chacun étant arbitre et régulateur de sa propre fortune, il n'est libre à qui que ce soit d'intervenir dans les affaires d'un autre, s'il n'en a reçu de lui le pouvoir. La mission général donnée au commissaire Danois par son souverain, pour le charger de veiller à l'intérêt des négocians de sa nation, et sur-tout de ceux qui ont essuyé des prises, ne suffirait donc jamais pour établir ce commissaire mandataire, proprement dit, de chacun de ses négocians. Dans les principes du droit politique, la mission du commissaire Danois est essentiellement limitée aux bons offices d'un protecteur qui recommande, et ne s'étend pas aux actes d' un fondé de pouvoir qui régit ou qui dispose.

Je conviens qu'un droit, plus ancien et plus sacré que le droit politique, je veux dire le droit social, autorise tout homme à suivre les affaires d'un absent qui ne connaît pas sa situation personnelle, et qui a besoin des secours spontanés de cette bienveillance

naturelle dont le germe n'a pu etre entièrement étouffé par nos vices, et dont le droit civil s'honore de sanctionner les effets. (a)

*61] *Il a été reconnu, dans tous les temps et chez tous les peuples policés, qu'un homme, a l'insçu de son semblable, peut lui faire du bien, et que s'il n'est jamais permis de faire le préjudice d'un autre, il l'est toujours de contribuer à son avantage, quoiqu'il n'en ait pas donné le mandat. (b)

Le commissaire Danois, à défaut de tout manda particulier ou spécial, pourrait peut-être se prévaloir de ces principes pour justifier les démarches qu'il fait, auprès du conseil des prises, dans la cause ou dans les affaires de ses compatriotes absens. Qui les défendra, s'il ne les défend pas, et si par leur éloignement ou par d'autres circonstances, ils sont dans l'impossibilité de se défendre eux-mêmes?

Cependant, comme, dans l'état de nos sociétés, il importe au maintien de l'ordre public et à la tranquillité, ainsi qu'à la sûreté des particuliers, que les actions en justice ne soient pas populaires, il est de maxime constante et universelle que l'intérêt seul est le principe de l'action, et qu'il faut être partie ou muni d'un pouvoir de la partie, pour pouvoir intervenir dans un litige. On a cru qu'il était nécessaire de prévenir les incursions dangereuses que des esprits entreprenans ou inquiets peuvent faire dans des choses qui ne les concernent pas. On a cru encore que, pour arrêter les indiscrétions d'un faux zèle, il était utile de prescrire des limites à la bienfaisance même.

Mais on a établi, près toutes les administrations et tous les tribunaux, un ministère public, connu aujourd'hui, en France sous le nom de commissaire du gouvernement, qui est le défenseur-né de tous ceuxqui n'en ont point, qui est partie principale dans les affaires importantes, et partie jointe dans toutes. Cette institution admirable, qui manquait aux anciens, est une barrière contre les surprises, les dénis de justice, les violences et les abus. La partie publique agit, et tous les droits sont conservés. Elle veille, et tous les citoyens sont tranquilles. Elle exerce toutes les actions du public.

*62] Elle est la vive-voix *du faible et du pauvre. Elle représente les absens; et, parmi, nous, une de ses principales fonctions, selon le témoignage du savant et vertueux d'Aguesseau, est de faciliter l'accès de la justice aux étrangers, de proposer leur défense, de leur offrir un appui, et de se rendre à leur égard le garant de la loyauté nationale.

Le commissaire Danois ne doit donc point s'alarmer, si je réclame les régles qui ne permettent qu'aux parties où à leurs fondés de pouvoirs d'exercer des actions et de former des demandes. L'intérêt de protection, qu'il doit ses à compatriotes, suffit pour l'autoriser à éclairer la religion des membres du conseil par des notes, par des instructions, par des mémoires. Jamais on ne doit dédaiguer les moyens de connaître la vérité. De quelque part qu'elle vienne, elle a des droits sur l'esprit et sur le cœur des hommes.

