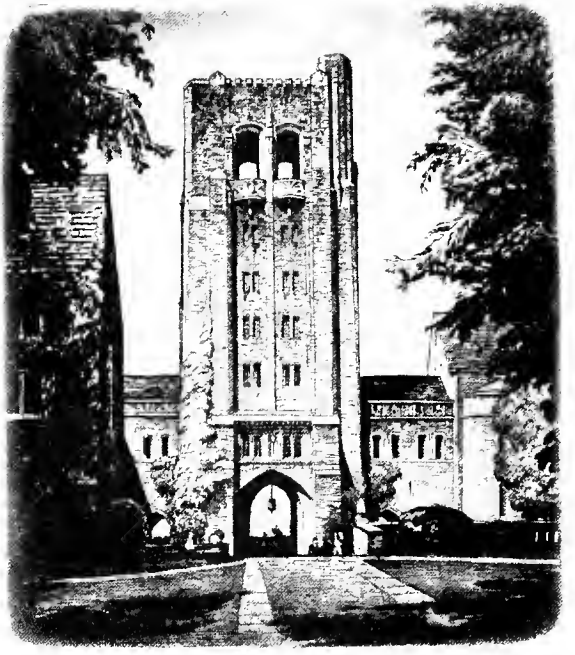


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A TREATISE

ON THE

Organization, Jurisdiction and Practice

OF THE

COURTS OF THE UNITED STATES

IN SUITS AT LAW,

INCLUDING

MUNICIPAL SEIZURES AND CRIMINAL PROSECUTIONS,

WITH AN

APPENDIX OF PRACTICAL FORMS.

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AUTHOR OF "THE ADMIRALTY JURISDICTION, LAW AND PRACTICE
OF UNITED STATES COURTS."

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PART I.

OF THE ORGANIZATION AND JURISDICTION OF THE COURTS OF THE UNITED STATES.

CHAPTER I.

OF THE JUDICIAL POWER OF THE UNITED STATES.

The scope of the judicial power of the United States is defined by the constitution; which also ordains that this power "shall be vested in one supreme court, and in such inferior courts as the congress may, from time to time, ordain or establish." In the language of the constitution, it extends—

1. To all cases in law and equity, arising under this constitution:

2. To all cases arising under the laws of the United States:

3. To all cases arising under treaties made or to be made under the authority of the United States:

4. To all cases affecting ambassadors, or other public ministers and consuls:

5. To all cases of admiralty and maritime jurisdiction:

6. To controversies to which the United States shall be a party:

7. To controversies between two or more states:

8. To controversies between a state and citizens of another state:

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9. To controversies between citizens of different states:

10. To controversies between citizens of the same state, claiming lands under grants of different states: and,

11. To controversies between a state or the citizens thereof and foreign states, citizens and subjects.[1]

[1] Const. U. S., Art. 3, Sec. 2. The following brief but discriminating exposition by Chief Justice JAY, in the case of *Chisholm* v. *The State of Georgia* (2 Dallas, 419, 475), of the policy which dictated the grant of jurisdiction over these several cases (except the 9th, which seems to have been accidentally omitted) it is presumed will not be uninteresting to the reader.

"1st. To all cases arising under this constitution; because the meaning, construction and operation of a compact ought always to be ascertained by all the parties, not by authority derived only from one of them. 2d. To all cases arising under the laws of the United States; because, as such laws, constitutionally made, are obligatory on each state, the measure of obligation and obedience ought not to be decided and fixed by the party from whom they are due, but by a tribunal deriving authority from both the parties. 3d. To all cases arising under treaties made by their authority; because, as treaties are compacts made by and obligatory on the whole nation, their operations ought not to be affected or regulated by the local laws or courts of a part of the nation. 4th. To all cases affecting ambassadors or other public ministers and consuls; because, as these are officers of foreign nations, whom this nation is bound to protect and treat according to the law of nations, cases affecting them ought only to be cognizable by national authority. 5th. To all cases of admiralty or maritime jurisdiction; because, as the seas are the joint property of nations, whose rights and privleges relative thereto are regulated by the law of nations, and treaties, such cases necessarily belong to national jurisdiction. 6th. To controversies to which the United States shall be a party; because, in cases in which the whole people

The constitution proceeds one step further, and as we shall see in the third chapter, fixes the boundary between the original, and, "with such exceptions and

are interested, it would not be equal or wise to let any one state decide and measure out the justice due to others. 7th. To controversies between two or more states; because domestic tranquillity requires that the contentions of states should be peaceably terminated by a common judicatory; and because, in a free country, justice ought not to depend on the will of either of the litigants. 8th. To controversies between a state and citizens of another state; because, in case a state (that is, all the citizens of it) has demands against citizens of another state, it is better that she should prosecute her demands in a national court, than in a court of the state to which those citizens belong; the danger of irritation and criminations arising from apprehensions and suspicions of partiality being thereby obviated. Because, in cases where some citizens of one state have demands against all the citizens of another state, the cause of liberty and the rights of men forbid, that the latter should be the sole judges of the justice due to the former; and true republican government requires that free and equal citizens should have free, fair, and equal justice. 9th. To controversies between citizens of the same state claiming lands under grants of different states; because, as the rights of the two states to grant the land are drawn into question, neither of the two states ought to decide the controversy. 10th. To controversies between a state or the citizens thereof, and foreign states, citizens or subjects; because, as every nation is responsible for the conduct of its citizens toward other nations, all questions touching the justice due to foreign nations or people, ought to be ascertained by, and depend on, national authority.

"Even this cursory view of the judicial powers of the United States" (adds the Chief Justice) "leaves the mind strongly impressed with the importance of them to the preservation of the tranquillity, the equal sovereignty, and equal rights of the people."

PART 1. under such regulations as congress shall make," the appellate jurisdiction of the supreme court.

Upon this footing, with the exception of certain summary injunctions relative to the prosecution of public offenders, trial by jury, and bail, which will be duly noticed in the sequel, the subject is left by the constitution. In what other courts the residue of the judicial power should be vested, and to what extent, and subject to what regulations, the supreme court should be clothed with appellate power, was submitted to the discretion of the legislative branch of the government.

At the first session of congress an act was accordingly passed "to establish the judicial courts of the United States." The additional courts established by it are the circuit and district courts. This act—familiarly known as the JUDICIARY [or JUDICIAL] ACT, though modified in some respects by the eleventh amendment of the constitution, and by subsequent legislation; and, in a few particulars declared invalid for want of constitutionality—still continues the legislative basis of the JUDICIAL SYSTEM of the United States.

But by the 11th amendment to the constitution it is declared with regard to the 8th specification above stated, 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.[1] It will be perceived therefore, that the capacity of the federal courts to take cognizance of legal controversies depends upon the subject matter of the controversy; and upon the character of the parties: that is, their

[1] This amendment was adopted in consequence of the decision in the case mentioned in the last preceding note, by which a state was held to be *suable* by a *citizen* of another state.

jurisdiction extends to certain *classes of cases*, whoever may be parties,—and to controversies between certain *descriptions of parties*, whatever may be the nature of the controversy. In other words, if the case arises under the constitution, &c., or if it is of admiralty or maritime jurisdiction, it matters not who may be the parties; and if, on the other hand, the controversy is one affecting ambassadors, &c., or if the United States are plaintiffs, or if it is between citizens of different states, &c., it matters not what may be the nature of the controversy.

CHAPTER II.

OF THE ORGANIZATION OF THE SUPREME COURT.

1. *The Judges and Officers of the Court.*

Judges.] The supreme court originally consisted of a chief justice and five associate justices. The number of judges has since been repeatedly changed. By an act passed April 10, 1869, ch. 22; 16 Stat. at Large, 44, the court is made to consist of a "chief justice and eight associate justices, any six of whom shall constitute a quorum."

They are appointed by the president, by and with the advice and consent of the senate. Const., art. 2, sec. 2.

In order to secure in the most effectual manner the independence and integrity of the judiciary, it is provided by the constitution (art. 3, sec. 1), that "the judges both of the supreme and inferior courts shall hold their offices during good behavior;" and that they "shall at stated times receive for their services a compensation, which shall not be diminished during their continuance in office." But they may be

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removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors. Art. 2, sec. 4.

The judges, in addition to the oath or affirmation to support the constitution of the United States, are required, before they proceed to execute the duties of their offices, to take an oath or affirmation that they will administer justice without respect to persons, and do equal right to the poor and rich, and that they will faithfully and impartially discharge and perform all the duties incumbent upon them as such judges, according to the best of their abilities and understanding, agreeably to the constitution and laws of the United States.[1]

The order of precedence among the associate justices is according to the date of their commissions; or, when two or more commissions are contemporaneously issued, according to their respective ages.[2]

In case of a vacancy in the office of chief justice, or of his inability to discharge the duties of his office, his powers and duties devolve on the senior associate justice.[3]

By the act of Dec. 18, 1812, ch. 5, it is declared to be unlawful "for any judge appointed under the authority of the United States to exercise the profession or employment of counsel or attorney, or be engaged in the practice of the law."

Clerk.] Notwithstanding the multifarious jurisdiction and diversified business of the supreme court, it has but one clerk, in whose office all its proceedings are entered and all its records kept. He is appointed by the court, and is required to take an oath, and to execute a bond with sureties in a penalty of two

[1] Act of Sept. 24, 1789, ch. 20; 1 Stat. at Large, 76.
[2] Act of Sept. 24, 1789, ch. 20; 1 Stat. at Large, 73.
[3] Act of June 25, 1868, ch. 81; 15 Stat. at Large, 80.

thousand dollars, for the faithful performance of his duties.[1]

He is required to keep his office at the seat of the national government, and is prohibited from practicing as attorney or counsel.[2] His office is in fact kept in the capitol. He is forbidden to permit any original record or paper to be taken from the supreme court room, or from the office, without an order from the court.[3] His compensation consists of an allowance of ten dollars a day during his attendance in court, and fees for specific services.[4] He is required in all cases to take from "*the party*" a bond, with competent security, in a penalty of two hundred dollars, or a deposit to that amount, to secure his fees; and upon service and non-payment of his bill of fees, he is entitled to an attachment to compel payment.[5] His duties, so far as it is necessary to treat of them, will be sufficiently indicated in the sequel.

Crier.] The crier is appointed by the court.[6]

Attorneys and Counselors.] By the act of Sept. 24, 1789,[7] it is provided, "that in all the courts of the United States, the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as, by the rules of the said courts, respectively, shall be permitted to manage and conduct causes therein."

Notwithstanding the privilege here secured to suitors, of litigation without the intervention of professional agents, it is hardly necessary to say that the

[1] Act of Sept. 24, 1789, ch. 20; 1 Stat. at Large, 76.
[2] Appendix, Rule 1, of Sup. Court of United States.
[3] Appendix, Rule 1, S. C. Rules.
[4] Act Feb. 28, 1799, ch. 19; 1 Stat. at Large, 624.
[5] See Appendix, Rule 10, S. C. Rules.
[6] Act of 1799, *ubi supra.*
[7] Ch. 20: 1 Stat at Large, 92.

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business of these courts is in fact conducted by attorneys and counselors.[1]

To entitle persons to admission as attorneys or counselors in the supreme court, "it is required that they shall have been such for three years past in the supreme court of the state to which they respectively belong; and that their private and professional characters shall appear to be fair."[2]

The oath or affirmation taken upon admission is as follows: I do solemnly swear (or affirm) that I will demean myself (as attorney, or counselor of this court), uprightly, and according to law, and that I will support the constitution of the United States.[3]

Of the privileges, disabilities and duties of attorneys—of their appointment, the duration of their authority, the mode of changing them, their punishment for misconduct, &c., it is deemed unnecessary to treat at large.

With very few exceptions the acts of congress, as well as the rules of the court, are silent with respect to all these particulars.

But by an act passed July 22, 1813, it is enacted that "if any attorney, proctor or other person, admitted to manage and conduct causes in a court of the United States, or of the territories thereof, shall appear to have multiplied the proceedings in any cause before the court, so as to increase the costs unreasonably and vexatiously, such person may be

[1] These are the only denominations of practitioners designated by the judicial act, and no others have been recognized by the rules of the supreme court. For, though it is a court of equity as well as of law, it has no solicitors, *eo nomine*, nor, although it is a civil law court, has it any proctors or advocates.

[2] Appendix, Rule 2, S. C. To obtain admission under this rule, it is only necessary that some counselor in whom the court reposes confidence, should make a motion for that purpose, and state orally that the case of the appellant falls within the rule.

[3] Appendix, Rule 2, S. C.

required by the order of the court to satisfy an excess of costs so incurred."[1]

The other legislative enactments, together with the judicial decisions, applicable to the subject, will be sufficiently treated of in the second part of this work; and it need at present only be observed, that the law and practice of the court of king's bench and chancery in England, afford in general the true guide in relation to it.[2]

Attorney-General.] By the last section of the judicial act, it is provided that "there shall be appointed a meet person, learned in the law, to act as attorney-general for the United States, who shall be sworn or affirmed, to *a faithful execution of his office;* whose duty it shall be to prosecute and conduct all suits in the supreme court in which the United States shall be concerned, and to give his advice and opinion upon questions of law, when required by the president of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments."[3] He is charged with the general superintendence and direction of the district attorneys and marshals in the several judicial districts and territories, as to the manner of discharging their duties; and these officers are required to report to him their official proceedings, as he shall direct. He is empowered also to employ attorneys and counselors when he thinks it necessary, to assist the district attorneys in the performance of their duties, and to enter into stipulations with such assistants as to the amount of their compensation.[4]

He is appointed by the president, by and with the

[1] Ch. 14: 3 Stat. at Large, 21.

[2] Appendix, No. 3, S. C. Rules.

[3] Act of Sept. 24, 1789, ch. 20, 1 Stat. at Large, 93.

[4] Act of August 2, 1861, ch. 37, 12 Stat. at Large, 285.

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advice and consent of the Senate, and the duration of his office is not limited by law. He is empowered also to appoint two assistant attorneys-general.[1]

Marshal.] By the act of June 9, 1794, chapter 64, so much of the 27th section of the judicial act, "as is or may be construed to require the attendance of the marshals of all the districts at the supreme court," was repealed; and this duty was restricted to the marshal of the district in which the court shall sit, unless the attendance of the marshals of the other districts shall be required by the special order of the court. But by the act of March 2, 1867, ch. 156, the supreme court is empowered to "appoint a marshal for the said court, whose compensation shall be three thousand five hundred dollars per annum; and said marshal shall take charge of all property of the United States used by said court or its members, and shall serve and execute all process and orders issuing out of said court, or made by the chief justice or any associate justice, in pursuance of law; and shall pay into the treasury of the United States all fees and compensation allowed by law, and render a true account thereof, at the close of each term, to the secretary of the interior; and the said marshal, with the approval of the chief justice, may appoint assistants and messengers in place of the crier and messengers now employed, with such compensation as is or may be allowed to officers of the house of representatives of similar grade; and all acts and parts of acts now in force relating to the marshal of the District of Columbia shall apply to the marshal of the supreme court, except so far as in this act otherwise provided."

Reporter.] The decisions of the supreme court have uniformly been reported, ever since its organization. No provision, however, it is believed, was

[1] Act of March 17, 1866, ch. 19; 14 Stat. at Large, 9.

made by law for the appointment or compensation of a reporter until 1817; when an act was passed providing an annual compensation of one thousand dollars to the reporter who should from time to time be appointed by the court to report its decisions; upon the condition, however, that he should print and publish the decisions of the court within eight months after such decisions were pronounced; and should deliver eighty copies thereof to the secretary of state (for distribution in the manner therein directed), without any expense to the United States.[1]

This act was limited to three years, but its provisions were continued in force by successive acts of short duration, until 1842, when a permanent act was passed, recognizing the power of the supreme court to appoint a reporter of its decisions, and awarding to him a compensation of thirteen hundred dollars per annum, provided he publish the decisions of the court within six months after they were made; that he deliver to the secretary of state one hundred and fifty copies thereof (for distribution in the manner prescribed by the act), and that they be not sold to the public at large for a greater price than five dollars for each volume.[2] In addition to the above mentioned compensation the reporter is entitled to the copyright of his volumes.

2. *Sessions or Terms of the Supreme Court.*

The act of June 17, 1844, ch. 96 (5 Stat. at Large, 676), fixed the first Monday of December as the day on which the annual session of the court should commence. But the act of July 23, 1866, ch. 210 (14 Stat. at Large, 209), reorganizing the court, only requires, in general terms, that the court "shall hold

[1] Act of May 21, 1866, ch. 88; 14 Stat. at Large, 51.

[2] Act of August 29, 1842, ch. 264; 5 Stat. at Large, 545.

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[1] Act of June 17, 1844, ch. 96; 5 Stat. at Large, 676. Whenever by reason of contagious sickness it shall, in the opinion of the chief justice, or, in the case of his death or disability, of the senior associate justice, be hazardous for the court to sit in Washington, he is authorized to direct its adjournment to some other place. The same authority is also given to the district judges to adjourn the district or circuit courts. Act of Feb. 25, 1799, ch. 12; 1 Stat. at Large, 619.

[2] Act of Jan. 21, 1829, ch. 12; 4 Stat. at Large, 332.

[3] Act of April 29, 1802, ch. 31; 2 Stat. at Large, 156.

CHAPTER III.

OF THE ORIGINAL JURISDICTION OF THE SUPREME COURT.

Constitutional definition.

In defining the original jurisdiction of the supreme court, the constitution designates two, and only two, descriptions of cases to which it shall extend; 1, cases affecting ambassadors, other public ministers and consuls; and 2, cases in which a state shall be a party. And with respect to all the other enumerated cases embraced by the judicial power, it is declared that, of these the supreme court "shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as congress shall make." Article 3, section 2. But in the organic act, congress saw fit not only to exercise the discretionary authority thus expressly given with respect to the appellate jurisdiction of the supreme court, but to deal, also, with its original jurisdiction conferred without any qualification. This was done chiefly by the thirteenth and fourteenth sections of the act, as follows:

As defined by the judiciary act.

"Sec. 13. *And be it further enacted*, That the supreme court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except, also, between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction; and shall have exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul or vice-consul is a party; and the trial of issues of fact in the supreme court, in all actions at law against citizens of the United States, shall be by jury. The supreme court shall also have appellate jurisdiction from the

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circuit courts and courts of the several states, in cases hereinafter specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and marine jurisdiction, and writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under authority of the United States.

"SEC. 14. *And be it further enacted*, That all the beforementioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as the judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of inquiry into the cause of commitment. *Provided*, that writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless they are in custody, under or by color of authority of the United States, or are committed for trial before some court of the same, or are brought into court to testify."[1]

By the 30th section of the same act the power of the courts of the United States to grant a "*dedimus potestatem* to take depositions according to common usage, where it may be necessary to prevent a failure or delay of justice," is expressly recognized. The foregoing are all the writs which the courts of the United States are, by the organic act, expressly empowered, by name, to issue.

Writs not named.

With respect to the authority of these courts conferred by the 64th section of the act to issue "all other writs * * * which may be necessary for the exercise of their respective jurisdictions, and agreea-

[1] This section is inserted here because it purports to confer *original* jurisdiction upon the supreme court in common and co-extensive with that conferred on the circuit and district courts; although, as we shall see in the sequel, it was in this particular not warranted by the constitution. See *post*, chapter v.

ble to the principles and usages of law," Chief Justice Marshall, on the trial of Burr, took occasion to observe, that the principles and usages here referred to meant those general principles and usages which are to be found, not in the legislative acts of any particular state, but in that generally recognized and long established law, which forms the substratum of the laws of every state. This authority was doubtless designed to comprise the *capias*, *subpœna*, *venire facias*, *fieri facias*, *capias ad satisfaciendum*, *quo warranto*, attachment, *certiorari*, injunction, *ne exeat*, writ of error and warrant of arrest, in familiar use in the English courts, for the institution of suits at law, and in equity, and in criminal prosecutions, and for the conducting of such suits and prosecutions to their consummation.

Some of these writs have been made the subject of legislative regulation. Thus, by an act "in addition to the" judiciary act, passed March 2, 1793, ch. 22, § 5, it is enacted "that writs of *ne exeat* and of injunction may be granted by any judge of the supreme court in cases where they might be granted by the supreme or circuit court;[1] but no writ of *ne exeat* shall be granted unless a suit in equity be commenced, and satisfactory proof shall be made to the court or judge granting the same, that the defendant designs quickly to depart from the United States; nor shall a writ of injunction be granted to stay proceedings in any court of a state; nor shall such writ be granted in any case without reasonable previous notice to the adverse party, or his attorney, of the time and place of moving for the same." There are

Ne exeat.

Injunctions.

[1] The power to issue writs of injunction has since been conferred on the district judges (see *post*, "Jurisdiction of the District Courts") but not to issue the writ of *ne exeat:* and so it was held in *Gernon* v. *Boccaline*, 2 Wash. C. C. Rep., 130.

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enactments relative to other forms of process which will be noticed in their proper places in the sequel.

New trials, &c.

The courts of the United States are also by this act expressly empowered to "grant *new trials*, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in courts of law, and to impose and administer all necessary *oaths or affirmations*, and to punish by fine or imprisonment, at the discretion of the said courts, all *contempts* of authority in any cause or hearing before the same; and to make and establish all necessary *rules* for the orderly conducting of business in the said courts, provided such rules are not repugnant to the laws of the United States."[1]

Contempts.

By a subsequent act, the power to inflict punishment for contempt has been limited and defined, and it has been declared an offense punishable by indictment, to interfere, corruptly or forcibly, with the administration of justice. The enactment is as follows:

"Sec. 1. That the powers of the several courts of the United States to issue attachments and inflict summary punishment for contempts of court, shall not be construed to extend to any cases, except the misbehavior of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the said courts in their official transactions, or the disobedience or resistance by any officer of the said courts, party, juror or witness, or any other person or persons to any lawful writ, process, order, rule, decree, or command of the said courts.

"Sec. 2. That if any person or persons shall corruptly, or by threats of force, endeavor to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty, or shall, corruptly, or by threats or force, obstruct or impede, or endeavor to

[1] Act of 24th Sept., 1789, ch. 20 (1 Stat. at Large, 73).

obstruct or impede, the due administration of justice therein, every person or person so offending shall be liable to prosecution therefor, by indictment, and shall, on conviction thereof, be punished by fine, not exceeding five hundred dollars, or by imprisonment, not exceeding three months, or both, according to the nature or aggravation of the offense."[1]

Rules.

The power of making *rules*, has been more fully and explicitly granted by the act of March 2, 1793, by which it declared to "be lawful, for the several courts of the United States, from time to time, as occasion may require, to make rules and orders for their respective courts, directing the return of writs and process, the filing of declarations, and other pleadings, the taking of rules, the entering and making up judgments by default, and other matters in the vacation; and otherwise, in a manner not repugnant to the laws of the United States, to regulate the practice of the said courts respectively, as shall be fit and necessary for the advancement of justice, and especially to that end to prevent delays in proceedings."[2]

Security of the peace.

By an act passed July 16, 1798, ch. 83, 1 Stat. at Large, 608, it is also enacted that the *judges* of the supreme court and of the several district courts shall, respectively, have the like power and authority *to hold to security of the peace and for good behavior*, in cases arising under the constitution and laws of the United States, as may or can be lawfully exercised by any judge or justice of the peace of the respective states, in cases cognizable before them."

Search warrants.

And by the act of July 13, 1866, ch. 184: 14 Stat. at Large, 152, the justices of the supreme court as

[1] Act of March 2, 1831, ch. 99 (4 Stat. at Large, 487).

[2] Act of March 2, 1793, ch. 22 (1 Stat. at Large, 333). As to the authority of the supreme court to prescribe rules of procedure for the circuit and district court, see, *post*, "Practice of the Circuit and District Courts."

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judges of the circuit court are empowered, within their respective circuits, to issue search warrants authorizing any internal revenue officer to search any premises, if such officer shall make oath in writing that he has reason to believe, and does believe, that a fraud upon the revenue has been or is being committed upon or by the use of such premises.[1]

Laws of the state to be rules of decision.

The 34th section of the judiciary act of 1789, enacts "that the laws of the several states, except where the constitution treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Upon the organization of the supreme court the important and delicate duty devolved upon it of determining and clearly defining the limits, not only of the jurisdiction of the circuit and district courts, but also of its own. Questions of this nature, as they arose from time to time, were almost invariably very elaborately argued by lawyers of great ability, and thoroughly canvassed by the court. Certain fundamental principles were thus early established which have long since come to be regarded as indisputable landmarks.

Congress has no power to extend the original jurisdiction of the supreme court, and an act for that purpose may be declared void.

1. Among the early cases here alluded to, is that of *Marbury* v. *Madison*.[2] The case was one of grave importance, for it imposed upon the court the duty of deciding upon its competency to pass upon the constitutionality of an act of congress; and on arriving at the conclusion that it possessed the power, the *duty* also of exercising it by pronouncing the enactment brought into question invalid. Mr. Marbury had been appointed a justice of the peace in the

[1] This act confers the same power also on the district judges and on the commissioners.

[2] 1 Cranch, 137.

District of Columbia, and his commission, signed by the president, but not yet sealed, was withheld from him by Mr. Madison, secretary of state. One of the powers of the supreme court, specified, as we have seen, in the thirteenth section of the judicial act, is that of issuing writs of mandamus to persons holding office under the authority of the United States; and Mr. Marbury, deeming himself agrieved, applied to the court to issue a writ of mandamus to Mr. Madison, requiring him to deliver the commission. The case was one arising under the constitution and laws of the United States, and one, therefore, to which the judicial power of the United States extended; but did the particular power invoked belong to the supreme court? Congress had assumed to confer it; but was the enactment warranted by the constitution? To issue the writ in such a case would be essentially the same as to entertain an original suit for the paper, and would, therefore, be the exercise, not of an *appellate*, but of *original* jurisdiction; the true criterion of appellate jurisdiction being, that it revises and corrects the proceedings in a cause already instituted, and does not create the cause. But the framers of the constitution thought proper to designate the cases over which the court should be invested with the original jurisdiction, and to declare that, in all others to which the judicial power extended, its jurisdiction should be appellate; and this affirmative grant of original jurisdiction implied a negative upon its exercise in any other case. For these reasons the court held that congress, in assuming to confer the jurisdiction in question, had transcended the limits of its own authority; and the motion was, accordingly, denied for want of jurisdiction. And in accordance with this principle the enactment contained in the 13th section of the act of June 30, 1864, ch. 164 (13 Stat. at Large, 311), authorizing the

The provision of the 13th section purporting to confer the power to issue a mandamus to "persons holding office," &c., as an act of original jurisdiction, is therefore *void*.

And so of an act permitting the *transfer* of a cause from a circuit court to the supreme court

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transfer of causes, *pendente lite*, from a circuit court to the supreme court, was held to be unwarranted by the constitution and consequently void. *The Alicia*, 7 Wallace, 571.

And so of the writ of *habeas corpus*.

The same consequence follows with respect to the power conferred in general terms by the 14th section upon the supreme court in common with the circuit and district courts, to issue the writ of *habeas corpus*. The power can be exerted by the supreme court as an act of original jurisdiction in those cases only to which this branch of its jurisdiction is, by the constitution, declared to extend: and so it was held on the application of an alien for a writ of *habeas corpus* for the purpose of obtaining possession of his infant daughter. As an alien, he had a right to sue in a court of the United States; but not being an ambassador, or other public minister, or consul, the original jurisdiction of the supreme court did not extend to his case, and the application was denied on this ground.[1] Hence results the anomaly that while the power to issue writs of *habeas corpus*, as an exercise of original jurisdiction, may be constitutionally conferred on the several justices of that court individually, it cannot be conferred on the court itself.

But the power given to issue them may be exercised as an appellate power.

2. But in the case of *Marbury* v. *Madison* another important principle was laid down. It was held that when a statute purports to confer on the supreme court a power not within the scope of its original jurisdiction as defined by the constitution, but which admits of application as an appellate power, it may be exercised as such in conformity with the regulations prescribed by law concerning this branch of the jurisdiction of the supreme court. Had *Barry*, for example, previously applied to a circuit court, the decision of that court would have been subject to

[1] *Ex parte Barry*, 2 Howard's R., 65.

review by the supreme court, provided the matter in dispute appeared to be of sufficient value.[1]

The authority conferred on the supreme court to issue the writs of *mandamus* and *habeas corpus* must, therefore, be classed with its appellate powers, except when invoked in cases affecting ambassadors, other public ministers, or consuls; or in cases in which a state is a party.

WRIT OF PROHIBITION.

The power conferred by 13th section of the judiciary act to "issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction," though to some extent *sui generis* must be regarded as belonging to the same category.

JURISDICTION OF SUITS AGAINST A STATE CONTESTED AND MAINTAINED.

3. Notwithstanding the express delegation to the supreme court, by the constitution, of original jurisdiction in all cases in which a state shall be a party, the power of that court to entertain original jurisdiction of suits of any discription *against* a state, has been repeatedly and very earnestly contested, on the ground that congress had prescribed no sufficient rules of procedure adapted to the nature of the case, and that the court possessed no adequate means of enforcing its judgments. The question was very elaborately examined by the court in the early case of *Chisholm* v. *The State of Georgia* (2 Dallas, 419), and the above mentioned objections (Mr. Justice IREDELL dissenting), were decided to be invalid. In *The State of Rhode Island* v. *The State of Massachusetts* (12 Peters, 657), which was a suit in equity, brought to ascertain and establish the boundary between the states, the jurisdiction was strenuously contested on the part of Massachusetts, not only on the above mentioned grounds, but also on the ground that the matter in controversy, pertaining, as it did, to the rights of sovereignty of the respective parties,

[1] *Barry* v. *Mercein*, 5 Howard's R., 103.

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was not in its nature a subject for *judicial* cognizance; in other words, that the question presented for decision was a *political* and not a judicial question. The court, in a very elaborate and able opinion delivered by Mr. Justice BALDWIN, sustained its jurisdiction over the case. Chief Justice TANEY, however, dissented from the opinion of the court, on the ground last above indicated, viz., that this was a contest for rights of sovereignty and jurisdiction, and therefore not a fit subject for judicial cognizance and control. Mr. Justice BARBOUR concurred in the decision, but desired to be understood as not adopting all the reasoning by which the court had arrived at its conclusion. Mr. Justice STORY did not sit in the case.

A state may be sued by a foreign state.

4. One of the descriptions of cases to which, as we have seen, the original jurisdiction of the supreme court is declared by the constitution to extend, is that in which a state is sued by a *foreign state.*

But cannot be sued by an Indian nation.

The only case in which this branch of jurisdiction is known to have been invoked, is that of *The Cherokee Nation of Indians* v. *The State of Georgia* (5 Peters, 1). But it was decided (Mr. Justice THOMPSON and Mr. Justice STORY dissenting), that the Cherokees were not a foreign state in the sense in which the term is used in the constitution, and that they were therefore incompetent to maintain their suit in that character. It was admitted that they were a *state*, having been uniformly recognized by the government of the United States as a people capable of maintaining the relations of peace and war; of being responsible in their political character for the violation of their engagements, and for aggressions committed on the citizens of the United States by individuals of their community. But it was denied that they were a *foreign* state; the condition of the Indians in relation to the United States being *sui generis*,

and such as to constitute them rather domestic dependent nations than foreign nations.

The state must be the real party.

5. In order to enable the supreme court to entertain jurisdiction of a cause upon the ground *that a state is a party*, it is not sufficient that a state may be consequentially affected; but a state must be a party in fact, if not in name, at least substantially. *Fowler et al. Lindsey et al.*, 3 Dallas, 411. See also 4 Dallas, 3, and 1 Peters, 121.

Whether congress had power to declare the original jurisdiction of the supreme court concurrent.

6. We have seen that by the thirteenth section of the judicial act, congress saw fit further to enact that the original jurisdiction conferred by the constitution on the supreme court should be in part *exclusive*, and in part *concurrent;* and the constitutionality of this part of the section also has been several times drawn into question with respect to the branch of this jurisdiction comprising those cases in which ambassadors, other foreign ministers, or consuls, are parties, and thus indirectly, with respect also to the other branch embracing cases in which a state is a party.

In *The United States* v. *Ravara* (2 Dallas, 297), in the circuit court for the district of Pennsylvania, upon motion to quash an indictment against a consul for want of jurisdiction, it was held that the grant, by the constitution to the supreme court of original jurisdiction, did not preclude congress from vesting a concurrent jurisdiction in other courts over the same causes.

On the other hand this decision has been considered as seriously impugned by the case of *Marbury* v. *Madison*, above referred to. (1 Cranch, 137.) See also 5 Serg. and Rawle, 545. It is to be observed, however, that this was not a point in judgment in case of *Marbury* v. *Madison*, and that the same great judge who pronounced the decision, has since, in the case of *Cohens* v. *Virginia* (6 Wheaton, 264), strongly inculcated caution in the application of his

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powerful but somewhat discursive reasoning in that case.

In *The United States* v. *Ortega* (11 Wheat., 467), this was treated and left by the supreme court, as still an open question. But in the recent case of *The State of Pennsylvania* v. *The Wheeling and Belmont Bridge Company et al.* (13 Howard, 516), originally prosecuted in the supreme court, it is incidentally asserted in the most explicit terms, both by Mr. Justice McLEAN in delivering the opinion of the court, and by Chief Justice TANEY in his dissenting opinion, that the suit might have been instituted in the circuit court for the western district of Virginia.

Suit in equity by a state for the removal of obstruction to navigation of a river held maintainable.

7. In the case last cited, which was a suit in equity prosecuted originally in the supreme court, the important question arose whether the judicial power of the United States extended to the case of an alleged nuisance consisting in the obstruction, by the erection of a bridge, of a free navigable river expressly recognized as such by congress. The case was held to be within the jurisdiction of the court, mainly on the ground that the only limitation to the equity jurisdiction of the courts of the United States, where the parties are competent, and the amount in controversy is sufficient, is that imposed by the 16th section of the judiciary act, viz.: "That suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law;" and that the case in question was one, in its nature, falling within the scope of equity jurisdiction, according to the usage and practice of the high court of chancery of England. Chief Justice TANEY and Mr. Justice DANIEL dissented from the decision.

The court cannot take cognizance of political questions.

8. The court cannot take upon itself the decision of *political questions;* and on this ground a bill in equity brought by a state asking an injunction to

restrain officers who represent the executive authority of the United States, from carrying into effect certain acts of congress, the enforcement of which, it was alleged, would annul and totally abolish the existing state government of the state, and establish another different one in its place, was held not to be within the jurisdiction of the court. *The State of Georgia* v. *Stanton*, 6 Wallace, 50.

CHAPTER IV.

OF THE APPELLATE JURISDICTION OF THE SUPREME COURT FROM THE CIRCUIT COURTS, BY WRIT OF ERROR AND APPEAL; AND FROM THE STATE COURTS BY WRIT OF ERROR.

Legislative acts.

We have seen[1] that by the thirteenth section of the judicial act it is declared, in general terms, that "the supreme court shall also have appellate jurisdiction from the circuit courts and courts of the several states in the cases hereinafter provided for."

The reference here is to the twenty-second section of the act which defines the appellate jurisdiction of the court from the circuit courts; and to the twenty-fifth section which defines this jurisdiction from the state courts. The provisions of these sections, except those parts of the former which will find a more suitable place in the subsequent parts of this work, now require attention, together with some subsequent enactments modifying and extending them. The 22d section declares that "final judgments and decrees in a *circuit court*, in civil actions and suits in equity," may be re-examined and reversed or affirmed in the supreme court, upon writ of error, which has been,

[1] *Ante*, 13.

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1. Brought there by original process (*i. e.*, originally instituted there); or,

2. Removed there from the courts of the several states;[1] or,

3. Removed there by *appeal* from a district court, provided the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs.

Under this provision, it will be observed, the mode of removal, *whatever might be the nature of the suit*, was by *writ of error;* and so it was held in the case of *Blain* v. *Ship Charles Carter*, 4 Dall., 22.

Appeal instead of writ of error in suits in equity and admiralty.

But this was subsequently altered, and the appellate power of the supreme court also extended, by the act of March 3, 1803, by which an *appeal* to the supreme court was given instead of a writ of error, "from all final judgments or decrees rendered, or to be rendered, in any circuit court, or in any district court acting as a circuit court, in any cases of *equity*, of *admiralty and maritime jurisdiction*, and of *prize or no prize*, where the matter in dispute, exclusive of costs, shall exceed the sum or value of two thousand dollars;"[2] and so it was held in the case of the *San Pedro*, 2 Wheat., 132.

Appellate jurisdiction extended to suits by U. S. to enforce revenue laws, whatever be the amount in controversy.

Experience having demonstrated that causes arising under the revenue laws directly involving only trifling sums, nevertheless sometimes involved questions of considerable importance affecting the public revenue, an act was at length passed providing "that final judgments in any circuit court of the United States, in any civil action brought by the United States for the enforcement of the revenue laws of the United States, or for the collection of duties due on any merchandise imported therein, may be examined,

[1] These cases are designated by the 12th section and several subsequent acts, and will be noticed in treating of the jurisdiction of the circuit court.

[2] Ch. 40: 2 Stat. at Large, 244.

and reversed or affirmed in the supreme court of the United States, upon writ of error, as in other cases, *without regard to the amount in controversy* in such action, at the instance of either party;"[1] and the phrase "revenue laws" in this enactment has been held to embrace an act of congress prescribing the rates of postage for the conveyance of letters by mail, and providing for the punishment of frauds on the revenue of the post-office department; and a writ of error to the supreme court was accordingly adjudged to lie to reverse the judgment of a circuit court in an action of debt for a penalty of less than two thousand dollars accruing under the act of March 3, 1845.[2] *The United* v. *States Bromley*, 12 Howard, 88.

Extended in like manner to suits against collectors, &c.

The act of 1844, just above cited, it will be noticed, is restricted to actions brought by the United States; but a practice having ensued of suing the collectors of revenue to recover back duties alleged to have been unlawfully exacted, the act of March 27, 1868, ch. 34 (15 Stat. at Large, 44), was at length passed, giving a writ of error to the parties in snch actions also. It enacts "That final judgments in any circuit court of the United States in any civil action against a collector or other officer of the revenue, for any act done by him in the performance of his official duty, or for the recovery of any money exacted by or paid to him, which shall have been paid into the treasury of the United States, may, at the instance of either party, may be re-examined and reversed or affirmed in the supreme court of the United States, upon writ of error, without regard to the sum or value in controversy."

The second and only remaining section of the act repeals so much of the act of February 5, 1867, ch. 28 (14 Stat. at Large, 385), as authorizes appeals

[1] Act of May 31, 1844, ch. 31: 5 Stat. at Large, 658.

[2] Ch. 42: id., 782.

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from the judgments of the circuit court to the supreme court.

Also to patent and copyright cases.

For similar reasons congress has seen fit to enact:

"That from all judgments and decrees of any circuit court rendered in any action, suit, controversy or case, at law or in equity, arising under any law of the United States granting or confirming to authors the exclusive right to their respective writings, or to inventors their exclusive right to their inventions or discoveries, a writ of error or appeal, as the case may require, shall lie, at the instance of either party, to the supreme court of the United States, in the same manner and under the same circumstances as is now provided by law in other judgments and decrees of such circuit courts, without regard to the sum or value in controversy in the action."[1]

Upon the provision of the judicial act above referred to giving a writ of error to the supreme court from the final decisions of the circuit courts on "*appeal*" from the district courts, the nice question arose at an early period, whether the term *appeal* was there used in its general sense, as descriptive of appellate jurisdiction without regard to the particular mode, by which a cause is transmitted to that jurisdiction, or in its ordinary technical sense, expressive of the civil law mode of removal, as contradistinguished from the common law process of writ of error. The latter was held to be its true sense. *The United States* v. *Goodwin*, 7 Cranch, 108; *The United States* v. *Gordon et al.*, id., 387; *The United States* v. *Ten Broeck*, 2 Wheat., 248; *The United States* v. *Barker*, id., 395.

Extended to cases brought to circuit court by writ of error or appeal from district court.

From this construction it followed, therefore, that no judgment of a circuit court, in a case brought before it by a *writ of error*, from a district court,

[1] Act of Feb. 18, 1861, ch. 37: 12 Stat. at Large, 130. This act enlarges and supersedes the prior act of July 4, 1856, conferring the like privilege, somewhat qualified, in patent cases.

could be re-examined in the supreme court. This arbitrary distinction continued until it was abolished by the act of July 4, 1840, by which it is enacted, "that writs of error shall lie to the supreme court from all judgments of a circuit court, in cases brought there by writs of error from the district court, in like manner and under the same regulations, limitations and restrictions, as are now provided by law for writs of error to judgments rendered upon suits originally brought in the circuit court."[1]

Appeals in prize causes to be direct from district court to supreme court, &c.

By the act of June 30, 1864, ch. 174: (13 Stat. at Large, 310,) appeals in prize causes from the district courts are to be made directly to the supreme court, and made within thirty days, unless for cause shown the time for appeal shall have been extended by the court. Such appeals may be claimed in all cases where the amount in controversy exceeds two thousand dollars, and in other cases on the certificate of the district judge that the adjudication involves a question of difficulty and general importance.

From court of claims, in all cases of decisions adverse to U. S.

And by the act of June 25, 1868, ch. 71: 15 Stat. at Large, 75, an appeal is given from all final decisions of the *court of claims* adverse to the United States.[2]

[1] Ch. 44: 5 Stat. at Large, 393. Particular district courts have, from time to time, been invested with the original jurisdiction of a circuit court, and from their judgments and decrees a writ of error or appeal has been declared to lie to the supreme court, as from those of a circuit court; and in each of the organized Territories of the United States, there are district courts and a supreme court, and from the final decisions of the latter, writs of error and appeals are given to the supreme court of the United States. These branches of jurisdiction will receive a separate notice in the sequel.

[2] In the District of Columbia, the court originally established by congress therein, bearing the name of circuit court, was abolished by an act passed March 3, 1863, and in lieu of it a new court was, by the same act, established, under the name of Supreme Court of the District of Columbia, modeled essentially after the state supreme courts for the several judicial districts of New York. It consists of "four justices,

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WRIT OF ERROR TO STATE COURTS.

After a lapse of nearly eighty years the venerable 25th section of the judicial act, holding so prominent a place in the history of American jurisprudence, was (except its last clause) supplanted by an act passed February 5, 1867, ch. 28: 14 Stat. at Large, 385. The new enactment is as follows:

"Sec. 2. *And be it further enacted,* That a final judgment or decree in any suit in the highest court of the State in which a decision in the suit could be had, 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 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 their validity, or where any title, right, privilege, or immunity is claimed under the constitution, or any treaty or statute of, or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity set up or claimed by either party under such constitution, treaty, statute, commission or authority, may be reversed or affirmed in the Supreme Court of the United States, upon a writ of error, the citation being signed by the chief justice, or judge, or

one of whom shall be denominated as chief justice." They are required to hold general terms, for which purpose three constitute a quorum, and special terms to be held by one of them. For exact information relative to the organization and jurisdiction of this court, I refer the reader to the act itself. See 12 Stat. at Large, 762. Its final judgments, orders and decrees are subject to review by the supreme court of the United States, "upon writ of error or appeal, in the same cases and in the like manner as is now provided by law in reference to the final judgments, orders and decrees of the circuit court of the United States for the District of Columbia." The reference here is to the act of February 27, 1801, ch, 15: 2 Stat. at Large, 103, giving a right of appeal and writ of error when the matter in dispute exceeded $100; and to an amendatory act of April 2, 1816, ch. 39: 3 Stat. at Large, 261, substituting $1,000 in lieu of $100, unless one of the justices of the supreme court shall, for special prescribed reasons, upon petition by a suitor, otherwise order.

the chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the supreme court of the United States, in the same manner, and under the same regulations, and the writ shall have same effect, as if the judgment or decree complained of had been rendered or passed in a court of the United States; and the proceedings upon the reversal shall also be the same, except that the supreme court may, at their discretion, proceed to a final decision of the same, and award execution, or remand the same to an inferior court. This act shall not apply to the case of any person who is or may be held in custody of the military authorities of the United States, charged with any military offense, or with having aided or abetted rebellion against the government of the United States, prior to the passage of this act."

Except by the addition of its concluding provisory clause, this latter act differs little from the former except in omitting its last clause in the following words: "But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties, commissions, or authorities in dispute." The new act does not in terms repeal the old, and there being no irreconcilable inconsistency between the former and the omitted clause of the latter, the clause is doubtless to be regarded as still in force. The purpose of the new act appears to have been, 1, to exclude any limitation which might be supposed to be implied by the words "or where is drawn in question the *construction of any clause* of the constitution" &c., and thus to give to this great conservative enactment a freer and more unquestionable scope, in strict accordance, however, with its original policy; and, 2, to empower the supreme court at its discretion, "to proceed to a final decision" of the cause, "and award execution or

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remand the same to an inferior tribunal," without having once already fruitlessly remanded the cause to the state court. The phrase of "an inferior court," not in the original act, seems, however, unnecessary and ill-chosen. It will be noticed also that the word "construction," omitted in the new enactment occurs again in the last clause, retained, of the 25th section; but its restrictive import will doubtless be held to be neutralized by its omission in reconstructing the more vital part of the section.

The learned reader, I trust, will see that there is nothing in these changes of the original act which affects the applicability or importance of the judicial dicisions enumerated in the sequel relative to the 25th section of the judicial act; and to avoid unnecessary circumlocution no change of phraseology will be made in the few instances in which the enactment is designated under the familiar name of the 25th section.

The power conferred on the supreme court by the judiciary act to issue the writs of prohibition and mandamus has been left undisturbed by any additional legislation. The authority to issue the writ of *habeas corpus*, on the contrary, has been largely extended and accurately defined. The power to issue it except to a very limited extent, being vested primarily, not in the supreme court, but in its judges individually, and in the judges of the district court, this is not the place for its further consideration. Its nature and importance entitle it to a separate chapter. The writs of prohibition and mandamus will be disposed of in this chapter.

Judicial decisions.

The foregoing legislative acts have given rise to endless forensic disputation, a considerable proportion of which seems referable to want of due attention to their provisions, and to antecedent adjudica-

tions.[1] It is now proposed to state and illustrate the judicial interpretations which these acts have received; and in doing so, to treat, conjointly, of the jurisdiction they confer, with respect to the national courts and to the state courts. Many of the decisions, especially those relating to the finality of judgments and decrees, are applicable alike to both. Little would be gained by an attempt to sever them, and it would unavoidably lead to prolixity and repetition.

Appellate jurisdiction can be exercised only in pursuance of legislative authority.

1. As shown in the last chapter, the constitution, after defining the original jurisdiction of the supreme court, proceeds to ordain that in all the other cases comprised within the judicial power of the United States, this court shall have appellate jurisdiction "*with such exceptions and under such regulations as congress shall make.*" And we have now seen that congress did not see fit, in pursuance of this discretionary power, expressly to limit the appellate jurisdiction of the court, by forbidding its exercise in certain specified cases; but on the contrary, chose simply to designate the cases to which it *should* extend. This omission to make "exceptions" by negative or restrictive words, gave rise to the question whether the court might not entertain jurisdiction of other cases, in virtue of the authority conferred by the constitution. But the reverse of this was held in the early case of *Wiscart* v. *Dauchy* (3 Dallas, 321); and the same result was, a few years later, more fully reasoned out by Chief Justice MARSHALL, in pronouncing the decision of the court in *Durouseau* v. *The United States*, 6 Cranch, 307.

The question, therefore, in any given case, whether the court possesses appellate jurisdiction over it,

[1] This is especially true of the 25th section of the judicial act. It is wonderful to what misapprehensions it has led, and how often the supreme court has been called upon to decide over again what had already been virtually decided.

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resolves itself into the simple inquiry whether such case falls within the legislative provisions enacted in pursuance of the constitution relative to the exercise of this branch of jurisdiction. If congress have provided no rule of proceeding applicable to the case, either in express terms, or inferentially by fair intendment, no cognizance can be taken of it. It is not, however, to be understood by this that the appellate powers of the supreme court *are given to it* by the judicial act. They are given by the constitution. And had this act merely organized the court, without defining or limiting its jurisdiction, it must have been considered as possessing all the jurisdiction which the constitution assigns it. In that case, the legislature, by omitting to exercise the right of excepting from its constitutional powers, would necessarily have left those powers undiminished. The doctrine of the cases above cited results from the fact that congress, in proceeding to carry this part of the constitution into effect, has provided extensively for the exercise of this branch of jurisdiction; and is, therefore, to be understood as having intended to execute the power it possessed of *making exceptions.* For though it has not made those exceptions in terms, yet the affirmative discription of the appellate power of the court implies a negative upon the exercise of such constitutional appellate power as is not comprehended within it. See also, in illustration of this principle, the case of *Clarke* v. *Bazadone* (1 Cranch, 212), in which it was held that a writ of error did not lie to the supreme court from a court of the United States for the territory northwest of the Ohio, because it had not been authorized by congress.

Does not extend to criminal cases.

2. In conformity with this principle, it has been decided that the supreme court possesses no appellate jurisdiction in any form, *from the circuit courts in criminal cases;* no such power having been con-

fided to it by congress. *United States* v. *Moore*, 3 Cranch, 159; *ex parte Kearney*, 7 Wheat., 38; *ex parte Watkins*, 3 Peters, 193.[1]

From the judgments of state courts.

3. In *Martin* v. *Hunter* (1 Wheat., 304), the constitutionality of the 25th section of the judicial act, providing for the re-examination by the supreme court in certain cases of *the judgments of state courts*, was strenuously drawn in question by the counsel for the defendant in error, upon the ground that the appellate power of the court was, according to the true construction of the constitution, limited to proceedings in the inferior *national* judicatories. But the validity of the law was most elaborately and ably vindicated, and fully maintained by the supreme court.

25th section held constitutional.

The appellate jurisdiction of the court, in this form, had before, as it has since, been repeatedly exercised, and is now, especially after the ample and explicit confirmation of it in *Cohens* v. *Virginia* (6 Wheat., 264), to be regarded as definitely settled.

It matters not though a state be a party.

4. In this last mentioned case of *Cohens* v. *Virginia*, it was also decided, that the circumstance of a *state being a party* (this case being a criminal prosecution against a citizen of Virginia for a violation of a law of that state), constituted no objection to the exercise of this appellate jurisdiction; the validity of a statute of a state being drawn in question on the ground of its repugnancy to a law of the United States, and the decision having been in favor of its validity; and no exception of cases of this discription having been made by congress.

In this case the whole subject of the judicial

[1] The power exercised by the supreme court in cases brought before it from the circuit courts, by certificates of opinions opposed, and which extends as well to criminal as to civil cases, is *sui generis*, being advisory rather than appellate.

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authority of the Union over the state judicatories, was canvassed by the chief justice in a most masterly and instructive manner.

May be extended to cases of original jurisdiction.

It is proper here also, somewhat more explicitly to add, that although the supreme court can exercise *original* jurisdiction only in those two descriptions of cases in which it has in terms been confided to it by the constitution, and, although it is declared by the constitution that in all the *other* cases, it shall have *appellate* jurisdiction, yet that there is no constitutional restraint upon its exercise of *appellate* jurisdiction in *any* case to which the judicial power of the United States extends, though it should be a case falling within its original jurisdiction. *Cohens* v. *Virginia*, 6 Wheat., 264.

What judgments are final.

5. By the judicial act, as already shown, it is only the *final* judgments and decrees of the courts of the states, and of the circuit courts of the United States, which are subject to re-examination in the supreme court.

In reference to this limitation it has been determined, that a writ of error[1] will not lie from a decree in a circuit court upon a bill in equity, overruling a plea, and ordering the defendant to answer the bill. *Rutherford* v. *Fisher*, 4 Dallas, 22. Nor does an appeal lie from an interlocutory decree dissolving an injunction. *Young* v. *Grundy*, 6 Cranch, 51. Nor from a decree affirming a decretal order of an inferior court, refusing to dissolve an injunction. *Gibbons* v. *Ogden*, 6 Wheat., 448. A decree in chancery directing a further inquiry as to matter of law or fact is not final. To warrant an appeal it must finally decide and dispose of the whole merits of the cause, so that it will not be necessary to bring the cause again before the court for its final decision. *Beebe et al.* v.

Must determine the whole merits.

[1] This was before the substitution of an *appeal* instead of a writ of error in cases in equity.

Russell, 19 Howard, 283. In this case the rule was fully discussed, and, as therein laid down, was reasserted in *Farrely* v. *Woodfok*, id., 288; see also *Mordecai* v. *Lindsay*, id., 199. Nor for want of finality, will a writ of error lie to reverse an award of a writ of restitution in an action of ejectment. *Smith's Lessee* v. *Trabue's heirs*, 9 Peters, 4. Nor upon an order of the circuit court quashing an inquisition of damages under the charter of a canal company. *Chesapeake & Ohio Canal Co.* v. *Union Bank*, 8 Peters, 259. But a decree for the sale of mortgaged property, upon a bill to forclose, is a final decree from which an appeal lies to the supreme court. *Ray* v. *Law*, 3 Cranch, 179.

A judgment of the highest court of a State reversing a judgment of an inferior court, and awarding a *venire de novo* is not a final judgment in the sense in which that term is used in the 25th section of the judicial act. *Houston* v. *Moore*, 3 Wheat., 433. Nor a judgment of a court of appeals reversing a judgment of an inferior court, and remanding the cause for further proceedings. *Brown* v. *The Bank of Florida*, 4 Howard 465; *Pepper* v. *Dunlap*, 5 id. 51. In the case of *Martin* v. *Hunter's Lessee* (1 Wheat., 304), the court of appeals of Virginia having declined to obey the mandate of the supreme court of the United States, issued to such state court upon the reversal by the supreme court of a judgment rendered therein, it was held that such refusal was a final judgment, upon which a writ of error would lie.

Judgment or decree final if it determines the particular cause.

In the case of *Weston et al.* v. *The City Council of Charleston* (2 Peters, 449), the defendants, under a general authority by law to tax the property owned and possessed within the city of Charleston, had imposed a tax upon certain property, supposed by the owners to be protected from taxation under the authority of a state, by the constitution and laws of

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What is a suit.

6. But the judgment or decree of the state court must be *in a "suit,"* and the question has arisen what constitutes a suit within the purview of the act. It arose in the case last above cited, and the proceeding in the state court therein described was held to be a suit. The term "suit," say the court, is a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues therein, that remedy which the law affords him. The modes of proceeding may be various, but if a right is litigated between the parties in a court of justice, the proceeding by which the decision of the court is sought, is a suit. The question arose, also, and was elaborately discussed in the case of *Holmes* v. *Jennison et al.* (14 Peters, 540), which came before the court on a writ of error to reverse the judgment of a state court on a writ of *habeas corpus*. Upon the question of jurisdiction the court was equally divided. But the chief justice, in pronouncing his own opinion and that of three of the associate justices, assigned very satisfactory reasons for holding the proceeding to be a suit, and the remaining members of the court founded their conclusions against its jurisdiction mainly on other grounds.[1] And in the subsequent case of *Ableman* v. *Booth* (21 Howard, 506), also a writ of error to reverse the judgment of a state court on a writ of *habeas corpus*, the jurisdiction of the court was unquestioned, and, apparently, not doubted. It is perfectly clear, indeed, that a proceeding on *habeas corpus* is embraced by the interpretation given to the word *suit* in the case of *Weston* v. *The City Council of Charleston*, just above cited.

Jurisdiction under 25th section, how made to appear.

7. *In what manner, or rather with what degree of certainty it must "appear upon the face of the record"* that some one of the points specified in the

[1] See a note upon this case a few pages *post*.

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twenty-fifth section[1] of the judicial act in order to enable the supreme court to revise the judgments and decrees of the state courts, "*was drawn in question*" in the state court, is a question which has often been agitated. By a long series of decisions, however, the following general principle may now be regarded as definitely settled, viz: that it need not appear in terms upon the record that one of these points *in fact* arose and was decided in the required manner; but that it is sufficient, if it is apparent that the case in point of law involved one of the specified questions, and could not have been decided by the state court in the manner it was, unless such question had been virtually passed upon and determined in the required manner. Thus in the case of *Craig et al.* v. *The State of Missouri* (4 Peters, 410), the suit in the state court having, as appeared by the record returned with the writ of error, been upon a promissory note (the declaration being in the usual form, and the plea being the general issue), in which (neither party having required a jury), the court found that the defendant did assume, &c., and that the consideration of the note was "the loan of loan office certificates, loaned by the state at their office at Charleston; which certificates were issued and the loan made in the manner pointed out by an act of the legislature of the said state of Missouri, approved the 27th day of June, 1821, entitled "an act for the establishment of loan offices," and the "act amendatory and supplementary thereto," and that the plaintiff had sustained damages, &c., &c.; for which a judgment was rendered; it was *held*, that it was sufficiently apparent upon the face of the record, that the validity of a statute of the state of Missouri, was drawn in question upon the ground of its being

Unavoidable implication sufficient.

[1] *Vide supra*, 25.

repugnant to that provision of the constitution of the United States, which prohibits the states from emitting bills of credit, and that it presented a case therefore, to which the appellate jurisdiction of the court extended, in virtue of the twenty-fifth section of the judicial act." "The record," say the court, "shows distinctly that this point existed, and that no other did exist; the special statement of the facts made by the court as exhibiting the foundation of its judgment, contains this point and no other. The record shows clearly that the cause did depend and must depend on this point alone. If in such a case the mere omission of the court of Missouri to say in terms, that the act of the legislature was constitutional, withdraws that point from the cause, and must close the judicial eyes of the appellate tribunal upon it, nothing can be more obvious than that the provisions of the constitution and of an act of congress, may be always evaded; and may be often, as we think they would be in this case, unintentionally defeated." This decision, the court were of opinion, was in strict conformity with their prior decisions upon this section of the judicial act, and they cite the following cases in confirmation of the fact: *Smith* v. *The State of Maryland*, 6 Cranch, 286; *Martin* v. *Hunter's Lessee*, 1 Wheat., 355; *Miller* v. *Nichols*, 4 id., 311; *Williams* v. *Norris*, 11 id., 117; *Wilson et al.* v. *The Blackbird Creek Marsh Company*, 2 Peters, 245; and *Harris* v. *Dennie*, 3 id., 292; see also *Mills* v. *Brown*, 16 id., 525.

But that some one of the questions designated in the 25th section did arise in the state court, and that it was decided in the manner required by the section, must appear on the face of the record, either in express terms or by *necessary intendment.* It is not enough that such question *may* have arisen and *may* have been so decided. *Crowell* v. *Randell*, 10 Peters,

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368; *M'Kinney* v. *Carroll*, 12 id., 66; *Ocean Insurance Company* v. *Polleys*, 13 id., 187; *Coons et al.*, v. *Gallaher et al.*, 15 id., 18. See, also, *Davis* v. *Packard et al.*, 6 id., 41; *S. C.*, 7 id., 276; 8 id., 312; *Wallace* v. *Parker*, id., 680; *Byrne* v. *The State of Missouri*, 8 id., 40; *The City of New Orleans* v. *De Armas et al.*, 9 id., 224; *The Palmyra*, 10 Wheat., 502; *Carter's heirs* v. *Cutting et ux.*, 8 Cranch, 251; *Mason* v. *Mason*, 1 Cranch, 45; *Mills* v. *Brown*, 16 Peters, 525.

Must be shown by the record.

The jurisdiction of the court must appear from the *record per se*, strictly considered. *Fisher* v. *Cockerell*, 5 Peters, 548; *Lessee of Reed* v. *Marsh*, 13 Peters, 153. And therefore the certificate of the clerk of the state court appended to the record, showing what documents were read and relied on at the trial, or on what grounds the case was decided, can have no influence. Ib. See, also, the case of *Armstrong* v. *Treasurer of Athens County*, 16 Peters, 281, where this principle is elaborately reasserted and defined as follows:

"In order to give this court jurisdiction under the 25th section of the act of 1789, it must appear on the record itself, to be one of the cases enumerated in that section: and nothing out of the record certified to this court can be taken into consideration. This must be shown: First, Either by express averment, or by necessary intendment, in the pleadings in the case; or, Secondly, By the direction given by the court, and stated in the exception; or, Thirdly, When the proceeding is according to the law of Louisiana, by the statement of facts, and of the decision, as usually made in such cases, by the court; or, Fourthly, It must be entered on the record of the proceedings in the appellate court, in cases where the record shows that such a point may have arisen and been decided, that it was in fact raised and decided—and this entry must appear to have been made by order of the court, or by the presiding judge, by order of the court, and certified by the clerk, as a part of the record in

the state court; or, Fifthly, In proceedings in equity, it may be stated in the body of the final decree of the state court; or, Sixthly, It must appear from the record that the question was necessarily involved in the decision, and that the state court could not have given the judgment or decree which they passed, without deciding it. We are not aware of any other mode in which the judgment or decree of a state court can lawfully be brought before us; and we have stated them particularly, in order to prevent, in future, the difficulties and discrepancies which have so often arisen on this subject."

See to the like effect, *Commercial Bank of Cincinnati* v. *Buckingham's Executors*, 5 Howard, 317; *Grand Gulf Railroad Company et al.*, v. *Marshall*, 12 Howard, 165; 20 Howard, 26.

Construction of state law, not within the act, unless, &c.

Where it appears from the record that the decision of the state court turned upon the construction of the state law, and that the question of its validity was not raised, the court has no jurisdiction. 12 Howard, 165. See, also, *Gill* v. *Oliver's Executors et al.*, 11 id., 529; *Williams et al.*, v. *Oliver et al.*, 12 id., 111; *Linton et al.* v. *Stanton*, 12 id., 423; *Smith* v. *Hunter et al.*, 7 id., 738; *Udell et al.* v. *Davidson*, id., 769; *Neilson* v. *Lagow*, id., 772; *Mills et al.* v. *The County of St. Clair et al.*, 8 id., 569; *Baltimore and Susquehannah R. R. Co.*, v. *Nesbit et al.*, 10 id. 395; *The State of Maryland* v. *The Baltimore and Ohio R. R. Co.*, 3 id., 534.

The right, &c., denied must be that of the party himself.

To entitle a party to a writ of error on the ground that the decision of the state court was adverse to a title, right, privilege, or exemption, set up or claimed by him in virtue of the constitution, or of a treaty or statute of the United States, it must appear that such title, &c., was claimed as *his*, and not for a third person; and, therefore, where a defendant, in an action of ejectment, set up an outstanding title in a third person, derived from a treaty with an Indian

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tribe, and the decision of the state court was against such title, the case was held not to be embraced by the 25th section of the judiciary act, because the defendant derived his right to set up this form of defense, not from the treaty, but from the laws of the state of Tennessee, by which it was authorized. *Henderson et al.* v. *The State of Tennessee*, 10 Howard, 311.

What constitutes a case arising under the constitution, &c.

8. *What shall be considered as constituting a case arising under the constitution, laws or treaties of the United States* within the import of these terms as used in the constitution, is a question which has several times been brought into discussion in the supreme court.

In the case of *Worcester* v. *The State of Georgia* (6 Peters, 515), the plaintiff in error had been indicted and convicted in a state court of Georgia for residing among the Cherokee Indians without having complied with certain conditions required by an act of the legislature of Georgia. His defense before the state court was, that the law of Georgia under which he was indicted, was repugnant to the treaties between the United States and Georgia, and also to the provisions of the act of Congress of March, 1802, regulating trade and intercourse with the Indian tribes, and was therefore void.

The court considered its jurisdiction over the case too clear for controversy. The indictment and plea drew in question the validity of the treaties relied on by the plaintiff in error, or, at least their construction; and the decision had been, if not against their validity, against the right, privilege, or exemption specially set up or claimed under them." They also drew into question the validity of a statute of the state of Georgia, "on the ground of its being repugnant to the constitution, treaties and laws of the

United States, and the decision had been in favor of its validity."

The case of *Smith* v. *Maryland* (6 Cranch, 286), involved the question, whether the confiscation of the property of British subjects, under a law of the state of Maryland, was complete, before the treaty of peace of 1783, between the United States and Great Britain, so as to render the 6th article of the treaty protecting such property if not actually confiscated, inapplicable to the case: and it was held that the appellate jurisdiction of the supreme court extended to it.

In the case of *Owings* v. *Norwood's Lessee* (5 Cranch, 344), in which the defendant in an action of ejectment set up an outstanding title in a British subject, which he contended was protected by the treaty of 1794, and that the title was therefore out of the plaintiff, it was held that a writ of error would not lie to remove the decision of the state court against the title thus set up. The language of the judiciary act must be restrained by that of the constitution; according to which the case must *arise under a treaty*, &c. But in this case no title was claimed by either party under the treaty, nor could the title of either party be protected by it; it was not a case therefore arising under a treaty.

It is sufficient if the right claimed is protected by a treaty, &c.

But it was further remarked by the court, that wherever a treaty of the United States is drawn in question, whether directly or incidentally; whether a right claimed grows out of, or is protected by, the treaty, the appellate power of the court extends to the case.

In the case of *The City of New Orleans* v. *De Arms et al.* (9 Peters, 224), on a motion to dismiss a writ of error to the state court for want of jurisdiction, it was insisted by the counsel for the defendants in error, that a case could be considered as arising

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In the case of *Wallace* v. *Parker* (6 Peters, 680), on appeal from the supreme court of Ohio, it appearing on the face of the record that there had been drawn in question at the trial, the construction of the act of cession by Virginia; of the resolution of congress accepting the deed of cession; and of the acts of congress prolonging the time for completing the title to lands within the Virginia military reservation (of which the lands in question formed a part); and that the decision of the state court has been against the title set up under the acts of congress, it was held that the supreme court had jurisdiction.

The right must be *dependent on* the constitution, &c.

But the right or title claimed must be one *depending on* the constitution, laws or treaties of the United States. It is not sufficient that it was originally derived from one of these sources, unless the validity of such original grant is drawn into controversy. Thus, in a suit between parties claiming title to lands under separate patents therefor, granted by a state deriving its title thereto from an act of congress, the supreme court has no jurisdiction under the 25th section, to review the judgment of the state court in favor of one of the claimants, both parties admitting

the title of the state, and the act of congress, therefore, not having been drawn in question. *Shaffer* v. *Scuddy*, 19 Howard, 16; see to the like effect, *Mich. RR.* v. *Mich. S. RR. Co.*, id., 379; *Burke* v. *Gaines*, id., 338; *Wyman* v. *Morris*, id., 3.

Denial by state court, of petition for removal within the act.

If a state court deny or disregard a petition for the removal of a cause to the circuit court, and proceed to judgment, and its judgment is affirmed in the highest court of the state, this is a case within the 25th section—the right of removal being given by a law of the United States. *Gordon* v. *Longest*, 16 Peters, 97; *Kanouse* v. *Martin*, 15 Howard, 198.

Alleged repugnancy of state law to state constitution, not within the act.

It has been imagined that the repugnancy of a state law to some restrictive provision of the state constitution, as, for example, a clause forbidding the taking of private property for public use without just compensation, would constitute a case for the exercise by the supreme court, of the jurisdiction conferred by the 25th section of the judiciary act. But the contrary has been repeatedly decided. Nor, in the case supposed, can the court exercise jurisdiction in virtue of the like inhibition contained in the 5th article of the amendments to the constitution of the United States. This is a restraint imposed on congress, not on the state legislatures. *Withers* v. *Buckley*, 2 Howard, 84, citing other cases.

See, also, relative to the subject, *Byrne* v. *The State of Missouri*, 8 Peters, 40; *Crowell* v. *Randell*, 10 Peters, 368; *M'Bride* v. *Hoey*, 11 Peters, 167; *Choteau* v. *Marguerite*, 12 Peters, 107; *The Ocean Insurance Company* v. *Polleys*, 13 Peters, 157.[1]

[1] In the case of *Crowell* v. *Randell*, the antecedent cases relating to this point are reviewed; and in the subsequent case of *Choteau* v. *Marguerite* (12 Peters, 507), the court refer to it as a case in which the law is laid down as they wish it to be universally understood.

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There are other decisions affecting this question, which will be noticed in a subsequent part of this work.[1]

[1] In the case of *George Holmes* v. *Silas H. Jennison, Governor of the State of Vermont, and John Starkweather, Sheriff of the County of Washington,* in the said state, and their successors in office (14 Peters, 540), the plaintiff in error had been arrested in the State of Vermont, on a warrant or order issued by Governor Jennison to Starkweather, setting forth that an indictment had been found by a grand jury of the district of Quebec, in the British Province of Lower Canada, against the said Holmes, for the crime of murder, alleged to have been committed within the district of Quebec, and that as it was fit and expedient that he should be made amenable to the laws of the country where the offense was charged to have been committed, the said Starkweather was commanded to convey the body of the said Holmes to some convenient place on the confines of the State of Vermont, and the Province of Lower Canada, and there deliver him to such persons as might be empowered by the Canadian authorities to receive him; to the end that he might be there dealt with as to law and justice appertained. On the application of Holmes a writ of *habeas corpus* was issued by the supreme court of the State of Vermont, commanding the said Starkweather to bring into court the body of the said Holmes; and in return to this writ the warrant or order of the governor of the state, as above described, was set forth as the cause of the said arrest and detention. Holmes having been brought into court, in obedience to the writ the judgment of the court, on the motion for his discharge, was in the following words: "Wherefore, after a full hearing of the parties, and all and singular the premises aforesaid being seen and fully examined, it is adjudged by the court here that the aforesaid cause of detention and imprisonment of the said George Holmes is good and sufficient in law; and that he be remanded and held accordingly, under the process set forth in the return to this writ of *habeas corpus.*"

For the re-examination of this decision, as a final judgment of the highest court of a state, in a suit in which was drawn in question the validity of an authority exercised under a state, on the ground of such authority being repugnant to the constitution of the United States, and in which the decision was in favor of such validity—a writ of error was brought to the supreme court.

Mr. Van Ness, by whom the case was elaborately and very ably argued for the plaintiff, insisted, first, that the supreme court had jurisdiction of the case; and second, that the State of Vermont had no right or power to deliver up Holmes, such authority belonging, from its nature, to the national government.

Upon the question of jurisdiction, the court was equally divided; the Chief Justice, and Justices STOREY, MCLEAN and WAYNE being of

When the matter in controversy may be said to exceed $2,000.

9. Several decisions have been made with respect to the provision contained in the judicial act of 1789, and contained also in the act of March 3, 1803, limiting writs of error and appeals from the circuit to the supreme court, to cases in which the *matter in controversy exceeds two thousand dollars.*

This affirmative description of cases to which the appellate jurisdiction of the court shall extend, excludes, by implication, all cases not excepted by subsequent laws, in which the matter in dispute does

opinion that the jurisdiction of the court extended to the case; Justices THOMPSON, BALDWIN, BARBOUR and CATRON being of the opposite opinion, and Mr. Justice M'KINLEY being absent. No authoritative judgment could, therefore, be pronounced, either upon the qestion of jurisdiction or upon the merits. The chief justice, however, in delivering the opinion of himself and his three brethren who concurred with him, considered it necessary to enter elaborately into the *nature* of the authority exercised by the governor of Vermont, and to show (as he has, I think, very satisfactorily done) that it belongs, not to the states, but to the nation, as a power pertaining to foreign intercourse, and which may be called into action either by law or by treaty.

The question of jurisdiction was one of great nicety. The case is highly instructive, and should be attentively read.

Treaties have since been entered into by the United States, with Great Britain and France, containing mutual stipulations for the surrender of fugitives from justice charged with great crimes.

Proceedings on writ of habeas corpus, a suit.

One of the questions on which the jurisdiction of the court was supposed to depend was, whether a proceeding in a state court on a writ of *habeas corpus*, is a *suit* within the just interpretation of the word as used in the twenty-fifth section of the judiciary act, and the question was elaborately discussed by the counsel for the plaintiff in error, and by the chief justice in pronouncing the opinion of himself and three of his associates. But the jurisdiction of the court was denied by the other justices, on the less questionable ground that the validity of no treaty or statute of the United States had been drawn in question in the suit in the state court, nor the validity of any statute of the state, on the ground of its being repugnant to the constitution, treaties or laws of the United States, neither of which contained any express provision upon the subject. In *Ableman* v. *Booth*, also a case of *habeas corpus* occurring several years later, in which the decision was unanimous, jurisdiction was exercised without question, and apparently without scruple. This last mentioned case will be more particularly noticed in the sequel.

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not exceed the sum specified, and therefore in these cases no writ of error lies. *Durousseau* v. *The United States*, 6 Cranch, 307, 314.

Difficulty, however, sometimes exists in the practical application of this test.

The case of *Wilson* v. *Daniel* (3 Dallas, 401, and see *S. C.*, 2 Dallas, 360, n.), was an action of debt, in which the judgment was for sixty thousand dollars, "to be discharged by the payment of eighteen hundred dollars," and it was held by a majority of the judges that the court possessed jurisdiction. But the reasons by which they appear to have been severally led to this conclusion are so variant as to render it difficult to deduce from the decision any rule applicable to other cases.

When the action is on a penal bond, the amount of the recovery is the test.

In the case of *The United States* v. *McDowell* (4 Cranch, 316), it was decided that a writ of error would not lie to reverse a judgment for the defendant in an action of debt upon a marshal's bond in a penalty of twenty thousand dollars, for the faithful performance of official duties, where the breach assigned was the omision to pay over the sum of three hundred and twenty-eight dollars.

It is therefore to the condition and not to the penalty of the bond that the court will look.

On a writ of error brought by plaintiff on judgment for defendant, the amount of damages *claimed* is the test.

In the case of *Cooke* v. *Woodruff* (5 Cranch, 13), which was an action in trover, in which the judgment upon which the writ of error was brought, was for the defendant, it was objected that *the amount of damages laid in the plaintiff's declaration* was not sufficient evidence of the sum in dispute, to enable the supreme court to entertain jurisdiction in error; and the counsel for the defendant in error, in support of this objection, referred to the 13th general rule of the court by which the plaintiff in error is permitted to *prove* the amount in dispute by *affidavit*.

But the objection was overruled; and Chief Justice MARSHALL said, that that rule applied only to cases where the *property itself* (and not damages), was the matter in dispute—such as actions of detinue, &c. If the judgment below be for the plaintiff, that judgment ascertains the value of the matter in dispute; but where the judgment below is rendered for the defendant, this court has not, by any rule or practice, fixed the mode of ascertaining that value.

The only point directly adjudicated in this case, it will be perceived is, that in actions of tort sounding in damages, where the judgment is for the defendant, the question of jurisdiction, so far as it depends upon the sum in dispute, is to be determined by reference to the amount of damages claimed by the plaintiff in his declaration.

But it will also be observed, that another rule is laid down in unqualified terms by the chief justice of no less importance, viz., that where the judgment below is for the plaintiff, *the amount of the recovery is to govern;* and in the subsequent case of *Wise & Lynn* v. *Columbian Turnpike Co.* (7 Cranch, 276), this point was directly adjudicated. But in the cases of *Gordon et al* v. *Ogden* (3 Peters, 33), and of *Smith* v. *Honey* (id. 469), the rule was qualified and defined in a manner obviously agreeable to the spirit of the act. It is there decided that whatever may have been the amount claimed by the plaintiff in the court below, if the judgment in his favor is for less than two thousand dollars, and the writ of error has been sued out by the *defendant* below, the court has not jurisdiction[1] but if, in such case, the writ of error is brought by the *plaintiff* below (provided the amount claimed in his declaration exceeds two thous-

On a judgment for less than $2,000 a writ of error cannot be brought by defendant, but may be by plaintiff, provided, &c.

[1] It is the amount for which the judgment was given that is to govern. Interest subsequent accruing, therefore, is disregarded. *Knapp* v. *Banks*, 2 How. R., 73.

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and dollars), the court *has* jurisdiction, because should the judgment be reversed he may still recover what he claims. See, also, *Knapp* v. *Banks*, 2 Howard, 73.

How on petition for freedom.

In the case of *Lee* v. *Lee* (8 Peters, 44), a petition for freedom, by persons who have been slaves, had been filed in the circuit court for the county of Washington, in the District of Columbia, from which court an appeal lies to the supreme court only where the matter in dispute is of the value of one thousand dollars or upwards. The decision of the circuit court was against the petitioners. On a writ of error to the supreme court it was objected, that the value in controversy was insufficient to give jurisdiction. But the matter in dispute being the freedom of the petitioners, the court entertained no doubt of its jurisdiction; and as the value of freedom was not susceptible of a pecuniary valuation, it was held not to be a case to which the rule authorizing the amount in dispute to be shown by affidavit, was applicable. Had the decision of the circuit court been in favor of the petitioners, and the writ of error been prosecuted by the party claiming to be the owner, the value of the slaves as property would have constituted the matter in dispute, and affidavits to ascertain this value would have been admissible.

Will not lie on refusal of habess corpus by father to obtain possession of his child.

Nevertheless, in the case of *Barry* v. *Mercein* (5 Howard, 103), it was held that where the circuit court had refused to grant a writ of *habeas corpus* prayed for by a father, to take his infant child out of the custody of the mother, a writ of error would not lie. The matter in dispute, say the court, must have a known and certain value, which can be proved and calculated in the ordinary mode of business transactions. And upon this ground it was held, in *Pratt* v. *Fitzhugh* (1 Black.,* 271), that a writ of error will not lie to reverse the judgment of a circuit court discharging a party from imprisonment on execution.

Nor on discharge from imprisonment.

When the prayer of a bill in equity shows that the complainant's demand is susceptible of computation, and that by no legal possibility it can be adjudged to exceed two thousand dollars, no appeal will lie. *Sewall* v. *Chamberlain*, 5 Howard, 6.

Nor where the demand is evidently below the required amount.

In the case of *Meredith* v. *McKee* (1 Peters, 248), the point decided seems to be that the requisite amount must be directly in contest in the suit, and that the court will not look beyond the case before them, to see what other or further interests may be incidentally affected by the decision. The case, however, is rather peculiar in its nature, and perhaps may not fully warrant this position without qualification, as it seems not to do the abstract of it by the reporter.

The requisite amount must be directly in contest.

In the admiralty, seamen are permitted to sue jointly for wages accruing under the same shipping articles for the same voyage. But their respective contracts are, nevertheless, to be treated as several and distinct, and the fact that several claims of this description embraced in the same suit amount, in the aggregate, to more than two thousand dollars, is insufficient to give jurisdiction on appeal to the supreme court. *Oliver et al.* v. *Alexander et al.*, 6 Peters, 143. The same principle is applicable also to the case of salvage adjudged against the several owners of parts of a cargo saved, when the sum to be paid by no one of the owners exceeds two thousand dollars, although the whole amount awarded to the salvors is more than that sum. *Spear, claimant, &c.*, v. *Place*, 11 Howard, 522. And also to the case of several suits consolidated by order of the court below, brought by the owners of goods to recover damages for the breach of a contract of affreight ment. And where, in such case, the sum awarded to some of the libelants is more, and to others less than two thousand dollars, the appeal will be dis-

Combination of claims not admissible.

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missed as to the latter. *Rich et al.* v. *Lambert et al.*, 12 Howard, 347.

In further illustration of the principles above stated, relative to this point, see *Scott* v. *Lunt's Administrator*, 6 Peters, 349; *The United States* v. *M'Daniel et al.*, id., 634; *The Bank of the United States* v. *Daniels*, 12 id., 32; *Ross* v. *Prentiss*, 3 Howard, 771; *Gruner* v. *The United States*, 11 id., 163; *Shields* v. *Thomas*, 17 id., 3; *Udall* v. *Steamship Ohio*, 17 id., 17; *Knapp* v. *Banks*, 2 Peters, 73; *Bank of the United States* v. *Daniel*, 12 id., 32; *United States* v. 84 *Boxes of Sugar*, 7 id., 453; *Grant* v. *M'Kee*, 1 id., 248; *Ryan* v. *Bradly*, 1 Wallace, 66; *Walker* v. *The United States*, 4 id., 163.

Exceptions to the rule making jurisdiction dependent on amount.

But with respect to certain cases of *prize*, and to *all final judgments of the court of claims adverse to the United States;* and with respect also to certain cases arising under the *revenue laws* of the United States, and to all cases arising under the *copyright* and *patent acts*, the appellate jurisdiction of the supreme court, as we have already seen, does not depend on the amount in controversy, the limitation in this respect imposed by the judiciary act having been abolished by subsequent acts of congress. Attempts have been made by liberal construction to extend these latter acts to cases supposed to be within their spirit, though not described in terms; and the supreme court has been called upon to determine their scope. But, as might have been expected, they have been held to embrace none but the cases they literally describe. Thus the act giving a writ of error from the judgment of a circuit court in a "civil action brought by the United States for the enforcement of the revenue laws, or for the collection of duties," without regard to the amount in controversy, has been decided not to extend to an action

To be strictly limited—revenue laws.

against a collector to recover back duties paid under protest; for although the question of the plaintiff's right of recovery depended on the just interpretation of a revenue law, and the case was therefore within the general policy of the act, it was not such an action as the statute describes; and, consequently, the judgment of the circuit court was not subject to review in such a case, unless the amount in dispute exceeded two thousand dollars.[1] The language of the act giving a writ of error or appeal, whatever may be the amount in controversy, in "*cases arising under*" the patent and copyright acts, it will be observed, is more general and comprehensive. But the act has been held to be strictly limited to such cases, and therefore, upon an appeal from the decree of a circuit court in a suit in equity to annul a conditional assignment of a privilege under a patent on the ground that the assignee had failed to comply with the terms of the assignment, the case was held not to be within the statute, and the amount in controversy appearing to be less than two thousand dollars, the appeal was dismissed for want of jurisdiction.[2] And in another case, of a bill in equity, filed in the circuit court, to enforce the specific execution of a similar contract, an appeal met with a like fate for the same reason.[3] In these cases the rights of the parties depended not upon the patent acts, but upon the general principles of law and equity touching private contracts. Upon the question, what constitutes a case "arising under" the copyright acts, I have met with no report of any judicial decision. It is very clear, however, that the principle govern-

Patent and copyright acts.

[1] *Mason* v *Gamble*, 21 Howard, 390. The phrase "revenue laws" in the act has, however, been held to embrace an act prescribing the rates of postage. *The United States* v. *Bromley*, 12 Howard, 88.

[2] *Wilson* v. *Sandford et al.*, 10 Howard, 99.

[3] *Brown* v. *Shannon*, 20 id., 9.

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ing cases relating to patents is strictly applicable also to those relating to copyrights.

Jurisdiction on error from a state court not dependent on amount in controversy.

The appellate jurisdiction of the supreme court over the final judgments and decrees of the highest court of state in the cases specified in the 25th section of the judiciary act, is independent of the amount in controversy.

WRIT OF PROHIBITION.

10. The power conferred on the supreme court to issue the writ of prohibition has led to no serious forensic controversy. The purpose for which it was given being specified, viz.: to restrain the district courts "when proceeding as courts of admiralty and maritime jurisdiction," it is limited to this purpose. *Ex parte Christy*, 3 Howard, 292. In one reported case this power was exercised to restrain a district court from proceeding further in a case held not to be within its jurisdiction, and in which no sentence had yet been pronounced. *The United States* v. *Peters*, 3 Dallas, 121.

WRITS OF MANDAMUS may be issued to courts of the United States.

The writ of *mandamus*. It has already been incidentally stated, in treating of the original jurisdiction of the supreme court, that the clause of the judicial act giving to that tribunal the power of issuing this writ to "persons holding office under the authority of the United States," other than judicial officers, has been held in the case of *Marbury* v. *Madison* (1 Cranch, 137), not to be warranted by the constitution.

But we have seen also that the authority conferred by the act to issue this writ to "any courts appointed under the authority of the United States" is liable to no such objection. To control in this manner the proceedings of these tribunals, is but the exercise of appellate power; a branch of the jurisdiction of the supreme court which congress are expressly authorized by the constitution (as we have already seen), to regulate and define according to their discretion. This power has been repeatedly exercised.

Upon the question whether the attorney-general of the United States has a right, *ex officio*, and of his own mere motion to apply for a mandamus to compel the execution of an act of congress, which the judges of the circuit court for the district of Pennsylvania declined to execute, the supreme court was equally divided. 2 Dallas, 409.

Right of attorney-general to move for.

In the case of *The United States* v. *Judge Lawrence* (3 Dallas, 42), in which a district judge upon the application of the vice-consul of the French Republic, founded upon the provisions of a convention between the two countries, had refused to issue a warrant for the apprehension of Capt. Barre, alleged to be a deserter from the French fleet, the supreme court refused to grant a mandamus to compel him to do so, upon the ground that he had acted judicially in the case, and that the court had "no power to compel a judge to decide according to the dictates of any judgment, but his own."

Will not be granted to control discretionary power.