En ma qualité de commissaire du gouvernement, je suis particulièrement obligé de faire valoir les exceptions favorables aux étrangers qui sont forcés de plaider en France, et de encourager, par l'impartialité de mon ministère, des hommes traînér hors du lieu de leur naissance et de leurs habitudes, des hommes aux-quels il importe de persuader que rien n'est possible de ce qui ne serait pas juste. Il n'est point de Français qui ne me désavouât si je professais d'autres principes. Notre nation s'est toujours distinguée par ses procédés décens et modérés envers les autres peuples. Elle a rempli l'Europe de la gloire de ses armes; mais l'équité la générosité sied bien à la toute-puissance.

J'ai donc pensé que si je ne pouvais regarder le commissaire Danois comme partie ou comme représentant de quelqu'une des parties intéressées, il était toujours de mon devoir d'examiner sa demande, et de la regarder comme un éveil donné à ma sollici-

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(a) Digeste, liv. III. tit. 5, *De negotiis gestis*, loi: hoc edictum necessarium est, quonian magna utilitas absentium versatur, ne indefensi.... patiantur.

(b) Si quis absentis negotia gesserit, licet ignorantis, tamen quidquid utiliter in rem ejus impenderit....habeat eo nomine actionem. Lib. II. Ibid.

Sufficit, si utiliter gessit. Lib. X.

tude; je serais dans le cas, si cette demande paraissait fondée, de la réaliser en mon nom, malgré le silence des parties et de leurs défenseurs. Car les objets, dont la sureté et la conservation, pendant le litige, sont réclamées par le commissaire Danois, sont sous la garde du droit des gens. Or, en pareille occurence, je pourrais agir d'office, comme ayant les actions du *gouvernement, qui est le gardien naturel, dans [*63
l'état, de tout ce qui repose sous la foi publique.

Je passe donc à l'examen foncier de la demande qui a été soumise à votre décision. Cette demande tend à faire ordonner la mise en sûreté ou le cautionnement du produit des ventes, dans les contestations sur la validité des prises Danoises, antérieures au 4 nivôse dernier. On ne peut nier que, pendant le litige, la chose litigieuse doit être en sureté, et que rien ne doit être innové pendant le procès. Ce principe général, dicté par le bon sens et par la raison, a été appliqué à la matière des prises, par tous les règlemens qui régissent cette matière.

On lit par tout qu'en général il ne doit y avoir ni vente, ni déchargement avant le jugement de la prise; que la vente provisoire ne peut avoir lieu que dans le cas où la prise serait dans un danger reconnu de dépérissement pour le navire ou la cargaison, et encore dans le cas où la prise serait reconnue constamment ennemie; que le produit des ventes provisoires doit être assuré par le dépôt ou par le cautionnement.

Le commissaire Danois est rassuré, par l'aracté des consuls, du 6 germinal, pour toutes les prises postérieures au 4 nivôse d'auparavant. Il ne réclame l'autorité du conseil que pour les prises faites avant cette époque. Mais ici les diverses époques ne doivent pas être confondues.

Avant l'établissement du conseil des prises, la matière des prises suivait l'ordre hiérarchique des tribunaux. Comme dans les autres matières, on pouvait recourir au tribunal de cassation, pour faire annuler le jugement rendu par le tribunal d'appel. Tout était conduit d'après les principes ordinaires de l'ordre judiciaire.

Parmi les contestations sur les prises antérieures au 4 nivôse, il y en a qui étaient pendantes au tribunal de cassation, quand le conseil des prises a été institué. D'autres étaient et sont encore devant les tribunaux d'appel, ou peut-être même devant les tribunaux de première instance.

D'après le vœu de tous les règlemens, les précautions pour la mise en sureté d'une prise, ne doivent cesser qu'après que la validité ou l'invalidité de cette prise a été définitivement jugée; d'où le commissaire Danois conclut que, tant qu'il y aura litige *devant quelque tribunal que ce soit, même celui de cassation, il faut continuer [*64
les précautions conservatoires.