And, therefore, a mandamus directing a district court to grant an application to set aside a default and inquisition, will not be granted; the application being to the discretion of the court. *Ex parte Roberts; Ex parte Adshead*, 6 Peters, 216. Nor to control the decision of a district judge as to the sufficiency of an affidavit to hold to bail, or as to the amount of bail. *Ex parte Taylor*, 14 Howard, 3. Nor to order a district court to enter a judgment; it appearing that a motion for a new trial was pending. *Bradstreet* v. *Huntington*, 8 Peters, 588. Nor where a district judge, sitting in the circuit court, was proceeding in an equity suit, as it was alleged, irregularly; the only remedy in such case being by appeal after a final decree. *Ex parte Whitney*, 13 Peters, 404. Nor to order a judge, to sign a bill of exceptions, which he returns is not conformable to the truth. *Ex parte Bradstreet* (4 Peters, 102); although the court does

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not doubt its power for this purpose in a proper case. *Ex parte Crane*, 5 Peters, 190. See, to the like effect, *Bradstreet* v. *Huntington*, 8 Peters, 588; *Bank of Columbia* v. *Sweeney*, 1 Peters, 567; *Life & Fire Insurance Company* v. *Adams*, 3 Peters, 571, 573. In *Ex parte Many* (14 Howard, 24), a mandamus was denied directing a circuit court to fill a blank in its judgment, with the amount of costs, after the mandate of the supreme court affirming its judgment had been received. In *Ex parte Davenport* (6 Peters, 661), and in *Ex parte Hoyt* (13 Peters, 297), the court expressed an opinion on the questions of law that gave rise to the applications, although they were denied. Where it was sworn that the judge had neglected or refused to enter a judgment, a rule to show cause why a mandamus should not issue was granted. *Ex parte Bradstreet*, 6 Peters, 774. And at the suit of the same party, a mandamus was granted requiring a district judge, having circuit court powers, to reinstate a writ of right which had been dismissed because the declaration did not show the land in controversy to be of sufficient value to give the court jurisdiction. 7 Peters 634. And a district court having circuit court powers having refused to carry into effect its decree from which an appeal had been taken to the supreme court and dismissed, a writ of mandamus, after an order to show cause, was granted. *Stafford et al.* v. *New Orleans Canal & Banking Company*, 17 Howard, 283.[1]

[1] The foregoing were cases of original application made to the supreme court by motion or on petition supported by affidavit. But applications have in several instances been made to the circuit court of the District of Columbia, for a writ of mandamus to one of the heads of department of the national government, and in one instance to the superintendent of public printing, in which the decisions of that court were brought under the review of the supreme court *on writ of error*, to which form of redress no exception was taken. In one of the earliest of these cases, the authority of the circuit court of the District of Columbia to

Unless in cases of very gross impropriety

In the case, *Ex parte Burr* (9 Wheat., 529), it was held, that whatever may be the authority of the supreme court to interfere by writ of mandamus, in the case of a removal or suspension of an attorney of the district court, it will not be exercised unless when the conduct of the court below was irregular, or flagrantly improper.

issue the writ of mandamus in such cases, was very elaborately canvassed, and affirmed; the judgment of the court turning mainly on the laws of Maryland; which, in virtue of an act of congress, are in force in the district. *Kendall* v. *The United States*, 12 Peters, 524. As the scope of this jurisdiction of the circuit court of the District of Columbia is a matter of interest to persons throughout the United States who may feel aggrieved by the decisions of the officers of the government, it may not be amiss (though it is not my design to treat, except incidentally, of the courts of the District of Columbia, for that would be like meddling with the courts of a state), to observe, that relief in this form is to be expected only in very clear cases; the principle established by the decisions of the supreme court being that the writ can be properly issued only in cases where the act which the officer has refused to perform is so clearly enjoined by law as to render it one of mere ministerial duty concerning which the law leaves him no discretion. Such was the nature of the case above cited. A mandamus was accordingly issued by the circuit court, and its judgment was affirmed by the supreme court. But where the act required of the officer is such as to demand the exercise of judgment and discretion on his part, the writ will be denied. *Decatur* v. *Paulding*, 14 Peters, 497; *Brashure* v. *Mason*, 6 Howard, 92; *Reside* v. *Walker*, 11 id., 272; *The United States* v. *Seaman*, 17 id, 225; *The United States* v. *Guthrie*, id., 284.

CHAPTER V.

OF THE WRIT OF HABEAS CORPUS AD SUBJECIENDUM.

The framers of the constitution, familiar with the importance of this great writ as a safeguard to personal liberty, took care to shield it by a provision that its "privilege shall not be suspended, unless when, in cases of a rebellion or invasion, the public safety may require it." The duty of giving vitality and efficacy to this remedy through the instrumentality of the national judges devolved on congress, and the power to issue the writ was accordingly, by the 14th section of the judiciary act, passed at the first session of congress, conferred on the courts and the justices and judges of the United States. This section has already been copied in a preceding chapter, at page 14. It limits the privilege to prisoners "in custody under or by color of authority of the United States, or committed for trial before some court of the same."

The power to issue the writ of *habeas corpus* as thus defined, and especially the nature and extent of the authority of the supreme court to afford relief by means of it, have been the subject of much earnest discussion. As one of the cases here alluded to (that of *Bollman & Swartwout*), led to an elaborate and exhausting examination of the whole subject, and therefore requires particular notice, and as the others are few in number and will serve the purpose of illustration, I propose to give a brief abstract of them also, in the order of their occurrence.

The first reported case in which the supreme court was called upon to grant the writ of *habeas corpus* is that of Hamilton in 1795, reported in 3 Dallas, 15.

The report is limited to the proceedings on the return of the writ, and is silent with respect to the original application for its issue.

The prisoner had been committed upon a warrant issued by the district judge of Pennsylvania on a charge of high treason, and, as it was alleged, "without ever having been heard, and without knowing the name of any witness that had been examined, or the scope of any deposition that had been taken against him;" and on this ground his counsel moved that he should either be discharged absolutely, or, at least, upon reasonable bail. There were, however, opposing affidavits tending to criminate the prisoner, and the court, after holding the case for some days under advisement, directed him to be admitted to bail in the sum of four thousand dollars, with sureties. No question depending on the construction of the fourteenth section of the judiciary act, and, consequently, no question of jurisdiction, appears to have been raised at bar, nor does it expressly appear that any such question was considered by the court.[1]

The next reported case is that of *Burford*, 3 Cranch, 448.

Writ granted on the authority of Hamilton's case.

The prisoner had been committed to jail, in virtue of a warrant issued by several justices of the peace, in the District of Columbia, as a person of ill fame, for want of sureties for his good behavior, and on being brought before the circuit court on *habeas corpus*, had been remanded to prison. In this case the report is of the proceedings on the petition of the prisoner to the supreme court for a writ of *habeas corpus*. Chief Justice MARSHALL, in pronouncing

[1] This case arose before the searching scrutiny to which the jurisdiction of the court was subjected in *Marbury* v. *Madison* (*vide supra*, 18), and in *Bollman & Swartwout* (to be mentioned presently), showing that the power of the court to issue the writ of *habeas corpus* was coëxtensive only with its revisory power over the decisions of the inferior judicatories of the United States, and that this power did not comprehend the decisions of a district judge until they had first been brought under the review of the circuit court. See *post, Metzer's & Barry's* cases, and additional observations on this point.

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the decision of the court, observed, that there "was some obscurity in the act of congress, and some doubts were entertained by the court as to the construction of the constitution. "But," he added, "the case of *The United States* v. *Hamilton* (3 Dallas, 17), is decisive. It was there determined that this court could grant a *habeas corpus*." The writ was accordingly granted, returnable immediately, together with a certiorari, and the prisoner was discharged on account of the illegality of the original warrant of commitment, no good cause of commitment, supported by oath, being stated therein. The case was, in itself, of no great public importance, and the petition was not opposed. The only reference to the constitution or the statute made by the court is that already mentioned, and without any explanation of the grounds of its doubts, the court, reposing itself on the authority of the case of *Hamilton*, simply decided that it had authority to grant the writ of *habeas corpus*.

Case of Bollman and Swartwout.

The next case is of a widely different character, for it led to a searching inquiry into the construction to be given to the statute considered in connection with the constitutional grant of judicial power, and, consequently to the authoritative establishment of certain general principles which have ever since been regarded by the supreme court, and, so far as I am informed, with one remarkable exception, by all other national courts, as indisputable landmarks. It was the case of *Bollman & Swartwout*, who had been committed to prison by order of the circuit court of the District of Columbia on a charge of high treason. 4 Cranch, 75.

The power of the court derived wholly from the constitution and laws.

The elaborate judgment of the court delivered by Chief Justice MARSHALL, commences by an explicit disclaimer on the part of the court "of all jurisdiction not given by the constitution, or by the laws of

the United States. Courts which originate in the common law," it was said, "possess a jurisdiction which must be regulated by the common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction." Referring to the argument of counsel on this point the chief justice observed that "The reasoning from the bar in relation to it, may be answered by the single observation, that for the meaning of the term *habeas corpus*, resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law."

The question, therefore, was whether by any statute compatible with the constitution the power to award a writ of *habeas corpus* in a case like that before the court, had been given to the court.

Construction of 14th section of judicial act.

The answer to this question depended primarily on the construction to be given to the fourteenth section of the judicial act. The only doubt of which the language seemed to be susceptible, was, whether the restrictive words "which may be necessary for the exercise of their respective jurisdiction," limit the power to the award of *such* writs of *habeas corpus* only, as are necessary to enable the courts of the United States to exercise their respective jurisdiction in some cause which they are capable of finally deciding; or whether these restrictive words relate exclusively to the last antecedent clause, "all other writs not specially provided for by statute."

The words "which may be necessary" &c., relate only to "other writs."

The propriety of the latter construction, indicated by strict grammatical construction, was demonstrated by a masterly *reductio ad absurdum;* and it was held also to be strongly corroborated by the thirty-third section of the judicial act, which contains the following words: "And upon all arrests in criminal

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cases, bail shall be admitted, except where the punishment may be death; in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court who shall exercise their discretion therein, regarding the nature and circumstances of the offense and of the evidence, and of the usages of law." The appropriate process of bringing up a prisoner, not committed by the court itself, to be bailed, being a writ of *habeas corpus*, it followed, of consequence, that a court possessing this power, might award this process. The enactment obviously proceeded on the supposition that the power in question had been previously given, and the thirty-third section was, therefore explanatory of the fourteenth.

Such the court deemed to be the true interpretation of the fourteenth section of the judicial act, and this, therefore, was the construction that would have been given to it had the question been new. But, in reality the court said, it had already been long since so decided in Hamilton's case, which was expressly in point in all its parts; and although the question of jurisdiction was not made at the bar, the case was several days under advisement, and this question could not have escaped the attention of the court. From that decision the court would not lightly depart.[1] It remained then only to inquire whether the act was compatible with the constitution.

In *Marbury* v. *Madison*, it had been decided that the supreme court could not exercise original jurisdiction except so far as that jurisdiction had been

[1] The opposite construction of the fourteenth section of the judiciary act, it will be seen, would have been no less fatal to the general authority it gives to the circuit and district courts, and to all the several judges, to issue the writ of *habeas corpus*, than to that of the supreme court collectively; for the power would then have been absolutely limited to those cases only in which it was "necessary for the exercise of their respective jurisdictions."

given by the constitution. It was consequently limited to "cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party." And with regard to the just distinction between original and appellate jurisdiction, the essential criterion of the latter was that it revises and corrects the proceedings in a cause already instituted, and does not originate that cause. Applying this criterion to the case before the court, it was clear that the jurisdiction the court was called upon to exercise was appellate. It was the revision of the decision of an inferior court, by which a citizen had been committed to jail.

The power in its nature appellate.

The decision that an individual must be imprisoned, must always precede the application for a writ of *habeas corpus*, and this writ must always be for the purpose of revising that decision, and was, therefore, appellate in its nature. This point, moreover, the court observed, had also been decided in Hamilton's case and in Burford's case.

In the first sentence of the fourteenth section of the act of 1789, conferring upon the *courts* of the United States power to issue writs of *habeas corpus*, it will be noticed, these writs are simply named, without any descriptive words expressive of their nature or uses; while in the next sentence it said, "that either of the justices of the supreme court, as well as the judges of the district courts, shall have power to grant writs of *habeas corpus for the pupose of an inquiry into the cause of commitment.*"

The reason of this doubtless is, that there being several species of writs of *habeas corpus*, all of which it was proper to empower the *courts* to grant, it was necessary, in conferring the power on them, to use the word in its generic sense; while, on the other hand, the writ of *habeas corpus ad subjeciendum*, being the only species of the writ properly issuable by

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a single judge, it was deemed expedient to describe it. Next and lastly comes the proviso: "Provided that writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

The power of the court as well as of the judges limited by the proviso.

Speaking of this proviso, the chief justice took occasion to observe, that "it extends to the whole section;" or, in other words, it defines and limits the scope of the power to award writs of *habeas corpus* conferred upon the courts as well as upon the judges. This interpretation, the only one, indeed, of which the language of the act is susceptible, has ever since been assumed and uniformly acted upon by the supreme court as unquestionable.

The next case is *Ex parte Wilson*, 6 Cranch, 52.

Whether proper in a civil case.

The prisoner being in confinement on *a capias ad satisfaciendum*, issued by a circuit court of the United States, in a civil cause, the supreme court denied his petition for a *habeas corpus*, Chief Justice MARSHALL merely observing, "the court was not satisfied that a *habeas corpus* is a proper remedy in a civil case." [This case occurred in 1810; but in *Ex parte Randolph* which arose in 1833 before Chief Justice MARSHALL and Judge BARBOUR in the circuit court for the eastern district of Virginia, in which the petitioner was in custody under a distress warrant issued by the solicitor of the treasury, the question whether the power conferred by the fourteenth section of the judicial act, extended to prisoners on civil process, was elaborately examined by both of the judges, and the jurisdiction was maintained and exercised; and it does not appear that it has since been drawn into question or doubted.][1]

[1] And see, *post*, Watkin's case, imprisonment on *ca. sa.*

Writ denied in case of commitment for contempt.

In *Ex parte Kearney* (7 Wheat, 33), the prisoner being in custody under a commitment of the circuit judge of the District of Columbia, for a contempt in refusing to answer as a witness, the court refused to grant a *habeas corpus*, not, however, on account of any doubt of its "authority to issue a *habeas corpus*, where a person is in jail under the warrant or order of any other court of the United States;" but because the case was not, in the opinion of the court, "a fit case" for the exercise of such an authority. There was no question, the court said, but that the commitment was made by a court of competent jurisdiction, and in the exercise of an unquestionable authority.

The only objection was, not that the court acted beyond its jurisdiction, but that it erred in its judgment of the law applicable to the case. If the application had been for a *habeas corpus*, after judgment on an indictment for an offense within the jurisdiction of the circuit court, it could hardly be maintained that the supreme court could revise such a judgment or the proceedings which led to it, or set it aside and discharge the prisoner. But there was in principle, no distinction between that case and the one before the court; for when the court commits a a party for contempt, their adjudication is a conviction, and their commitment in consequence, is execution; and so the law was settled upon full deliberation, in the case of *Brass Crosby, Lord Mayor of London*, 3 Wilson, 188.

And in case of sentence of imprisonment on conviction.

Notwithstanding the decision in the last mentioned case, an application was made to the supreme court several years later, in *Ex parte Watkins* (3 Peters, 193), although the prisoner was in prison under the sentence of the circuit court of the District of Columbia, on a conviction for a criminal offense. The motion was, however, founded on the allegation

PART I. that the acts charged in the indictment to have been committed by the prisoner, were not criminal or punishable by any law of the United States, wherefore it was contended that the circuit court had no jurisdiction in the case and that the prisoner was wrongfully imprisoned; but the question whether the acts imputed to the prisoner in the indictment constituted a criminal offense, being a question necessarily involved in every criminal prosecution, and the court in this instance in the exercise of a competent jurisdiction, having unavoidably decided it, its judgment was held to be obligatory and conclusive, as much so as a judgment of the supreme court itself; this court having by law, no revisory power over the final judgments of the other courts of the United States in criminal cases, within their jurisdiction in any form.

On this ground the application was denied, the court distinctly conceding, however, that if, in entertaining the prosecution, the circuit court had usurped a jurisdiction that did not in fact, and could not by law, belong to it, the prisoner would have been entitled to liberation.

Imprisonment on capias ad satisfaciendum—writ granted.

In *Ex parte Watkins* (7 Peters's R., 568), the petitioner was in custody on several writs of *capias ad satisfaciendum*, issued out of the circuit court of the District of Columbia, on the return day long past, of which writs he had not, as it was insisted, a statute of Maryland in force in the District of Columbia, expressly required, been brought into court, but had been left and kept in prison.

It was on this ground that the writ was prayed for. But the process had been issued to enforce the payment of fines imposed on conviction in a criminal prosecution; it was therefore objected by the attorney-general that if the prisoner was wrongfully detained, it was by the act of the marshal alone, and

that the proper remedy was, not an application to the supreme court for a habeas corpus, but an application, on motion, to the circuit court, for the prisoner's discharge, or else an action against the marshal for false imprisonment. On this ground he denied the authority of the court to award a writ of habeas corpus. The objection was, however, overruled by the court, Mr. Justice JOHNSON, in a very forcible opinion, dissenting on the ground above mentioned, and Mr. Justice MCLEAN on the ground that the majority of the court erred in its construction of the laws of Maryland.[1]

And on process to enforce recognizance.

In *Ex parte Milburne* (9 Peters's R., 104), the petitioner was imprisoned on process to enforce a recognizance entered into by him to appear and answer to an indictment, and the jurisdiction of the court was not questioned.

In *Ex parte Barry* (2 Howard, 65), the petitioner being an alien, applied for a habeas corpus for the purpose of obtaining the custody of his infant daughter.

Writ denied for want of previous application to circuit court.

His petition was denied on the ground, that, as no previous application for redress had been made by the petitioner to the circuit court,—to award the writ would be to exercise an original jurisdiction not belonging to the court.

Writ denied, the petitioner being imprisoned on state process.

In *Ex parte Dorr* (3 Howard, 103), the prisoner having been convicted of a criminal offense, and sentenced to imprisonment for life by a state court, an application was made in his behalf for a habeas corpus, to the end that, by being brought out of prison, he might be enabled to obtain a review of the judgment of the state court, under the twenty-fifth sec-

[1] A writ of habeas corpus having been awarded, the petitioner was again committed upon writs issuing on the same judgments, and on application for another writ of habeas corpus, the judges of the supreme court were equally divided in opinion.

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tion of the judiciary act; of which privilege, it was alleged, he was deprived, all access to him being denied in the prison where he was confined. The court rejected the application for want of jurisdiction, the imprisonment being under the authority of a state, and not of the United States.

Commitment by district judge at chambers, writ denied.

In *Metzger's Case* (5 Howard, 176), an application had been made by the minister of France to the executive government of the United States, under the treaty of 1843 for the surrender of an alleged fugitive from justice. The application was denied on the ground that no such power belonged to that branch of the government. The minister was referred to the judiciary; and he accordingly addressed himself to the judge of the United States for the southern district of New York, who, upon a full examination of the case at chambers, held that the evidence was sufficient to warrant a surrender of the fugitive, and committed him to abide the order of the president. An application to the supreme court for a habeas corpus was denied on the ground that the power exercised by the district judge under the treaty was a special authority, and that no provision had been made by law for the revision of his decision. It was said also, in general terms, that "there is no form in which an appellate power can be exercised by" the supreme court "over the proceedings of a district judge at his chambers."

Commitment under treaty of extradition.

A like application was made to the supreme court in the case of *Kaine* (14 Howard, 103) arising under a mutual stipulation for the extradition of fugitives from justice contained in the treaty of 1842, between the United States and Great Britain. A warrant had been issued by a commissioner, at the instance of the British consul, for the apprehension of Kaine, and the commissioner being of opinion that the evidence against him was sufficient to warrant his surrender

Writ denied on the merits.

ordered him to be committed to await the order of the president. A writ of habeas corpus was sued out, and allowed by the district judge of the southern district of New York, returnable to the circuit court; and on a subsequent day the district judge, then sitting alone in the circuit court, decided that the writ should be dismissed, and the prisoner was remanded to the custody of the marshal. This decision having been made known to the executive, the secretary of state issued a warrant, directing the marshal to deliver up Kaine to the British consul. Before this was done, however, a precept was issued by Mr. Justice NELSON, which, being in several respects *sui generis*, requires to be copied. It bore the seal of the circuit court of the southern district of New York, and was as follows:

"The president of the United States of America to the United States marshal for the southern district of the state of New York, or to any other person or persons having the custody of Thomas Kaine, greeting:

We command you, that you have the body of Thomas Kaine, by you imprisoned and detained, as it is said, together with the cause of such imprisonment and detention, by whatsoever name the said Kaine may be called, or charged, before our justices of our supreme court of the United States, at his chambers, in Cooperstown, New York, on the 11th day of August, instant, to do and receive what shall then and there be considered, concerning the said Thomas Kaine.

Witness SAMUEL NELSON, Esq., one of our justices of our said court, this third day of July, eighteen hundred and fifty-two.

RICHARD BUSTEED,
Attorney for the Petitioner."

The marshal having made his return, a hearing took place at Cooperstown, when Mr. Justice NELSON made the following order:

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"COOPERSTOWN, *August* 11, 1852,
AT CHAMBERS.

The marshal having made the within return, Ordered, that in consequence of the difficult and important questions involved in the case, it be heard before all the justices of the supreme court, in bank, at the commencement thereof; and that in the meantime the prisoner remain in the custody of the said marshal.

S. NELSON."

The prisoner was detained by the marshal accordingly until the next session of the supreme court; but the court being of opinion that it could not take cognizance of the anomalous proceedings before Mr. Justice NELSON, nevertheless held itself competent, Mr. Justice CURTIS dissenting, to entertain an application for a writ of habeas corpus, for the purpose of revising the decision of Judge BETTS sitting in the circuit court. A majority of the court concuring in this decision, the motion was heard, but the writ of habeas corpus was denied. Mr. Justice NELSON, however, delivered an elaborate and very animated opinion, in which the CHIEF JUSTICE and Mr. Justice DANIEL fully concurred, maintaining, 1. That "the judiciary possesses no jurisdiction to entertain proceedings under the treaty [with Great Britain] for the apprehension and committal of the alleged fugitive, without previous requision made under the authority of Great Britain, upon the president of the United States, and his authority obtained for that purpose. 2. That the United States commissioner in this case is not an officer within the treaty or act of congress, upon whom the power is conferred to hear and determine the question of criminality, upon which the surrender is made."[1]

[1] The commissioner in this case seems to have been an ordinary commissioner of the circuit court, acting under a general appointment as such, without having been specially appointed, as required by the act

He denied, also, the sufficiency of the evidence of guilt, and was accordingly of opinion that a writ of habeas corpus ought to be granted.

Commitment under state authority: writ denied for want of jurisdiction.

Ex parte Cabrera,[1] the petitioner, being secretary of the Spanish legation, had been arrested and imprisoned, under the authority of the state of Pennsylvania, for forgery, and, having been brought before the circuit court of the United States on habeas corpus, claimed immunity from prosecution in the tribunals of this country, under the law of nations, in virtue of his diplomatic character. But the court, conceding his exemption, held itself incompetent to discharge him for want of jurisdiction.

The laws of nations, Mr. Justice WASHINGTON observed, were obligatory no less upon the state courts than upon the courts of the United States;

of August 12, 1848, ch. 67 (9 Stat. at Large, p. 302), passed for the express purpose of giving effect to our treaty stipulations for the surrender of fugitives.

Mr. Justice MCLEAN, in pronouncing the judgment of the court, referring to this objection, and the embarrassment arising from it, said that commissioners had executed the act of 1848, without any one supposing they wanted power, until now; nor had any special appointment been made, to his knowledge, for this purpose, by any court of the United States. He added, also, that he felt "quite safe in saying that it" had "not been done in any judicial circuit of the United States." There is no court for any judicial *circuit* of the United States, and if it had been done, it must have been done in some judicial *district*.

But his Honor was altogether mistaken. In the northern district of New York, into which, bordering as it does, for several hundred miles, on Canada, offenders against the laws of Great Britain frequently make their escape, the ordinary commissioners of the circuit court, as well as the local magistrates, refused to officiate under the treaty, from an apprehension of threatened prosecutions for false imprisonment, and the act of congress was passed for the express purpose of remedying the evil. In that district, at least, appointments were accordingly made by the circuit court, in some instances of persons who had received no previous appointment as commissioners under the antecedent acts of congress, and in others by superadding an appointment under the act of 1848.

[1] Wash. C. C. R., 232.

PART 1. and it was to the former that the prisoner must appeal for redress.

In *The United States* v. *French*,[1] the circuit court for the district of Massachusetts held that it had not the power to award a writ of habeas corpus for the purpose of enabling bail to surrender their principal in jail under process from a state court.

It will be seen from this brief review of the judicial decisions relative to the writ of habeas corpus *ad subjeciendum*, that the power conferred on the courts and judges of the United States to grant it, by the judiciary act, is strictly limited to the cases therein specified. It is only in behalf of persons in confinement "under or by color of the authority of the United States," or "committed for trial before some court of the same"[2] that the power can be exercised. In all *such* cases, except after final conviction before a court of competent jurisdiction, the writ may be awarded either by a circuit or district court, or by a judge of the district court, and, it is presumed, also, by a justice of the supreme court. This power was accordingly exercised, as we have seen, by the circuit court for the eastern district of Virginia, in the case of *Randolph*, who was in custody under a warrant of distress issued by the solicitor of the treasury, and by the circuit court for the southern district of New York in the case of *Kaine*, who had been committed by a commissioner.

In virtue of the same authority, a person committed on a warrant issued by a commissioner under the act commonly known as the fugitive slave act, was brought up on a writ of habeas corpus awarded by

[1] 1 Gallison, 1.

[2] The latter clause was doubtless designed either to enlarge the power conferred by the former, or to exclude some doubt that it was supposed might otherwise arise as to its extent. But I have met with no judicial exposition of this point.

the district judge of the northern district of New York.

Power of supreme court limited to commitments by inferior courts.

In all these cases it was sufficient that applicants were "in custody under or by color of the authority of the United States." But, as we have seen, according to the interpretation given to the constitution in *Marbury* v. *Madison*, and in *Ex parte Bollman & Swartwout*, there is a further and very comprehensive limitation to the power of the supreme court, although no such distinction is made by the fourteenth section of the judicial act. The *original* jurisdiction of that court being specified in the constitution, congress, it was held, had no power to enlarge it; and consequently the authority of the supreme court to grant a writ of habeas corpus is restricted to cases falling within the scope of its appellate power, and cases, should any arise requiring this form of redress, affecting an ambassador, other public ministers or consuls, or to which a state is a party.

The power exercised under a writ of habeas corpus, where the party is in custody under a commitment by some other judicatory, as observed by Chief Justice MARSHALL in the case of *Bollman & Swartwout*, is always in its nature revisory. But to bring a case within the appellate jurisdiction of the supreme court in the sense requisite to enable that court to award the writ, it is necessary that the commitment should appear to have been by a tribunal whose decisions are subject to revision by the supreme court. And so strictly has this limitation been observed latterly, that, as we have seen, while the court did not scrupple to entertain an application for a writ of habeas corpus, upon the merits, in the case of *Kaine*, under commitment by a district judge, made while sitting alone in the circuit court, it dismissed a like application for want of jurisdic-

PART 1. tion, in the case of *Metzger* who had been committed by the same judge acting at chambers, thereby overruling the decision in *Hamilton's Case*, and *Ex parte Barry* is to the like effect.

It is important to observe, however, that no distinction in this respect has been made between cases in which the original commitment was under process from a circuit court, and cases where it had been made by a justice of the peace or a commissioner, and the prisoner, having afterward been brought before a circuit court on habeas corpus, had been remanded by that court. *In re Kaine*, Mr. Justice CURTIS, in his dissenting opinion, very forcibly maintained that the prisoner having been simply remanded by the circuit court, ought to be regarded as still in justody under the commissioner's warrant, and consequently that the case was not within the appellate jurisdiction of the court; and, in an antecedent case, Mr. Justice JOHNSON, in an able dissenting opinion, expressed himself to the like effect. But in both instances the objection was unheeded by the court.

Thus stood the statutory law and the judicial decisions regulating the remedy by writ of habeas corpus during the lapse of more than forty years. But when, in the year 1832, one of the states of the union attempted, by coercive legislation, forcibly to prevent the collection of duties on merchandise imported from foreign countries, it became necessary to extend this remedy to prisoners under or by color of the *laws of the states;* and the act of March 2, 1833, ch. 57 (4 Stat. at Large, 632), entitled "An act further to provide for the collection of duties on imports," was accordingly passed, by which it was enacted:

Act of 1833.

Extends to persons imprisoned under *any* law, &c.

"That either of the justices of the supreme court, or a judge of any district court of the United States, in addition to the authority already conferred by law, shall have power

to grant writs of habeas corpus in all cases of a prisoner or prisoners in jail or confinement, where he or they shall be committed or confined on or by any authority of law, for any act done in pursuance of a law of the United States, or any order, process or decree of any judge or court thereof, any thing in any act of congress to the contrary notwithstanding." CHAP. 5.

This act, it will be seen, provides for the relief of persons deprived of liberty in virtue of "*any* authority of law," for any act or omission in obedience to the authority of the United States. The act contained other provisions to insure the payment of imposts, adapted to the extraordinary exigencies of the case, which it was deemed advisable to limit to the period of two years; but the seventh section, containing the above cited enactment, was left to remain permanently in force.

This act was speedily followed by another, to meet another new and unforeseen emergency arising out of our duplex political system. One McLeod had been indicted in a court of the state of New York for his supposed participation in the burning of the steamer "Caroline," at Schlosser, on the Niagara river, during an insurrection in Canada; and the prosecution had been persisted in notwithstanding the assumption by the British government of all responsibility for the acts of McLeod, and its formal protest acquiesced in by the executive of the United States.

The act is entitled "An act to provide further remedial justice by the courts of the United States," passed August 29, 1842, ch. 257 (5 Stat. at Large, 539), and is as follows: Act of 1842.

"Be it enacted —— That either of the justices of the supreme court of the United States, or judge of any district

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Aliens imprisoned for acts or omissions sanctioned by the government to which they owe allegiance entitled to relief by habeas corpus.

court of the United States, in which[1] a prisoner is confined, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases of any prisoner or prisoners in jail or confinement, where he, she or they, being subjects or citizens of a foreign state, and domiciled therein, shall be committed or confined, or in custody, under or by any authority of law, or process grounded thereon, of the United States, or any one of them, for or on account of any act done or omitted under any alleged right, authority, privilege, protection or exemption, set up or claimed under the commission or order, or sanction, of any foreign state or sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof. And upon the return of the said writ, and due proof of the service of notice of said proceeding to the attorney-general or other officer prosecuting the pleas of the state, under whose authority the petitioner has been arrested, committed or held in custody, to be prescribed by the said justice or judge at the time of granting said writ, the said justice or judge shall proceed to hear the said cause; and if, upon hearing the same, it shall appear that the prisoner or prisoners is or are entitled to be discharged from such confinement, commitment, custody or arrest, for or by reason of such alleged right, title, authority, privilege, protection or assumption, so set up and claimed, and the laws of nations applicable thereto, and that the same exists in fact, and has been duly proved to the said justice or judge, then it shall be the duty of the said justice or judge forthwith to discharge such prisoner or prisoners accordingly. And if it shall appear to the said justice or judge that such judgment or discharge ought not to be rendered, then the said prisoner or prisoners shall be forthwith remanded. *Provided*, always, that from any decision of such justice or judge an

Appeal allowed from the decision of a justice or judge.

[1] The phrase "in which" in this highly important act, it will be noticed, is badly chosen. I copy from 5 Stat. at Large, p. 539. The sense doubtless intended requires for its fit expression the words, *for any judicial district*, next after the "United States," or else after "district court," and the substitution of *the* in lieu of "any," before these words. So, doubtless, it will be interpreted.

appeal may be taken to the circuit court of the United States for the district in which the said cause is heard, and from the judgment of said circuit court to the supreme court of the United States, on such terms and under such regulations and orders, as well for the custody and appearance of the prisoner or prisoners as for the sending up to the appellate tribunal a transcript of the petition, writ of habeas corpus return thereto, and other proceedings, as the judge hearing the said cause may prescribe; and pending such proceedings or appeal, and until such final judgment be rendered therein, and, after final judgment, of discharge in the same, any proceeding against such prisoner or prisoners in any state court, or by or under the authority of any state, for any matter or thing so heard and determined, or in process of being heard and determined under and by virtue of such writ of habeas corpus, shall be deemed null and void."

There is a third act respecting the writ of habeas corpus traceable to an event in our national history, compared with which the incidents that produced the acts of 1833 and 1842 dwindle into insignificance. I hardly need to add, that I allude to the late formidable and destructive civil war.

This act was passed February 5, 1867.[1] It is entitled "*An act to amend 'An act to establish the judicial courts of United States,' approved September twenty-fourth, seventeen hundred and eighty-nine.*"

The first section, omitting the enacting clause, is as follows:

Writ to be granted when the imprisonment is in violation of the constitution, treaties or laws.

"That the several courts of the United States, and the several justices and judges of such courts, within their respective jurisdictions, in addition to the authority already

[1] Ch. 28; 14 Stat. at Large, 385. The second section of this act has already been recited in treating of the power of the supreme court to review the final judgments and decrees of the highest courts of the several states.

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conferred by law, shall have power to grant writs of *habeas corpus* in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States;[1] and it shall be lawful for such person so restrained of his or her liberty to apply to either of said justices or judges for a writ of *habeas corpus*, which application shall be in writing, and verified by affidavit, and shall set forth the facts concerning the detention of the party applying, in whose custody he or she is detained, and by what claim or authority, if known; and the said justice or judge to whom such application shall be made shall forthwith award a writ of *habeas corpus*, unless it shall appear, from the petition itself, that the party is not deprived of his or her liberty in contravention of the constitution or laws of the United States. Said writ shall be directed to the person in whose custody the party is detained, who shall make return to the said writ and bring the party before the judge who granted the writ, and certify the true cause of the detention of such person within three days thereafter, unless such person be detained beyond the distance of twenty miles; and if beyond the distance of twenty miles and not above one hundred miles, then within ten days; and if beyond the distance of one hundred miles, then within twenty days; and upon the return of the writ of *habeas corpus* a day shall be set for the hearing of the cause, not exceeding five days thereafter, unless the party petitioning shall request a longer time. The peti-

Application to be in writing and on oath.

Writ to be granted unless, &c.

Direction and return.

Number of days allowed to bring prisoner before the judge.

Day to be set for hearing.

[1] A studiously devised and carefully framed act "relating to habeas corpus, and regulating judicial proceedings in certain cases" (amended by the act of May 11, 1866, ch. 80), was passed March 3, 1863, to meet the exigencies of the rebellion then at its height. It empowered the president, "whenever, in his judgment, the public safety may require it," to "suspend the writ of habeas corpus in any case throughout the United States, or any part thereof;" and contained many provisions for the safe custody and speedy trial of prisoners, for the security of public officers employed in making arrests, and for the removal of causes from the state courts to the courts of the United States. Most of its provisions are in terms limited to the duration of the rebellion, and such of them as are adapted to a state of domestic peace have been superseded by subsequent legislation.

tioner may deny any of the material facts set forth in the return, or may allege any fact to show that the detention is in contravention of the constitution or laws of the United States, which allegations or denials shall be made on oath. The said return may be amended, by leave of the court or judge, before or after the same is filed, as also may suggestions be made against it, that thereby the material facts may be ascertained. The said court or judge shall proceed in a summary way to determine the facts of the case, by hearing testimony and arguments of the parties interested; and if it shall appear that the petitioner is deprived of his or her liberty in contravention of the constitution or laws of the United States, he or she shall forthwith be discharged and set at liberty. And if any person or persons to whom such writ of *habeas corpus* may be directed shall refuse to obey the same, or shall neglect or refuse to make return, or shall make a false return thereto, in addition to the remedies already given by law, he or they shall be deemed and taken to be guilty of a misdemeanor, and shall, on conviction before any court of competent jurisdiction, be punished by fine not exceeding one thousand dollars, and by imprisonment not exceeding one year, or by either, according to the nature and aggravation of the case."

Petitioner may contest the return on oath.

Return may be amended.

Hearing, how conducted.

Prisoner, when to be discharged.

Penalty for disobedience of writ or failure to make return thereto

The remainder of this section gives an appeal "from the final decision of any judge, justice or court inferior to the circuit, and *from the judgment of the said circuit court to the supreme court.*" But the latter clause has been repealed by the act of March 27, 1868, ch. 34: 14 Stat. at Large, p. 44.

Appeal.

The importance of the subject will, I hope, be accepted as a justification for the occupancy of so considerable a space by the recital of the foregoing acts at large. Neither of the three latter acts contain any repealing clause, and each of them purports in terms to confer power "*in addition* to the authority already conferred by law." They must all be

Review of the several acts.

PART 1. regarded, therefore, as in full force, except such provisions, if any there be, of a prior act as are inconsistent with those of a subsequent act, or are clearly intended to be superseded by it. The acts of 1833 and 1842 were severally designed for a special purpose, to which accordingly they are in terms limited. Neither of them conflicts with the original act, or invades its provisions, and they consequently leave it unchanged.

Scope of the act of 1867.

In the remaining act of 1867, described by its title to be an act to *amend* the original act of 1789, the generality of the language of the brief formula defining the power to be conferred seems to infer an intent to give to the remedy, by writ of *habeas corpus* the utmost scope of which it is susceptible in our national jurisprudence without transgressing the limits of the sphere assigned to the judicial authority of the nation.

Whether the terms of the definition are fitly chosen aud sufficiently precise for this purpose, will probably be found to be a question of no great practical importance; because, while the antecedent acts are left in full force to speak for themselves, this act, it may be presumed, can hardly fall short of supplying their deficiencies. The adequacy of the acts of 1833 and 1842 for the accomplishment of their particular designs has never been questioned, and the judiciary act was at length, after repeated and earnest forensic discussion, found sufficient for ordinary cases arising in peaceful times, and, among others, for bringing prisoners before a court or judge to be liberated on reasonable bail, as well in civil as in criminal cases.

Of the 14th section.

But whatever may be the judicial interpretation of the act of 1867 with respect to the extent of the power to *award* the writ of *habeas corpus*, it may, I trust be safely presumed that the exact and judicious

rules it prescribes, regulating the proceedings from beginning to end upon a resort by a prisoner to this form of remedy, will be held applicable to all cases.

Depositaries of the power to award the writ.

This act, it will be remarked, like the 14th section of the act of 1789, assumes to confer the power to award the writ upon "the *several courts* of the United States," indiscriminately, as well as upon the justices and judges, while each of the intermediate acts restrict it to the justices of the supreme court and the judges of the district courts. But, as already shown, in treating of the original jurisdiction of the supreme court, that court has no authority, and cannot be made by law the recipient of any, to award the writ, except in the exercise of its appellate jurisdiction over the judgments of the courts whose decisions are subject to its revisory power, except in those rare cases to which its original jurisdiction is limited by the constitution.

Right of appeal.

Nevertheless, the authority conferred in general terms on the supreme court by the judiciary act to issue the writ may, as we have also seen, according to the principle to that effect established in the case of *Marbury* v. *Madison*, be exercised as an appellate power. Whether this power has been taken away by the repeal, by the above mentioned act of March 27, 1868, ch. 34, and of the clause of the act of 1867, which specifically gives a right of appeal in all cases of *habeas corpus* from the decisions of the circuit court to the supreme court, can only be certainly determined by authoritative judicial decision. But, considering the nature and importance of the power, and recollecting at what expense of forensic and judicial dialectics it was reasoned out, and at length firmly established, the student of our national jurisprudence cannot but find it difficult, not to say impossible, to reconcile himself to the belief that it

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was intended thus indirectly to sweep it away. Nor, when he comes to subject the question to the test of a severer logic, will he fail to perceive that there are very strong grounds, sanctioned by law as well as reason, for the conclusion that the appellate power of the supreme court derived from the constitution and judiciary act, remains unaffected by this repeal.[1]

[Since the revision of this chapter was completed, and as it is about to go to press, I see in a newspaper a report of the case of *Ex parte Yerger* just decided by the supreme court, now in session. The decision is highly important, and I accordingly interpolate a notice of it in this place. The case was this: Yerger was a private citizen of the state of Mississippi. He had been arrested in virtue of a military order, and held for trial upon a charge of murder, before a military commission, under the act of congress of March 2, 1867, "to provide for the more efficient government of the rebel states." Upon his prayer, a writ of *habeas corpus* was issued by the circuit court of the United States for the southern district of Mississippi, directed to certain officers holding him in custody. In obedience to the writ he was brought into court by the commanding officer of the military district comprising the state of Mississippi, who made a return in due form, certifying the cause of the prisoner's detention, as above stated. The circuit court adjudged his imprisonment to be lawful, and accordingly dismissed the writ and remanded the prisoner to the custody of the officer by whom he had been brought before the court, to be held and detained for the purpose, and to answer to the charge set forth in the return.

[1] Since the text was written it appears, by the last and recently published volume of the reports of the decisions of the supreme court, that this question has been decided. In *Ex parte McArdle*, 7 Wallace, 500, it was held that the appellate jurisdiction of the supreme court, as it was prior to the act of February 5, 1867, was unaffected by the repeal of that act by the act of March 27, 1868.

To obtain the reversal of this order and relief from imprisonment, the prisoner petitioned the supreme court for a writ of *certiorari* to bring up for review the proceedings of the circuit court, and for a writ of *habeas corpus* to the officer to whose custody he had been remanded.

In opposition to the petition, it was insisted that the court had no authority to grant it. As the newspaper report consists only of the opinion of the court (with some omissions) the grounds on which the jurisdiction of the court was asserted and denied at bar can only be inferred from the opinion — marked throughout by signal perspicacity and ability — of the chief justice in pronouncing the decision of the court.

The controversy, he said, resolved itself necessarily into two narrow questions: First, has the court jurisdiction, in a case like the present, to inquire into the cause of detention (alleged to be in fact unlawful), by a writ of *habeas corpus*, under the judiciary act of 1789: Second, if, under that act, the court possesses this jurdiction, has it been taken away by the act of March 27, 1868, repealing so much of the act of February 5, 1867, as authorizes appeals from the circuit court to the supreme court. To the first of these questions the court gave an affirmative answer, deduced by a cogent train of reasoning from the nature and importance of the power; the significant recognition of it by the constitution; and the carefully devised and ample provision for its exercise made by first congress at its first session. It was true, it had been adjudged that the supreme court could not, constitutionally, be made the recipient of it as a branch of its original jurisdiction; but it had also been adjudged that this was no impediment to its exercise as an appellate power. The objection, that to bring a case within the jurisdiction of the court, the *commitment* must be shown to have been made by a tribunal whose decisions are subject to the revisory power of the supreme court, was held to be untenable. The decision which the court was called on to review *was* made by such a tribunal, and its order remanding the prisoner was equivalent to an order of commitment. The second question, touching the effect of the repeal of that clause of

PART 1. 1867 which conferred upon the supreme court authority to entertain appeals in all cases of *habeas corpus* from the decisions of the circuit courts, was also decided favorably to the petitioner. The clause in question enlarged the appellate power of the court, and its repeal took away the power it gave. But it did not give the power of which the court was already possessed, and which was sufficient for the case before it, and its repeal ought not, therefore, be held to have taken away this power. But, assuming that it did so, there would still remain another obstacle to be surmounted, in the rule of construction whereby an act repealed is to be held reinstated by the repeal of the repealing act. Had the act of 1867 repealed all former laws investing the supreme court with this power, doubtless the repeal of the clause conferring it would have left the court powerless in this respect; but it enacts no such repeal.

The court accordingly summed up its decision on the whole question as follows: "They are obliged to hold, therefore, that in all cases where a circuit court of the United States has, in the exercise of its original jurisdiction, caused a prisoner to be brought before it, and has, after inquiring into the cause of detention, remanded him to the custody from which he was taken, this court, in the exercise of its appellate jurisdiction, may, by writ of *habeas corpus*, aided by the writ of *certiorari*, revise the decision of the circuit court; and, if it is found unwarranted by law, relieve the prisoner from the unlawful restraint to which he has been remanded."

The question, it will be seen, related exclusively to the appellate jurisdiction of the supreme court over the adjudications of the *circuit courts*, in cases *depending on the judiciary act of* 1789. It in no respect affected the authority conferred by that act, by the act of 1842, or by the act of 1867, on the justices of the supreme court, the judges of the district courts, the circuit courts, or the district courts, to grant the writ of *habeas corpus;* nor the appellate jurisdiction vested by any of those acts in the circuit and district courts. For the purpose of determining whether, independently of the acts of 1867 and 1868, the

court had authority to entertain an appeal from a circuit court where the prisoner was restrained of his liberty under a military order, and, having been brought before the circuit court on a writ of *habeas corpus*, had been *remanded* to the same custody, it became necessary to recur to the original sources of the power (of the supreme court) to issue the writs of *habeas corpus* and *certiorari* to revise the judgment of the circuit court and to the early adjudications relative to it. Having come to the conclusion that the power tried by this test belonged to the court, it only remained to determine whether it had been abrogated by the act of 1868.

This supplemental exposition is given on account of the summary manner in which the long, elaborate and able opinion of the court has been unavoidably dealt with.]

When the writ will not be granted.

The English habeas corpus act, 31 Car., II, c. 2, excepts from the privilege of the writ persons committed on a charge of treason or felony plainly expressed in the warrant, or as accessory, or upon suspicion of being accessory before the fact, to petit treason or felony so expressed, or committed or charged in execution by legal process.

The act of 1789, as we have seen, contains no such exceptions, and the act of 1867 confers the power to grant the writ of habeas corpus in *all* cases of restraint "in violation of the constitution, or of any treaty or law of the United States." But this power as defined by the former act was held to be limited in its exercise by certain implied restrictions founded in a just regard to fitness. Thus, in *Ex parte Kearney*, 7 Wheat. R., 33, as we have seen, it was held inapplicable to the case of a prisoner under commitment for contempt; and, in *Ex parte Watkins*, 3 Peters, 193, the writ was denied to a prisoner under sentence on conviction for a criminal offense before a court of competent jurisdiction.

Will be denied to a prisoner committed for contempt or on conviction.

PART I.

These decisions, though made before the passage of the act of 1867, it may reasonably be expected will be adhered to, notwithstanding the generality of its language.[1]

State courts and judges cannot issue the writ of *habeas corpus* in cases of imprisonment under the authority of the United States.

Whether the courts and judges of the several states are empowered to issue the writ of *habeas corpus* in cases of imprisonment under the authority of the United States, is a question which, though often brought under discussion, remained for seventy years unsettled. Some of these courts and judges have claimed and exercised it without limitation; others only to the extent of instituting an inquiry into the jurisdiction of the officer or court of the United States, on whose process or order the petitioner was subjected to restraint, while others have declined its exercise altogether. In this predicament the question stood until shortly before the last edition of this work; and so, in the antecedent editions, it was accordingly left by the author, surrounded by all the doubt and uncertainty in which it had thus become involved. But at length, in the case of *Ableman* v. *Booth* (21 Howard, 506), the question was, for the first time, brought under the consideration of the supreme court of the United States, and was there decided upon grounds so unquestionable, and by a course of reasoning so forcible and convincing, as to command, it may be hoped, the ready assent of every enlightened and impartial mind, and to put the question forever at rest. The case came before the court on a writ of error under the 25th section of the judiciary act. Booth had been committed to prison in virtue of a warrant issued by a commissioner for an alleged offense against the United States, and, on being brought up on a writ of

[1] The judges of the district courts are specially empowered to issue the writ of *habeas corpus* for the release of soldiers in certain cases. *Vide post*, District Courts.

habeas corpus issued by one of the justices of the supreme court of the state, was discharged by his order from the custody of the marshal, on the ground that the act of congress, with the violation of which he stood charged, was unconstitutional and void; and, on certiorari to the supreme court of the state, his decision was affirmed. The writ of error, therefore, presented the question directly whether the state judge, in exercising jurisdiction in the case, had not transcended his lawful authority. The court held that he had. The chief justice, in delivering the unanimous opinion of the court, observed:

"We do not question the authority of a state court or judge, who is authorized by the laws of the state to issue the writ of *habeas corpus*, to issue it in any case where the party is imprisoned within its territorial limits, provided it does not appear, when the application is made, that the person imprisoned is in custody under the authority of the United States. The court or judge has a right to inquire, in this mode of proceeding, for what cause and by what authority the prisoner is confined within the territorial limits of the state sovereignty. And it is the duty of the marshal, or other person having the custody of the prisoner, to make known to the judge or court, by a proper return, the authority by which he holds him in custody. The right to inquire by *habeas corpus*, and the duty of the officer to make return, grows, necessarily, out of the complex character of our government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each within its sphere of action, prescribed by the constitution of the United States, independent of the other. But, after the return is made, and the state judge or court is judicially apprised that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of

PART 1. *habeas corpus*, nor any other process issued under state authority, can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jusisdiction of the United States. If he has committed an offense against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress. And although, as we have said, it is the duty of the marshal, or other person holding him, to make known, by a proper return, the authority under which he detains him, it is at the same time imperatively his duty to obey the process of the United States, to hold the prisoner in custody under it, and to refuse obedience to the mandate or process of any other government. And, consequently, it is his duty not to take the prisoner, nor suffer him to be taken, before a state judge or court upon *habeas corpus* issued under state authority. No state judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or require him to be brought before them. And if the authority of the state, in the form of judicial process or otherwise, should attempt to control the marshal or other authorized officer or agent of the United States, in any respect, in the custody of the prisoner, it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference. No judicial process, whatever form it may assume, can have any lawful authority outside the limits of the jurisdiction of the court or judge by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence."

The chief justice proceeds to show, with admirable clearness and force, that there is nothing in this supremacy of the general government, or in the jurisdiction of its judicial tribunals to awaken jealousy or offend the natural and just pride of state sovereignty. The powers confided to the national government were voluntarily and deliberately conferred by the people of the several states for their

own protection and safety. And their anxiety to preserve it in its full force, and to guard it against resistance or evasion on the part of a state, is manifested in the final clause of the constitution, added when the whole frame of government, with all the powers specified therein, had been adopted by the convention; requiring the members of the state legislatures, and all the executive and judicial officers of the several states, to bind themselves by oath or solemn affirmation to support this constitution. "Now," continued the chief justice, "it certainly can be no humiliation to the citizen of a republic to yield a ready obedience to the laws as administered by the constituted authorities. On the contrary, it is among his first and highest duties as a citizen, because free government cannot exist without it. * * * And no power is more clearly conferred by the constitution and laws of the United States, than the power of this court to decide, ultimately and finally, all cases arising under such constitution and laws; and for that purpose to bring here for revision, by writ of error, the judgment of a state court, where such questions have arisen, and the right claimed under them denied by the highest judicial tribunal of the state."[1]

[1] Looking at this question under the strong light shed upon it by the opinion of Chief Justice TANEY, it may seem strange, not to say unaccountable, that it should have rested so long in doubt, or, indeed, that it should have led to any diversity of opinion at all among the learned and able men under whose judicial consideration it had, from time to time, been brought, during the lapse of three-quarters of a century. But it is to be borne in mind that until the establishment of the constitutional government, the judicial power, with a very limited exception, under the articles of confederation, had been lodged exclusively, first in the colonial and then in the state tribunals. Their power to grant relief on *habeas corpus* was plenary. It was as ample as that of the king's bench in England, and they were inured to its unquestioned exercise. The constitution, it is true, had invested the national judiciary with jurisdiction over all cases arising under the constitution, laws and

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CHAPTER VI.

OF THE ADVISORY POWER OF THE SUPREME COURT ON CERTIFICATE OF OPINIONS OPPOSED.

By "An act to amend the judicial system of the United States," passed April 29, 1802, it is provided "that whenever any question shall occur before a circuit court, upon which *the opinions of the judges shall be opposed*, the point upon which the disagreement may happen shall, during the same term, upon the request of either party or their counsel, be stated under the direction of the judges, and certified, under the seal of the court, to the supreme court, at their next session to be held thereafter; and shall by

treaties of the United States, and congress at its first session had enacted that the national courts and judges should have power to issue the writ of *habeas corpus* for the relief of all persons restrained of their liberty under or by color of the authority of the United States. With this exception, hardly comprehensive enough to embrace one in a hundred of the cases requiring the application of this remedy, the state judicatories were left in full possession of their jurisdiction over the remaining ninety-nine. Nor was the limited power conferred upon the federal judiciary to grant the writ, in terms declared to be exclusive. If to these circumstances we add the prejudice arising from a widely diffused jealousy of the national government, it will appear less surprising that even lawyers and judges were slow to discern that, from the very nature of the power, it must of necessity be exclusive, and that the authority of the state courts and judges had accordingly become indirectly limited *pro tanto*. It was a result not to be arrived at by the study of English law books, but to be reasoned out by an attentive consideration and thorough comprehension of our duplex system of civil government. In some of the discussions to which the subject has given rise, it has been said that each state is bound to protect the liberties of its own citizens, and that to this end its judiciary must be armed with unlimited power to afford a remedy in all cases of unlawful restraint from whatever quarter. But the citizens of a state are citizens also of the United States, and the national government is no less imperatively bound, and its judiciary no less competent, to afford them the like protection against any infringement of their rights under color of its authority.

It is unnecessary to add that no provision contained in the constitution or laws of any state touching the writ of *habeas corpus*, can in any respect vary the duty of its courts and judges, as indicated in the

the said court be finally decided. And the decision of the supreme court, and their order in the premises, shall be remitted to the circuit court, and be there entered of record, and shall have effect according to the nature of the said judgment or order: Provided, 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: 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."[1]

Nature and importance of this branch of jurisdiction.

The form of remedy provided by this section is peculiar to our national jurisprudence. Strictly, the jurisdiction thus exercised is neither original nor appellate; it is simply advisory; and in the actual state of the law in other respects, it is of considerable importance; for it affords the only means by which any question arising in the circuit court in a criminal case; or, with some exceptions, in a civil suit in which the amount in controversy does not exceed

judgment of the court in the case of *Ableman* v. *Booth*, mentioned in the text, nor afford any justification for a disregard of such duty. For example, a statute of the state of New York, in describing the persons who shall not be entitled to prosecute this writ, designates those "committed or detained by virtue of any *process* issued by any *court* of the United States, or any *judge* thereof, in cases where such courts or judges have exclusive jurisdiction under the laws of the United States;" but is silent as to cases of commitment on process issued by the commissioners of the United States, although, probably, nineteen-twentieths of the commitments before indictment are made by these officers; and it is silent also with respect to restraints of liberty in virtue of the military laws of the United States. These omissions can have no legitimate influence on the conduct of the state courts and judges, but it would have been better to supply them, and better still to have excepted in general terms *all persons restrained of liberty under or by color of the laws of the United States.*

[1] Ch. 31, § 6: 2 Stat. at Large, 156.

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two thousand dollars, can be brought under the cognizance of the supreme court for decision. In other words, the circuit courts would be obliged in these cases to decide absolutely, and their decisions would be final.

To what questions it is applicable.

With respect to the kind of questions of which the supreme court may take cognizance in this form, its jurisdiction has been held to be confined to questions of *law*. *Wilson* v. *Barnum*, 8 Howard, 258. The question in this case was, whether a machine was substantially like the thing patented; and it was held not to be within the act. Nor does the act embrace questions depending on the *discretion* of the circuit court. *Davis* v. *Braden*, 10 Peters, 286; *Smith* v. *Vaughan*, id., 366; *Packer* v. *Nixon*, id., 408; and on this ground it was held that the court had no jurisdiction upon a certificate of division of opinion on a motion to quash an indictment. *The United States* v. *Rosenburgh*, 7 Wallace, 580. Neither can a certificate of disagreement be resorted to for the purpose of transferring an entire cause to the supreme court. The particular point must be distinctly stated; and, therefore, where there was a demurrer to an indictment, assigning several distinct causes of demurrer, a certificate that the judges of the court were divided in opinion as to the point whether the demurrer should be sustained, was held to be insufficient. *The United States* v. *Briggs*, 5 Howard, 208. And so, when, on the trial of an indictment, the counsel for the prisoner moved the court to instruct the jury, that "the evidence did not conduce to establish the offense" with which the prisoner was charged, and the opinions of the judges being opposed upon the propriety of giving this instruction, this division of opinion was certified to the supreme court, it was held that the court could not entertain jurisdiction of the case. *The United*

States v. *Bailey*, 2 Peters, 267. See, also, *Webster* v. *Cooper*, 10 Howard, 54; *Luther* v. *Borden*, 7 Howard, 1; *White* v. *Turk*, 12 Peters, 283. The rule is strongly exemplified in this case. A motion has been made in the circuit court to set aside a judgment on a bail bond, and the question certified was, whether the motion ought to be granted. But though the various questions on which the motion depended were separately certified, yet inasmuch as they brought the whole case before the supreme court, the case was held not to be within the jurisdiction of the court. See, also, *Nesmith* v. *Sheldon*, 6 Howard, 41.

But though the motion on which the question arises be one addressed to the discretion of the circuit court, and though the certificate state several points of disagreement, yet if the question relates to matter of strict right, the court has jurisdiction, and will decide the points necessary to a decision of that question, provided they arose simultaneously, and may be resolved virtually into one point. *The United States* v. *Chicago*, 7 Howard, 185.

The question whether a new trial ought to be granted, whether in a civil or a criminal case, is not a question upon which a division of opinion can be certified. *The United States* v. *Daniel*, 6 Wheat., 542. Yet in a case where such a division was certified, it appearing by the record that the division was upon the same points raised by bills of exception taken at the trial, the court heard the argument, reserving its judgment until a writ of error had been sued out. *Grant* v. *Raymond*, 6 Peters, 218.

It has been held, also, that the court has not jurisdiction of a question arising in the circuit court upon some proceeding subsequent to the decision of the cause in that court. *Devereaux* v. *Marr*, 12 Wheaton, 212. In *Wayman* v. *Southard* (10 Wheaton, 1), it was decided, that on a certificate of division of opin-

PART 1. ion, the court could not inquire whether the parties were properly before the circuit court.

When the question certified is adjudged to be one not within the jurisdiction of the court, the case is simply dismissed. In *Wolfe* v. *Usher*, however (3 Peters, 259), of which the court was unable to take jurisdiction, because, upon opening the record, it was found to contain a certificate that the judges of the circuit court had differed in opinion, but the point on which they differed was not stated, the case was *remanded* to the circuit court, *with directions to proceed according to law*. And in *Sanders* v. *Gould* (4 Peters, 392), where the whole case had been sent to the court upon a certificate, it was *remanded*. But in *Sadler* v. *Hoover* (7 Howard, 646), which was essentially identical with *Wolfe* v. *Usher*, the cause was dismissed. It is presumed, however, that these diversities were not designed to be substantial. And although the act requires the point of disagreement to be certified "during the same term," it may be supposed that where the certificate admits of correction, it may be amended.

A certificate of opinions opposed in a cause is no impediment to the prosecution of a writ of error upon the final judgment therein, and the whole record will then be before the court. *Ogle* v. *Lee*, 2 Cranch, 35. The certificate brings nothing before the supreme court but the points certified. The cause remains upon the docket of the circuit court, and, at its discretion, may be prosecuted; provided, only, that nothing be done to defeat or impair the proper legal effect of the decision of the supreme court where it shall be made. *Kennedy* v. *Georgia State Bank*, 7 Howard, 586, 611. This, indeed, is virtually said in the act itself. Besides the foregoing cases, affecting the jurisdiction of the court, a multitude of others, involving no question of juris-

diction, have been carried to the supreme court by certificate of division of opinion. A large proportion of these consisted of criminal cases, in most of which the question certified arose either on a motion to quash the indictment, or a motion for an arrest of judgment after conviction. Upon a motion to quash, the court doubtless has a discretionary authority either to overrule the motion, *pro forma*, and put the accused on trial upon a plea of not guilty, or to postpone the trial to await the decision of the supreme court. When the question on which the judges differ arises on a motion in arrest, sentence, it may be supposed, would be deferred, care being taken in both cases to secure the re-appearance of the accused at the proper time, either by commitment or bail.

RECAPITULATION.

At the conclusion of this survey of the constitutional and statutable provisions, and of the judicial decisions, by which the jurisdiction of the supreme court is declared and defined, a summary statement of the result may serve to disentangle a subject at first view somewhat complex.

The cognizance of the court embraces litigation under all the various forms in which it is pursued in that country whence the principles of our jurisprudence are chiefly derived. It is a court of common law, of equity, and of admiralty and maritime jurisdiction. It is hardly necessary to add, that its jurisdiction extends, and, of course, its process runs, throughout the Union.

Its jurisdiction is *original*, that is to say, suits may be instituted in it, and be brought to trial or hearing and decision before it, *in the first instance:*

1. In all civil cases cognizable in the courts of the United States, in which *a state is a party.*

PART 1. And the cases of this description cognizable in these courts, it must be remembered, comprise all those in which a state can either sue or be sued, except those in which a state is *plaintiff against its own citizens*. Of these the state courts alone have jurisdiction. It must be remembered, also, that *no suit* can be maintained *against a state* by *any private person*.

From these premises, therefore, it follows that the supreme court has original jurisdiction of all civil actions *between* different states, of all brought by a state against the citizens of another state, and against aliens; and of all such actions brought *against* a state by a foreign state.

This branch of the original jurisdiction of the supreme court is declared by the judicial act to be partly *exclusive* and partly *concurrent*; *exclusive*, in suits between different states, and by a foreign state against a state; *concurrent*, where the suit is against a citizen of another state, or an alien.

2. The second and only remaining branch of the original jurisdiction of the supreme court embraces all cases affecting *ambassadors, other public ministers and consuls*.

Of all such suits or judicial proceedings *against* ambassadors, other public ministers, their domestics, or domestic servants, as are permitted by the laws of nations, this jurisdiction is declared by the judicial act to be *exclusive;* and of all suits brought *by* ambassador, or other public ministers, or in which a consul or vice-consul shall be a party, plaintiff, or defendant, it is declared to be *concurrent*.

But whether these restrictions are warranted by the constitution, and whether the jurisdiction of the supreme court over these cases is not in fact wholly exclusive, is a question resting in doubt.

The original jurisdiction of the supreme court, being limited by the constitution as interpreted by that court, to these two classes of cases, cannot be extended to others.

As an *appellate* tribunal, the supreme court has cognizance, by a writ of error and appeal, of all civil causes whatsoever decided in the circuit courts of the United States, or in such district courts as are invested with the original jurisdiction of the circuit courts, or in the supreme courts of the territories, provided, as the general rule, the sum or value in dispute exceeds two thousand dollars; but in certain prize causes, and in cases decided by the court of claims adversely to the United States, and in suits arising under the revenue laws, or the patent or copyright acts, no such limitation exists.

Over the *judgments* of these courts, *in criminal cases*, it has no jurisdiction.

But in all cases, as well criminal as civil (except such as are brought up by writ of error or appeal from the district court of the same district), questions arising upon the trial or hearing of a case, upon which the judges of the circuit court may happen to disagree in opinion, may be certified to the supreme court for decision.

This court also possesses appellate jurisdiction, by *writ of error*, over the final judgments and decrees of the highest court in which a decision could be had, of any *state*, in every case belonging to either of the three classes of cases described in the 25th section of the judicial act, under the restrictions therein mentioned, whether the case be civil or criminal, whoever may be the parties, and whatever may be amount in controversy.

Finally, the supreme court has power to issue writs of *prohibition* to the district courts, when proceeding as courts of admiralty without jurisdiction; writs of

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mandamus to the district and circuit courts of the United States, but not to the ministerial officers thereof; writs of *habeas corpus*, to bring up prisoners in jail, when in custody under the authority of the United States, or for trial before some court thereof, in virtue of the process or order of a court whose decisions are subject to the appellate jurisdiction of the supreme court, or when it is necessary to bring them into court to testify, but not when committed for contempt, nor in execution in criminal or civil cases; writs of *scire facias*, of *dedimus potestatem, and all other writs* which may be necessary for the exercise of its jurisdiction, and agreeable to principles and usages of law.

CHAPTER VII.

OF THE ORGANIZATION OF THE CIRCUIT COURTS.

These courts, substantially as they at present exist, formed a part of the original judicial system of the United States as established by the judicial act of 1789. They were established by congress in virtue of the authority given by the constitution, to constitute other courts inferior to the supreme court. By an act passed February 13, 1801, this system was virtually abolished, and a new one substituted. The new system was, however, of short duration, this act having been repealed on the 8th of March, 1802, and the former system expressly revived.

SECTION 1.

OF THE CIRCUITS.

The judicial districts of the United States are arranged into *nine circuits*, as follows:

The districts of Maine, New Hampshire, Massachusetts and Rhode Island constitute the *first circuit.*

The districts of Vermont, Connecticut, the Northern, Southern and Eastern districts of New York, the *second circuit.*

The districts of Eastern and Western Pennsylvania, New Jersey and Delaware, the *third circuit.*

The districts of Maryland, West Virginia, Virginia, North Carolina and South Carolina, the *fourth circuit.*

The districts of Georgia, Florida, Alabama, Mississippi, Louisiana and Texas, the *fifth circuit.*

The districts of Ohio, Michigan, Kentucky and Tennessee, the *sixth circuit.*

The districts of Indiana, Illinois and Wisconsin, the *seventh circuit.*

The districts of Minnesota, Iowa, Missouri, Kansas and Arkansas, the *eighth circuit.*

The districts of California, Oregon and Nevada, the *ninth circuit.*[1]

SECTION II.

OF THE JUDGES AND OFFICERS OF THE CIRCUIT COURT.

Judges]. At the date of the passage of the act (to be noticed presently) of April 10, 1869, ch. 22 (16 Stat. at Large, 44), entitled "*An act to amend the judicial system of the United States,*" and limited to take effect on the first Monday of December of

[1] These circuits are defined and established by the act of July 23, 1866, ch. 210, 14 Stat. at Large, p. 209. With respect to the *first* and *second* circuits, the act, however, simply directs that they "shall remain as now constituted." The second circuit was established by the act of March 3, 1837, ch. 34. At that date, and until the passage of the act of February 25, 1865, ch. 54, creating the eastern district of New York, there were but the northern and southern districts. Neither this nor any other act expressly assigns the new district to the second circuit; but it is supposed that it may properly be regarded as belonging to it, by just legal intendment. The *first* circuit was established by the act of March 30, 1820, ch. 27. The distribution, it will be seen, comprises all the thirty-six states of the Union except Nebraska, which did not become a state until March 1, 1867.

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that year, the circuit courts of the United States consisted, regularly and ordinarily, of the justice of the supreme court assigned to the circuit, and the district judge for the district in which the court sat; but the supreme court were authorized, in cases where special circumstances should, in their judgment, render it necessary, to assign *two* of the justices to attend;[1] and when either the justice of the supreme court, or the district judge by whom any circuit ought to be held, should fail to attend, the court might be held by the judge attending.[2]

The *allotment* of judges to the several circuits (made January 15, 1869) is as follows:

To the *first circuit*—Mr. Justice CLIFFORD.
To the *second circuit*—Mr. Justice NELSON.
To the *third circuit*—Mr. Justice GRIER.
To the *fourth circuit*—Chief Justice CHASE.
To the *fifth circuit*—Mr. Justice SWAYNE.
To the *sixth circuit*—
To the *seventh circuit*—Mr. Justice DAVIS.
To the *eighth circuit*—Mr. Justice MILLER.
To the *ninth circuit*—Mr. Justice FIELD.

By "An act in amendment of the acts respecting the judicial system of the United States," passed February 28, 1839, ch. 36 (5 Stat. at Large, 322), it is enacted:

Suits to be certified to another circuit, when.

"That in all suits and actions in any circuit court of the United States, in which it shall appear that both the judges

[1] Act of March 3, 1793, ch. 22; 1 Stat. at Large, 333.

[2] Act of April 29, 1802, ch. 31; 2 Stat. at Large, 156. Whether, in thus constituting these courts, congress did not transcend its constitutional authority, is a question which does not appear to have been raised for judicial decision until many years after their organization; and when at length their constitutionality was assailed, the supreme court considered the question as already settled by the force of cotemporary interpretation and long acquiescence. "This practical exposition," said the court, "is too strong and obstinate to be shaken or controlled. Of course the question is at rest, and ought not to be disturbed."

thereof, or the judge thereof, who is solely competent by law to try the same, shall be any ways concerned in interest therein, or shall have been of counsel for either party, or is or are so related to or connected with either party as to render it improper for him or them, in his or their opinion, to sit in the trial of such suit or action, it shall be the duty of such judge or judges, on application of either party, to cause the fact to be entered on the records of the court; and also to make an order that an authenticated copy thereof with all the proceedings in such suit or action shall be certified to the most convenient circuit court in the next adjacent state, or in the next adjoining circuit; which circuit court shall, upon such record and order being filed with the clerk thereof, take cognizance thereof in the same manner as if such suit or action had been rightfully and originally commenced therein, and shall proceed to hear and determine the same accordingly; and the proper process for the due execution of the judgment or decree rendered therein shall run into and be executed in the district where such judgment or decree was rendered, and also into the district from which such suit or action was removed."

An act entitled "An act to give greater efficiency to the judicial system of the United States," passed March 3, 1863, ch. 93; (12 Stat. at Large, 768), directs:

In case of the disability, &c., of the judge, his place may be supplied by the judge of another circuit.

"That whenever the judge of the supreme court for any circuit, from disability, absence, the accumulation of business in any circuit court in any district within his circuit, or from his having been of counsel or being interested in any cause pending in such circuit court, or from any other cause, shall deem it advisable that the circuit court in such district shall be holden by the judge of any other circuit, he may request, in writing, the judge of any other circuit to hold the circuit court in such district, during a time to be named in such request; and such request shall be entered on the journal of the circuit court so to be holden. And thereupon it shall be lawful for the judge so requested, to hold the court in such district and exercise all the powers of the judge of such circuit within and for such district,

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during the time named in such request. When, by reason of death or resignation, there shall be no judge in any circuit, this request may be made by the chief justice, and shall be operative until such circuit shall be assigned to another judge."

The second section of this act contains the following provision:

Causes certified into a circuit court may be sent back.

"And be it further enacted, that the judge of any circuit may order any civil cause certified into any circuit court within his circuit from any court of the United States, to be certified back to the court whence it came; and in such case such cause shall be proceeded in by such court in all respects as if the same had not been certified from it: *Provided,* That if from any cause it shall be improper that the judge of such court should try any cause so certified back, the same shall be tried by some other judge holding such court, pursuant to the provisions of this act."

The third and last section enacts:

"That all acts and parts of acts inconsistent with the provisions of this act be and the same are hereby repealed."

There were also several antecedent acts (which will be noticed in treating of the district courts), directing in case of the disability, etc., of a judge of a district court, the transmission of causes from that court to the circuit court for the same district. Under this state of the law the question arose in the case of *Supervisors* v. *Rodgers*, 7 Wallace, 175, whether

The act of 1839 not repealed by the act of 1863.

the above recited provision of the act of 1839 was repealed by the second section of the act of 1863. The supreme court held that it was not, the above quoted provisions of that section being applicable only to the cases specified in the first section.

It was said also in this case that the court to which the cause is certified may, in conducting it, adopt, *pro hac vice*, the practice of the court whence it came.

When circuit court may be held by the district judge of another district.

By an act passed August 6, 1861, ch. 59; (12 Stat. at Large, 318), when there are two districts in a state, in case of a vacancy in the office of district judge in one of them, and of the sickness or absence of the circuit judge, the circuit court may be held therein by the district judge of the other district.

An act passed June 17, 1844, ch. 96, relieves the justices of the supreme court from the duty of attending more than one term of the circuit court in any district in any one year.

Such was the predicament of the circuit courts of the United States as constituted and regulated by law at the passage of the act of 1869, cited at the commencement of this chapter.

A circuit judge for each circuit—his powers.

It directs for the appointment "for each of the nine judicial circuits," of "a circuit judge, who shall reside in his circuit, and shall possess the same power and jurisdiction therein as the justice of the supreme court allotted to the circuit." The circuit courts in each circuit may be "held by the justice of the supreme court allotted to the circuit, or by the circuit judge of the circuit, or by the district judge; and such courts may be held at the same time in different districts of the same circuits; and cases may be heard and tried by each of the judges holding any such court, sitting apart, by direction of the presiding justice or judge, who shall designate the business to be done by each." The act makes it "the duty of the chief justice and of each justice of the supreme court" to "attend at least one term of the circuit court in each district of his circuit during every period of two years."

Circuit courts, by whom held.

Justice of supreme court to attend once in two years.

Effect of the change.

This last clause supplants the above mentioned enactment, exonerating the justices of the supreme court from their obligation to attend more than one term of a circuit court in each year; but whether it interferes with the foregoing enactments authorizing

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the substitution of one justice for another; the transmission of causes to an adjoining circuit; and the holding of a circuit court in one district in a state by the district judge of another district of the same state, is a question upon which I forbear to speculate.

Clerk.] It is by this act further enacted that nothing therein "shall affect the powers of the justices of the supreme court as judges of the circuit court, except in the appointment of clerks of the circuit courts, who in each circuit shall be appointed by the judge of that circuit."

The act of March 3, 1863, ch. 93, requires that "the clerk of every court shall give bond in such sum as may be fixed by the court, with sureties to be approved by the court, and a new bond may be required whenever the court shall deem it proper that such bond be given." A copy of the bond is to be "entered on the journal of the court" and the original "deposited for safe keeping as the court may direct. A certified copy of such entry shall be *prima facie* proof of the execution of such bond and of the contents thereof."

The compensation of the clerk consists of fees fixed by acts of congress which will be found in the appendix.

Crier.] The crier is appointed by the court, and is entitled to a compensation of two dollars per day for his services.[1]

Commissioners to take acknowledgments of bail and affidavits, &c., depositions, &c.] The office of commissioner was originally created by an act of congress passed in the year 1812, empowering the circuit courts, whenever the extent of their districts renders it necessary, "to appoint such and so many discreet persons, in different parts of the district, as such court may deem necessary, to take acknowl-

[1] Act of February 26, 1853, ch. 80.

edgments of bail and affidavits; which acknowledgments of bail and affidavits shall have the like force and effect as if taken before any judge of the said courts."[1] And by the act of September 18, 1850, ch. 60, this power has been conferred on the superior court of each of the organized territories of the United States.

Their powers extended.

By several successive subsequent acts of congress, the powers of these officers have been greatly enlarged, until at length the office has become one of considerable importance and responsibility. The authority to take acknowledgments of bail and affidavits, conferred by the original act, being limited to suits in the circuit courts, an act was passed a few years later extending it to causes in the district court; and by the same act these persons were empowered to take depositions *de bene esse* under the thirtieth section of the judiciary act, a power of which it will be necessary to treat in the second part of this work.[2] The power to take affidavits and depositions extends as well to suits in admiralty as to those at law and in equity; and by the rules of practice in admiralty and maritime causes, prescribed by the supreme court in 1845, commissioners are empowered to take admiralty stipulations.

May take bail, &c., in district court.

Depositions.

May grant summons in behalf of seamen.

By another act these officers are invested with "all the powers that a judge or justice of the peace may exercise" under and in virtue of the sixth and seventh sections of the act of July 20, 1790, for the government and regulation of seamen in the merchant service.[3]

The power here designated is that of granting a summons in behalf of seamen to whom wages are

[1] Act of Feb. 20, 1812, ch. 25: 2 Stat. at Large, p. 679.

[2] Act of March 1, 1817, ch. 30: 3 Stat. at Large, p. 350.

[3] Act of August 23, 1842, ch. 188, § 1: 5 Stat. at Large, p. 516: act of July 28, 1866, ch. 309.

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due, calling on the master to show cause why admiralty process should not issue against the vessel; and if no sufficient cause is shown, granting a certificate authorizing the issue of such process.

May cause offenders to be arrested, &c.

By the same section of the act last above cited, it is also enacted that commissioners "shall and may exercise all the powers that any justice of the peace or other magistrate of any of the United States may now exercise in respect to offenders for any crime or offense against the United States, by arresting, imprisoning or bailing the same, under and by virtue of the thirty-third section of the" judiciary act of 1798. And, by the second section of the same act, it is further enacted, "That in all hearings before any justice or judge of the United States, or any *commissioner* appointed as aforesaid, under and by virtue of the said thirty-third section, it shall be lawful for such justice, judge or commissioner, where the crime or offense is charged to have been committed on the high seas or elsewhere within the admiralty and maritime jurisdiction of the United States, in his discretion to require a recognizance of any witnesses produced in behalf of the accused, with such surety or sureties as he may judge necessary, as well as in behalf of the United States, for their appearing and giving testimony at the trial of the cause, where testimony, in his opinion, is important for the purposes of justice at the trial of the cause, and in danger of being otherwise lost."

May require witnesses to give bail.

May require new bail.

By an act passed a few years later it is enacted, "That upon the necessary proof being made to any judge of the United States, or other magistrate having authority to commit on criminal charges against the laws of the United States, that a person previously admitted to bail on any such criminal charge is about to abscond, and that his bail is insufficient, it shall and may be lawful for any such judge or

magistrate to require such person to give better security, or in default thereof, to cause him to be committed to prison; and to that end an order for his arrest may be indorsed on the former commitment, or a new warrant therefor may be issued by such judge or magistrate, setting forth the cause thereof."[1] The terms "other magistrate having authority to commit," &c., have in this instance been understood to embrace commissioners, and the policy of the act and the relation it bears to the other enactments on the same subject and in which commissioners are expressly named, favor this construction.

May issue process to enforce decisions of consuls.

And by another act of the same date, entitled "An act more effectually to provide for the enforcement of certain provisions in the treaties of the United States," commissioners, as well as the district and circuit courts of the United States, are empowered, upon the application of consuls, vice-consuls or commercial agents of foreign powers, with which the United States have entered into treaty stipulations to the effect mentioned in the preamble of the act, to issue process for the purpose of enforceing the awards and decisions of such consuls, &c., relative to controversies which may arise in our ports between the masters and crews of vessels belonging to their respective countries.[2]

May issue search warrant.

By the act of July 13, 1866, ch. 184 (14 Stat. at Large, 152), commissioners, as well as the judges of the circuit and district courts, are empowered to issue search warrants authorizing any internal revenue officer to search any premises, if he shall make oath in writing that he has reason to believe and does believe that a fraud upon the revenue has been or is being committed upon or by the use of such premises.

[1] Act of August 8, 1846, ch. 98, § 6; 9 Stat. at Large, p. 73.

[2] Ib., p. 79.

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Marshal incompetent to act as commissioner.

No marshal or deputy marshal is permitted to hold the office of commissioner, or exercise the duties thereof.[1]

In those districts in which the district courts are invested with the original jurisdiction of the circuit courts, these officers, it is hardly necessary to add, are appointed by the district courts, acting as circuit courts.

Attorneys, Counselors &c.] The circuit court being a court of law and equity, and, as an appellate tribunal, a court of admiralty also, the persons appointed to conduct the business of suitors therein, are properly designated under the various appellations of attorneys, solicitors, proctors, counselors and advocates. The names of proctor and advocate are derived from the civil law, and are used in admiralty proceedings, as correspondent with those of attorney and counselor in proceedings at law, and those of solicitor and counselor in proceedings in equity.

The admission of persons to practice in the several circuit courts, is regulated by the rules of those courts respectively. As far as I have been able conveniently to ascertain, and probably throughout the Union, those who have been already admitted to practice in the supreme or superior courts of the several states, are entitled to admission to the corresponding rank in the circuit courts held therein, of course.[2]

[1] Act of August 16, 1856, ch. 124, § 13; 11 Stat. at Large, p. 50.

The fees of these officers are regulated by the act of Febrnary 26, 1853, ch. 80. See Appendix.

[2] The rule upon this subject of the circuit court for the southern district of New York, is as follows:

"Attorneys and counselors of the supreme court, and solicitors and counselors of the court of chancery of this state, may, on presentation of their licenses to the clerk and his report of their degree, have an order of course entered in open court in term time, or in the common

Of the privileges, disabilities and duties of attorneys, of their appointment, the duration of their authority, and the mode of changing them, their punishment for misconduct, &c., it is sufficient to say that the practice of the supreme courts of the respective states, relative to these particulars, are applicable to the national courts sitting in such states respectively, except so far as the same may be altered by acts of congress, or by rules of court.

Attorneys, &c., may be required, by order of court, to satisfy costs unnecessarily made.[1]

Their fees are prescribed by a late act of congress, a copy of which is appended to this work.[2]

District Attorney and Marshal.] See *post*, Organization of the District Courts.[3]

rules in vacation, admitting them to the same standing in this court; and attorneys and solicitors of the said courts may also be admitted as proctors; and counselors of the said courts may be admitted as advocates, on the admiralty side of the court; all such officers first taking and subscribing the oaths of office, prescribed by the constitution and laws of the United States."

The rule of the circuit court for the northern district is substantially the same. Appendix, Rule 1, C. C. (N. D.) N. Y. On the establishment of this court in 1837, a rule was made authorizing the practitioners in the district court to practice also in this. Appendix, Rule 13.

[1] Act of July 22, 1813; 3 Stat. at Large, 21.

[2] Acts of February 26, 1853, ch. 80, Appendix.

[3] The times and places designated by law for the stated sessions of the circuit court in the northern district of New York are as follows: At the village of *Canandaigua*, on the third Tuesday of June, and at the city of *Albany* on the second Tuesday of October. The October term to be adjourned to the third Tuesday of January, at *Albany*, and again to the third Tuesday of March, at the city of *Utica*; "and the said adjourned term [terms?] shall be held for the transaction of civil business only; and no jury shall be drawn for service therein exclusively, but the jury drawn to serve in the district court at the same time and place of the said adjourned terms of the said circuit shall be used for the trial of issues of fact arising in civil causes in said circuit court," &c. Act of July 2, 1864, ch. 255; 13 Stat. at Large, p. 385.

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May be appointed for the trial of criminal causes, at, &c.

Special Sessions.] By the act of March 2, 1793, it is provided, "That the supreme court, or, when the supreme court shall not be sitting, any one of the justices thereof, together with the judge of the district within which a special session, as hereafter authorized, shall be holden, may direct special sessions of the circuit courts to be holden for the trial of criminal causes, at any convenient place within the district, nearer to the place where the offenses may be said to be committed than the place or places appointed by law for the ordinary sessions; that the clerk of such circuit court shall, at least thirty days before the commencement of such special sessions, cause the time and place for holding the same to be notified, for at least three weeks, successively, in one or more of the newspapers published nearest to the place where the session is to be holden; that all process, writs and recognizances of every kind, whether respecting juries, witnesses, bail or otherwise, which relate to the cases to be tried at the said special sessions, shall be considered as belonging to such sessions, in the same manner as if they had been issued or taken in reference thereto; that any special session may be adjourned to any time or times previous to the next stated meeting of the circuit court; that all business depending for trial at any special court, shall, at the close thereof, be considered as of course removed to the next stated term of the circuit court.[1]

Notice to be given of time and place.

[1] 1 Stat. at Large, ch. 22, § 3, p. 333.

In the case of *The United States* v. *Hamilton* (3 Dallas, 17,) strong doubts were expressed, 1. Whether a special circuit court could be appointed to be held on a day subsequent to that fixed by law for the next stated session; and, 2. Whether admitting the power to appoint such court, indictments found at a stated session could be tried at such special session. And in the case of *The United States* v. *Insurgents* (id., 513), it seems to have been justly considered that the authority conferred by the above recited act was to be exercised in subordination

And by the act of July 4, 1840,[1] it is enacted, "That the presiding judge of any circuit court may, at his discretion, appoint special sessions thereof, to be held at the places where the stated sessions thereof are holden; at which special sessions it shall be competent to the said court to entertain jurisdiction of and hear and decide all cases in equity, cases in error, or on appeal, issues of law, motions in arrest of judgment, motions for new trial, and all other motions, and to award executions and other final process, and to do and transact all other business, and direct all other proceedings, in all causes pending in the circuit court, except trying any cause by jury, in the same way and with the same force and effect as the same could or might be done at the stated sessions of such court."

May be appointed by presiding judge, at, &c., for all business except trials by jury.

With respect to the form in which the power here conferred upon the presiding judge is to be exercised, the act is silent. But considering that it invests the court appointed in pursuance of it with all the powers pertaining to a stated session, except the power of trying causes by jury, and that all suitors are equally entitled to a hearing, and may even be held chargeable with laches for neglecting the opportunity, it would seem to be highly proper, if not indispensable, that full and timely publicity should be given to the appointment, according to the express requirement of the above recited act of March 2, 1793.[2]

Notice, how to be given.

to the provision contained in the judicial act of 1789, (vol. 2, p. 67, § 29,) directing "that in cases punishable with death, the trial shall be in the county where the offense was committed; or where that cannot be done without great inconvenience, twelve petit jurors at least shall be summoned from thence."

[1] Ch. 43, § 2; 5 Stat. at Large, p. 392.

[2] The acts of May 5, 1862, ch. 71; 12 Stat. at Large, p. 386, respecting the courts for the district of Kentucky, contain very definite and judicious regulations relative to special sessions and adjournments, which, for the sake of simplicity and certainty, it would have been well to extend to all other districts.

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Court always open as a court of equity, for what purposes.

In addition to the facilities afforded to suitors by the above mentioned provisions, it has also been enacted that the district courts as courts of admiralty, and the circuit courts as courts of equity, shall be deemed always open for the purpose of filing libels, bills, petitions, answers, pleas and other pleadings, for issuing and returning mesne and final process and commissions, and for making and directing all interlocutory motions, orders, rules, and other proceedings whatever, preparatory to the hearing of all causes pending therein upon their merits. And it shall be competent for any judge of the court, upon reasonable notice to the parties, in the clerk's office or at chambers, and in vacation as well as in term, to make and direct, and award all such process, commissions and interlocutory orders, rules, and other proceedings, whenever the same are not grantable of course according to the rules and practice of the court."[1]

Powers of judge in vacation.

Original provision for.

Adjournment, &c.] By the judiciary act of 1789[2] it is provided "That a circuit court may be adjourned from day to day by any one of its judges, or, if none are present, by the marshal of the district, until a quorum be convened." The circuit courts consisted originally of *two* judges of the supreme court and the district judge, two of whom constituted a quorum.[3] But by an act passed in 1793, as we have seen, these courts were made to consist of *one* judge of the supreme court and the district judge; and the judge of the supreme court, in the absence of the district judge, was authorized to hold the court alone.