Mais on peut répondre que l'on regardait une prise comme définitivement jugée, quand le tribunal d'appel avait prononcé sur sa validité ou sur son invalidité. En effet dans les principes de l'ordre judiciare, les jugemens des tribunaux d'appel sont des jugemens définitifs et en dernier ressort dont aucune puissance, dans l'état, ne peut empêcher ni suspendre l'exécution.

L'appel a, par lui même, un effet dévolutif, et il a de plus un effet suspensif, toutes les fois que l'on ne se trouve dans aucun des cas où les lois autorisent l'exécution provisoire des jugemens de première instance. Le recours en cassation n'a aucun des effets ni des caractères de l'appel. Par ce recours, il n'y a ni dévolution de la matière, ni suspension du jugement contre lequel on l'exerce. Le tribunal à qui le recours en cassation est porté, n'est juge que des infractions de formes, ou des contraventions ormelles aux lois; il ne peut prononcer sur le bien ou le mal jugé; il est tenu, quand il casse, de renvoyer le fond de la contestation à un autre tribunal. Le tribunal de cassation est plutôt le gardien des lois que l'arbitre de l'intérêt des parties. C'est l'institution par laquelle le législateur surveille, maintient et protége son propre ouvrage.

Par l'événement de la cassation, une cause est agitée de nouveau. Mais le jugement, qui la terminait, était définitif; il tenait lieu de la vérité même, res judicata pro veritate habetur. La cassation le fait disparaître, en le déclarant nul. Mais tant qu'il existe, il est le dernier terme de la justice nationale; il peut être anéanti et non ré-

formé. Il est aussi souverain que le loi, à moins qu'il ne soit constaté que le magistrat qui l'a rendu cherchait à être plus puissant que la loi même.

Il est donc évident que, tant que la matière des prises a été laissée aux tribunaux ordinaires, il n'y avait plus lieu à continer des précautions conservatoires, après le jugement d'un tribunal d'appel, vu que des prècautions uniquement relatives à un état que l'on suppose provisoire, ne peuvent avoir de vie que jusqu'au jugement définitif.

*65] *Je sais que tout est changé depuis la loi qui dépouille les tribunaux de la matière des prises, et depuis l'établissement du counseil auquel cette matière a été attribuée. Mais quels sont les effets de ce changement? S'étendent-ils sur le passé, ou n'ont-ils trait qu'á l'avenir? Les contestations qui ne sont plus pendantes devant aucun tribunal, et dans lesquelles tous les degrés de jurisdictions et tous les genres de recours ont été épuisés, sont terminées irrévocablement.

Cels que le nouvel ordre de choses a trouvé pendantes au tribunal de cassation, pouvaient revivre; suivant le langage des jurisconsultes, elles étaient encore dans le hasard des jugemens, in aleâ judiciorum. Si la nullité du jugement attaqué était reconnue, la question du fond demeurait entière, comme si elle n'avait point été définitivement jugée, et le renvoi en était fait à d'autres juges.

Dans les contestations dont je parle, le conseil des prises remplace à la fois et le tribunal de cassation où elles étaient pendantes, et le tribunal auquel elles auraient été renvoyées à la suite d'une sentence ou d'un jugement de cassation. Le conseil des prises n'a donc point une compétence limitée à des points de procédure ou de forme, et l'on voit, par les termes dans lesquels est congu le titre de son établissement, que les questions foncières sur la validité ou invalidité des prises maritimes, sont le véritable objet de son attribution.

Il était possible, dira-t-on, que si l'ancien ordre êut été conservé, le tribunal de cassation n'eut point jugé nuls la plupart des jugemens qui lui étaient dénoncés comme tels, et, dans, ce cas, les parties que ces jugemens intéressaient, n'eussent pas été exposées à de nouvelles incertitudes sur le fond de leurs différends. J'en conviens; mais il était également possible que la cassation fut prononcée. Dans le doute, faut-il que le conseil des prises prononee sur des questions de forme, avant de se croire autorisé à prononcer sur les questions du fond? Mais, se trouvant juge du fond et de la forme, il sèparerait des choses que son attribution unit; il manquerait le but principal de son établissement; il agirait contre le bon sens et la raison qui ne permettent pas de sacrifier la justice essentielle à de *simples formes de procéder, dans une matière ou

*66] la loi juge nécessaire d'écarter les formes contentieuses de la procédure, pour laisser plus de latitude à l'application des principes de la justice essetielle.