[1] Act of August 23, 1842, ch. 188, § 5; 5 Stat. at Large, 516. See, also, Appendix, Rules 1, 2 and 3, of the Rules regulating the practice of the C. C. in equity, embodying and amplifying the above recited provisions of this act.

[2] Ch. 24, § 7; 1 Stat. at Large, 73.

[3] Ibid, § 4.

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By an act passed May 19, 1794,[1] it is provided "That a circuit court in any district, when it shall happen that no justice of the supreme court attends within four days after the time appointed by law for the commencement of the session, may be adjourned to the next stated term by the judge of the district, or, in case of his absence also, by the marshal of the district." But by the act of April 29, 1802, as we have seen, a circuit court may be holden by *either* of the judges; and the necessity of an adjournment on account of the absence of the judge of the supreme court was thereby removed, and the applicability of the act of 1794 was thus limited to the case of the absence of both of the judges. Under this state of the law, the act of July 4, 1840,[2] was passed, by which it was enacted, "That whenever it shall so happen that neither of the judges of a circuit court of the United States shall attend at the commencement of a session of the said court, or at the time appointed on any adjournment thereof, to open and adjourn the said court in person, either of the said judges may, by a written order to the marshal, adjourn the court from time to time, as the case may require, to any time or times antecedent to the next stated term of the said court; and all suits, actions, writs, processes, recognizances, and other proceedings pending in such court, or returnable to or to be acted upon at such court, shall have day and be returnable to, and be heard, tried and determined, at such adjournment or adjournments, in the same manner and with the same effect as if the said court had been duly opened and held at the commencement of such session, or other day appointed therefor; and all persons bound or required to appear at said court, either as jurymen, witnesses, parties,

To next stated term by judge or marshal.

In the absence of both judges, marshal may adjourn on written order.

[1] Ch. 32; 1 Stat. at Large, 369.

[2] Ch. 43; 5 Stat. at Large, 392.

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or otherwise, shall be bound and required to attend at such adjournment or adjournments accordingly."

Practical results of the foregoing provisions.

I have deemed it necessary to enumerate these several legislative provisions relative to the power of adjournment, on account of the importance of the subject, and because there seems to be some ground for doubt concerning the precise result of these various enactments. Unquestionably the provision of the judiciary act authorizing one judge to adjourn from day to day till a quorum shall appear, is wholly superseded by the subsequent acts. It is equally clear, also, that the provision of the act of 1794, authorizing the district judge to adjourn the court to the next stated term on account of the non-attendance of the justice of the supreme court, is also in like manner, superseded. But whether the authority given to the marshal by that act is taken away, is a question which may admit of doubt.

It may be that congress intended by the act of 1840, to supersede and thus indirectly to repeal all existing regulations on the subject. But the act contains no repealing clause, and its provisions are not repugnant to those of the act of 1794. The better opinion, therefore, seems to be, that the power given by this act to the marshal, still exists. The authority *expressly* given to this officer, is that of adjourning the court *to the next stated term*, in case of the non-attendance of either of the judges within *four days* after the time appointed by law for the commencement of the court. But, as *incidental* to this authority, an *implied* power is also probably given to the marshal to open and adjourn the court *from day to day* during the four days, and it seems advisable for him to do so. The act of 1840 authorizes the marshal to act only in pursuance of a written order of one of the judges, for the adjournment of

the court to some day, to be specified in the order, prior to the next stated term.[1]

In case of contagious disease, court to be held elsewhere by order of the judge.

By the act of February 25, 1799,[2] when a "*contagious disease* shall render it hazardous" to hold a circuit or district court at the place prescribed by law, the district judge is authorized to designate some other place within the district for holding such court, and for that purpose to issue his order to the marshal of the district, who is required to "make publication thereof, in one or more public papers printed at the place by law appointed for holding the same, from the time of receiving such order until the time by law prescribed for commencing the said sessions."[3]

Or may be adjourned.

And by the act of January 18, 1839,[4] it is enacted "That the judges, or some one of them, of the circuit court of the United States shall have power to direct the said courts to be adjourned over to some future day, designated in a written order to the clerk of either of the said courts, whenever there is a *dangerous and general disease* at the place where the court is usually holden; and the adjournment over by the clerk, in the absence of the judges, shall have the same force and effect as if the judges had been present."

The courts of the United States have power to

[1] See note [a] p. 113, relative to the District of Kentucky.

[2] Ch. 12, § 7, 1 Stat. at Large, 619.

[3] By this act (§ 5) it is also humanely declared that it shall be lawful for the "judge of any district court of the United States, within whose district any contagious or epidemic disease shall at any time prevail, so as in his opinion to endanger the life or lives of any person or persons confined in the prison of such district, in pursuance of any law of the United States, to direct the marshal to cause the person or persons confined as aforesaid to be removed to the adjacent prison where such disease does not prevail, there to be confined, until he, she or they may safely be removed back to the place of their first confinement, which removals shall be at the expense of the United States."

[4] Ch. 3, § 9, 5 Stat. at Large, 313.

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Courts may be adjourned to a distant day.

adjourn to a distant day, and not merely from day to day. Thus, when the circuit court for the District of Columbia, having continued to sit regularly from the commencement of its session in April until the 16th of May, adjourned to the fourth Monday of June following, and then resumed and continued its sessions, the adjournment was held to be a legal continuation of the April term; and to adjourn in this manner was said to be a power common to all courts not restrained in this respect by express law. 6 Wheaton, 106.

CHAPTER VIII.

OF THE ORIGINAL JURISDICTION OF THE CIRCUIT COURTS.

The constitution, as we have seen, defines the judicial power of the United States; designates one tribunal through which it is to be exerted, and vests a portion of it absolutely in that tribunal; but confides every thing else relating to the subject to the wisdom of congress.

What other courts should be established—in what proportions and under what modifications the judicial power should be distributed among them—were points to be determined by laws enacted in pursuance of the constitution.

To these laws, therefore, and to the judicial expositions they have received, recourse must be had, to ascertain the jurisdiction of the circuit and district courts.

By the judicial act.

The original jurisdiction with which congress saw fit at the outset to invest the circuit courts is described chiefly in the 11th section of the organic act of September 24, 1789, as follows:

"SEC. 11. *And be it further enacted*, That the circuits of the United States shall have original cognizance, concurrent

with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners; or an alien is a party, or the suit is between a citizen of the state where the suit is brought, and a citizen of another state. And shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable therein. But no person shall be arrested in one district for trial in another, in any civil suit before a circuit or district court. And no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ; nor shall any district or circuit court have cognizance 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 said contents if no assignment had been made, except in cases of foreign bills of exchange. And the circuit court shall also have appellate jurisdiction from the district courts under the regulations and restrictions hereinafter provided.[1]

Circuit court to have civil jurisdiction in what cases.

Criminal jurisdiction.

No person to be arrested for trial in another district in a civil suit, &c.

Assignee's right of action restricted.

Subsequent laws have considerably enlarged the jurisdiction specified in this section, by abolishing the limitations in point of amount in several descriptions of cases, and by extending the jurisdiction to additional ones. An act of March 3, 1815, does both, though in terms rather indirect. It enacts "That the district courts of the United States shall have cognizance, concurrent with the courts and magis-

The jurisdiction of circuit court extended to suits by officers of United States without limitation as to amount.

[1] Ch. 20; 1 Stat. at Large, 78. The 12th section authorizing the removal of suits from the state courts, and *extending* the jurisdiction of the circuit courts to certain controversies concerning the title to lands, will be noticed presently.

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trates of the several states and the *circuit courts* of the United States, of all suits at common law, where the United States, *or any officer thereof*, under the authority of an act of congress, shall sue, although the debt claimed or other matter in dispute shall not amount to *one hundred dollars*."[1] This act came under the review of the supreme court in *The Postmaster-General* v. *Early et al.* (12 Wheat., 136), and was held sufficient to confer upon the circuit courts jurisdiction of cases in which an officer of the United States shall sue, and upon the same grounds must be considered as abolishing the restriction in point of amount in both cases.

Jurisdiction of circuit courts extended to all cases arising under the revenue laws, and suits for damages incurred in their maintenance.

By the act of March 2, 1833, "*further to provide for the collection of duties on imports*,"[2] it is provided, "That the jurisdiction of the circuit courts of the United States shall extend to all cases in law or equity, *arising under the revenue laws of the United States*, for which other provisions are not already made by law; and if any person shall receive any injury to his person or property for or on account of any act by him done under any law of the United States, for the protection of the revenue or the collection of duties on imports, he shall be entitled to maintain suit for damage therefor in the circuit court of the United States, in the district where the party doing the injury may reside or shall be found." The jurisdiction here conferred, it will not fail to be observed, is of great importance, and does not depend upon the citizenship of the parties or the amount in controversy.

This act also provides for the removal from the state courts to the circuit courts of the United States, of suits against revenue officers; and both

[1] Ch. 101, § 4; 3 Stat. at Large, 244. The limitation in the district courts was $100.

[2] Ch. 57, § 2; 4 Stat. at Large, 632.

of these provisions were, by the 50th section of the act of June 30, 1864 (13 Stat. at Large, 241), extended to like cases arising under the internal revenue acts. But this section was repealed by the 68th section of the act of June 18, 1866 (14 Stat. at Large, 172), which, moreover, for greater caution, forbids the application of the provisions of the act of 1833 to cases arising under this or any other internal revenue act. It, however, (section 67) extends the jurisdiction of the circuit courts, without regard to citizenship or amount in controversy, to suits brought by officers appointed under it for any injury to their persons or property committed on account of acts done in pursuance of it; and also provides for the removal of suits and prosecutions against them for such acts. See *post*, REMOVAL FROM STATE COURTS.

Garn proc suits Unit Stat agai corp tion

By the act of April 20, 1818,[1] it is enacted, that in any suit or action which shall be hereafter instituted *by the United States* against any *corporate body* for the recovery of money upon any bill, note or other security, it shall be lawful to summon as *garnishees* the debtors of such corporation; and it shall be the duty of any person so summoned to appear in open court and depose, in writing, to the amount which he or she was indebted to the said corporation, at the time of the service of the summons, and at the time of making such deposition; and it shall be lawful to enter up judgment in favor of the United States, for the sum admitted by such garnishee to be due to the said corporation, in the same manner as if it had been due and owing to the United States: *Provided*, that no judgment shall be entered against any garnishee until judgment shall have been rendered against the corporation defend-

[1] Ch. 83, §§ 8, 9, 10: 3 Stat. at Large, 441.

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ant to the said action, nor until the sum in which such garnishee may stand indebted be actually due. That when any person summoned as garnishee shall depose in open court that he or she is not indebted to such corporation, nor was not at the time of the service of the summons, it shall be lawful for the United States to order an issue upon such demand; and if, upon the trial of such issue, a verdict shall be rendered against such garnishee, judgment shall be entered in favor of the United States, pursuant to such verdict, with costs of suit. That if any person summoned as garnishee under the provisions of this act shall fail to appear at the term of the court to which he has been summoned, he shall be subject to attachment for contempt of the court.

Debentures.

By the "act to regulate the collection of duties of imports and tonnage," passed March 2, 1799,[1] it is made the duty of the collectors in certain cases to grant certificates called *debentures*, certifying that the sums therein mentioned are due from the United States, payable at the office of such collector, to the persons therein named, or order. These debentures are also declared to be negotiable by indorsement and delivery, and "the possessor or assignee" thereof is authorized, upon their non-payment by the collector, to maintain suits thereon against any indorser, in the proper *circuit* or district court. In this case also, as well the *amount* in dispute as the *character of the parties* is unimportant to the question of jurisdiction.

Suits by the bank of the United States.

By the "act to incorporate the subscribers to the *Bank of the United States*," passed April 10, 1816,[2] the president, directors and company of the said bank are authorized and rendered liable "to sue

[1] Ch. 22, § 80: 1 Stat. at Large, 627.
[2] Ch. 44, § 7: 3 Stat. at Large, 266.

and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all state courts having competent jurisdiction, and *in any circuit court of the United States.*"

And here again it will be perceived the jurisdiction is independent of the *amount* in controversy, and of the *citizenship of the parties.*

Cir cou hav limi juri tion und pat cop acts

Similar acts have been passed with respect to suits arising under the patent and copyright acts.

By the judiciary act patentees and authors were left upon the same footing as suitors in general; their right to sue in the circuit courts depending on citizenship and the amount in controversy. But theirs being cases "arising under the constitution and laws of the United States," congress had power to bring them within the jurisdiction of the circuit courts without regard either to amount or to citizenship. This was done by an act of February 15, 1819, ch. 19, giving to the circuit courts original jurisdiction, "as well in equity as in law, of all actions, suits, controversies, and cases arising under any law of the United States, granting or confirming to authors and inventors the exclusive right to their respective writings, inventions and discoveries," with power, at the suit of any party aggrieved," to grant *injunctions,* according to the course and principles of courts of equity, to prevent the violation of the rights of any authors or inventors, secured to them by any laws of the United States, on such terms and conditions as the said courts may deem fit and reasonable." This act has been superseded and repealed, with respect to copyrights, by the copyright act of February 3, 1831, ch. 16 (4 Stat. at Large, 436); and with respect to patent rights, by the patent act of July 4, 1836, ch. 357 (5 Stat. at Large, 117), both of which, however, incor-

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porate and re-enact the above mentioned provisions of the act of 1819.[1]

Manuscripts.

By a subsequent act the courts of the United States are expressly empowered to grant injunctions, in like manner, according to the principles of equity, to restrain the unauthorized publication of any *manuscript*.[2]

[1] This last mentioned act has received in the circuit court of the United States for the southern district of New York, an interpretation so extraordinary as to require notice, but as it does not admit of being fitly treated in a note, and, as I am averse to interweaving my criticisms upon it with the main body of the text, I assign them a distinct place at the close of the appendix. It may be hoped that the unequivocal repudiation, either by judicial or legislative authority, of the mischievous heresy to which I am referring, will permit the omission of its further exposure in future editions of this work.

[2] The subject of copyrights is one of considerable interest, and its importance is daily increasing. In pursuance of the power expressly delegated by the constitution to congress for that purpose, an act was passed at the first session of that body "for the encouragement of learning, by securing the copies of *maps, charts* and *books* to the authors and proprietors of such copies, during the terms therein mentioned." (Act of May 31, 1790: 1 id., p. 124). This act embraced only the productions named in the title, and secured (or was inteded to secure) to the author (being a citizen or resident of the United States), and to his executors, administrators and assigns, the exclusive right to publish and sell the same during the period of fourteen years; and if at the expiration of that period the author should still be living, and a citizen or resident of the United States, then, upon certain conditions, for the further term of fourteen years.

On the 29th of April, 1802, a supplemental act was passed, extending the benefits of the foregoing act to the "arts of *designing, engraving* and *etching, historical and other prints.*" 2 id., p. 171.

The act of February 3, 1831, in addition to books, maps, charts, prints, and engravings embraces also *musical compositions*. But the most important alteration introduced by it consists in the extension of the period of the exclusive enjoyment to *twenty-eight* instead of *fourteen* years, and in the right conferred upon the *widow and children* of the author, in case of his death before the expiration of the first term, to renew the copyright for fourteen years longer, in the same manner as the author himself may do if living. These liberal and just provisions are also extended to existing copyrights, dating from the time of their entry. This act was designed wholly to supersede the two former acts

CHAP. 8.

To enfo awards consuls

A power of considerable importance has been conferred on the circuit and district courts, and also on the commissioners, to take affidavits and acknowledgments of bail, &c., designed more fully to effectuate certain treaty stipulations with foreign powers. The preamble to the act for this purpose recites a provision contained in a treaty between the United States and Prussia, provisions similar in substance being also contained in treaties with some other foreign powers, that the consuls, vice-consuls, and commercial agents of the respective parties, "shall have the right, as such, to sit as judges and arbitrators in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities, unless," &c. And it is therefore enacted that the district courts and circuit courts of the United States, and the commissioners shall have full authority, on the application of any such consuls, or vice-consuls, or commercial agents, for assistance to carry into effect the award, arbitration or decree of such consul, &c., to issue all proper remedial process, mesne and final, to carry into full effect such award, &c.; and to enforce obedience thereto, by imprisonment in the common jail, or other place in the district, where the United States may lawfully imprison per-

of 1790, and 1802, and expressly repeals them; saving only such rights as had already been acquired under them. It accordingly provides *remedies* for any invasion of the exclusive rights intended to be secured by it. But in this respect it adopts, substantially, the provisions of the two former acts. It imposes *forfeitures* and *penalties; the one moiety thereof to the use of the United States;* and "*to be recovered in any court having competent jurisdiction thereof.*" These remedies, in point of form, were originally borrowed from the laws of England. Whether it was wise to adopt and thus continue them, may be doubted. It is believed they will, in practice, be found inconvenient and embarrassing.

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sons arrested under their authority, until such award, &c., shall be complied with, or the parties shall be otherwise discharged therefrom, by the consent in writing of such consul, &c., or his successor, or by authority of his government.[1]

To alter the forms of process and procedure.

The process act of May 8, 1792, empowers all the courts of the United States to make, and the supreme court to prescribe, such alterations in the forms of writs, executions and other process, except their style, and in the forms and modes of proceeding, as they shall in their discretion respectively deem expedient.[2]

Power to issue writs, make rules and grant new trials.

For the statutable authority of the circuit courts to issue writs of *scire facias*, *habeas corpus*, *ne exeat*, *injunction*, and "*all other writs* which may be necessary for the exercise of their jurisdiction and agreeable to the principles and usages of law," and for the restrictions upon the exercise of that authority, as also for power to punish for contempts, *make rules*, *grant new trials*, &c., see pp. 76–81.

Removals from state courts. Lastly, it remains now to bring to the notice of the reader the important provisions of the 12th section of the judicial act. In the first place it prescribes a mode by which the jurisdiction conferred by the 11th section, of suits to which an alien is a party, and suits between citizens of different states, may be made effective, when such suits are commenced in a state court; and, in the next place, it makes the only provision which congress has yet seen fit to make, for the purpose of giving effect to the constitutional grant of judicial power over "controversies between citizens of the same state claiming lands under grants from different states"—thus superadding another distinct branch

[1] Act of August 8, 1846, ch. 105; 9 Stat. at Large, p. 78.

[2] Ch. 36, § 2: 1 Stat. at Large, p. 276.

of jurisdiction to those specified in the preceding section. It is in the following words:

Suits against aliens or between citizens of different states.

"SEC. 12. *And be it further enacted*, That if a suit be commenced in any state court, *against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state*, and the matter in dispute exceeds the aforesaid sum or value of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the court, and the defendant shall, at the time of entering his appearance in such state court, file a petition for the removal of the cause for trial into the next circuit court, to be held in the district where the suit is pending, or if in the district of Maine, to the district court next to be holden therein, or if in Kentucky district,[1] to the district court next to be holden therein, and offer good and sufficient surety for his entering, in such court, on the first day of its next session, copies of said process against him, and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein, it shall then be the duty of the state court to accept the surety, and proceed no further in the cause; and any bail that may have been originally taken, shall be discharged; and the said copies being entered as aforesaid, in such court of the United States, the cause shall there proceed in the same manner as if it had been brought there by original process. And any attachment of the goods or estate of the defendant, by the original process, shall hold the goods or estate so attached, to answer the final judgment, in the same manner as by the laws of the state they would have been holden to answer final judgment had it been rendered by the court in which the suit commenced."

Thus far, it will be perceived, the civil jurisdiction conferred depends *wholly upon the character of the parties* and the *amount in dispute*.

[1] The districts of Maine and Kentucky were by this act excepted from the circuits, and the district courts therein invested with the original jurisdiction of the circuit courts.

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But this section also further enacts, that—

Suits concerning title to lands between citizens of the same state.

"If in any action commenced in a state court, the *title of land* be concerned, and the parties are *citizens of the same state*, and the matter in dispute exceeds the sum or value of five hundred dollars, exclusive of costs, the sum or value being made to appear to the satisfaction of the court, either party, before the trial, shall state to the court, and make affidavit, if they require it, that he claims and shall rely upon a right or title to the land, under grant from a state, other than that in which the suit is pending, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his power, and shall move that the adverse party inform the court whether he claims a right or title to the land under a grant from the state in which the suit is pending, the said adverse party shall give such information, or otherwise not be allowed to plead such grant, or give it in evidence upon the trial; and if he informs that he does claim under such grant, the party claiming under the grant first mentioned, may then, on motion, remove the cause for trial to the next circuit court to be holden in such district, or if in the district of Maine, to the court to be holden next therein, or if in Kentucky district, to the court to be holden next therein; but if he is the defendant, he shall do it under the same regulations as in the before mentioned case of the removal of a cause into such court by an alien; and neither party removing the cause, shall be allowed to plead, nor give evidence of any other title than that by him stated as aforesaid, as the ground of his claim."

With respect to the last description of cases, it will be observed, the jurisdiction is founded entirely upon *the nature of the controversy*, and the *amount* in dispute.

It will, doubtless, also occur to the student that this is an ingeniously devised, if not indeed the only unexceptionable mode of giving effect to the consti-

tutional grant of jurisdiction over "controversies between citizens of the same state, claiming lands under grants of different states."

Act of Suits in state co for acts done, & under r enue la may be remove

The right of removal from state courts has, by the act of March 2, 1833, been extended to another description of cases, viz., those in which any officer of the United States, or other person, is sued in a state court for or on account of any act done under the revenue laws of the United States, or under color thereof, or for or on account of any right, authority or title, set up or claimed by such officer or other person, under any such law of the United States.[1]

This enactment composes a part of the act before referred to in treating of the power of the national judges to grant the writ of *habeas corpus*, as having grown out of a course of proceeding on the part of a state, hostile to the government of the Union. The act accordingly proceeds, in the section above mentioned, and that immediately following, to provide with great minuteness against the consequences of a refusal by the state court to lend its aid for the removal of a cause or to surrender its jurisdiction. For the same reason the petition for removal in these cases, verified by affidavit and a certificate from an attorney or counselor at law, is to be prosecuted, not to the state courts, but to the circuit court. In this description of cases the right of removal is conferred without regard to the amount in controversy or citizenship.

Acts of a like nature emanating from the rebellion.

The rebellion gave rise to a series of acts, extending this form of antidotal remedy to other descriptions of cases.

The first of these enactments is contained in the fifth section of the act of March 3, 1863, ch. 81 (12

[1] Ch. 57, § 3: 4 Stat. at Large, 632.

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Act of March 3, 1863, amended by act of May 11, 1866, ch. 80.

Stat. at Large, 755), entitled "An act relating to *habeas corpus*, and regulating judicial proceedings in certain cases." It confers the right of removal in *criminal prosecutions*, as well as in civil suits, for arrests or other alleged torts, against officers or other persons acting under authority derived from the president or any act of congress. It gives to each party a right of removal by appeal and re-trial, *after judgment*, except a judgment of acquittal in a criminal prosecution. But this act is virtually obsolete, and is noticed chiefly on account of its priority in the extension of the right of removal to criminal prosecutions and to cases after judgment. It also subjects an unsuccessful plaintiff to double costs, and gives a writ of error to the supreme court, whatever may be the amount of the judgment.

This act was followed by others, in their nature permanent, conferring the right of removal upon other descriptions of persons, and comprising, likewise, criminal prosecutions, as well as civil suits.

Act of April 9, 1866.

The other acts here alluded to are: 1. "An act to protect all persons in the United States in their civil rights, and furnish the means of their vindication," passed April 9, 1866, ch. 31 (14 Stat. at Large, 27).

Removal in cases affecting the rights of citizenship.

It defines citizenship and asserts equal rights in all citizens of the United States. It inflicts penalties for the invasion of such rights; invests the district courts with jurisdiction, exclusive of the state courts, of all offenses against the act, and concurrently with the circuit courts, of all cases civil and criminal, in behalf of persons otherwise remediless, for the purpose of vindicating such rights; and gives a right of removal in the manner prescribed by the act of 1863 above mentioned, of all suits and prosecutions in a state court against the beneficiaries of the act, for any cause, or against any officer, civil or military,

or other person, for any arrest or other act done, in virtue or under color of the act, or of the act establishing a bureau for the relief of freedmen and refugees, and the acts amendatory thereof.[1]

Act of Ju 13, 1866.

2. "An act to reduce internal taxation and to amend an act entitled 'An act to provide internal revenue to support the government, and to pay interest on the public debt, and for other purposes,' approved June 30, 1864, and the acts amendatory thereof," passed July 13, 1866, ch. 184 (14 Stat. at Large, 98). By section 67 of this act, at page 171, the right of removal is given in civil suits or criminal prosecutions for acts done in execution of the internal revenue laws. It directs the clerk of the circuit court, when the suit in the state court has been commenced by summons to issue a writ of *certiorari* to that court; and if by a *capias*, a writ of *habeas corpus cum causa*, in virtue of which, if the defendant is in confinement on mesne process, the marshal is required to take him into his custody, to be dealt with by the circuit court, according to law and the exigencies of the case. The act contains other stringent provisions to insure the accomplishment of its design, and forbids the application of the provisions of the above mentioned act of March 2, 1833, ch. 37, to cases arising under the "act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes," passed June 30, 1864, ch. 173, or any other amendatory thereof or in addition thereto, and, by section 68, repeals the 50th section of that act.

Suits and prosecutions for acts done under internal rev enue law

Certiorar and habe corpus ct causa.

Act of March 2, 1833, ch. inapplicable.

[1] This act contains an unique and studiously qualified recognition of the "common law," adapted to provoke speculation as to its purpose and its effect. But, as it is limited to cases arising under the act, and as it may be reasonably hoped that there will be few, if any, further violations of it, it would be impertinent to indulge in such speculation.

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Section 67 also extends the jurisdiction of the circuit courts to all suits brought therein by "any officer appointed under and by virtue of any act to provide internal revenue, or by any person acting under or by authority of such officer," to recover damages "for injury to his person or property, for or on account of any act by him done under any law of the United States, for the collection of taxes."

Act of July 27, 1866, ch. 288.

3. The next act, giving a right of removal, is that of July 27, 1866, ch. 288 (14 Stat. at Large, 306), as amended by the act of March 2, 1867, ch. 96 (14 Stat. at Large, 558). It provides that where a suit is brought in a state court, "in which there is controversy between a citizen of the state in which the suit is brought, and a citizen of another state, and the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs, such citizen of another state, whether he be *plaintiff* or defendant, if he will file in the state court an affidavit, stating that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such state court, may, at any time before the final hearing or trial of the suit, file a petition," &c.

Suits between citizens of different states.

Plaintiff entitled to removal.

The novelty introduced by these acts, in defining the right of removal, as compared with that conferred by the 12th section of the judiciary act, it will be seen, consists in extending the right to the plaintiff, in requiring an affidavit setting forth the specified reason for demanding a removal, and in allowing the application to be made at a later stage of the proceedings in the state court. It seems unlikely that it was the purpose of congress to interfere with the right conferred upon the *defendant* in the state court by the 12th section, which may, therefore, it is presumed, be regarded as still in full force. These acts,

The 12th section of judiciary act unaffected by this act.

however, prescribe other modes for rendering them effective and guarding the rights of the defendant.

4. By the act of February 5, 1867, ch. 27 (14 Stat. at Large, 385), when in a suit in a state court all the requisite steps have been taken for its removal under and by virtue of the provisions of the "act relating to *habeas corpus*, and regulating certain judicial proceedings in certain cases," of March 3, 1863, ch. 81 (12 Stat. at Large, 755), or by virtue of an act amendatory thereof, approved May 11, 1866, ch. 80 (14 Stat. at Large, 46), and the defendant therein is in actual custody under process from the state court, the clerk of the circuit court is required to issue a writ of *habeas corpus cum causa*, on which the marshal is to take the defendant in charge, "to be dealt with in the said circuit court according to the rules of law and the orders of the said court, or of any judge thereof in vacation; and he shall file a duplicate copy of the said writ of *habeas corpus* with the clerk of the state court," or deliver it to him, and "all attachments made, and all bail and other security given," shall continue in full force.

If de ant b priso habe pus c causa issue

5. Lastly. By the act of July 27, 1868, ch. 255 (15 Stat. at Large, 227), it is enacted:

"That any corporation, or any member thereof, other than a banking corporation, organized under a law of the United States, and against which a suit at law or in equity has been or may be commenced in any court other than a circuit or district court of the United States, for any liability or alleged liability of such corporation, or any member thereof as such member, may have such suit removed from the court in which it may be pending to the proper court of the United States, upon filing a petition therefor, verified by oath, either before or after issue joined, stating they have a defense arising under or by virtue of the constitution of the United States, or any treaty or law of the United States, and offering good and sufficient security, * * * * and

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doing such other appropriate acts as are required to be done by the act," &c., viz., the act of July 27, 1866, ch. 288, above cited.[1]

Having pointed out the sources whence the original jurisdiction of the circuit courts is derived, I propose in the next place, to bring under review certain GENERAL PRINCIPLES affecting it in the aggregate, and, lastly, to treat summarily of the several parts of which it consists.

In what sense the circuit and district courts are inferior courts.

1. In denominating the courts to be ordained and established by congress "inferior courts," the constitution is to be understood as speaking of them only in their relation to the supreme court as an appellate tribunal. But, in the technical sense of these terms, they are not inferior courts.[2] In the language of Chief Justice ELLSWORTH, therefore, in the first of the above cited cases, "their proceedings are not subject to the scrutiny of those narrow rules, which the caution or jealousy of the courts at Westminster, long applied to courts of that denomination; but are entitled to as liberal intendments or presumptions, in favor of their regularity, as those of any supreme court." They, are, however, he adds, "of *limited* jurisdiction; and have cognizance not of cases generally, but only of a few specially circumstanced, amounting to a small proportion of

[1] Some of the above mentioned acts came under review in the cases of *Insurance Company* v. *Ritchie*, 5 Wallace, 541; and *City of Philadelphia* v. *Collector*, Id., 720.

[2] *Staley* v. *The Bank of America*, 4 Dallas, 11; *Kemp's Lessee* v. *Kennedy*, 5 Cranch, 185; *Kennedy* v. *The Bank of Georgia*, 8 Howard, 586, 611. One of the powers confided to congress by the eighth section of the first article of the constitution is, "to constitute tribunals inferior to the supreme court." In this same sense, doubtless, it was that the word "inferior" was used in section one of article three, ordaining that the judicial power should be vested in "one supreme court, and in such inferior courts" as congress might establish. The true meaning is, one supreme court and *such other courts inferior thereto, &c.*

the cases, which an unlimited jurisdiction would embrace. And *the fair presumption is* (not as with regard to a court of general jurisdiction, that a cause is within its jurisdiction unless the contrary appears, but rather), *that a cause is without their jurisdiction till the contrary appears.*"

The chief justice then proceeds to deduce the following corollary, which has ever since been rigorously adhered to, and has led, as the student will perceive in the sequel, to highly important practical results. "This renders it necessary," he observes, "inasmuch as the proceedings of no court can be deemed valid further than its jurisdiction appears, or can be presumed, *to set forth upon the record of a circuit court the facts or circumstances which give jurisdiction*, either expressly, or in such manner as to render them certain by legal intendment." See, also, *M'Cormick* v. *Sullivant*, 10 Wheat., 192.

But though, when the jurisdiction of the court is not shown, the judgment is erroneous and liable to be reversed on error, yet it is not a nullity. *Kennedy* v. *The Bank of Georgia*, 8 Howard, 586, 611.

2. The same general fundamental principle which has already been stated as applicable to the appellate branch of the jurisdiction of the supreme court, is equally applicable to the *entire* jurisdiction of the circuit courts; and is founded, indeed, upon substantially the same reasons. It results in each case from the discretionary powers confided by the constitution to congress, over the subject.

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The principle is this: That the circuit courts possess no powers except such as both the constitution and the acts of congress *concur* in conferring upon them. In other words, to enable them to act in any given case, it is not sufficient that such case falls within the scope of the judicial power of the United

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States, as declared in the constitution, unless jurisdiction over it has also been conferred by some act of congress; nor, on the other hand, is it sufficient that the case is thus embraced within some legislative act, unless it also appears that it belongs to one of the classes or descriptions of cases enumerated in the constitution.

This important doctrine, though under one of its aspects particularly it has been strenuously contested, is now definitely settled upon the most stable basis.

Thus though as we have seen, it is declared in unqualified terms by the judicial act that the circuit courts shall have original cognizance of all civil suits where an *alien* is a *party:* yet, inasmuch as the constitution only provides that the judicial power of the United States shall extend to controversies between a *state* or the *citizens thereof* and the *citizens or subjects of foreign states*, it is held that the jurisdiction of these courts, founded upon the alienage of a party, is limited by the constitution to the cases therein specified; and that it does not extend to suits *between aliens*. *Mossman* v. *Wigginson*, 4 Dallas, 11; *Hodgson* v. *Bowerbank*, 5 Cranch, 303.

It may not be amiss here also to observe, that although these decisions were made in causes originally instituted in the courts of the United States in virtue of the 11th section of the judicial act, they are equally applicable to causes removed from the state courts on the ground that the defendant is an alien, in virtue of the 12th section; which, though in terms it authorizes the removal of a suit "*against an alien*," must, nevertheless, in conformity with the constitution, be limited to suits in which a *citizen is plaintiff*.

And so upon the other hand, though by the constitution the judicial power of the United States is

declared to extend to all cases *arising under the laws of the United States*, yet congress having omitted in the act incorporating the former Bank of the United States, expressly to enact that suits brought by it should be cognizable in the circuit courts, it was decided that they could not, in virtue of this provision of the constitution, exercise jurisdiction. *Bank of the United States* v. *Deveaux*, 5 Cranch, 61.

So, also, in the case of *M'Intyre* v. *Wood* (7 Cranch, 504), it was held that the circuit courts have no authority to grant a *mandamus* to a ministerial officer of the United States to compel him to perform an official act enjoined upon him by the laws of the United States; because the authority conferred by congress upon these courts, to issue this writ, is not extended in terms beyond those cases in which it is necessary for the exercise of their acknowledged jurisdiction.[1]

And, again, in the case of *Livingston et al.* v. *Van Ingen et al.* (1 Paine, 45), (decided before the act of 15th February, 1819), it was held by Judge LIVINGSTON that the circuit court had no jurisdiction in equity upon a bill to restrain the infringement of rights secured by letters patent; because no such jurisdiction had then been conferred by congress.

So, too, although the judicial power of the United States, as defined in the constitution, is extensive

[1] The same reason would forbid the issuing of the writ of *mandamus*, except under the limitations mentioned, by the *district courts*. It has been seen that the power of the supreme court to issue this writ (though for a very different reason) is subject to the same restrictions: and it has also been decided that a state court cannot issue a mandamus to an officer of the United States. *M'Cleary* v. *Silliman*, 6 Wheat., 598. It follows, therefore, that the ministerial officers of the United States, as such, are *beyond the reach* of this process, except in the District of Columbia, where the circuit court, from its peculiar organization and functions, is held to possess the power to issue this writ to officers of the United States where the act to be done is expressly enjoined by law. *Kendall* v. *The United States*, 12 Peters, 524.

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enough to embrace many common-law offenses not enumerated in any act of congress, still it must now be considered as settled, in conformity with the decision of the supreme court in the case of *The United States* v. *Hudson & Goodwin* (7 Cranch, 32), that the national courts can take cognizance only of such as are expressly provided for by the statutes of the United States. And though, by the constitution, the judicial power of the United States is declared to extend to all cases of admiralty and maritime jurisdiction, yet no other *offenses* of this description are cognizable in their courts except such as are specified by law. *United States* v. *Bevins*, 3 Wheat., 336. See, also, *United States* v. *Wiltberger*, 5 Wheat., 76.

In fact, congress, in legislating upon this subject, while they have, in a very few instances, inadvertently transcended the limits imposed by the constitution, have intentionally permitted a considerable portion of the judicial power placed at their disposal by the constitution, to lie dormant, by omitting to call it into action by law.

Laws of the state to be rules of decision.

3. The 34th section of the judiciary act (1 Stat. at Large, p. 92) directs that "the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply."

In the case of *Swift* v. *Tyson* (16 Peters, 1), the just interpretation of this important enactment was brought under the consideration of the supreme court on a writ of error to the circuit court of the United States for the Southern District of New York. The action was assumpsit on a bill of exchange. There was no statute of the State of New York applicable to the questions before the court, and

they depended therefore upon the general principles of law regulating negotiable instruments, of which Mr. Justice STORY said it might be truly declared, in the language of Cicero, adopted by Lord MANSFIELD in *Luke* v. *Lynde* (2 Burr. R., 883, 887), in relation to a question of maritime law, to be, in a great measure, not the law of a single country only, but of the commercial world. *Non erit alia lex Romæ alia Athœnis; alia nunc, alia posthac*; *sed et apud omnes gentes, et omni tempore, una eademque lex obtinebit.* The counsel for the defendant in error nevertheless insisted that, under the enactment above quoted, the case was to be governed by the laws of New York, and that the court was bound to look to the decisions of the judicial tribunals of that state as an authoritative exposition of those laws. But the court, in answer to this argument, observed, that, in order to maintain it, it was essential to hold that the word "laws" in this section includes within the scope of its meaning the decisions of the local tribunals; whereas, according to the ordinary use of language, it could hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and not of themselves laws.

Only locally local laws, customs are intended.

4. The laws of a state are most usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws; and in all the various cases that had hitherto come before the court for decision, the court had uniformly supposed that the true interpretation of the thirty-fourth section limited its application to state laws strictly local; that is to say, to positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to

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real estate, and other matters immovable and intra-territorial in their nature and character. It never had been supposed by the court that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as this court: that is, to ascertain, upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. The court, therefore, felt not the slightest difficulty in holding, that this section upon its true intendment and construction was limited to local statutes and local usages of the character before stated, and did not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly the decisions of the local tribunals upon such subjects were entitled to and will receive the most deliberate attention and respect of this court; but they could not furnish positive rules or conclusive authority by which its judgments are to be controlled. See, also, *Ames* v. *Smith*, 16 Peters, 303.

This provision not applicable to the practice of the courts.

5. In the case of *Wyman* v. *Southard* (10 Wheat., 1), this enactment was decided to be wholly inapplicable to the *practice* of the national courts, and was held to be operative only as furnishing a rule to guide them in the formation of their judgments. The words of the act being, that the laws of the state shall govern "*in trials*," &c., this phrase is to be

considered as implying litigation in court. These laws, therefore, of themselves, were held to furnish no rule of proceeding for a ministerial officer of the court in the execution of its process. Supposing, for example, that after the service of an execution by the marshal, a question respecting the legality of his proceedings should be brought before the court by a regular suit against him: there would, it is true, then be a "trial at common law:" but still this would not be a case where the laws of the state would *apply:* because, it was not to these laws that the officer was required to look for the regulation of his conduct. "It would," say the court, "be contrary to all principle to admit that, in the trial of a suit, depending on the legality of an official act, any other law should apply than that which had been previously prescribed for the government of the officer."

The provision, it will be observed, is limited in terms to "trials *at common law*," and it has, accordingly, never been supposed to be applicable to suits in equity.

Suits t brougl the dis where fendar sides found.

6. The judicial act, it will be recollected, forbids the arrest of any person in *one district for trial in another*, in any civil action before a circuit or district court; and also, *the bringing of any civil suit* before either of the said courts, against an inhabitant of the United States by original process *in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.* Although this restriction does not, strictly speaking, affect the *jurisdiction* of the court, it is convenient to notice it in this place.

The first clause, it will be seen, is applicable more particularly to suits at law, in which the first process authorizes the arrest of the defendant, while the

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second extends also to suits in equity, in which the process is in the nature of a summons.

Extent of the restriction.

Taken together, the provision merely imports that process for the institution of a suit, either at law or in equity, whether in the circuit or district courts, shall not run beyond the limits of the district for which the court, from which it issues, is held.

This prohibition, as already intimated, has been adjudged not to amount to a denial of jurisdiction over causes otherwise in themselves cognizable in the national courts, but only to a privilege given to the defendant; of which, however, he must avail himself at the outset, or he will be held to have waived it. An *appearance*, therefore, by the defendant and *answering generally without objection*, has always been considered to be a waiver. *Pollard* v. *Dwight*, 4 Cranch, 421; *Logan* v. *Patrick*, 5 Cranch, 288; *Gracie* v. *Palmer*, 8 Wheat., 699. So, also, an *appearance* alone and omission to plead, or otherwise to insist upon this privilege *until a subsequent term*, has been held to be a waiver of it. *Flanders* v. *The Ætna Insurance Company*, 3 Mason, 158; *Harrison et al.* v. *Rowan*, Peters's C. C. R., 489. In the case last cited, another point was also adjudicated. The case arose in the circuit court for the District of New Jersey, and was as follows:

May be waived.

It was set down by the plaintiffs for hearing (in equity) upon a plea stating that the defendants are citizens and residents of Pennsylvania; that they were served with subpœnas in that state, and not in the State of New Jersey. Against the plea it was shown *by the docket entries*, that, after service of the subpœnas, the defendants' appearance was entered by a solicitor of the court, and that, after sundry orders in the cause, ruling the defendants to answer, this plea was filed. The court was clearly of opin-

Docket entries not evidence of waiver.

ion that the previous appearance of the defendants at a former term, by a solicitor, unaccompanied by any objection, would amount to a waiver, *provided the court could take notice of the docket as sufficient proof of the fact.* This, it was however held, the court was *not* at liberty to do; inasmuch as the appearance might have been without the authority of the defendants. The plea was therefore held sufficient; but the plaintiff was allowed to amend, so as to put the fact of authority to the solicitor to appear for the defendants at issue.

If sea ably u the pr ceedir will b quash

But where this objection is seasonably urged, the proceedings will be quashed. See the cases above referred to; and *Hollingsworth* v. *Adams* (2 Dallas, 396), which was a foreign attachment, returnable in the circuit court for the Pennsylvania District, in which the defendant was described as a citizen of Delaware. Upon the return of the process, an affidavit was also produced in proof of that fact, and the proceeding was, *on motion*, quashed, with costs.

Excep *ex nec tate re*

7. It is proper, however, here to observe, that there is one description of cases, attended by circumstances so peculiar as to have been deemed sufficient to warrant a departure in practice from the strict letter of this enactment. Where a party, residing out of the jurisdiction of the court, has obtained a judgment at law which is sought to be enjoined, by bill in equity filed by the defendant in the judgment, on the equity side of the court; or, where a non-resident has instituted a suit in equity, and a cross bill is filed by the defendant in such suit, the court, upon motion, will order that a service of the subpœna upon the *attorney or solicitor* of such non-resident party, shall be sufficient. *Hitner* v. *Suckley*, 2 Wash. C. C. Rep., 465; *Eakert* v. *Bauert*, 4 id., 370; *Ward* v. *Seabry*, id., 426; *Read* v. *Consequa*, id., 174.

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8. The legislative restriction in question, and the foregoing adjudications with regard to its construction, relate, it will be observed, exclusively to the first process in a suit, by which the defendant is called upon to appear and answer to the plaintiff's demand. But, although I have met with no similar legislative provision with respect to other forms of process, it is well understood that no process whatever issued from the circuit or district courts, can be legally executed without the limits of the judicial district in which it is issued, unless congress expressly authorize it to be done. *Ex parte Graham*, 3 Wash. C. C. Rep., 456. Such too has been the understanding of congress. A legislative provision was deemed necessary to give efficacy to the *subpœna ad testificandum* beyond the bounds of the district in which it was issued:[1] and by an act passed May 20, 1826 (4 Stat. at Large, 184), it is enacted that where a state is divided into two judicial districts, writs of execution from the district or circuit court for either district, may run and be executed, in any part of such state. So, too, it is enacted by the act of March 3, 1797 (1 Stat. at Large, 512, § 6), "that all writs of execution upon any judgment obtained for the use of the United States, in any of the courts of the United States, in one state, may run and be executed in any other state, or in any of the territories of the United States, but shall be issued from, and made returnable to, the court where judgment was obtained, any law to the contrary notwithstanding." And, again, where a

All process subject to the like limitation except when otherwise specially directed by law.

Subpœnas.

Executions in favor of the United States.

[1] By the 6th section of the act of March 2, 1793 (vol. 2, p. 367), it is enacted, "that subpœnas for witnesses, who may be required to attend a court of the United States, in any district thereof, may run into *another district: Provided*, That in *civil* causes, the witnesses living out of the district in which the court is holden, do not live at a greater distance than one hundred miles from the place of holding the same."

defendant, having been sued, and having put in special bail in one district, and having afterwards been arrested in another district, is surrendered by his bail in the former district, to the marshal of the latter district, it is expressly provided, by the act authorizing such surrender, that the execution upon the judgment obtained in the former district may be executed by the marshal of the latter. Act of March 2, 1799, 1 Stat. at Large, 727.

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And, by the act of May 4, 1858, ch. 37 (11 Stat. at Large, 272), in suits not local, "if there be two or more defendants residing in different districts in the same state, the plaintiff may sue in either district and issue a duplicate writ against the defendants, directed to the marshal of any other district within the state in which any of the defendants reside, on which duplicate writ the clerk, issuing the same, shall indorse that it is a true copy of a writ sued out of the court of the proper district, and such original and duplicate writs, so issued, when executed and returned into the office from which they issued, constitute one writ and be proceeded on accordingly, and upon any judgment rendered in a suit so brought, process of execution may be issued directed to the marshal of any district in the same state."

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The act, it will be seen, comprehends all cases of joint liability, whether of contract or tort, cognizable in the national courts; and this modification of the restriction imposed by the act of '89, so reasonable and unobjectionable, ought not to have been so long deferred.

Actions, local or transitory.

9. The distinction between local and transitory actions has, from the outset, been recognized in the courts of the United States, and actions, in their nature local, according to the laws of the state in which they arise, must be prosecuted only in the

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circuit court for the district in which they originate. In the case of *Livingston* v. *Jefferson* (4 Hall's American Law Journal, 78), it was accordingly held that an action *quare clausum fregit*, for a trespass alleged to have been committed on lands in New Orleans, could not be maintained in the circuit court, for the district of Virginia, although the plaintiff was a citizen of Louisiana, and the defendant a citizen of Virginia. And, in accordance with this principle, where a suit in equity was instituted in the circuit court, for the district of Michigan, by a railroad company established in the state of Indiana, against a railroad company established in the state of Michigan, to obtain redress and relief for alleged injuries to the road of the complainants, it was held to be a case not within the jurisdiction of the court, the injuries complained of being intrusions upon the real estate of the complainants, situate in another district. *Northern Indiana Railroad Co.* v. *Michigan Central Railroad Co.*, 15 Howard, 233.

When more than one district in a state, process in local actions may be served where defendant resides.

This distinction is recognized also by the act of May 4, 1858, just above cited, by which it is further enacted, that, "in suits of a local nature, where the defendant resides in a different district in the same state than the one in which the suit is brought, the plaintiff may have original and final process against such defendant, directed to the marshal of the district in which he resides." And, "that in all cases of a local nature at law or in equity where the land or other subject matter of a fixed nature is partly in one district and partly in another district, within the same state, the plaintiff may bring his action or suit in the circuit or district court of either district, and the court in which any such action or suit shall have been commenced, as aforesaid, shall have jurisdiction to hear and decide the same, and to cause

When the land is partly in one and partly in another district, the action may be brought in either.

mesne or final process to be issued and executed as if the land or other subject matter were wholly within the district for which such court is constituted."

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10. The jurisdiction conferred on the circuit courts by the 11th section of the judiciary act, it will be remembered, was by that section restricted to cases in which the amount in controversy, exclusive of costs, exceeded five hundred dollars, whoever might be the parties, and whatever might be subject matter of the suit; and, though, as we have also seen, this restriction has been abolished with respect to several kinds of suits, all others remain subject to it. It has been held, however, that the sum claimed in the plaintiff's declaration is to be deemed the amount in dispute; so that, unless the suit be for a less sum certain, fixed by a contract, which the plaintiff is obliged to set forth, he may always obtain a standing in court by laying his damages at the requisite sum. *Gordon* v. *Longest*, 10 Peters, 97. But, by the twentieth section of the judicial act, if he recovers less "he shall not be allowed, but, at the discretion of the court, may be adjudged to pay costs."

Right assign sne de ent on of assi

11. One of the restrictions upon this branch of the jurisdiction of the circuit courts, the reader will remember, is the denial of it, contained in the 11th section of the judicial act, "in 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 cases of *foreign bills of exchange.*"

With regard to *promissory notes*, it was held by Mr. Justice STORY, in the case of *Bullard* v. *Bell* (1 Mason, 251), that this provision is inapplicable to

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notes payable to *bearer*, upon the ground that the original promise is to pay any person who may happen to be the bearer, and that, as the interest in such a note passes by mere manual delivery, the plaintiff cannot, therefore, be said to claim in virtue of an *assignment*. It is true the particular case before the court was a very strong one of this description, the suit being upon a bank note[1] payable to "W. Pitt, or bearer." But there was no proof that W. Pitt was a fictitious person, and the decision proceeded avowedly upon the general grounds above mentioned. In the case of the *Bank of the United States* v. *Planters' Bank of Georgia* (9 Wheat., 904), this question was, however, expressly waived. But, in the case of the *Bank of Kentucky* v. *Wister et al.* (2 Peters, 318), the question is treated as settled in conformity with the decision in *Bullard* v. *Bell*.[2] In the case of *Young* v. *Bryan* (6 Wheat., 146), it was also determined, that a suit may be brought in the circuit court by *the indorsee*, resident in a different state, against the *indorser* of a note, whether the maker could be sued there or not; because the indorsee does not claim through an assignment, but in virtue of a new contract between him and the indorser. But, when the suit is against a remote indorser, it must appear, in order to give jurisdiction, that the intermediate indorser, through whom the plaintiff's title is traced, could have sus-

[1] Prosecuted under a statute of New Hampshire, giving an action in certain cases against the stockholders.

[2] See, also, the case of *A. & E. Bonnaffee* v. *Williams et al.* (3 Howard, 574), in which it was also held that the jurisdiction of the court was not affected by the circumstance that the note was made payable to the person therein named as payee or bearer, "*to the use*" of persons residing in the same state as the maker; nor will the case be altered by the joinder, in virtue of a state law, of the maker with the payee as indorsee in an action by the indorsee. *Dromdale et al.* v. *The Farmers' and Merchants' Bank of Mississippi*, 2 Howard, 241.

tained an action against the defendant. *Turner* v. *The Bank of North America*, 4 Dallas, 8; *Mollan et al.* v. *Torrance*, 9 Wheat., 537; *Coffee* v. *The Planters' Bank of Tennessee*, 13 Howard, 183. In the case of *Bean* v. *Smith et al.* (2 Mason, 252), this restriction was held not to embrace the case of a suit in equity brought by a judgment creditor against his debtor and others, they being citizens of different states, to set aside conveyances made in fraud of creditors, although the judgment was founded upon a negotiable chose in action, on which a suit could not originally have been maintained in the circuit court. And where a judgment rendered in a state court between citizens of different states had been assigned to a citizen of the same state with the original plaintiff, it was held that the circuit court might entertain jurisdiction of a suit in equity brought by such assignee, although the ground of the original suit in which the judgment was obtained, was a negotiable chose in action falling within this restriction. *Dexter* v. *Smith et al.*, 2 Mason, 303.

Legatee and representatives of deceased persons not within the act.

In the case of *Chappedelaine et al.* v. *Dechenaux* (4 Cranch, 306), the complainants, who were aliens, were, one of them, a residuary legatee, and the other an administrator *de bonis non*, of a testator who could not have sued in the circuit court; and this restriction seems to have been considered inapplicable to them, because (as was subsequently remarked by Ch. J. MARSHALL, in the case of *Sere et al* v. *Pitot et al.* (6 Cranch, 332), "the representatives of a deceased person are not usually designated by the term 'assignees,' and are, therefore, not within the words of the act."

In the case just cited of *Sere et al* v. *Pitot et al.*, another point of considerable importance was settled, viz.: that this disability attaches to *assignees*

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by operation of law, as well as to those who become such by the voluntary act of the party.

The complainants were aliens, and syndics, or assignees by law of an insolvent trading company composed of citizens of Orleans territory, and the defendants were also citizens of the same territory: and it was held, in accordance with the principles above stated, that the suit could not be maintained in the court of the United States for that territory.[1]

This restriction does not apply to cases in which the *Bank of the United States* is a party. *Bank of the United States* v. *Planters' Bank of Georgia*, 9 Wheat., 904.

Foreign attachment not admissible in national courts.

12. In the case of *Picquet* v. *Swan* (5 Mason, 35), the important question arose, whether, in the states where the proceeding, usually denominated a *Foreign Attachment*, was sanctioned by the local law, this form of proceeding could be lawfully resorted to in the courts of the United States.

[1] In the case of *Deshler* v. *Dodge* (16 Howard, 622), this enactment was held to be inapplicable to a suit by the assignee of a chose in action to recover possession of the thing in specie, or damages for its wrongful caption or detention; that it applied only to the case of a suit brought to recover the contents of, or to enforce the contract contained in, the instrument assigned, and that it was, therefore, no impediment to an action of replevin by the assignee of a package of bank notes. See, also, *Smith et al* v. *Kernochen*, 7 Howard, 198; *Sheldon et al.* v. *Sill*, 8 id., 441. Nor does the restriction apply to railroad bonds issued in blank. Thus, a bond issued by a railroad company to a citizen of Massachusetts, and coming into the hands of a citizen of New Hampshire, may be filled up by making it payable to himself or bearer, or order; and a suit may be maintained upon it on his own name in the circuit court of the United States for the district of Massachusetts. Without the name of a payee the bond was inchoate and ineffectual. Established public usage in this country, gave the holder a right to give it validity in his hands by inserting his name. By the late decisions of the English courts, bonds delivered in blank are held absolutely void: but the reverse has been repeatedly decided or assumed by the state courts. *White* v. *The Vermont & Mass. Railroad Co.*, 21 Howard, 575.

The decision was that it could not. The opinion of the court, delivered by Mr. Justice STORY, is elaborate, forcible and eminently instructive.

This case was decided in 1828. It appears to be the first reported case in which the question on which it turned had been distinctly presented for adjudication in any court of the United States; and it was not until the case of *Tolland* v. *Sprague* (11 Peters, 300), that this question was brought directly before the supreme court for adjudication. The decision (Chief Justice TANEY and Mr. Justice CATRON doubting, and Mr. Justice BALDWIN and Mr. Justice WAYNE intimating dissent) was in accordance with that of the circuit court of Massachusetts in the case above cited, and the reasoning of Mr. Justice STORY in that case was expressly adopted, enforced and justified.[1]

Having completed our general survey of the field, comprehending the original jurisdiction of the circuit courts, it remains to examine each of its divisions.

1. *Of civil suits in which the* UNITED STATES *are plaintiffs or petitioners.*

When the United States may sue.

To enable the United States to maintain an action on a contract, it is not necessary that there should be an act of congress expressly authorizing such suit.

A right of action results to them in common with individuals from the contract itself. *Dungan* v. *The United States*, 3 Wheat., 172, 181; *Barker* v. *The United States*, 1 Paine, 156.

But to sustain an action in the name of the United States, it is in general necessary, especially if the

[1] An abridgment of the train of reasoning that led to these decisions, sufficiently full to be intelligible and useful, would occupy more space than is compatible with the plan of this work, and is on that account reluctantly omitted. I beg leave, however, to recommend the cases themselves to the attentive study of the reader.

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contract be in writing, that it should have been entered into with the United States, *eo nomine*. *The United States* v. *Parmelee*, 1 Paine, 252; *The United States* v. *Kennon*, Peters's C. C. Rep., 168. But in the case of *Dungan* v. *The United States* (3 Wheat., 172, above referred to), it was held, nevertheless, that such a suit might be maintained against the first indorser upon a bill of exchange which had been indorsed to the treasurer of the United States, acting under the direction of the secretary of the treasury, who was the agent of the commissioners of the sinking fund. See, also, to the same point, the case of *Barker* v. *The United States*, above referred to.

The United States cannot be sued.

No contract, however, can be judicially enforced *against* the United States. If the other contracting party is dissatisfied with the course pursued towards him by the officers of the executive branch of the government, who are generally charged with the fulfillment of contracts on the part of the United States, he can obtain redress only by *petition to Congress*. *Cohens* v. *Virginia*, 6 Wheat., 411, 412. Nor can this principle be evaded in a suit in which the United States are plaintiffs, by pleading an offset and obtaining the verdict of a jury finding a balance in favor of the defendant, although the laws of the state provide this form of redress between private parties. *Reeside* v. *Walker*, 11 Howard, 272.

2. *Of suits in which an* ALIEN *is a party.*

Nature and extent of the alien's privilege.

The privilege secured to aliens (which term comprises all unnaturalized foreigners, whether resident abroad or in the United States), of suing and being sued in these courts, consists merely in the right of electing between the national and state tribunals; and does not therefore supersede the disability, founded in general principles of law, of non-resident

alien *enemies* to sue. *Mumford* v. *Mumford*, 1 Gallison, 366.

It is sufficient if the *real* party be an alien, although the *nominal* party be a citizen. Thus, in a suit instituted under the laws of Virginia, in the names of certain justices of the peace of that state, against another citizen of the same state, upon his bond as executor to recover a debt due to a British subject, the jurisdiction was sustained. *Brown* v. *Strode*, 5 Cranch, 303. A trustee is not a nominal party; and, therefore, an alien executor is competent to sue upon the ground of his alienage. *Chapdelaine et al.* v. *Dechneaux*, 4 Cranch, 306.

It has already been seen that the jurisdiction of the circuit courts does not extend to suits *between* aliens.

3. *Of suits between a citizen of the state in which the suit is brought, and a citizen of another state.*[1]

What state.

The word "*state*," in the judicial act, is to be interpreted by reference to that term as used in the constitution; and means not merely a distinct political society, according to the definitions of writers on general law, but a member of the American confederacy. It is not, therefore, applicable to the *District of Columbia*. *Hepburn* v. *Elzey*, 2 Cranch, 445. Nor to the *Territories* of the United States. *Corporation of New Orleans* v. *Winter*, 1 Wheat., 91.

What constitutes citizenship.

What is sufficient to constitute *citizenship* within the meaning of the constitution and the judicial act, is a question which, in its practical application, has been attended with some difficulty.

It arose in the case of *Knox* v. *Greenleaf* (4 Dallas, 360); but as it would lead to unwarrantable prolixity

[1] See further, on this subject, part II, ch. 2, sec. 7, "Character of the Parties."

PART I. to state the circumstances upon which it depended, the student is merely referred to the case as reflecting some light upon the subject.

In the case of *Rabauld et al.* v. *D' Wolf* (1 Paine, 580), Belknap, one of the plaintiffs, who was averred to be a citizen of the state of Massachusetts, was proved either to have been born in Boston or to have removed there with his father, at an early age, from New Hampshire, and to have resided there until he went to France, where he resided ten or twelve years, and then returned to Boston. It further appeared that he was an unmarried man; that he lived at lodgings in Boston, occupying rooms hired, as was understood for a year, and was there about two-thirds of his time. The rest of his time was occupied in attending to the business of the firm of which he was a partner, principally in New York, Philadelphia, and the other cities of the United States. All the witnesses considered his home to be in Boston. This evidence was held sufficient to establish the fact of citizenship as averred.

In the case of *Cartlett et al.* v. *The Pacific Insurance Company* (1 Paine, 594), this question was again agitated.

Cartlett, one of the plaintiffs, was averred to be a citizen of Virginia; and Mr. Justice THOMPSON, in considering the question whether this averment had been sufficiently proved, expressed himself as follows: "There is some difficuly in understanding, precisely, the sense in which the term citizen is used in reference to this question. A citizen of the United States is, to many purposes, a citizen of each state; and I am not aware that it has ever been held, that where there is a permanent change of residence by a citizen from one state to another, the party so removing must acquire all the rights and privileges of a citizen of the state to which he removes, according

to the state laws, before he can come into the circuit court of the United States. It has been held, however, that it is not enough for the party to aver that he is a resident or inhabitant of the state, but there must be an averment in the language of the law and constitution, that he is a citizen. This presents some difficulty, then, as to the proof that will sustain such averment. But I am inclined to think it is sustained by proof of a permanent and fixed residence, under such circumstances that it may be said, that he has his domicile there. A mere temporary residence for temporary purposes might not be sufficient.

"In the present case there is no question as to Keith, one of the plaintiffs. The objection only goes to Cartlett, the other plaintiff. And with respect to him, the proof is substantially, that he removed from Alexandria into Virginia, in December, 1824,[1] avowing that one of the objects of his removal was to enable him to prosecute this suit in the courts of the United States, at the same time declaring that it was a permanent removal, never intending to return again to reside in Alexandria—that he leased a house in Virginia, and had lived there ever since his removal with his family. It has been said that his declaration, that one object he had in view by the removal, was to enable him to bring this suit, makes it a fraud upon the law. I do not think it can be regarded in this light. If he had avowed that his sole object was to place himself in a situation to bring this suit, with an intention of returning to his former residence when it was ended, it might have been considered a fraud upon the law. But if he deemed the privilege of bringing a suit in the courts of the United States of sufficient consequence to justify a *bona fide* change of residence, he cannot be charged with a fraudulent evasion of the law, so as

[1] The trial took place in October, 1826.

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to make the act void. Whether it was a *bona fide*, or a mere colorable removal, is a question for the jury."

Continuous residence and prosecution of local business sufficient.

At length, in the case of *Shelton* v. *Tiffin et al.* (6 Howard, 163, 184), the subject came under the cognizance of the supreme court. This suit was instituted in the circuit court for the eastern district of Louisiana, the complainants being citizens of the state of Missouri, and the defendant described as a citizen of the state of Louisiana. He, however, interposed a plea to the jurisdiction of the court in which he alleged that he was a citizen of Virginia. The facts, as they appeared in evidence, relative to his citizenship, were as follows: He and his wife, they having no children, became residents of Louisiana more than two years before the commencement of the suit; they had, during this time, been absent from the state only once, a short time, on a visit to a watering place in Mississippi. During the greater part of the time they had resided on the plantation which was the subject of the controversy, cultivating and improving it by the labor of slaves, and had erected thereon a more comfortable dwelling-house. In the winter next succeeding his removal, the defendant observed to a witness, that he considered himself a resident of Louisiana. There was no proof that he had voted at any election in that state, or served on a jury. At one time, subsequent to the commencement of the suit he refused to vote. Some of the witnesses had heard him speak of returning to Virginia, but whether to reside there permanently, or only on a visit, did not appear. The court adjudged him to be a citizen of Louisiana under the act of congress, and accordingly upheld the jurisdiction of the circuit court. Mr. Justice MCLEAN, in delivering the opinion of the court, expressed himself as follows: "When an individual has resided

in a state for a considerable time, being engaged in the prosecution of business, he may be presumed to be a citizen of such state, unless the contrary appear. And this presumption is strengthened where the individual lives on a plantation and cultivates it with a large force, as in the case of Shelton, claiming and improving the property as his own. On a change of domicile from one state to another, citizenship may depend upon the intention of the individual. But this intention may be shown more satisfactorily by acts than declarations. An exercise of the right of suffrage, accompanied by acts which show a permanent location, unexplained, may be sufficient."

One of parties must h citizen the sta which suit is brougl

To vest this branch of jurisdiction it is not sufficient, as will readily be perceived, according to the 11th section of the judiciary act of 1789, that, in the language of the constitution, the adverse parties are citizens of different states. Congress, in providing for its exercise, thought proper to restrict it to cases in which one of the parties (and it matters not which) is a citizen of the state in which the suit is brought, and to forbid the service of the process of arrest out of that state. It was also held that where there is a plurality of plaintiffs or of defendants, *each one* must possess the requisite character in this respect, to sue or be sued.

Under this state of the law, the common law rule being that in an action on a joint contract all the parties liable must be joined as defendants, and that all the defendants must be brought into court, the result was that the present residence, whether original or by removal, of any one of any number of joint contractors, beyond the limits of the state where the rest resided, was sufficient to defeat the jurisdiction of the national courts, unless the non-resident party should happen to be found in that state, or choose voluntarily to appear in the suit.

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Strawbridge et al. v. *Curtis et al.*, 3 Cranch, 267; *Ward* v. *Arredondo et al.*, Paine's C. C. Rep., 410; *Levy* v. *Fitzpatrick*, 15 Peter's Rep., 167. This consequence being deemed inconsistent with the policy of the constitutional grant of judicial power over controversies between citizens of different states, an act was at length passed providing "That where, in any suit at law or in equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of, or found within the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction and proceed to the trial and adjudication of such suit, between the parties who may be properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties, not regularly served with process, or not voluntarily appearing to answer; and the non-joinder of parties who are not so inhabitants, or found within the district, shall constitute no matter of abatement or other objection to said suit."[1]

11th section of judiciary act modified.

The language of this act speaks for itself. Since its passage a suit may be effectively prosecuted against such of a larger number of persons jointly liable, as are inhabitants of, or found within the district where the suit is brought, notwithstanding the non-residence or absence of the rest; the plaintiff being at liberty either to include them in his process (to be in that case returned *non est inventus* as to them), or to omit them altogether, and in either case, to proceed to judgment against those on whom the process has been served.

Corporations aggregate.

A controversy arose early, and was continued with great earnestness, and with varying fortunes, through many years, touching the capacity of corporations

[1] Act of Feb. 28, 1839, ch. 37, § 1: 5 Stat. at Large, 321.

aggregate to sue and be sued in the courts of the United States. The question was, whether it was necessary to ascertain who where the persons composing these bodies, and to show that each one of them, individually, possessed the requisite character. It was so decided in *The Hope Insurance Company* v. *Boardman*, and *The Bank of the United States* v. *Devau* (5 Cranch, 57, 61); and the decisions in these cases were followed (though, as we learn from a subsequent case, with great reluctance,) in *The Commercial Bank of Vicksburg* v. *Slocomb*, 14 Peters, 60. The decision was that a corporation could not, in its corporate capacity, be a citizen, and could not, therefore, litigate in the courts of the United States, except in consequence of the citizenship of the individual members composing it. Each of the corporators must be a person capable of suing where the corporation was plaintiff, and of being sued where it was defendant, and it appearing that some of them were citizens of the same state with the plaintiffs, it was held that the circuit court had not jurisdiction.

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But in the case of *The Louisville, Cincinnati, and Charleston Railroad Co.* v. *Lettson* (2 Howard, 497), the supreme court saw fit to subject this doctrine to a severe and searching re-examination; and, upon mature deliberation, declared its unanimous dissent from the narrow and inconvenient rule laid down in the antecedent cases, and holding "that a corporation created by and doing business in a particular state, is to be deemed, to all intents and purposes, as a person, although an artificial person, capable of being treated as a citizen of that state as well as a natural person;" and that as such, it may, in strict conformity with the language of the constitution and of the 11th section of judiciary act, sue and be sued by a citizen of another state, without regard to the citizenship of the persons of whom

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it is composed. It matters not, therefore, in a suit against a corporation, if some of the corporators are citizens of the same state with the plaintiff, provided he is a citizen of another state than that in which the corporation is established, and where the suit must be prosecuted.

The doctrine of this case is firmly established. It was fully discussed, re-examined and affirmed in *Marshall* v. *The Baltimore and Ohio Railroad Co.* (16 Howard, 314), and applied in *The Lafayette Insurance Co.* v. *French* (18 Howard, 404); in *The Covington Drawbridge Co.* v. *Shepherd* (20 Howard, 225); and in *The Ohio and Mississippi Railroad Co.* v. *Wheeler* (1 Black, 286). In the last two cases the chief justice, in pronouncing the judgment of the court, reviewed the antecedent cases, and reasserted the rule laid down in *Lettson's* case; as he also did the decision of the court in the prior case of *The Bank of Augusta* v. *Earl* (13 Peters, 512), in which it was held that a corporate body can have no existence beyond the limits of the state or sovereignty which indues it with its faculties and powers. It must dwell in the place of its creation.

The result then is, that the legal entity brought into being as a corporation aggregate by any state of the Union, is placed, under the 11th section of the judiciary act, upon the same footing, both as plaintiff and defendant, as an individual citizen of that state.[1] The individuality of its members is, *pro tanto*, merged in their collective corporate character. They are to be presumed to inhabit the state to which

[1] This is true, without qualification, with respect to suits brought *by* a corporation; but it will be seen that a suit *against* a corporation can be instituted only in the district comprising (wholly or in part) the state where, by law, it has its domicil; while an individual may be sued either in the state of which he is an inhabitant, in that of which the plaintiff is a citizen, if casually "found" there. A corporation can be *found* only at its home.

they owe their corporate existence, and no allegation to the contrary will be admitted.

In one of the above cited cases, *The Ohio and Mississippi Railroad Co.* v. *Wheeler*, in which the corporation was plaintiff, in the circuit court, the jurisdiction of that court was denied by the supreme court. The action was brought in the State of Indiana, to recover the amount of the defendant's subscription to the capital stock of the company. The plaintiffs alleged themselves to be a body corporate, created by the laws of the States of Indiana and Ohio, having their principal place of business in Cincinnati, in the latter state, and that the corporation was a citizen of that State, and the defendant a citizen of the State of Indiana. The decision of the court was, that the suit was to be regarded and treated as a suit in which the citizens of Ohio and Indiana are joined in an action against a citizen of the latter state, and, consequently, that such an action, the jurisdiction depending altogether on the character of the parties, could not be maintained in a court of the United States.[1]

[1] As to the proper modes of describing a corporate body in pleading, see part 2, ch. 2, sec. 7, "Character of the Parties."

In the case of *The Louisville, Cincinnati and Charleston Railroad Co.* v. *Letson*, which, as we have seen, was the first of the series of cases ascribing to corporate bodies the attributes of citizenship, the suit was instituted against the corporation in the circuit court for the district of South Carolina, to recover damages for the alleged non-fulfillment of a contract relating to the construction of the defendant's road, entered into by them in their corporate capacity, with the plaintiff, who was a citizen of the State of New York; and among the stockholders of the company were two other corporate bodies, some of the members of which were also citizens of New York. The court desired to be considered as founding its decision upon the ground above mentioned; but at the same time declared its opinion to be, that jurisdiction of the case might also be maintained in virtue of the act of February 28, 1839, ch. 37.

This act is not referred to as a ground of jurisdiction in any of the subsequent cases, and I cannot well understand its applicability in a

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This restriction cannot be evaded by colorable assignment.

Jurisdiction cannot be created by an *assignment* of the property, which is the subject matter of the suit, merely *colorable*, and made for that purpose, by one not competent to sue in the circuit court, to one having the requisite character. Thus in an action of ejectment brought by a citizen of Maryland against a citizen of Pennsylvania, in which it appeared from the answer of the defendant to a bill of discovery filed against him on the equity side of the same court by the defendant, that the only title he possessed to the premises in question was derived through a conveyance from a citizen of Pennsylvania, made without consideration, for the purpose of enabling his grantor to litigate in the circuit court, the cause was for that reason struck off the calendar

suit against a corporation. This is not a case in which some of "the parties" are "properly before" the court, and others not. The process having been served on the official representation of the corporation, if valid as to any of the corporators as natural persons, must be equally so as a service on all; and the same is true of the appearance of the corporation in court. And a judgment rendered against it must be equally binding and operative against all its members, so that no effect could be given to the saving clause of the statute, providing that the judgment "shall not conclude or prejudice other parties not regularly served with process, or not voluntarily appearing to answer."

But there is another question of considerable importance, to which the act of '39 may fairly give rise, and which, to my knowledge has not yet been definitively settled. It is whether, when some of several persons jointly liable in their individual capacity, are citizens of a state other than that of which the adverse party is a citizen, an action against them may not be maintained, notwithstanding others of the persons so liable are citizens of the latter state. In the previous case of *The Commercial Bank of Vicksburg* v. *Slocomb* (14 Peters, 60), this act was invoked by the plaintiff against a corporation, and the court held it inapplicable, adhering to the general rule established before the passage of the act, that each of the several plaintiffs must be capable of suing, and each of the persons who ought to be joined as defendants must be capable of being sued. But this is one of the cases overruled by *The Louisville, Cincinnati and Charleston Railroad Co.* v. *Letson*, in which, as above observed, the opinion was expressed by the court, that the act was applicable to corporations. I have already intimated my dissent from this opinion, but for reasons inapplicable to

upon motion. *Maxfield's Lessee* v. *Levy*, 2 Dallas, 381; *S. C.*, 4 Dallas, 330. But a conveyance by a trustee not competent to sue, to the *cestui que trust*, who is competent, is not colorable within this rule. *Browne's Lessee* v. *Aurbuckle*, 4 Dallas, 338; note (2). CHAP. 8.

As in suits in which an alien is a party, so in those between citizens of different states, it is the character of the *real* and not that of the nominal parties which determines the question of jurisdiction. But executors and administrators are considered as real parties, and the courts of the United States have jurisdiction by or against them, if they are citizens of different states, although their testators or intestates were not thus entitled to sue, or liable to be

It applies to the real parties.

Executors and administrators are such

suits against individuals; and I can discern no reason for excluding such suits from the operation of the statute, although a part of the persons to whom the joint liability attaches may be citizens of the same state as the plaintiff. Such a case seems to be clearly embraced by the policy of the act, and to be fully warranted by its terms. Its language is general, and is as much descriptive of a case in which some or one of the defendants is a citizen of the same state as the plaintiff when the suit is brought in another state, as it is of the opposite case; and it may be added also that the policy of the act appears to extend alike to both. It is true, congress has not power to confer a general jurisdiction on the national courts of controversies between citizens of the same state; and the question, therefore, is, whether the jurisdiction in question can properly be said to be of this character. If a citizen of Pennsylvania, having a right of action against several persons jointly, a part of whom are residents of that state, and the rest of the state of Alabama, should institute a suit in the circuit court of the United States in the latter state against those resident therein, could the court, in entertaining jurisdiction of the case and rendering a judgment therein which could not conclude or prejudice those resident in Pennsylvania, be properly said to take cognizance of a suit between the plaintiff and his Pennsylvania debtors? If not, I perceive no reason why the act should not receive an interpretation which would sanction such a suit. To adopt it is but to decide that the act allows a citizen of one state in the American Union to institute a suit in the circuit court of the United States in any other state, against such of his joint debtors as reside or may be found there, without any regard to the citizenship of the others.

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sued, in these courts. *Childress, ex'r, &c.*, v. *Emory et al., ex'rs, &c.*, 8 Wheat., 642.

The legal interest is the test.

But in suits at law, the *legal* interest alone is to be regarded. *Irvine* v *Lowry*, 14 Peters, 293; *Colson* v. *Lewis*, 2 Wheat., 377.

Jurisdiction cannot be divested by a change of residence.

The jurisdiction of the circuit courts being once vested between citizens of different states, cannot be divested by a change of domicil of one of the parties, and his removal into the same state with the adverse party, *pendente lite*. *Morgan's Heirs* v. *Morgan et al.*, 2 Wheat., 290.

And a bill for an injunction to stay execution on a judgment at law, may be entertained, although the adverse parties to the judgment have, subsequent to the judgment, become citizens of the same state. *Dunn et al.* v. *Clarke et al.*, 8 Peters, 1.

4. *Of suits "arising under" the Patent and Copyright Acts.*

What constitutes a case arising under the patent or copyright laws.

To constitute a suit of this description, of which a circuit court may take cognizance, without regard to the citizenship of the parties, or the amount in controversy, it must arise strictly under the patent or copyright laws. It is not sufficient that it relates to rights acquired under them; the rights of the parties in contest must depend on them. And therefore a bill in equity for the specific performance of a contract for the use of privileges secured by letters patent, was held not to be a suit arising under the patent laws.[1] And so of a bill in equity to annul a conditional assignment of a patent right, on the ground that the assignee had failed to comply with the terms of the assignment.[2] Unquestionably the same principle is applicable to contracts respecting copyrights.

[1] *Brown* v. *Shannon*, 9 Howard, 9.

[2] *Wilson* v. *Sandford et al.*, 10 id., 99.

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Purcha a copp plate a execut sale co no rigt use it.

In *Stephens* v. *Cady* (14 Howard, 529), it was decided that the purchaser at a sale under execution, of a copperplate engraving of a map, the copyright whereof had been secured, acquired no right to use the plate for the purpose of making maps. Copyright is an incorporeal property, not subject to sale on execution. An engraved map plate is but an instrument for the exercise of this right, and stands in the same relation to it as the implements employed by a patentee in the construction of the machine patented do to the right secured by the patent. Besides, the copyright act of February 3, 1831, ch. 16, § 7 (4 Stat. at Large, p. 436), forbids, under severe penalties, the copying of any map, &c., the copyright whereof has been secured, without the consent of the proprietor, in writing, signed in the presence of two witnesses. Doubtless this incorporeal right, like a share of a debtor in a joint stock company, may be reached by a creditor's bill; but even when this mode of transfer is resorted to, it may well be doubted, said Mr. Justice NELSON, in pronouncing the decision of the court, whether it would not be necessary for the court to direct a conveyance to the purchaser in the mode prescribed by the statute.

It was held, also, that the proprietor of the copyright could not be required, as a condition on which the purchaser of the plate should be enjoined from using it, to refund the purchase money.[1]

[1] There is one other reported case deciding a point, it is true, about which it seems strange that any doubt should have been entertained, but to which, nevertheless, I deem it proper to advert, partly as an act of justice to the district judge of the northern district of New York, before whom, sitting alone in the circuit court, the cause was tried. The only point decided by the supreme court, of the nine points presented by the bill of exceptions, is that the penalty of fifty cents imposed by the sixth section of the act on the unauthorized publisher of a book, "for every sheet *found in his possession*," does not attach to

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5. *Of suits removed from state courts.*

Removal a matter of right.

The privilege conferred by the 12th section of the judicial act, on defendants, in suits instituted in state courts, of having their causes removed thence to the circuit court of the United States, is matter of right; and when, on an application for this purpose, it is shown that the case is one embraced by the act, and that the defendant has complied with the required conditions, it is the duty of the state court "to proceed no further in the cause," and every step further taken in the case, whether in the same court or in an appellate court, is *coram non judice*, and, of course, nugatory. *Gordon* v. *Longest*, 16 Peters, 97.

Amount in dispute.

When the damages are laid by the plaintiff at more than five hundred dollars, this satisfies the words of the act "to be made to appear to the satisfaction of the court," &c., and is conclusive upon the state court, with respect to the sufficiency of the amount in dispute. Id.

Consequence of refusal of state court to allow petition for removal.

When the state court, after improperly refusing to allow the petition for removal, proceeds to render a judgment against the defendant, and the judgment is affirmed on writ of error to the highest court of the state, the defendant may prosecute a writ of error to the supreme court of the United States in virtue of the 25th section of the judiciary act, and

sheets *not* found in his possession. Of course it does not; nor did the judge decide otherwise. No such point was raised or suggested. The amount for which, *if for any thing*, the verdict was to be rendered, was a mere matter of computation between the counsel, acquiesced in by both parties, and announced to the court. There were six questions raised, and no more, as conclusively appears by the full minutes of the trial, carefully made by the judge, and the one on which the case turned in supreme court is not one of them. How, without the knowledge of the judge, it found its way into the bill of exceptions, it is unnecessary to trouble the reader by explaining. *Backus* v. *Gould & Banks*, 7 Howard, 798.

the judgment of affirmance will be reversed, and the cause remanded to the state court with instructions that it shall be transmitted to the court in which it originated, with directions to allow the petition of the defendant for the removal of the cause to the circuit court. Id.

In the subsequent case *Kanouse* v. *Martin* (15 Howard, 198), these principles were reasserted. The suit was instituted in the court of common pleas for the city and county of New York, the plaintiff being a citizen of the state of New York, and the defendant of New Jersey. The sum originally claimed in the declaration, as damages, was one thousand dollars; but after the defendant had presented his petition for the removal of the cause, the plaintiff was allowed to reduce his claim to the sum of four hundred and ninety-nine dollars. The petition was then denied, and the plaintiff recovered a judgment. On a writ of error to the superior court of the city of New York, the highest court possessing appellate power in the case, the judgment was affirmed, the court refusing to entertain the question of the defendant's right of removal, because the objection did not appear upon the record; no plea to the jurisdiction of the inferior court having been interposed therein. But this decision was held by the supreme court to be erroneous. The denial of the defendant's petition was an infringement of a right conferred by the act of congress, and entitled him to a writ of error and the reversal of any judgment the court might render in that suit against him. To require him to plead was inconsistent with this right, and with the obligation imposed on the court by the act of congress, to "proceed no further in the cause."

For these reasons also it was erroneous in the court of common pleas to allow the declaration to be amended by the reduction of the damages claimed.

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At a previous term of the supreme court a motion had been made in behalf of the defendant in error to dismiss the cause for the want of jurisdiction; but the court held the case to be clearly one of those enumerated in the 25th section of the judiciary act of 1789. The plaintiff in error claimed the right under the 12th section of this act, to remove the cause from the state court to the circuit court of the United States. The right claimed was denied. The construction of an act of congress was therefore drawn in question, and the decision of the court was against the right claimed under it.

Suit on recognizance for good behavior not removable.

In the case of *The State of Pennsylvania* v. *Cobbett* (3 Dallas, 467), it was held by the supreme court of that state, that an action of debt upon a recognizance for good behavior, against an alien, was not removable by the defendant to the circuit court of the United States; it being in the nature of a criminal proceeding, and therefore not *such a case* as was contemplated in the judicial act.

A bill for an injunction to restrain another state court not within the act.

It having been held (*Diggs & Keith* v. *Wolcott*, 4 Cranch's R., 179), that a court of the United States has no power to enjoin proceedings in a *state* court; it therefore follows, that a bill in equity filed in a state court (though against an alien, or a citizen of another state), for the purpose of obtaining an injunction to restrain proceedings in another state court, is not *such a suit* as is removable to the circuit court of the United States. And so it was held by the court of chancery of New York. 1 Paige's Chan. Rep., 183.

Rule as to character of parties the same as in original suits.

The rule relative to suits originally instituted in the courts of the United States, that where the jurisdiction depends upon the character of the parties, *all* the individuals composing the respective parties, plaintiff and defendant, must possess the requisite character, was held applicable also to suits removed

from the state courts. Accordingly, where the plaintiffs were citizens of the state in which the suit was brought, and one of the three defendants was also a citizen of the same state, it was held that the suit could not be removed, although the other two defendants were aliens. *Ward* v. *Arredondo et al.*, 1 Paine, 410.

Indeed it is perfectly obvious that no suit can be removed to the national courts, which might not by *the constitution* of the United States have been originally commenced in one of these courts. It is true, as we have seen, that congress in defining the original jurisdiction of the inferior courts of the United States have not seen fit to cover the whole ground embraced by the constitution. But it is evident from the language of the twelfth section of the judicial act, that it was not intended by it to extend the jurisdiction of these courts over causes brought before them on removal, beyond the limits prescribed to their original jurisdiction; and such, as far as it goes, is the judicial construction which has been given to this section.

It may, therefore, be safely assumed, that all the decisions affecting the original jurisdiction of the circuit courts in the classes of cases which may be removed are equally applicable to them as the subjects of removal.

Compliance with the law by a state court may be enforced by mandamus.

In the case of *Spraggins* v. *The County Court of Humphries* (1 Cooke, 160), it was held that a state court improperly refusing to permit the removal of a cause to the circuit court of the United States may be compelled to allow such removal, by *mandamus*, from the circuit court to which the removal is sought; and in the case of *Brown* v. *Cupin & Wise* (4 Hen. and Munf., 173), it was held that a *mandamus*, under the like circumstances, and for the like purpose,

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would lie from a superior to an inferior court of the state.

The petition for removal must be filed at the time prescribed by the act.

The act, it will be recollected, authorizes a removal upon the filing of a petition by the defendants, *at the time of entering his appearance in the state court*; and in the case of *Gibson* v. *Johnson* (Peters's C. C. R., 44), in which the defendant had suffered two terms to intervene between the time of entering his appearance in the state court and the filing of his petition for removal, the circuit court remanded the cause for that reason, although the petition was granted by the state court *nunc pro tunc* as of the term of the defendant's appearance.

A suit improperly removed should be remanded by the circuit court.

When a cause is improperly removed, it is the duty of the circuit court to remand it to the state court in which it was instituted; and if the circuit court should entertain jurisdiction of a cause thus improperly brought before it, and the cause should subsequently be carried by writ of error to the supreme court, the latter court would be bound still to remand it. *Pollard et al.* v. *Dwight*, 4 Cranch, 429.

In the case of *Wright* v. *Wells* (Peters's C. C. R., 220), the cause was removed before a declaration was filed in the state court. Upon the defendant's appearance in the circuit court, the plaintiff filed his declaration, and laid his damages at one thousand dollars. Afterwards, by a release of part of the debt, he reduced the sum in controversy to less than five hundred dollars: whereupon it was moved to remand the cause to the state court for want of jurisdiction: but the motion was denied, upon the ground that jurisdiction having once vested, it was not competent for the plaintiff by his own act to oust it.

Jurisdiction not divested by reduction of damages claimed.

The foregoing decisions, it will be perceived, relate to the first description of causes mentioned in the section above referred to, viz.: those against an alien or a citizen of another state.

As it regards the other description of causes, the removal of which is provided for by this section, viz.: those in which the parties claim title to land under grants from different states, it has been held, where one party claimed under a grant from a state before its division, and the other under a grant from a new state subsequently formed from a portion of the territory, that these were grants from *different* states within the meaning of the constitution and judicial act. *Town of Pawlet* v. *Clark et al.*, 9 Cranch, 292. So, also, where both parties obtained inchoate titles from the same state before its separation into two states, and after such separation severally received conflicting grants from the two new states; the constitution and laws looking to the *grants* as the test of jurisdiction, and not to any equitable title previously acquired. *Colson* v. *Lewis*, 2 Wheat., 377.

Grant fr state be fore, and from ne state aft division.

There m be a clai of the le title und grants.