Je remarquerai pourtant que, pour ne pas aggraver ou compromettre, sans des considérations majeures, le sort des parties qui peuvent, jusqu'à un certain point, se éprvaloir de l'autorité de la chose jugée, il est équitable de ne pas reformer légèrement des décisions régulières dans la forme, et intervenues en dernier ressort. Un simple mal jugé, dans des hypothéses qui peuvent laisser plus ou moins de liberté à l'opinion du magistrat, ne serait point un motif suffisant de réformation; car sirien n'est purement arbitraire à la volonte du juge, il est une foule de circonstances dans lesquelles plusieurs choses demeurent arbitraires à sa raison. Mais nous ne sanctionnerons jamais une décision qui renfermerait une injustice évidente, ou qui blesserait l'intérêt d'état.

Je sais que l'injustice, même évidente, ne peut autoriser le tribunal de cassation à annuler un jugement rendu en dernier ressort, si elle n'est jointe à la violation formelle de quelque loi positive. Mais cette règle est fondée sur ce que les justiciables ordinaires du tribunal de cassation, sont des citoyens qui vivent entr'eux, non dans l'état de nature, mais sous des lois civiles.

Le conseil des prises, au contraire, n'a pour justiciables que des hommes, Frangais ou étrangers, qui n'ont eu, entr'eux, que des relations assises sùr le droit de la guerre, c'est-à-dire, des relations absolument régies par le droit des gens; la cause de ces particuliers est toujours liée plus ou moins à celle même des nations dont ils font partie. Or, les nations vivant entr'elles dans l'indépendance de l'état de nature, il suit que,

dans la matière qui nous est attribuée, la loi naturelle conserve un empire qu'elle obtient rarement dans les matières civiles: car, dans l'ordre civil, les principes du droit naturel dirigent; mais il n'y a que les lois positives qui commandent, au lieu que, relativement aux choses qui appartiennent au droit des gens, la loi naturelle est le véritable code des peuples: de-là toute infraction *manifeste de la justice, de l'équité, [*67
ou de la raison naturelle, peut déterminer la décision du conseil.

L'intérêt d'état, blessé ou méconnu, devient encore un juste motif de réformation; cet intérêt ne saurait atteindre les objets qui sont sous l'empire de la loi civile; mais il est lui-même la loi suprême dans ceux qui sont sous l'empire immédiat de la cité.

La guerre est le droit des états, et non celui des particuliers; la course est une délégation du droit de la guerre; personne ne peut armer en course, s'il n'y est autorisé par une permission spéciale du souverain ou du gouvernement; cette permission, que le souverain ou le gouvernement peut refuser, est, à plus forte raison, susceptible de conditions.

Un particulier, qui n'aurait pas le mandat de son souverain, et qui, forcé de se battre pour sa défense personnelle, prendrait un navire ennemi, n'en deviendrait point propriétare; la propriété de ce navire appartiendrait à l'état.

Les produits de la course en faveur de l'armateur sont donc une cession du souverain. Ils pourraient être réduits à la juste et rigoureuse indemnité du négociant qui arme à ses frais et à ses risques. Tout ce qui va au-delà de cette indemnité, est un bénéfice librement abandonné par l'état à titre de don, de récompense ou d'encouragement.

Ce qui n'est acquis qu'à titre d'encouragement, de récompense, ou même d'indemnité, ne l'est qu'autant qu'il est reconnu qu'on s'est trouvé dans le cas de la récompense ou de l'indemnité stipulée ou promise. Conséquemment le souverain demeure toujours juge de la manière dont on a exécuté son mandat.