6. *Of the jurisdiction conferred on the circuit courts by the act to incorporate the Bank of the United States.*[1]

The validity of that provision contained in the *charter of The Bank of the United States*, granted in 1816, which confers on the bank an unlimited right to sue in the circuit courts of the United States, has been questioned on two grounds: 1. That congress had no power, by the constitution, to incorporate a national bank; and 2. That, admitting this power, congress could not, constitutionally, empower the circuit courts to take cognizance of suits between citizens of the same state. But in the case of *M'Culloch* v. *The State of Maryland* (4 Wheat., 316), after elaborate argument and full con-

Charter conetitn- tional, a congress had pow to confer the right sue in ci cuit cou

[1] This subject may strike the reader as *obsolete*. But the profound discussions to which it gave rise, and the comprehensive scope and importance of the principles to the establishment of which it led, give to it an enduring interest.

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sideration, the court, through Chief Justice MARSHALL, pronounced its unanimous decision in favor of the constitutionality of the bank. And in the subsequent case of *Osborn et al.* v. *The Bank of the United States* (9 Wheat., 738), in which, on account of the great importance of the question, the same question, at the request of the court, was re-argued, this decision was, with like unanimity, re-affirmed.

In this latter case it was also further decided that, inasmuch as the bank owed its existence to an act of congress, and could sue and be sued only in virtue of this act, suits to which the bank was a party must be considered as cases arising (in the language of the constitution) *under a law of the United States*, and, as such, might constitutionally be made cognizable in the circuit courts, without regard to the citizenship of the parties.

In the case of *The Bank of the United States* v. *The Planters' Bank of Georgia* (9 Wheat., 904), the suit was founded on negotiable promissory notes, made payable to a citizen of Georgia, and which had been transferred to the plaintiffs.

The Planter's bank interposed a plea to the jurisdiction of the circuit court, alleging that the said bank was a corporation, of which the state of Georgia and certain individuals, who are citizens of the same state, with some of the plaintiffs, are members; and, further, that the persons to whom the notes in question were made payable were citizens of the state of Georgia, and, therefore, incapable of suing the said bank in a circuit court of the United States—and being so incapable, could not, by transferring the notes to the plaintiffs, enable them to sue in that court. To this plea the Bank of the United States interposed a demurrer, and upon this issue the case came before the supreme court, on a certificate of division of opinion between the

judges of the circuit court, for the district of Georgia.

In support of the plea it was insisted that inasmuch as the state of Georgia was a stockholder in the Planters' bank, and so one of the corporators, the suit must be considered as one *against that state*, and was therefore prohibited by the 11th amendment to the constitution, by which 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, or by citizens or subjects of any foreign state," or, that, if such a suit could be maintained at all, it was maintainable only in the supreme court. The decision of the court was against the validity of this objection. The state does not, it was said, by becoming a corporator, identify itself with the corporation. The Planters' bank is not the state of Georgia, although the state holds an interest in it. It was considered a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. The state of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily stripped itself of its sovereign character, so far as respected the transactions of the bank, and waived all the privileges of that character.

It was, however, further contended in support of the above plea to the jurisdiction of the court, that the case fell within the limitation contained in the 11th section of the judiciary act, which is in these

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words: "nor shall any district or circuit court have cognizance of any suit, to recover the contents of any promissory note, or other chose in action, in favor of an assignee, unless the suit might have been prosecuted in such court, to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange."

But this objection was also overruled. The above cited provision of the judiciary act was held to be a limitation on the jurisdiction conferred by *that act*. The bank did not sue in virtue of any right conferred by the judiciary act, but in virtue of a right conferred by its charter. It was authorized to sue, not because the defendant was a citizen of a different state from any of its members, but because its charter conferred upon it the right of suing its debtors in a circuit court of the United States.

7. *Of the jurisdiction conferred by the act authoring Banking Associations.*

The above-named act declares "that suits, actions and proceedings by and against any association under this act, may be had in any circuit, district or territorial court of the United States, held within the district in which such association may be established."[1]

8. *Of the power to issue particular writs, and other special powers.*

The only writs of this description which the circuit courts are specially authorized by the judicial act to issue, it will be recollected, are those of

[1] Act of February 25, 1863 (ch. 58, § 59: 12 Stat. at Large, p. 681). And the act of March 2, 1863 (ch. 67, § 4: 12 Stat. at Large, p. 698), gives to the circuit and district courts jurisdiction of all suits for the recovery of fines and forfeitures incurred under that act. The act denounces forfeitures and penalties for frauds committed by persons in the military and naval service of the United States.

scire facias, *habeas corpus*, *dedimus potestatem*. Respecting the first and last named, there are no judicial decisions requiring notice under this head.

The authority of the courts and judges of the United States to grant the writ of *habeas corpus ad subjiciendum* has already been considered in treating of the jurisdiction of the supreme court.

Writ of Mandamus.] This is one of those writs "not specially provided for by statute," but which the circuit courts are authorized to issue only when "necessary for the exercise of their jurisdiction." Of course it can be issued in no other cases. *M'Intire* v. *Wood*, 7 Cranch, 504.[1] But it will lie, for example, to a district court, which refuses to proceed to judgment, in a case subject to the appellate jurisdiction of the circuit court to which the application is made; but not to compel it to expunge amendments improperly made, in a record returned to the circuit court, on error. *Smith* v. *Jackson*, 1 Paine, 453.

Writ of Injunction.] The authority of the circuit court to grant injunctions, except in patent and copyright cases, where, as we have seen, the power is specially conferred, is founded in the same general grant of power.

There are many judicial decisions regulating its exercise, which will be noticed hereafter. It will be sufficient in this place to cite the following, which are all that I have met with that involve the question of jurisdiction.

May be issued after removal by writ of error.

An injunction may be issued from the equity side of a circuit court, to stay proceedings upon a judgment at law in the same court, notwithstanding the removal of the record by writ of error to the supreme

[1] Except in the District of Columbia, as already stated and explained.

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court. *Parker* v. *The Judges of the Circuit Court of Maryland*, 12 Wheat., 561.

To restrain a state officer.

It may also be issued to restrain the performance of an official act by an officer of a state, if a state law requiring him to perform such an act is *repugnant to the constitution of the United States. Osborne et al.* v. *The Bank of the United States*, 9 Wheat., 738.

Not to a state court.

The circuit courts have no jurisdiction to enjoin proceedings in a state court, and so it was held in the case of *Diggs et al.* v. *Wolcott*, 4 Cranch, 179.

Power of judges to issue.

By the act of 1793, the reader will bear in mind, *any judge* of the supreme court is authorized to issue this writ in cases where it might be granted by the supreme or circuit court; and by a later act this authority has been extended, with certain limitations, to the judges of the district courts.[1] This power may of course be exercised in vacation.

As to the power to issue writs of *ne exeat*, *procedendo*, *quo warranto*, *certiorari*, *&c.*, and as to that of appointing special courts, and punishing for contempts, see *ante*, Supreme Court, where what is said is equally applicable in this place.

The jurisdiction in regard to some of the foregoing writs, it will be remarked, is of a nature rather appellate than original. But in the brief disquisitions upon them in this part of the work, it was deemed unnecessary formally to recognize this distinction.

9. *Of the power to make alterations and additions in the forms of process.*

The nature and extent of the power vested in the courts of the United States, generally, by the process of the act of 1792, of *making alterations and additions*, and in the supreme court in particular, of

[1] See *post*, Jurisdiction of the District Courts.

prescribing regulations to the circuit and district courts, respecting the forms of writs, executions, and other process, and especially in the forms and modes of proceeding in suits, were very fully and ably examined in the cases of *Wayman et al.* v. *Southard et al.* (10 Wheat.), and *The Bank of the United States* v. *Halsted* (ib., 51).

The questions decided in both these cases, however, related immediately to writs of execution; and the only points established by them, which it is deemed necessary to state in this place, are the following:

Congress possesses the power, exclusive of the state legislatures, of regulating the proceedings of the national courts, and might constitutionally confide this power to these courts themselves, to the extent declared in the process act. The courts of the United States were therefore authorized to determine the form and effect of their own process. They might, in their discretion, if they considered it expedient to do so, adopt such regulations as might from time to time be resorted to by the states; but such state regulations would be in no degree binding upon them *per se*. Thus, the laws of Kentucky compelling plaintiffs to receive certain bank notes in satisfaction of their executions, or, upon their refusal to do so, authorizing the defendant to give a replevin bond for the debt, payable in two years, were held to be inoperative with regard to executions issuing from a court of the United States. So, also, a statute of Kentucky forbidding the sale of property upon execution for less than three-fourths of its appraised value was held not to be binding upon the marshal acting under a writ of *venditioni exponas*, from the circuit court of the United States for the district of Kentucky, but it was his duty to proceed, without regard to it, to a sale of the defendant's land. So, too, the statute of New York, passed in 1820, direct-

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ing the sheriff, instead of executing a deed for lands sold under execution, to give the purchaser a certificate, and authorizing a redemption of such lands within a limited period, would doubtless have been held to be inapplicable to executions issued upon judgments rendered in the courts of the United States.

State laws affecting final process adopted by statute, except, &c.

But the law as it was at the time of these adjudications, so far as final process is concerned, is, as will readily be perceived, materially altered, by the act of May 19, 1828, ch. 68, § 3: 4 Stat. at Large, p. 278.

By this act all the existing laws and usages of the several states regulating the effect and operation of judgments and executions and the proceedings for their enforcement, appear to be adopted into the national courts in each state respectively with the single exception that where, by the local law, judgments are not allowed to be enforced until after the lapse of more than one term after their rendition, the period of such suspension is limited in the national courts to one term. And no power is left to these courts to modify such laws and usages, except "if they shall see fit in their discretion, by rules of court so far to alter final process in said courts as to conform the same to any change which may be adopted by the legislature of the states for the state courts." In those states, however, in which there are no courts of equity, the national courts are authorized by rule to prescribe the mode of executing their decrees in equity.

10. *Criminal jurisdiction.*

As derived from the constitution.

With the exception of the power given to congress "to provide for the punishment of counterfeiting the securities and current coin of the United States," and "to declare the punishment of treason," there is not, in the constitution, either among the enumerated

powers of congress, or in the section defining the judicial power, any authority expressly conferred to inflict punishment for crimes. There are, however, several provisions regulating the exercise of this power, in general, and clearly implying its existence in other than the cases above mentioned. Thus, it is ordained that "the trial of *all* crimes, except in impeachment, shall be by jury;" that "no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury, except," &c.; that "excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted." And even had all these provisions been omitted, it cannot be doubted that this power would have belonged to the national government. In confiding to it the exclusive guardianship of those great political interests which concern the whole American people, and in giving to congress power to make all laws which shall be necessary and proper for carrying into execution all the other enumerated legislative powers, and all other powers vested in the government, or any department or officer thereof, there could have been no question that it was intended also to confer the requisite authority to enforce obedience to the laws by penal sanctions. At any rate, under the constitution as it is, no doubt has ever been entertained about the existence of this power.

Controversy concerning.

But with respect to the nature and extent of the criminal jurisdiction vested in the national courts, widely different opinions prevailed at the outset, which were maintained with zeal and tenacity. On the one hand, it was contended that this jurisdiction comprehended all common-law offenses against the United States, and especially, all offenses cognizable by the maritime law in a court of admiralty; and, on the other hand, it was insisted that this jurisdic-

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tion extended only to those offenses which had been defined and made punishable by act of congress.

Its extent determined by statute.

After repeated and very animated discussions in the circuit courts, resulting in conflicting decisions, the subject was, for the first time, brought under the consideration of the supreme court, in the case of *The United States* v. *Hudson & Goodwin*.[1] Upon the trial of an indictment against the defendants in the circuit court for the district of Connecticut, for a libel upon the president, the judges disagreed in opinion upon the question of jurisdiction, and this question was certified to the supreme court for its decision. The act charged against the defendants was an offense at common law, and being directed against the chief magistrate of the nation, it was contended that it was an offense against the United States, and, as such, cognizable in a national court. But, on the other hand, congress had not seen fit to enumerate this among the numerous offenses specified in the crimes act of April 30, 1790, ch. 9; and on this ground a majority of the judges held it not to be within the jurisdiction of the circuit court. The next case was *The United States* v. *Coolridge*,[2] in which the indictment was for a forcible rescue of a prize captured by an American cruiser. This was an offense under the maritime law, and therefore of admiralty jurisdiction; and inasmuch as the United States had, by the constitution, been invested with the entire admiralty jurisdiction, it was supposed the case might, on this ground, be distinguishable from that of *Hudson & Goodwin*—*the soundness of* the decision of which was, moreover, denied. But the majority of the court, being of opinion that the case before them was not distinguishable from that, contented themselves with merely declaring their adherence to their former decision, limiting the

[1] 7 Cranch, 32. [2] Wheat., 415.

criminal jurisdiction of the national courts, without exception, to statute offenses. In accordance with this rule, it was held, in the case of *The United States* v. *Bevans*,[1] that the circuit court for the district of Massachusetts could not take cognizance of the crime of murder committed on board an American ship of war in Boston harbor, because the 8th section of the act of 1790, by which, alone, any provision had been made for the punishment of this crime committed on shipboard, speaks only of offenses committed "upon the high seas, or in any river, harbor, or bay out of the jurisdiction of any particular state." And in the case of *The United States* v. *Wiltberger*,[2] the rule was applied with the same result in the case of manslaughter committed on board an American merchant vessel while within the dominions of a foreign power, because the provision contained in the 12th section of the same act for the punishment of that offense committed on shipboard is also confined to manslaughter perpetrated on the high seas.[2]

The result, then, with respect to the criminal jurisdiction of the courts of the United States is this, that, in order to ascertain its extent, resort must be had to the various statutes of the United States providing for the punishment of crimes. For although the national courts are unquestionably to look to the common law, in the absence of statutable provisions, for rules to guide them in the exercise of their functions in criminal as well as in civil cases, it is to the statutes of the United States, enacted in pursuance of the constitution, alone, that they must have re-

[1] 3 Wheat., 336.

[2] 5 Wheat., 76. But by the crimes act of March 3, 1825, offenses committed on board American ships while within the jurisdiction of a foreign state or sovereign are made cognizable and punishable in the courts of the United States, in the same manner as if committed on the high seas. Ch. 65, § 5: 4 Stat. at large, 115.

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course to determine *what constitutes an offense* against the United States. The United States have no unwritten criminal code to which resort can be had as a *source of jurisdiction.* A considerable proportion of these offenses are, in their nature, of admiralty jurisdiction. But this distinction in our system is merely theoretical, the form of prosecution and trial, and the rules of evidence being the same in these last-mentioned cases as in others. The constitution, it is true, extends the judicial power of the United States to *all cases* of admiralty and maritime jurisdiction; and this plenary grant embraces criminal as well as civil causes. But this power can be brought into action, only through the instrumentality of the national legislature. This principle is applicable as well to criminal as to civil jurisdiction, and extends as well to admiralty as to common-law offenses. Congress, in dealing with the admiralty and maritime jurisdiction placed by the constitution at their disposal, have thought proper to provide for its exercise, *eo nomine*, only in *civil cases*, and have confided this branch of it, exclusively, except under an appellate form, to the district courts. Criminal jurisdiction in admiralty, *as such*, is not conferred by any act of congress. The judicial act only declares in general terms that the circuit courts, and the district courts under certain limitations, shall have cognizance of all crimes and offenses cognizable under the authority of the United States; and the subsequent acts providing for the punishment of specific offenses make no distinction between those of admiralty and those of common-law jurisdiction.

Comprises two classes of crimes.

The crimes designated in the several penal statutes of the United States are referable to one or other of the two following classes: 1. Such as are perpetrated on board American vessels on the high seas, or in

any arm of the sea, or in any river, haven, creek, basin, or bay, within the jurisdiction of the United States, and out of the jurisdiction of any particular state (and which are, therefore, comprehended within the admiralty jurisdiction), or within any fort, dock-yard, navy-yard, arsenal, magazine, site of a light-house, or other place which has been ceded to the United States, and is under their jurisdiction. 2. Such as relate to subjects committed to the charge of the national government, and which are, therefore, comprised within the grant of judicial power over all cases arising under the constitution, laws and treaties of the United States, and over all cases affecting ambassadors or public ministers and consuls. Of this nature are forgeries of the public securities or other instruments, documents, or papers, whereby the United States, or others, may be defrauded; counterfeiting the current coin; depredations upon the mail; false swearing in oaths taken under the laws of the United States; crimes and trespasses against the Indians; enticing soldiers to desert; frauds committed by public officers and contractors; violence to public ministers. Most of these offenses are specified in the crimes act of April 30, 1790,[1] and of March 3, 1825;[2] the amendatory act of March 3, 1835;[3] the act of the same date, regulating the post-office department;[4] the neutrality act of April 20, 1818;[5] the act of March 2, 1863, to prevent and punish frauds upon the government of the United States;[6] the act of March 3, 1863, to punish frauds upon the revenue, &c.;[7] the acts for the suppression

By what statute defined

[1] Ch. 9: 1 Stat. at Large, p. 112.
[2] Ch. 65: 4 Stat. at Large, p. 115.
[3] Ch. 40: 4 Stat. at Large, p. 775.
[4] Ch. 64: 4 Stat. at Large, p. 102.
[5] Ch. 88: 3 Stat. at Large, 447.
[6] Ch. 67: 12 Stat. at Large, 694.
[7] Ch. 76; 12 Stat. at Large, 737.

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of piracy and the slave trade; the acts to regulate trade and intercourse with the Indian tribes; and the acts regulating the carriage of passengers in merchant vessels.[1]

CHAPTER IX.

OF THE APPELLATE JURISDICTION OF THE CIRCUIT COURTS.

The revisory power of the circuit courts over final judgments and decrees of the district courts is exercised either, 1. By *appeal*, in this, its technical sense, a civil-law process by which the entire cause is removed, and both the law and the fact are subjected to review and retrial; or, 2. By *writ of error*, a common-law process which removes for re-examination nothing but the law. The following are the enactments by which the jurisdiction is conferred:

Legislative acts conferring.

"That from final decrees in the district court, in cases of admiralty and maritime jurisdiction, where the matter in dispute exceeds the sum or value of three hundred dollars, exclusive of costs, an appeal shall be allowed to the next circuit court to be holden in such district." Act of 24 September, 1789, ch. 20, § 21: 1 Stat. at Large, p. 83.

[1] The Criminal Code of the United States is, in several respects, defective, and stands much in need of a thorough revision. It is wanting in precision and consistency, and requires additions. Some of its defects are pointed out by Chancellor KENT in a note at page 363 of Vol. 1 of his Commentaries. But there are others equally objectionable. The crimes act of 1825 repeals all prior acts and parts of acts inconsistent with its provisions, as it doubtless would have been held to do by implication, without this clause. But to determine the precise extent to which it repeals the acts of 1790, will be found to be a task of some difficulty. The judicial decisions in cases arising under this branch of jurisdiction are numerous. Most of them are cited in notes appended to the several acts under which the cases arose, in the Statutes at Large. A notice of them, sufficiently full, to supersede the necessity of resorting elsewhere for further information, would require too much space, and is, for that reason, omitted.

"That final decrees and judgments in civil actions in a district court, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, may be re-examined and reversed or affirmed in a circuit court, holden in the same district, upon a writ of error." Id., § 22, p. 84.

"That from all final judgments and decrees, in any of the district courts of the United States, an appeal, where the matter in dispute, exclusive of costs, shall exceed the sum or value of fifty dollars, shall be allowed to the circuit court next to be holden in the district where such final judgment or judgments, decree or decrees, may be rendered." Act of March 3, 1803, ch. 11: 2 Stat. at Large, p. 244.

Constr tion of these

Before the act of 1803, and while this branch of jurisdiction was regulated only by the two sections of the judicial act above referred to, no difficulty existed in deciding in what cases it was requisite to resort to an appeal, and in what to a writ of error. The right of appeal was clearly restrained by the 21st section to cases of admiralty and maritime jurisdiction, as the writ of error was to civil actions at common law, by the 22d section. But the act of 1803, giving an *appeal* from *all* final judgments or decrees, involving an amount exceeding fifty dollars, gave rise to the perplexing question whether it was not intended to substitute, or at least to confer upon suitors, the privilege of electing the process of appeal instead of the writ of error, in actions of common law. But in the case of the *United States* v. *Wonson* (1 Gallison, 5), upon very full examination, it was held that the enactment in question was applicable only to cases of admiralty and maritime jurisdiction, and had no other effect except to reduce the amount in controversy requisite to the exercise of appellate power in those cases, from three hundred to fifty dollars. See, also, *M'Lellan* v. *The United States*, 1 Gallison, 227.

From all final decrees, therefore, of the district court in cases of admiralty and maritime jurisdic-

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tion, involving an amount exceeding fifty dollars, exclusive of costs, an *appeal* lies to the next circuit court to be held in the district where the decree is pronounced; and from all final judgments in actions at common law involving the like amount, a *writ of error lies*. But no right of election exists in either of these descriptions of cases.

What decrees and judgments are final.

As to what shall be deemed *final* decrees and judgments, within the meaning of these acts, *vide Jurisdiction of the Supreme Court, ante; M'Lellan* v. *The United States*, 1 Gallison, 227; and *Brig Helen*, 1 Mason, 431.

Amount in dispute.

And as to the principles which have been settled with respect to the *amount* in controversy, as requisite to vest jurisdiction, see *Jurisdiction of the Supreme Court, ante; Martin* v. *Taylor*, 1 Wash. C. C. Rep., 1; and *Postmaster-General* v. *Cross et al.*, 4 Wash. C. C. Rep., 326.

The legislative provisions and judicial decisions stated in this chapter relative to the appellate jurisdiction of the circuit courts, it must be borne in mind, are applicable only to the district courts for those districts in which circuit courts have been established, except, as will be hereafter explained in treating of the jurisdiction of the district courts; when, as already intimated, the peculiar structure of the courts for the other districts will be considered.

RECAPITULATION.

From the foregoing analysis it therefore follows: that the circuit courts of the United States are tribunals both of original and appellate jurisdiction: that their *original* jurisdiction embraces, *concurrently with the courts of the several states*, all civil suits at common law and in equity, 1. In which the United States are plaintiffs; 2. In which any officer of the United States, suing under the authority of

an act of congress, is plaintiff; 3. In which an alien is a party plaintiff or defendant, against a citizen, or the party defendant at the suit of a state; 4. In which one of the parties is a citizen of the state in which the suit is brought, and the other a citizen of another state, *provided*, that where the suit is brought by the *assignee* (claiming title through the assignment), of a promissory note, or other chose in action (except foreign bills of exchange, and debentures) to recover the contents thereof, the court would have had jurisdiction if the suit had been brought by the original party before assignment; 5. By removal from state courts, or suits in which the parties are citizens of the same state, and are litigating concerning the title to lands claimed by the one party under a grant from the state of which he is a citizen, and by the other under a grant from another state, provided, that, in each of the three last descriptions of cases, the amount *claimed* by the plaintiff exceeds five hundred dollars;[1] 6. In which damages are claimed by the plaintiff for injury to his person or property on account of any act done by him under some revenue law; 7. In which the president, directors and company of the bank of the United States are a party; 8. *Concurrently with the district courts*, suits upon debentures, without regard to the character of the parties; 9. *Exclusively* (as it is apprehended), all suits for the infringement of patents and copyrights; 10. *Suits* in a few specified cases for penalties; 11. *Concurrently with the district courts*, prosecutions for all crimes and offenses cognizable under the authority of the United States, and of which the latter courts possess jurisdiction, and *exclusively*, prosecutions for all other such crimes and offenses: and that their

[1] And of certain other cases arising out of the present rebellion, as to which, *vide supra*.

PART 1. appellate jurisdiction extends to all final decrees of the district courts in cases of admiralty and maritime jurisdiction (in which cases the remedy is by *appeal*), and to all final judgments in civil actions (in which case the remedy is by *writ of error*), when the matter in dispute exceeds fifty dollars.

CHAPTER X.

OF THE ORGANIZATION OF THE DISTRICT COURTS.

The district courts, like the circuit courts, were established by congress in virtue of the power conferred by the constitution, to establish other courts inferior to the supreme court.

1. *Of the Districts.*

The plan originally adopted by the framers of our national judicial system was, to constitute each of the several states of the Union a judicial district, and to direct the appointment of a judge, a clerk (to be appointed by him), a district attorney, and a marshal for each district. The only exceptions to this arrangement were the erection of that part of the state of Massachusetts which now constitutes the state of Maine, and of that part of the state of Virginia which now forms the state of Kentucky, into independent districts, under the names of the district of Maine and the district of Kentucky, and the establishment of a district court in each, invested with the powers of a circuit court; the remaining portions of the states thus divided being constituted judicial districts, bearing the names of these states. Of the eleven original states, Virginia has since been divided into two states, one of them retaining the name of Virginia, and the other denominated West Virginia, each of which constitutes a single district;

New York has been divided into three and Pennsylvania into two districts. Of the states since admitted into the Union, Ohio, Illinois, Missouri, Louisiana, Florida, Texas and Michigan, though at first severally organized as single districts, have since been respectively divided, in like manner, into two districts; and California was thus divided at the outset. But by the act of July 27, 1866 (ch. 280), Louisiana and California have severally been converted into a single district. All these being completely organized districts, like those consisting of entire states, they require no further separate notice. But of several other states, subdivisions have been made of so anomalous a character, and so different from each other, as to render it no easy matter to decide whether any of them, and if any, which, are entitled to the appellation of judicial districts. North Carolina, Tennessee, South Carolina, Alabama, Mississippi, Georgia, Arkansas and Iowa are the states here referred to. Notwithstanding their subdivision into what are denominated *districts*, each bearing a distinctive name, and some of them partially organized by having a marshal or clerk, or both, they still, collectively, bear the name of the state, and have only one judge.

2. *Of the judges and immediate officers of the district courts.*

Judges.] The judges of these courts are appointed in the same manner, hold their offices by the same tenure,[1] enjoy the same immunities with respect to

[1] This remark, with regard to the tenure by which the district judges hold their offices, requires, perhaps, a word of explanation. As importing merely the security of these judges against removal by the executive, it is strictly true. But congress have, in one memorable instance, exercised the power of indirect removal from the judicial office, by virtually abolishing the office itself. By an act passed in 1801, the judicial system of the United States was remodeled, so far as the circuit and

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their salaries, are in like manner prohibited from being engaged in the practice of the law, and are required to take the same oath, as the judges of the supreme court.[1]

Clerk.] This officer is appointed by the court; and is required to keep his office at the place of holding the court, where there is only one place; and where there are more, at the place appointed by the judge.[2] Before entering upon the execution of his office, he is required to take an oath (of which the form is prescribed), and to give bond, with sufficient sureties (to be approved of by the court), to the United States, in the sum of two thousand dollars, "faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments and determinations of the court of which he is clerk."[3]

In case of the absence or disability of the judge, the clerk is authorized to take recognizances of special bail, *de bene esse*, in any action depending in the court, and also the affidavits of all surveyors, relative to their reports, and to administer oaths to all persons identifying papers found on board of vessels or elsewhere, to be used on trials in admiralty

district courts were concerned, and the number of national judges increased.

These newly created offices were filled. But the act was itself repealed, and the incumbents displaced, though it was strenuously objected that such an exercise of power was forbidden by that clause of the constitution which provides that "the judges both of the supreme and inferior courts shall hold their offices during good behavior." In the case of *Stuart* v. *Laird* (1 Cranch, p. 299), which arose soon after, the constitutionality of this act was drawn in question, but the cause was determined upon other grounds. It may now, therefore, be considered as practically settled, that the power conferred upon congress "from time to time to ordain and establish inferior courts," implies also the power to *abolish* such courts.

[1] *Vide, supra*, Organization of the Supreme Court.

[2] In a few instances the place is designated by law.

[3] Act of Sept. 24, 1789, ch. 20, § 7: 1 Stat. at Large, p. 73.

cases.[1] This provision, though still in force, is now in a great measure superseded by subsequent acts, authorizing the appointment of commissioners, with more ample powers, to take affidavits and special bail.[2]

By the act of March 2, 1809,[3] it is enacted, that in case of the disability of the judge of any district to discharge his duties, the clerk of such district shall be authorized and empowered, by leave or order of the circuit judge of the circuit in which such district is included, to take, during such disability of the district judge, all examinations and depositions of witnesses, and make all necessary rules and orders preparatory to the final hearing of all causes of admiralty and maritime jurisdiction.

By the act of March 3, 1817,[4] it is required that all moneys which shall be paid into the circuit or district courts, or received by the officers thereof, in cases pending therein, shall be immediately deposited in the branch bank of the United States within such district, if there be one, otherwise in some incorporated state bank within the district, in the name and to the credit of the court: that no money so deposited shall be drawn from the bank, except by order of the judge or judges of the court in term or vacation, to be signed by such judge or judges, and to be entered and certified of record by the clerk; and every such order shall state the cause in or on account of which it is drawn; and that if any clerk of any such court, or other officer thereof, having received any such moneys as aforesaid, shall refuse or neglect to obey the order of such court, for depositing the same as aforesaid, such clerk, or other officer,

[1] Act of May 8, 1792, ch. 30, § 10: Ib., 275.

[2] See, *infra*, Commissioners.

[3] Ch. 27, § 3: 2 Stat. at Large, p. 534.

[4] Ch. 108: 3 Stat. at Large, p. 395.

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shall be forthwith proceeded against by attachment for contempt. It is also further enacted that at each regular and stated session of said courts, the clerks thereof shall present an account to the said court of all moneys remaining therein, or subject to the order thereof, stating particularly on account of what causes said moneys are deposited; which account and the vouchers thereof shall be filed in court: *Provided, nevertheless*, That if in any district there shall be no branch of the bank of the United States, nor any incorporated state bank, the courts may direct such moneys to be deposited, according to their discretion, as heretofore.

By the act of May 15, 1820, it is made the duty of the clerks of the district and circuit courts within thirty days after the adjournment of each successive term of the said courts, respectively, to forward to the agent of the treasury a list of all judgments and decrees which have been entered in the said courts respectively during such term, to which the United States are parties, showing the amount which has been so adjudged or decreed, for or against the United States, and stating the term to which execution thereon will be returnable.[1]

A subsequent act, however, creates a new officer called the solicitor of the treasury, to whom it transfers the powers and duties of the agent of the treasury, and requires the clerks to forward the list to him.[2]

The fees and emoluments of the clerk are prescribed in a recent statute, a copy whereof is appended to this work.[3]

This is a very carefully framed act, and contains many important regulations besides the tariffs of

[1] Ch. 107, § 8: 3 Stat. at Large, 592.

[2] Act of May 29, 1830, ch. 153: 4 Stat. at Large, p. 414.

[3] Act of February 26, 1853, ch. 80: Appendix.

fees, with which officers of the courts of the United States ought to be familiar. Its insertion in the appendix supersedes the necessity of more full and minute references to its provisions, in treating the various subjects to which these provisions relate.

Minimum compensation of clerks repealed.

The proviso contained in the second section, entitling clerks whose compensation falls short of five hundred dollars per annum to the payment of the deficit, is repealed by the amendatory act of August 16, 1856, ch. 124, § 9: 11 Stat. at Large, p. 50; and this act (§ 1) requires that all accounts of clerks, as well as of district attorneys and marshals, shall be examined and certified by the district judge before presentation to the accounting officers of the treasury department for settlement.

Clerk of every court to give bond.

The above cited act, authorizing the appointment of a separate clerk for the circuit courts, is silent as to any security to be given by them for the faithful performance of their duties; but a subsequent act directs that "the clerk of every court shall give bond in such sum as may be fixed by the court, with sureties to be approved by the court, and a new bond may be required whenever the court shall deem it proper that such bond shall be given."[1] The act, it will be noticed, prescribes no condition for the required bond, but leaves that as well as the penalty to be determined by the court. Doubtless it ought to be for the faithful performance of duty; and it seems to have been taken for granted that the courts would be of this opinion.

A public officer cannot delegate his powers without express authority of law. There is no general act of congress empowering the clerks of the national courts to constitute deputies, and consequently no such general power exists. In several

[1] Act of March 3, 1863, ch. 93: 12 Stat. at Large, 768.

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instances, this power has been conferred on the clerk of a particular district, by special act.[1]

Crier.] The crier is appointed by the court, and is entitled to two dollars per day for his services.[2]

Special Sessions.] By the judicial act of September 24, 1789, ch. 20, § 3 (1 Stat. at Large, p. 73), the district judges are authorized to hold special sessions at their discretion, at such places within their respective districts as they may deem proper.

In most of the acts providing for the establishment of district courts in the districts which have been organized since 1789, the power to appoint special courts is specifically given; probably on the supposition that the provision above cited, contained in the judiciary act, could not properly be construed so as to embrace any other than the districts designated in that act.

The *mode* of appointing special sessions of the district courts is not prescribed by any general law. But the act of March 2, 1793, as we have seen, authorizes the supreme court, or, when it is not in session, a justice thereof, together with the proper district judge, to appoint special sessions of the circuit courts for the trial of criminal causes; and it directs the clerk to *publish a notice* of such appointment at least *thirty days* before the commencement of the session, for *three successive weeks*. In the absence of any other legislative direction, it would seem to be most discreet to conform to the provisions of this act in the appointment of special sessions of the district courts.

[1] There has been strange misapprehension on this point. A clerk in a neighboring district who also held the office of commissioner, having assumed to appoint a deputy, the latter was supposed to be empowered, not only to exercise the functions of clerk, but those of commissioner also; and he actually took it upon himself to act in this latter capacity.

[2] Act of February 26, 1853, ch. 80. See Appendix.

As courts of admiralty, the district courts, except for the final hearing of causes on their merits, are deemed to be always open.[1]

Adjournments, &c.] By the act of 1793, just cited, (§ 6) it is enacted that a district court, in case of the inability of the judge to attend at the commencement of the session, may, by virtue of a written order from the said judge, directed to the marshal of the district, be adjourned by the said marshal to *such day, antecedent to the next stated session of the said court*, as in the said order shall be appointed; and, in case of the death of the said judge, and his vacancy not being supplied, all process, pleadings and proceedings, of what nature soever, pending before the said court, shall be continued of course until the next stated session, after the appointment and acceptance of the office by his successor."

By act of March 26, 1804, ch. 44 (2 Stat. at Large, p. 291), it is enacted, "That in case of the inability of the judge of any district court to attend on the day appointed for holding a *special* or *adjourned* district court, such court may, by virtue of a written order from the judge thereof, directed to the marshal of the district, be adjourned by the marshal *to the next stated term of said court*, or to such day, prior thereto, as in the said order shall be appointed."

As to the power to adjourn the session of the court to some other place, in case of contagious sickness, and the power to continue a session by adjournment to a *distant* day, see conclusion of ch. 7, Organization of the Circuit Courts.

The act of March 2, 1809, ch. 27 (2 Stat. at Large, p. 524), provides "That in case of the disability of the district judge of either of the districts of the

[1] Act of August 23, 1842; ch. 188: 5 Stat. at Large, 116.

PART 1. United States to hold a district court, and to perform the duties of his office, and satisfactory evidence thereof being shown to the justice of the supreme court, allotted to that circuit in which such district court ought by law to be holden; and, on application of the district attorney or marshal of such district, in writing, to the said justice of the supreme court, said justice of the supreme court shall thereupon issue his order, in the nature of a certiorari, directed to the clerk of such district court, requiring him forthwith to certify into the next circuit court, to be holden in said district, all actions, suits, causes, pleas, or processes, civil or criminal, of what nature or kind soever, that may be depending in said district court and undetermined, with all the proceedings thereon, and all files of papers relating thereto, which order shall be immediately published in one or more newspapers printed in said district, and at least thirty days before the session of such circuit court, and shall be deemed a sufficient notification to all concerned. And the said circuit court shall thereupon have the same cognizance of all such actions, suits, causes, pleas, or processes, civil or criminal, of what nature or kind soever, and in the like manner as the district court of said district by law might have, or the circuit court, had the same been originally commenced therein; and shall proceed to hear and determine the same accordingly; and the said justice of the supreme court, during the continuance of such disability, shall moreover be invested with, and exercise, all and singular, the powers and authority vested by law in the judge of the district court in said district." The act further requires the clerk of the district court during the continuance of the disability of the judge to continue in like manner to certify and transmit all suits, &c., subsequently brought in the district court; and

when the disability of the judge shall have ceased, all suits, &c., so certified and transmitted, which remain undetermined, and which, from their nature, are by law exclusively cognizable in a district court, to be remanded by the order of the circuit court, and the clerk of that court is to transmit the same to the district court.[1] [As to the power conferred by this act on the clerk of the district court during the disability of the judge, *vide supra*, *Clerk*.]

The act of March 3, 1821, ch. 51 (3 Stat. at Large, 643), contains provisions of a similar nature in relation to all suits and actions in any district court, in which it shall appear that the judge of such court is any ways concerned in interest, or has been of counsel for either party, or is so related to, or connected with, either party, as to render it improper for him in his opinion, to sit on the trial of such suit or action.

In case of the sickness or other disability of the judge of any district, which shall prevent him from holding any stated or appointed term of the district or of the circuit court, in the absence of the circuit judge, and upon the fact of such sickness or disability being certified by the clerk of such court to the circuit judge of the circuit comprising the district, it is enacted that it shall be lawful for such circuit judge, if, in his judgment, the public interest shall so require, to designate and appoint the district judge of any other district, within the same circuit, to hold such court in place of the sick or otherwise disabled judge, and to discharge all his judicial duties, during the continuance of his inability; which appointment shall be filed in the office of the clerk

[1] In a case which arose under this act, Mr. Justice STORY held that when the disability of the district judge terminated in his death, it was the duty of the circuit court to remand the certified causes remaining undetermined. 1 Gallis, 238.

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of the said district court, and be entered on the minutes of the court, and a certified copy thereof, under the seal of the court, be by such clerk transmitted to the judge so designated and appointed.

Want or absence of circuit judge, how supplied.

The act further provides that, if there be no circuit judge resident within the circuit, or if the resident circuit judge be absent, or unable to make the required appointment, or if the judge, designated by him, fail to perform the service, it shall be the duty of the clerk to certify the facts to the chief justice of the United States, who, in such case, is empowered to make the required appointment by the designation of any district judge of the same or of a contiguous circuit. The like authority is also given to make new appointments, from time to time, as the exigencies of the case may require, by the designation of other judges. The act enjoins it upon the judge, on receiving the specified notice of his appointment, to execute the notice it implies.[1]

Provisions of this act extended.

An amendatory act extends the provisions of this act to the case of such an accumulation or urgency of judicial business in any district as to require relief in this form. The certificate of the clerk of the circuit or district court, to the circuit judge or chief justice, must be under the seal of the court, "and it shall be lawful in case of such appointment, for each of the said district judges separately to hold a district or circuit court at the same time in such district, and discharge all the judicial duties of a

[1] Act of July 29, 1850, ch. 30: 9 Stat. at Large, 442. The provisions of this act have been extended, by the act of Feb. 24, 1855 (ch. 125), to the Florida districts, so as to authorize the holding of a court in one by the judge of the other, the appointment for that purpose being made by the chief justice, or by the judge of an *adjoining* circuit. The act also authorizes this to be done on the application of the disabled judge of one district to the judge of the other.

district judge therein, but no such judge shall hear appeals from the district court."[1]

And by a more recent act, "in case of a vacancy in the office of district judge in any state in which there are two judicial districts, it shall be lawful for the district judge of the other district in said state to hold the district court or circuit court, in case of sickness or the absence of the circuit judge, and discharge all the judicial duties of the district judge of such vacant district so long as such vacancy shall continue; and all the acts and proceedings in said courts, or by or before the said district judge of the adjoining district shall have the same force, effect and validity as if done and transacted by and before the judge appointed for such district."[2]

Vacancy, &c., in one of two districts in same state, how supplied.

When a vacancy occurs in any judicial district in a state in which there are two such districts, the judge of the other district is empowered to hold the district courts in both during the continuance of the vacancy, and, in case of the sickness or absence of the circuit judge, the circuit courts also.[3]

There are a few special provisions relating to particular districts which it is proper to notice.

With respect to the district of *North Carolina*, it is enacted that if the judge fails to attend on the first day of the term, the marshal may adjourn the court to the next day; and, if he does not attend on the second day, the marshal may adjourn the court to the next term.[4]

In the *Western District of South Carolina*, the judge "is authorized and directed to hold such

[1] Act of April 2, 1852, ch. 20: 10 Stat. at Large, 5.

[2] Act of August 6, 1861, ch. 59: 12 Stat. at Large, p. 318. These acts being general, supersede several special acts containing similar provisions relative to particular districts which were noticed in the last edition.

[3] Act of August 6, 1861, ch. 59: 12 Stat. at Large, 318.

[4] Act of January 23, 1812, ch. 17: 2 Stat. at Large, 675.

PART 1. special courts as he may deem necessary for the dispatch of the causes in said court, at such time or times as he may deem expedient, and may adjourn such special sessions to any other time previous to the stated session."[1]

With respect to the *Northern and Southern Districts of Alabama*, it is enacted that in case of the non-attendance of the judge before the close of the third day of the term, the business of the court shall stand adjourned until the next term.[2]

And in the *Middle District of Alabama*, the business of the court is in like manner to stand adjourned if the judge fails to attend before the close of the *fourth* day of any term.[3]

Court Houses.] No general provision has been made by law for the erection of court houses in the several judicial districts; the United States having hitherto relied, with few exceptions, upon the liberality of the local governments for the accommodation of the national courts. As yet it is not known that any very serious inconvenience has arisen from this circumstance. The circuit and district courts are generally held in public buildings belonging to the state, county or city where they sit, with the assent, either express or implied, of the proprietors. Should such assent at any time be withdrawn, or a court from any other cause be excluded from its accustomed place of session; or should a special court be appointed at a place destitute of a public building affording the requisite accommodations, it would doubtless be the duty of the marshal, under the direction of the court, to provide a suitable room, at the expense of the United States, subject, however, to the following proviso: that he "shall not

[1] Act of February 21, 1823, ch. 11: 3 Stat. at Large, 727.
[2] Act of March 10, 1824, ch. 28, § 9: 4 Stat at Large, 9.
[3] Act of February 6, 1839, ch. 20, § 10: 5 Stat. at Large, 315.

incur an expense of more than twenty dollars in any one year for furniture, or fifty dollars for rent of building and making improvements thereon, without first submitting a statement and estimates to the Secretary of the Interior, and getting his instructions in the premises."[1]

Jails.] The only provisions which congress have hitherto deemed it necessary to make for the safe keeping of prisoners, committed under the authority of the United States, are the following:

Recommendation to the states.