Il est donc évident que l'on n'a droit aux produits de la course qu'après le jugement qui prononce la validité de la prise. Jusques-là, tout demeure incertain et contentieux. Il est encore incontestable que, dans ce jugement, l'intérêt de l'armateur demeure toujours subordonné à l'intérêt national. Car la puissance publique n'a ni la volonté ni le pouvoir de se nuire.

Les proudits de la course ne peuvent donc être regardés que comme une propriété politique que l'on ne saurait assimiler *aux propriétés civiles ordinaires. C'est [*68
même parler peu exactement que de donner le nom de propriété à des émolumens ou à des produits dont la cession ne peut se réaliser qu'après due vérification des faits sur lesquels on fonde leur légitimité; vérification dans laquelle on doit avoir égard non aux régles de cette justice privée que gouverne les individus, mais à cette sagesse supérieure qui régit les sociétés.

Les armateurs en course connaissent les conditions inhérentes à la nature de ce genre périlleux d'entreprises. Ils savent que la course étant la délégation d'un droit qui n'appartient qu'à l'état, ceux qui sollicitent ou qui acceptent cette délégation, ne peuvent jamais faire le préjudice de l'état qui les délègue; et qu'ils doivent être jugés d'après les principes sur lesquels le bien même de l'état repose.

Ces principes seront la base des jugemens du conseil, même dans les affaires que nous avons trouvées pendantes au tribunal de cassation. D'autre part, j'ai déjà observé qu'indépendamment de tout texte positif, l'infraction manifeste de la loi naturelle pouvait autoriser, dans les mêmes affaires, la réformation des sentences rendues par les tribunaux d'appel. Il semble donc qu'il ne resterait plus qu'à conclure que, rien n'étant fini avant que le conseil des prises ait prononcé, il faudrait soumettre tous ceux en faveur de qui la main-levée a été ordonée à une nouvelle consignation ou au cautionnement: car, avant que tout soit terminé par un jugement absolument irrévocable, le gage de toutes les parties intéressées doit, d'après les lois de la manière, demeurer en sûreté.

Une loi du 4 prairial, an 6, relative à la question que j'examine, portait: qu'aucun neutre ou soi-disant tel, ne pouvait, en matière de prises maritimes, mettre à exécution aucun jugement definitif, et qu'il ne lui serait accordé aucune main-levée, à moins qu'il n'eut

fourni au prealable bonne et valable caution, dans le cas ou les armateurs se seroient pourvus en cassation, ou seraient encore dans le delai utile pour se pourvoir.

Mais on voit, par cette loi, que la mesure du cautionnement ou du refus de toute
*69] main-levée, n'avait été prise qu'en faveur *des armateurs Français, et qu'elle ne grévait que les étranger qui gagnaient leur cause dans les tribunaux d'appel; les armateurs Français obtenaient pleine main-levée, sans être soumis à un cautionnement lorsque les jugemens des tribunaux d'appel leur étaient favorables.

Le directoire, en provoquant la loi dont il s'agit, avait reconnu dans son message que, de droit commun, l'exécution des jugemens rendus par les tribunaux d'appel, ne peut être suspendue. Mais il pensait qu'il fallait faire exception à ce principe général, contre les étrangers dont la disparution pouvait rendre inutile l'action en nullité que des armateurs Français pouvaient être obligés de porter au tribunal de cassation.

Je n'ai point à examiner si ce motif était ou n'était pas raisonnable. Mais je ne dois pas perdre de vue qu'en force des lois existantes, les armateurs Français obtenaient, après un jugement du tribunal d'appel qui leur avait donné gain de cause, la main-levée qui, dans le même cas, était refusée aux étrangers. Une mesure qui, dans les circonstances obligerait les armateurs Français à déposer de nouveau le produit des ventes, ou à fournir caution, serait évidemment rétroactive; et tout effet rétroactif est réprouvé par la jutice.

Mais si, par quelques conidérations particuliéres, des armateurs français n'ont point obtenu la main-levée, quoiqu'ils aient gagné leur cause par un des jugemens que l'on regardait comme définitifs, il est équitable que cet état de choses ne soit pas changé jusqu'après le jugement du conseil des prises, saisi de toutes les affaires pendantes au tribunal de cassation. Car dans ce cas, il ne s'agit pas d'inquiéter ceux qui tiennent, mais seulement de ne pas invertir ceux qui ne tiennent point encore. Or, comme il est plus favorable de suspendre une main-levée, que de la faire rétracter, quand elle a été consommée, il n'y aurait pas de raison, depuis la nouvelle législation sur les prises, de faire cesser un état provisiore qui est utile à tous, qui a été continuè jusqu'à ce moment, et auquel les réglemens nouveaux, à quelques exceptions près, ne fixent d'autre terme qu'une décision du conseil établi pour remplacer, dans la matière des prises, tous les tribunaux.

*70] *On annonce des jugemens rendus par les tribunaux ordinaires, soit de premiére instance ou d'appel, depuis la publication de la loi qui les dépouille tous. Je n'ai pas des instructions assez précises sur l'existence de ces jugemens, et sur les circonstances dans lesquelles ils sont intervenus, pour pouvoir en faire l'objet de mes conclusions; mais je pense due de tels jugemens, s'ils existent, sont incompétens et nuls, comme en fraude de la loi, et par des juges sans pouvoirs et sans caractère. Aucune main-levée n'a pu valablement être accodée à la suite de ces jugemens, et les parties sont incontestablement autorisées à faire reparer le dommage, qui pourrait en résulter.

Quant auv affaires qui peuvens avoir été terminées dans les tribunaux d'appel, avant la loi qui les dépouille, on doit distinguer celle où les parties sont encore dans le délai du recours en cassation, d'avec celles où les parties ont laissé passer ce délai, et ont exécuté les jugement sans se plaindre. Dans les affaires de cette seconde espèce, tout est consommé et tout doit l'être, puisque les parties ont accédé à l'autorité de la chose jugée. Dans les premières, au contraire, les parties peuvent porter au conseil des prises, le recours qu'elles auraient pu porter au tribunal de cassation. Ce recours ne saurait être regardé comme une surcharge, puisqu'il était dans le vœu des lois, sous lesquelles la contestation était née, et dans la prescience des parties qui agissaient sous l'égide de ces lois. Ce n'est point une innovation, mais l'exécution d'un droit acquis à tous ceux qui ont été dans le cas de plaider devant les juges ordinaires; or, comme les jugemens rendus par les tribunaux d'appel ne pouvaient être suspendus dans leur exécution, si la main-levée a déja été réalisée à la suite de ces jugemens, on laissera les choses en l'état ou elles se trouvent sans rien innover non plus dans les causes où les jugemens en dernier ressort n'auront encore reçu aucune exécution, et où les parties sont conséquemment assez heureuses pour voir continuer les précautions conservatrices de leur gage.

Je ne crois pas avoir besoin de parler des contestations non jugées par les tribunaux

d'appel, ou dont l'instruction est peut-être encore pendante devant les tribunaux de première instance. *Ces contestations sont portées de droit au conseil des prises, [*71
et il est incontestable qu'avant le jugemênt qui les terminera, on ne peut délivrer à aucune des parties les effets ou les marchandises qui sont l'objet du litige. Tout juge, tout agent, tout administrateur qui méconnaîtrait ce qui est prescrit par les réglemens, répondréait, en son propre et privé nom, des dommages et intérêts auxquels il aurait donné lieu par sa conduite.

Ou voit, par les détails dans lesquels je suis entré, qu'indépendamment du défaut de pouvoir ou de qualité suffisante dans la personne du commissaire Danois, pour intenter des actions et former des demandes, proprement dites, dans des contestations qui lui sont individuellement étrangères, il serait impossible de faire droit à sa reclamation, et sur-tout d'y faire droit par forme de mesure gènérale, sans s'exposer à cammettre une foule d'injustices, en confondant des hypothèses qui sont dans le cas d'être distinguées, et en assignant un sort commun à des parties qui sont dans des situations différentes.

Le commissaire Danois peut recommander et instruire. Il peut, par le devoir de sa place, protéger indéfiniment les négocians de sa nation. Mais pour pouvoir agir plus pertiulièrement dans les contestations pendantes, il aurait besoin d'un pouvoir spécial de la partie ou des parties au nom desquelles il agirait.

Le procureur fondé de plusieurs parties, doit agir, séparement dans chaque cause, pour l'intérêt de chaque client, et ne pas cumuler, par des demandes in globo, des intérêts divers qui ne se ressemblent souvent pas, et quiexigent chacun un examen séparé et une prononciation distincte.

Comme chaque cause doit être instruite et jugée séparément, c'est aux parties et à leurs défenseurs à faire, dans chaque cause, tous les actes nécessaires à l'instruction et au jugement.

J'ai pourtant cru qu'il était essentiel de rappeler les maximes qui veillent, pendant le litige, à sûreté des effets litigieux: maximes aussi anciennes que la matière des prises, maximes vraies sous tous les régimes et dans tous les tems.

*Dans ces circonstances, je conclus à ce qu'il soit dit n'y avoir lieu de pro- [*72
noncer sur la demande du commissaire général des relation commerciales du Danemark, sauf à lui de fournir au commissaire du gouvernment près le conseil, telles notes out tels mémoires qu'il jugera utiles à l'intérêt des négocians de sa nation, et sauf aux parties ou a leurs defenseurs gui justffieront de leurs droits et de leurs pouvoirs d'intenter telles actions, et de former, dans les affaires les concernant, telles demandes qu'elles aviseront; et néanmoins, pour prévenir les dangers ou les abus contre lesquels on paraît vouloir être rassuré, je requiers, en mon nom (pour l'intérêt du gouvernement et pour celui des armateurs ou négocians Français et étrangers, dont les propriétés et les gages doivent être garantis par la foi publique,) qu'il soif décidé que dans les contestations antérieures au 4 nivôse, et dans celles postérieures à cette époque, qui n'ont point encore été jugées définitivement, ou dont les jugemens définitifs, mais soumis au recours en cassation, n'ont point encore été exécutés, aucune vente, aucune mainlevée, aucune décharge de cautionnement, ne puissent être accordées, autrement que dans les cas marqués par l'arrêté des consuls du 6 germinal dernier, et par les règlemens auxquels cet arrêté ne déroge pas.

Délibéré à Paris, le 8 prairial, an 8.

Signé Portalis.

Le conseil, après en avoir délibéré, décide n'y avoir lieu de prononcer sur la demande du commissaire-général des relations commerciales du Danemark, sauf à lui de fournir au commissaire du gouvernement près le conseil, telles notes ou tels mémoires qu'il jugera utiles à l'intérêt des négocians de sa nation, et sauf aux parties ou à leurs défenseurs qui justifieront de leurs droits et de leurs pouvoirs, d'intenter telles actions, et de former dans les affaires les concernant, telles demandes qu'elles aviseront; et sur les fins prises d'office par le commissaire du gouvernement, décide que dans les contestations antérieures au 4 nivôse, et dans celles postérieures à cette époque, qui n'ont point encore été jugées définitivement, ou dont les jugemens définitifs, mais soumis au recours en cassation, n'ont point encore été exécutés, aucune vente, aucune

*main-levée, aucune décharge de cautionnement ne pourront être accordées autrement que dans les cas marqués par l'arrêté des consuls, du 6 germinal dernier, et par les règlemens auxquels cet arrete ne deroge pas.

Fait à Paris, le 8 prairial an 8, maison de l'Oratoire, lieu des séances du conseil, Présens les citoyens Redon, présipent; Nion, Lacoste, Moreau, Montigny-Montplaisir, Barrennes, Dufaut, Parceval-Grandmaisou et Tournachon, membres du conseil.

En foi de quoi, la présente décision a été signée par le président.

[Signé,] REDON, Président.

par le conseil,

Le secrétaire-général ; signé, CALMELTE.

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