At the first session of congress, after the adoption of the constitution, it was "*Resolved*, by the senate and house of representatives, that it be recommended to the legislatures of the several states, to pass laws, making it expressly the duty of the keepers of their jails, to receive and safely keep therein, all prisoners committed under the authority of the United States, until they shall be discharged by due course of law thereof, under the like penalties as in the case of prisoners committed under the authority of such states respectively: the United States to pay for the use and keeping of such jails at the rate of fifty cents per month for each prisoner that shall, under their authority, be committed thereto, during the time such prisoner shall be therein confined: and also to support such of said prisoners as shall be committed for offenses."[2] On the 3d of March, 1791, after a preamble reciting in substance the foregoing resolution, and "in order to insure the administration of justice," it was "*Resolved*, that in case any state shall not have complied with the said recommendation, the marshal in such state, under the direction of the judge of the district, be authorized to hire a convenient place to serve as a temporary

To be provided by marshal when necessary.

[1] Act of February 26, 1853, ch. 80, § 2: 10 Stat. at Large, 161. See Appendix.

[2] Resolution of September 23, 1789: 1 Stat. at Large, 96.

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jail, and to make the necessary provision for the safe keeping of prisoners committed under the authority of the United States, until permanent provision shall be made by law for that purpose; and the said marshal shall be allowed his reasonable expenses, incurred for the above purposes, to be paid out of the treasury of the United States." [1] By a resolution passed March 3, 1821, this provision was extended in the same words to all cases in which "any state or states, having complied with the above recommendation, shall have withdrawn, or shall hereafter withdraw, either in whole or part, the use of their jails." [2]

And by an act passed March 2, 1833, it was enacted, "That in any state where jails are not allowed to be used for the imprisonment of persons arrested or committed under the laws of the United States, or where houses are not allowed to be so used, it shall and may be lawful for the marshal, under the direction of the judge of the United States, for the proper district, to use other convenient places within the limits of said state, and to make such other provision as he may deem expedient and necessary for that purpose." [3]

Recommendation to states complied with.

In pursuance of the recommendation of congress, laws have been enacted in the several states making it the duty of the proper officers to receive into their custody prisoners committed under the authority of the United States, and making them responsible for their safe keeping.

The laws of New York upon the subject may be found in vol. 2 of the original edition of the Revised Statutes, pp. 448, 773, 774.

[1] 1 Stat. at Large, 225.
[2] 3 Stat. at Large, 646.
[3] Ch. 57, § 6, 4 id., 632.

Under this system the responsibility of the marshal ceases with the delivery of his prisoner to the keeper of the prison—the jailer being neither in fact nor in law the deputy of the marshal, and the prisoner, therefore, being no longer, even constructively, in the custody of the latter. *Randolph* v. *Donaldson*, 9 Cranch, 76.

Responsibility of marshal ceases on delivery of prisoner to jailer.

The marshal ought to deliver to the keeper a copy of the process or warrant in virtue of which the commitment is made, and take a receipt for the prisoner.

4. *Attorneys, counselors, &c.*

The district courts being courts of law and of admiralty, the persons admitted to conduct the business of suitors therein, are designated under the appellation of *Attorneys*, *Counselors*, *Proctors and Advocates*.

Those district courts which are invested with the original jurisdiction of the circuit courts, and being therefore courts of equity, as well as of law and admiralty, have *Solicitors* also, in addition to the practitioners above mentioned.

The conditions of admission are prescribed by the rules of the respective courts.

The rules of the national courts in New York on this subject are extremely liberal. See Appendix, Rule 2, D. C., Northern District of New York, which is also the rule of the circuit court, and the rule in the courts of the southern district is substantially the same.

The fees of the practicers in the national courts are prescribed by a late statute. See Appendix.

5. *Marshal.*

The marshal is the executive officer of the courts of the United States, corresponding with the sheriff in England. He is appointed by the president, by

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How appointed.

and with the advice and consent of the senate of the United States, for the term of four years; but is removable from office at the pleasure of the president.[1] And in case of a vacancy in the office of marshal in any circuit, the judge of such circuit may fill such vacancy, and the person so appointed shall serve until an appointment is made by the president and the appointee shall be duly qualified, and no longer. He is required to give bond as if appointed by the president. The appointment must be in writing, and filed and recorded in the clerk's office of the circuit court.[2]

Required to execute a bond and take an oath.

Before entering upon the duties of his office he is required to execute a bond to the United States for the faithful performance of his duties by himself and his deputies, before the judge of the district court, jointly and severally with good and sufficient sureties, inhabitants and freeholders of the district, to be approved by the district judge, in the sum of twenty thousand dollars. He is further required, as also are his deputies, to take before the district judge the following oath or affirmation: "I do solemnly swear (or affirm), that I will faithfully execute all lawful precepts directed to the marshal of the District of under the authority of the United States, and true returns make, and in all things well and truly, and without malice or partiality, perform the duties of marshal (or marshal's deputy, as the case may be), of the District of during my continuance in said office, and take only my legal fees."[3]

[1] Act of September 24, 1789, ch. 20, § 27: 1 Stat. at Large, 73.

[2] Act of March 3, 1863, ch. 93: 12 Stat. at Large, 768.

[3] Act of September 26, 1789, ch. 20, § 27: 1 Stat. at Large, 73. By the act of February 28, 1799 (ch. 19, § 2: 1 Stat. at Large, 624), deputies who reside more than twenty miles from the district judge may take the required oath before "any judge or justice of a state court, within the same district, or before any justice of the peace having authority therein;" which oath is to be certified to the district judge.

By "an act relating to bonds given by marshals," passed April 10, 1806,[1] it is required that such bonds shall be filed and recorded in the office of the clerk of the district court, or circuit court, sitting within the district; and certified copies thereof, under the seal of the court, are declared to be competent evidence in any court of justice.

His bond to be filed and recorded.

Certified copies of it to be evidence.

And it is further enacted, that, in case of the breach of the condition of such bond, the party injured may institute a suit thereon, *in the name*, and for the sole use of such party, for the recovery of such damages as shall be legally assessed, with costs of suit.[2] By section three, it is further enacted, that the said bonds, after any judgment thereon, shall remain as a security against future breaches, until the whole penalty shall have been recovered; and that the proceedings shall always be *in the same manner*, as hereinbefore described.

The fourth and last section limits the right of prosecuting suits on marshals' bonds, to the period of six years, after such right shall have accrued; saving, nevertheless, the rights of infants, feme coverts, and persons *non compos mentis*, so that they sue within three years after their disabilities are removed.

His duties.

The duties of the marshal, as prescribed by the act of September 24, 1789,[3] are, to attend to the district and circuit courts, when sitting (in the district for which he has been appointed), and also the supreme court in the district in which that court

[1] Ch. 21: 2 id., 372.

[2] This act does not designate the court in which such suit is to be brought; but by the act of March 3, 1815 (3 Stat. at Large, 244), giving concurrent jurisdiction to the circuit and district courts, of suits by any officer of the United States suing under their authority, it may be brought in either of these courts.

[3] Ch. 20, § 27: 1 Stat. at Large, 73.

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shall sit;[1] and to execute, throughout the district, all lawful precepts directed to him, and issued under the authority of the United States;" and he is empowered "to command all necessary assistance in the execution of his duty, and to appoint, as there shall be occasion, one or more deputies," who are declared to be "removable from office by the judge of the district court, or the circuit court sitting in the district, at the pleasure of either."

His deputies removable by district judge.

Marshal subject to fine and imprisonment for voluntarily suffering escape.

Any marshal, deputy marshal, or other ministerial officers of the United States, having in custody any prisoner in virtue of process issued by any court, judge or commissioner of the United States under the laws thereof, who shall voluntarily suffer such prisoner to escape, shall be deemed guilty of a misdemeanor, and, upon conviction, in any district or circuit court of the United States, shall be fined or imprisoned, or both, according to the discretion of the court, having respect to the nature of the crime charged against the prisoner, in a sum not exceeding two thousand dollars, and for a term not exceeding two years. And the act is to be taken to apply as well to prisoners in custody charged with offenses against a foreign government, and arrested under a treaty of extradition, as to prisoners charged with, or convicted of, offenses against the United States.[2]

By the 28th section of the act of 1789, it is further provided, that when the marshal or his deputy shall be a party, the process in the suit shall be directed to a disinterested person, appointed by the court or

[1] So much of this section "as is or may be construed to require the attendance of the marshals of *all* the districts at the supreme court is repealed by an act of June 9, 1794, ch. 64, § 7; and this duty is restricted to the marshal of the district in which the court shall sit, unless the attendance of the marshals of the other districts shall be required by special order of the court.

[2] Act of June 21, 1860, ch. 64: 12 Stat. at Large, 69.

any judge thereof, who is authorized to execute and return such process.

The office of deputy not vacated by his death.

In case of the death of the marshal, his deputies continue in office unless specially removed, and execute the duties in his name, until another marshal shall be appointed and sworn; and the bond of the deceased marshal continues as security against their defaults and misfeasances in the meantime.

The responsibility of the deputies also continues, and may be enforced by the legal representatives of the marshal. "And every marshal or his deputy, when removed from office, or when the term for which the marshal is appointed shall expire, shall have power, notwithstanding, to execute all such precepts as may be in their hands respectively, at the time of such removal, or expiration of office."

May execute process after removal.

Responsible for prisoners.

The marshal is "answerable for the delivery to his successor, of all prisoners which may be in his custody at the time of his removal, or when the term for which he was appointed shall expire, and for that purpose may retain such prisoners in his custody, until his successor shall be appointed, and qualified as the law directs."

His successor may execute deeds.

By the act of May 7, 1809, ch. 45, § 3 (2 Stat. at Large, 60), it is enacted, that whenever a marshal shall sell any lands, tenements or hereditaments, by virtue of process from a court of the United States, and shall die or be removed from office, or the term of his commission expire, before a deed shall be executed for the same to the purchaser: in every such case, the purchaser or plaintiff at whose suit the sale was made, may apply to the court from which the process issued, and set forth the case, assigning the reason why the title was not perfected by the marshal who sold the same; and thereupon the court may order the marshal for the time being, to perfect the title and execute a deed to the purchaser, he pay-

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ing the purchase money and costs remaining unpaid; and where a marshal shall take in execution any lands, &c., and shall die, &c., before sale, or other final disposition made of the same; in every such case, the like process shall issue to the succeeding marshal, and the same proceedings shall be had, as if such former marshal had not died, &c.[1]

His powers in executing the laws of the United States.

By the act of February 28, 1795,[2] it is declared that the marshals of the several districts and their deputies shall have the same powers in executing the laws of the United States, as sheriffs and their deputies, in the several states, have by law in executing the laws of the respective States.

To receive instructions from the solicitor of the treasury, and report to him.

The act of May 15, 1820,[3] makes it "the duty of such officer of the treasury department, as the president of the United States shall, from time to time, designate for that purpose, as the agent of the treasury, to direct and superintend all orders, suits or proceedings, in law or equity, for the recovery of money, chattels, lands, tenements, or hereditaments,

[1] In a recent case in the supreme court the question arose whether so much of the 28th section of the judiciary act of 1789 as confers on a person no longer in office, power to execute process which came to his hands as marshal, is not superseded and virtually repealed by the above mentioned section of the act of 1800. It was a question, as the learned reader will observe, of no slight difficulty. The conclusion of the court was, that the two enactments were not absolutely repugnant, and that the former remained in force; and it was accordingly held that a sale of land by a marshal, after his removal and the appointment of his successor, on a *venditioni exponas* which had come to his hands while in office, was a valid sale. *Doolittle et al.* v. *Bryan et al.*, 14 Howard, 563.

It will be perceived, therefore, that process remaining in the hands of the late marshal may be executed by him in virtue of the act of 1789; or the party at whose suit it was issued may, at his option, sue out new process to the new marshal, in virtue of the act of 1800. Indeed, this is expressly said by the court in the above cited case.

[2] Ch. 36, § 9: 1 Stat. at Large, 424. This enactment is repeated, verbatim, in the act of July 29, 1861, ch. 27, § 7: 12 Stat. at Large 282.

[3] Act of May 15, 1820, ch. 108: 3 Stat. at Large, 592.

in the name and for the use of the United States." And by the 8th section of this act, it is made "the duty of the marshals of the several judicial districts of the United States, within thirty days before the commencement of the several terms of the said courts (circuit and district courts), to make returns to the said agent of the proceedings which have taken place upon all writs of execution, or other process, which have been placed in his hands, for the collection of the money which has been adjudged and decreed to the United States, in the said courts respectively.

The act passed ten years later[1] directed the appointment of an officer to be known as *Solicitor of the Treasury*, to whom it transferred all the powers and duties of the agent of the treasury; and it empowers the solicitor of the treasury "to instruct the district attorney, marshals and clerks of the circuit and district courts of the United States, in all matters and proceedings, appertaining to suits in which the United States is a party, or interested, and cause them, or either of them, to report to him, from time to time, any information he may require in relation to the same." Whether the above recited provision of the act of 1820, requiring returns from the marshals thirty days before each ensuing term, is still in force, is, to say the least, very doubtful. But it may, in virtue of the power conferred on the solicitor by the act of 1830, if he shall see fit, be reinstated and enforced by instructions from him.

And now, by a subsequent act, the attorney-general is "charged with the general superintendence and direction of the attorneys and marshals of all the districts in the United States and territories as to the manner of discharging their respective duties; and the said district attorneys and marshals

And the attorney general.

[1] Act of May 29, 1830, ch. 153: 4 Stat. at Large, 414.

PART 1. are hereby required to report to the attorney-general an account of their official proceedings, and the state and condition of their respective offices, in such time and manner as the attorney-general may direct."[1] This act does not, in terms, repeal the above mentioned provisions of the prior acts, and though its language admits of an interpretation broad enough to cover the entire ground embraced by them, it probably was not designed to supersede them. The duty it enjoins on the attorney-general is limited to a *general* supervision and direction, as to *all* the duties of the marshal, and in both these respects it differs from the older act. It was passed soon after the breaking out of the rebellion, and congress may well be supposed to have had in view, mainly, if not exclusively, the new and important interests growing out of the rebellion and requiring judicial cognizance, and, consequently, the agency of the district attorneys and marshals; and its design may reasonably be supposed to have been to guard against errors on their part *in point of law*. They are to make such reports as the attorney-general may require, and follow such directions as he may see fit to give; and it was probably taken for granted that he would be careful not to interfere, unnecessarily, with the more special and limited range of duty prescribed by the former acts.

Salaries. To the several marshals of a considerable number of districts, a salary of two hundred dollars per annum was given by acts passed from time to time before the passage of this act, in addition to the fees allowed for specific services. But inasmuch as the act expressly declares that the compensation given by it "and no other compensation" shall in future be allowed, it would seem to follow that these salaries were abrogated.

[1] Act of August 2, 1861, ch. 37: 12 Stat. at Large, 285.

This act, itself, however, gives to the marshal of South Carolina a salary of two hundred dollars, and the prohibitory clause above quoted may, possibly, by construction, be limited to specific services.

The marshal is entitled to the summary process of attachment to enforce the payment of his fees of office, upon demand and non-payment, against suitors in court, and also against the attorney, &c., where, by the *lex loci*, the latter is responsible for such fees. *Anonymous*, 2 Gall., 101. See, also, *Caldwell* v. *Jackson*, 7 Cranch, 276.[1]

6. *District Attorney.*

His duties.

By the judicial act of September 24, 1789, it is enacted that "there shall be appointed in each district a meet person, learned in the law, to act as attorney for the United States in such district, who shall be sworn or affirmed to the execution of his office, whose duty it shall be to prosecute, in such district all delinquents, for crimes and offenses cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned, except before the supreme court in the district in which that court shall be holden."[2]

By the act of February 27, 1813, the foregoing provision is extended to the several territories of the United States.[3]

Appointment and tenure of office.

These officers are appointed by the president, by and with the advice and consent of the senate.

The term of their office is four years; but they are removable from office at pleasure.[4]

[1] For several years past, annual appropriations have been made by congress, and placed at the disposal of the president, for the allowance of additional compensation to marshals for extra services in efforts to suppress the slave trade.

[2] Ch. 20, § 35: 1 Stat. at Large, 73.

[3] Ch. 35, 2 Stat. at Large, 806.

[4] Act of May 15, 1820, ch. 102, § 1: 3 Stat. at Large, 582.

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Vacancy in the office of district attorney may be temporarily filled by circuit judge.

But in case of a vacancy in the office of district attorney in any circuit, the judge of such circuit may fill such vacancy, and the person so appointed shall serve until an appointment shall be made by the president, and the appointee shall be duly qualified, and no longer.[1]

The scope and general nature of the duties of this officer are sufficiently indicated by his official designation, and the summary description of them contained in the original act above recited. But by subsequent legislation his duties have been more particularly defined, and for the purpose especially of insuring promptitude, efficiency and fidelity on his part, many regulations have been prescribed for his guidance and direction in their performance. His correspondence with the government is conducted mainly through the *solicitor of the treasury*, whose office was created by the act of May 29, 1830,[2] and who, by that act, was invested with the powers and charged with the duties of the *agent of the treasury*, prescribed by the act of May 15, 1820.[3] The act of 1830 directs "that when any suit or action for the recovery of any fine, penalty or forfeiture shall be instituted or commenced, a statement of such suit or action shall be immediately transmitted to the solicitor of the treasury, by the attorney instituting the same." The act also, as we have seen, empowers the solicitor to give instructions to the district attorneys;[4] and they are required, at the end of each term, to forward to him a full and particular statement of the cases in which the United States are a party, decided during the term, and of those

To receive instructions from the solicitor of the treasury, and report to him.

[1] Act of March 3, 1863, ch. 93: 12 Stat. at Large, 768.

[2] Ch 107: 3 Stat. at Large, 592.

[3] Ch. 153: 4 Stat. at Large, 414. This act requires the attorney-general, at the request of the solicitor, to advise with and direct him as to the manner of conducting suits and prosecutions.

[4] *Vide, supra*, "*Marshal.*"

still pending. They are required also, by the act of August 2, 1861, as we have seen, to make reports to the attorney-general, and conform to his instructions.[1]

To report to the attorney-general and conform to his instructions.

Whenever the district attorney shall find it impossible to attend a court, he may engage some fit person residing near the place where the court is to be held, to supply his place, who shall receive for his services the same compensation that the district attorney would have been entitled to if he had acted in person, provided the necessity of such substitution shall be satisfactorily shown to the secretary of the interior.[2]

May appoint substitutes, when.

The fees and emoluments of the district attorneys are prescribed by an act of congress, a copy whereof may be found in the appendix to this work. By antecedent enactments small salaries, in addition to fees for specific services, had been allowed to the district attorneys for most of the districts. The strong language of the recent act above referred to seems to infer an intention on the part of congress to abolish these salaries, though there may be ground for the opposite construction. But the provisions of this act relative to the compensation of district attorneys have been essentially modified by a subsequent act allowing to these officers two per centum of all moneys collected or realized in any suit or proceed-

Fees and emoluments.

[1] As to the practical effect of this act, *vide, supra*, "*Marshal.*" Important duties are enjoined on these officers by acts passed in consequence of the rebellion. Among these are the acts of July 17, 1862, ch. 204 (12 Stat. at Large, 608), and the act of June 30, 1864, ch. 174 (13 Stat. at Large, 306), regulating proceedings in cases of *prize;* the act of March 2, 1863, ch. 67 (12 Stat. at Large, 698), to prevent and punish frauds; and the act of February 25, 1863, ch. 58 (12 Stat. at Large, 682), to provide a national currency. A notice, sufficiently comprehensive and minute to be useful, of the new duties and responsibilities developed by these acts on the district attorneys and marshals of the United States, would occupy too much space, and is accordingly omitted.

[2] Act of August 16, 1856, ch. 124, § 14: 11 Stat. at Large, 51.

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ing arising under the revenue laws, conducted by them in which the United States is a party, in lieu of the fees prescribed by the former act. And the same act further directs that in all suits or proceedings against collectors or other officers of the revenue, for any act done by them, or for the recovery of any money exacted by or paid to such officer for the United States, in which the district attorney or other attorney shall be directed to appear for such officers, or in which he shall so appear without any such directions, as the act makes it his duty to do in all such cases as shall come to his knowledge, such attorney shall be allowed for his services such sum as the court shall certify to be reasonable and proper.[1]

7. *Commissioners to take acknowledgments of bail, affidavits, dispositions, &c.*

[*Vide, supra,* Organization of the Circuit Courts.][2]

[1] Act of March 3, 1863, ch. 76, §§ 11, 12, 13: 12 Stat. Large, 741.

[2] The times and places prescribed by law for the stated terms of the district court for the northern district of New York, are as follows: At the city of *Albany*, on the third Tuesday of January; at the city of *Utica*, on the third Tuesday of March; at the city of *Rochester*, on the third Tuesday of May; at the city of *Buffalo*, on the third Tuesday of August; at the city of *Auburn*, on the third Tuesday of November; "and, in the discretion of the judge of said court, one term annually at such time and place within the counties of St. Lawrence, Clinton, Jefferson, Oswego or Franklin, as the judge of the said district shall from time to time appoint, by a notice of at least twenty days to be published * * * which term shall be held only for the trial of issues of fact arising within the said counties." Act of July 4, 1864, ch. 245; 13 Stat. at Large, 385. See advertisement to this edition.

CHAPTER XI.

OF THE JURISDICTION OF THE DISTRICT COURTS.

By the judicial act of September 24, 1789, it is enacted:

Criminal jurisdiction as originally conferred.

"That the district courts shall have, exclusive of the courts of the several states, cognizance of all crimes and offenses, that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas, where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted; and shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it. And shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States. And shall also have cognizance concurrent with the courts of the several states, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations, or a treaty of the United States. And shall also have cognizance, concurrent as last mentioned, of all suits at common law, where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of two hundred dollars. And shall also have jurisdiction, exclusive of the courts of the several states, of all suits against consuls, or vice-consuls, except for offenses above the description aforesaid. And the trial of issues in fact, in the district courts, in all causes

Exclusive original jurisdiction of admiralty and maritime causes and seizures on waters, &c.

Of seizures on land.

Concurrent jurisdiction of suits by aliens; and by the United States—when.

Of suits against consuls, except, &c.

Trial by jury.

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except civil causes of admiralty and maritime jurisdiction, shall be by jury."[1]

Restrictions imposed by 11th section judicial act.

The *eleventh* section of the judicial act contains certain restrictions, affecting, however, as well the circuit as the district courts, and which have therefore already been noticed in treating of the jurisdiction of the former courts.

Jurisdiction extended.

It has already been stated, also, that, by the act of March 3, 1815,[2] the jurisdiction of the district courts (as also of the circuit courts), is extended to all suits at common law, in which the United States, or *any officer thereof*, under the authority of an act of congress, shall sue, *without regard to the amount in controversy.*

The act of February 25, 1863,[3] authorizing banking associations, gives jurisdiction, without regard to the amount in controversy, as well to the district as to the circuit courts of all suits by and against such associations.

Captures within American waters.

By an act passed in 1794, it was "enacted and declared that the district courts shall take cognizance of complaints by whomsoever instituted, in case of captures made within the waters of the United States, or within a marine league of the coasts or shores thereof;" and this provision is re-enacted in the act of 20th April, 1818,[4] which embodies and repeals all the provisions of prior acts relative to our neutral relations.

Criminal jurisdiction extended.

The very limited criminal jurisdiction conferred by the judiciary act of 1789 has since been extended to all cases not capital; and, even in capital cases,

[1] Ch. 20, § 9: 1 Stat. at Large, 73. See *post*, part 3.

[2] Ch. 101, § 4: 3 Stat. at Large, 244.

[3] Ch. 58, § 59: 12 Stat. at Large, 681.

[4] Ch. 88, § 7: 3 Stat. at Large, 447.

indictments may be found in the district court to be transmitted for trial to the circuit court.[1]

By an act passed July 13, 1866, ch. 184 (14 Stat. at Large, 152), the district judges, in common with the justices of the supreme court within their respective circuits, and also with the commissioners, are authorized to issue search warrants to any internal revenue officer, to search any premises, if such officer shall make oath, in writing, that he has reason to believe, and does believe, that a fraud upon the revenue has been or is being committed upon or by the use of such premises.

Habeas corpus, &c.

We have already seen that *all* the courts of the United States are authorized by the judicial act to issue writs of *scire facias*, of *habeas corpus*,[2] "and

[1] Act of August 3, 1842, § 3: 5 Stat. at Large, 516.

[2] By an act relative to the army of the United States, passed March 3, 1799, ch. 48, § 4 (1 Stat. at Large, 751), a special authority is given to the judges of the district courts to issue the writ of *habeas corpus* in a case not embraced within this general provision. It is enacted "that all non-commissioned officers, artificers, privates, and musicians, who are, and who shall be enlisted, and the non-commissioned officers, artificers, privates and musicians of the militia, or other corps, who, at any time, may be in the actual service of the United States, shall be, and they are hereby, exempted, during the time of their service, from all personal arrests, for any debt or contract. And whenever any non-commissioned officer, artificer, private or musician shall be arrested, whether by mesne process, or in execution contrary to the intent hereof, it shall be the duty of the judge of the district court of the United States and of any judge of a court of a state, who, by the laws of such state are authorized to issue the writ of *habeas corpus*, respectively, on application by an officer, to grant a writ of *habeas corpus*, returnable before himself; and upon due hearing and examination, in a summary manner, to discharge the non-commissioned officer, private or musician, from such arrest, taking common bail, if required, in any case upon mesne process, and commit him to the applicant or some other officer of the same corps." But by the subsequent act of March 16, 1802, ch. 9, § 23 (2 Stat. at Large, 136), it is enacted, "that no non-commissioned officer, musician or private shall be arrested or subject to arrest, or be taken in execution, for any debt under the sum of twenty dollars contracted before enlistment, nor for any debt contracted after enlist-

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all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles and usages of law," and that the power to grant writs of *habeas corpus* for the purpose of inquiry into the cause of commitment is given also to each of the judges of the district courts, as well as to the several justices of the supreme court. The nature and extent of this latter power has been considered in treating of the jurisdiction of the supreme court.

Ne exeat and injunction.

It has been seen, also, that of these "other writs," those of *ne exeat* and of *injunction*, may, by a subsequent act, be granted by any justice of the supreme court. And, by a still later act, entitled "An act to extend the power of granting writs of injunction to the judges of the district courts of the United States," these judges are invested with "as full power to grant writs of injunction, to operate within their respective districts, in all cases which may come before the circuit courts within their respective districts, as is now exercised by any of the judges of the supreme court of the United States, under the same rules, regulations and restrictions, as are prescribed by the several acts of congress, establishing the judiciary of the United States, any law to the contrary notwithstanding: *Provided*, that the same shall not, unless so ordered by the circuit court, continue longer than to the circuit court next ensuing; nor shall an injunction be

ment." And by the last section of this act, "so much of any act or acts now in force, as *comes within the purview of this act*," is repealed; "saving," &c.

The only change in the prior law, made by this latter act, seems to be, that the persons named are rendered liable to arrest for debts of twenty dollars and upwards contracted before enlistment. It will be seen that the act of 1799 purports to confer on the state judges the power to issue the writ of *habeas corpus*. As to the authority of congress to do this, see, *post*, part 4, chapter 2.

issued by a district judge in any case where a party has had a reasonable time to apply to the circuit court for the writ."[1]

Limitation as to injunction abolished.

The limitations imposed by the proviso, I presume, are to be considered as abrogated by the rules regulating proceedings in equity prescribed by the supreme court in 1842.

These rules having been devised and promulgated in pursuance of plenary authority conferred by congress,[2] it seems undeniable that they have the force of laws; and that, when they come in conflict with a prior statute prescribing some regulation of a nature fairly within the scope of this authority, they are to prevail.

Such, probably, was the design of congress; and such, unquestionably, must have been the view of the subject entertained by the supreme court. The fifty-fifth of these rules, after ordaining that injunctions to stay proceedings at law may, under certain specified circumstances, be obtained upon motion, without notice, further ordains, as follows: "But special injunctions shall be grantable only upon due notice to the other party by the court in term, or by *a judge* thereof in vacation, after a hearing which may be *ex parte*, if the adverse party does not appear at the time and place ordered. In every case, where an injunction, either the common injunction or a special injunction, is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, *or* until it is dissolved by some other order of the court."[3] This rule, it will be seen, makes no distinction in point of authority

[1] Act of February 13, 1807, ch. 13: 2 Stat. at Large, 418.

[2] See act of August 23, 1842, ch. 188, § 6: 5 Stat. at Large, 516.

[3] The word "or," I imagine, must either have been inadvertently used, or misprinted, instead of *and*.

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between the two judges composing the circuit court, each being alike empowered to grant an injunction, and the injunction having the same duration, when granted by the district judge, as by the justice of the supreme court. With regard to the other restriction contained in the proviso of the above recited enactment, limiting the power of the district judge to cases in which the party has not had reasonable time to apply to the court, it seems equally clear that this, also, is abrogated by the rule. See, also, rule 3.[1]

Injunction to stay proceedings on distress warrant.

The judges of the district courts are also invested with an independent authority of considerable importance to grant injunctions in a particular case, by the act of May 15, 1820, providing for the better organization of the treasury department.[2]

By this act (§§ 2 and 3), if any collector of the revenue, receiver of the public money, or other public officer, who shall have received the public money before it is paid into the treasury of the United States, or if any officer employed, or who has been employed in the civil, military or naval departments of the government, to disburse public money appropriated for the service of those departments respectively, shall fail to render his accounts and pay over, in the manner and at the times required by law, or the regulations of the department

[1] Appendix.—Rules of Practice in Equity. These rules were promulgated on the 2d of March, 1842. The time prescribed for them to take effect, on the 2d day of August next following, which, it will be observed, was *prior to the passage of the act.* No one, however, who compares some of these rules, the *first* and *third,* for example, with the 5th and 6th sections of the act, will entertain a doubt that the rules were framed in the confident expectation of precisely such enactments, and that one object, at least, which the court had in view in designating so remote a future day before which the rules were not to take effect, probably was to provide against the contingency of delay on the part of congress.

[2] Ch. 107: 3 Stat. at Large, 592.

to which he is accountable, any sum of money remaining in his hands, the agent of the treasury, upon the balance due from the delinquent officer, being duly certified, is "authorized and required to issue a warrant of distress against such delinquent officer and his sureties directed to the marshal of the district in which,"[1] &c. And the marshal is to proceed to levy and collect such balance by distress and sale of the goods and chattels, and for the want thereof, by the sale of the lands of the delinquent, or his surety or sureties.

And by the fourth section it is provided:

"That if any person shall consider himself aggrieved by any warrant issued under this act, he may prefer a bill of complaint to any district judge of the United States, setting forth therein the nature and extent of the injury of which he complains; and thereupon the judge aforesaid may, if in his opinion the case requires it, grant an injunction to stay proceedings on such warrant altogether, or for so much thereof as the nature of the case requires; but no injunction shall issue till the party applying therefor shall give bond and sufficient surety, conditioned for the performance of such judgment as shall be awarded against the complainant, in such amount as the judge granting the injunction shall prescribe; nor shall the issuing of such injunction in any manner impair the lien produced by the issuing of such warrant. And the same proceedings shall be had on such injunction as in other cases, except that no answer shall be necessary on the part of the United States; and if, upon dissolving the injunction, it shall appear to the satisfaction of the judge, who shall decide upon the same, that the application was merely for delay, in addition to the lawful interest which shall be assessed on all sums which may be found against the complainant, the said judge is hereby authorized to add such damages as that, with the lawful

[1] This duty now appertains, as we have seen, to the *solicitor of the treasury*.

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interest, it shall not exceed the rate of ten *per centum per annum*, on the principal sum."

The 5th section provides, "That such injunction may be granted or dissolved by such judge, either in or out of court."

Right of appeal to judge of supreme court.

The 6th section gives to the applicant the right of appeal to a judge of the supreme court, from the decision of the judge of the district court either refusing to issue the injunction prayed for, or dissolving it after it has been granted.

The direction to the agent to issue the warrant, it will be observed, is peremptory and imperative. He is "authorized and required to issue it." But by the last section of the act it is provided "that nothing in this act contained shall be construed to take away or impair any right or remedy which the United States now have, by law, for the recovery of taxes, debts, or demands." And according to the construction which seems to have been given to the act at the treasury department, it is discretionary with the agent either to resort to this summary proceeding, or to prosecute in the ordinary form of action.

No appeal lies in behalf of the United States from the decision of the district judge granting an injunction under this act. None is given by the act itself; nor does the act of March 3, 1803 (ch. 40), extend to the case. *The United States* v. *Nourse* (6 Peters, 470). And a decree of the district judge in favor of the party against whom the warrant was issued, is conclusive on the subject-matter of the controversy, and a bar to a suit at law to recover the balance claimed in behalf of the United States. *The United States* v. *Nourse* (9 Peters, 8).

To determine seaworthiness of vessels.

By the act "for the government and regulation of seamen in the merchants' service," passed July 20, 1790, ch. 29 (1 Stat. at Large, 132), the district judges are authorized and required, under certain circum-

stances, upon the report of persons skilled in maritime affairs to be by them appointed, to determine whether ships and vessels are fit to proceed to sea.

New trials, &c.

The authority expressly conferred by law on the district as well as the other courts of the United States, to grant new trials, to administer oaths, to punish for contempts, to make rules, and to hold to security of the peace and for good behavior, has already been stated.

To enforce awards of foreign consuls.

As already stated, the district courts are invested concurrently with the circuit courts, for the purpose of giving effect to certain treaty stipulations, with authority to enforce awards made by foreign consuls in controversies between masters of vessels and seamen.

Act of 1845: inland waters.

The only remaining act affecting the jurisdiction of the district courts, requiring notice, is one which, as we shall see in the sequel, constitutes a new and important era in our national jurisprudence. It purports to confer a large additional jurisdiction upon the district courts; but upon being brought under the consideration of the supreme court on appeal, soon after its passage, it led, as we shall also see, to the judicial annunciation and establishment of a great principle which supersedes the designs of the act, and imparts to it a character the reverse of that which its title imports.

It is entitled "An act *extending* the jurisdiction of the district courts to certain cases upon the lakes and navigable waters, connecting the same." It consists of a single section, which is as follows:

"*Be it enacted*," &c., "That the district courts of the United States shall have, possess and exercise the same jurisdiction in matters of contract and tort, arising in, upon, or concerning steamboats and other vessels of twenty tons burthen or upwards, enrolled and licensed for the coasting trade, and at the time employed in business of commerce

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and navigation between ports and places in different states and territories upon the lakes and navigable waters connecting the said lakes, as is now possessed and exercised by the said courts in cases of the like steamboats and other vessels employed in navigation and commerce upon the high seas, or tide waters, within the admiralty and maritime jurisdiction of the United States; and in all suits brought in such courts, and in all such matters of contract or tort, the remedies and the forms of process, and the modes of proceeding, shall be the same as are or may be used by such courts in cases of admiralty and maritime jurisdiction; and the maritime law of the United States, so far as the same is or may be applicable thereto, shall constitute the rule of decision in such suits, in the same manner, and to the same extent, and with the same equities, as it now does in cases of admiralty and maritime jurisdiction; saving, however, to the parties, the right of trial by jury, of all facts put in issue in such suits, where either party shall require it; and saving, also, to the parties the right of a concurrent remedy at the common law, where it is competent to give it, and any concurrent remedy which may be given by the state laws, when such steamer or other vessel is employed in such business of commerce and navigation."[1]

The foregoing are all the statutable provisions relative to the jurisdiction of the district courts, and of the judges thereof, which it is deemed necessary to cite in this place.

By recurring to the ninth section of the judicial act first above quoted, the student will perceive that it is by this that their multifarious and comprehensive jurisdiction is chiefly regulated and defined; and that by it the district courts are constituted courts of *criminal* jurisdiction; of *common law* jurisdiction; and, in civil cases, of *admiralty and maritime* jurisdiction.

[1] Act of February 26, 1845, ch. 20: 5 Stat. at Large, 726.

1. Their *criminal* jurisdiction has already been described in treating of this branch of the jurisdiction of the circuit court.[1] Criminal jurisdiction.

2. As courts of *admiralty*, the district courts are *prize* courts and *instance* courts. Admiralty jurisdiction.

Their prize jurisdiction was, however, originally much questioned. It was argued that this is not an ordinary inherent branch of the admiralty jurisdiction, but an extraordinary faculty, from its nature operative only in time of war, and requiring, in England (although prize and instance jurisdiction are there, as here, exercised by the same person), a special commission upon the breaking out of war, to call it into action.[2] It was contended also, that, admitting prize jurisdiction to be comprized within the unqualified terms of the constitution, "all cases," &c., it was not embraced by those of the judicial act, delegating to the district courts jurisdiction of "all *civil* causes," &c. Prize jurisdiction questioned and upheld.

Upon this question conflicting decisions were pronounced in the district and circuit courts for the district of Pennsylvania, and in those for the district of Maryland. But, upon its being brought before the supreme court in 1794, in the case of *Glass* v. *The Schooner Betsey* (3 Dallas, 6), the court, after an elaborate and able argument at the bar, declared itself decidedly of opinion that the district courts possessed all the powers of a court of admiralty, whether considered as an instance or a prize court; and in the case of *Penhallow* v. *Doan* (3 Dallas, 54), decided at the next succeeding term, the court expressed its unshaken confidence in the soundness of this decision, and it has never since been drawn in question. Indeed, this jurisdic-

[1] See, also, *post*, Part IV.

[2] See the important case of *Lindo* v. *Rodney*, Douglas, 613, *note*, upon the authority of which this argument was chiefly founded.

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tion was expressly sanctioned and declared by the national legislature, in the prize act of June 26, 1812, by which it is enacted, that, "in the case of all captured vessels, goods and effects, which shall be brought within the jurisdiction of the United States, the district courts of the United States shall have exclusive original cognizance thereof, as in civil causes of admiralty and maritime jurisdiction."[1] The district courts are, therefore, *prize courts of admiralty*, possessing all the powers incident to their character as such under the laws of nations.

Extent of prize jurisdiction.

To ascertain the precise limits of this jurisdiction, and the rules which regulate its exercise, recourse must be had to the works of elementary writers of acknowledged credit upon national law, and especially to the reports of judicial decisions in this country and Great Britain. The cases of this description which have arisen in our own courts, alone, are numerous; and the learned and profound disquisitions to which they have given rise, will be found to embrace most of the principles appertaining to this branch of jurisdiction. They are stated summarily, but with characteristic precision and clearness, by Chancellor KENT, in the first volume of his Commentaries. The pithy laconicism of Sir WILLIAM SCOTT, "I know of no other definition of prize goods, than they are goods taken on the high seas, *jure belli*, out of the hands of the enemy,"[2] quoted and adopted by the chancellor, could not have been designed to be strictly accurate. Indeed, the learned commentator proceeds, at once, to show that the prize jurisdiction extends to all captures, whether on the high seas, or in ports, harbors, creeks or rivers, or even on land, if made by naval forces, or by land

Extends to naval captures whenever made.

[1] Ch. 107, § 6: 2 Stat. at Large, 759.

[2] *The Two Friends*, 1 Rob. Ad. Rep., 228.

and naval forces acting in concert. This doctrine was asserted and maintained upon English authority by the circuit court for the district of Massachusetts, in the early case of *The Emulous*,[1] and does not appear to have since been controverted. The above cited act of 1812, passed a few days after the declaration of war against Great Britain, investing the district courts with jurisdiction "in the case of all captured vessels, goods and effects, which shall be *brought within*," etc., may seem, literally, to embrace only captures made beyond the territorial limits of the United States; but it can hardly be doubted that it was in fact the intention of congress to confer plenary jurisdiction extending to all captures cognizable, by the laws of nations, in the admiralty.[2] CHAP. II.

The prize jurisdiction of the district courts extends to the subordinate questions, affecting as well neu- To incidental questions.

[1] 1 Gallison, 563.

[2] A like literal interpretation would also exclude prizes not brought into an American port; but it is an established rule in England and in this country, that the actual presence of the prize is not necessary to the exercise of jurisdiction over the capture; for if the prize be carried by the captor into a port of a foreign neutral nation, or even be lost by accident at sea, the court may, nevertheless, proceed to adjudicate upon the capture and the questions incident to it. See 1 Kent's Com., 358, 104, and the authorities there cited.

The language of the act of 1812 is comprehensive enough to include captures as well upon the great lakes as upon the ocean. But at the date of its passage, and for many years after, the constitutional grant of admiralty jurisdiction was held to extend only to cases arising on the high seas and tide waters; and it is not easy to discern how, consistently with this interpretation of the grant, captures made on inland waters, not navigable from the ocean, could be brought within it. As cases arising under the constitution and laws of the United States, there would have been no difficulty in disposing of them in the manner provided for cases of municipal seizures on land: but by what authority could congress declare them "civil causes of admiralty, and maritime jurisdiction?" But, as we shall presently see, this narrow interpretation of the constitution has, at length, upon full consideration, and with entire unanimity, been discarded, as unreasonable and unsound, by the supreme court.

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trals as the belligerents, to which captures incidentally give rise.

Belongs exclusively to courts of captor's country.

It is an established principle, that the right of adjudicating all captures and questions of prize, belongs in general, exclusively to the courts of the captor's country. *L'Invincible*, 1 Wheat., 238; *The Estrella*, 4 Wheat., 298. Generally speaking, therefore, this branch of the jurisdiction of our courts is dormant when the nation is at peace. But it is the right and the duty of neutral nations to prevent their neutrality from being abused by belligerents for purposes of hostility against each other; and, therefore, if a captured vessel is brought, or comes voluntarily, *infra præsidia* of a neutral nation, the courts of such neutral nation may rightfully take cognizance of the capture, so far as to ascertain whether a trespass has been committed on its neutrality by the vessel which made the capture; and if it appears that its neutral rights, as secured by the laws of nations, or declared by its own municipal regulations, have been violated, as for example, that the capture was made within its waters, or that the capturing vessel had been equipped in its ports, the capture may be declared illegal, and the property restored. *The Estrella*, 4 Wheat., 298; *La Amistad de Rues*, 5 Wheat., 385; *The Santissima Trinidad*, 7 Wheat., 283; *The Arrogante Barcelones*, ib., 496. This description of cases, therefore, forms an exception to the general principle above laid down. And so too captures made by the public armed vessels of the United States, in virtue of the authority conferred by the act relating to piracies, of 3d March, 1819,[1] and made perpetual by the act of January 30, 1823,[2] though not strictly cases of prize *jure belli*, are considered to be of prize jurisdiction. *The Palmyra*, 12 Wheat., 1.

Right of neutrals.

[1] Ch. 77: 3 Stat. at Large, 510.

[2] Ch. 7: id., 721.

Long since the foregoing paragraphs touching the prize jurisdiction were written, the memorable rebellion broke forth and with all its horrors passed away; and among the numberless extraordinary exigencies to which it gave rise, was supposed to be that of prescribing by statute a more full and exact code of judicial procedure in causes of prize, including the distribution of prize money. This was elaborately done by the act for these purposes, of June 30, 1864, ch. 174 (13 Stat. at Large, p. 306), to a large extent repealing, superseding or modifying several previous kindred enactments. The proceedings prescribed by this act belong to the admiralty branch of the national jurisprudence, and are, moreover, to a large extent *sui generis* as a branch even of admiralty procedure. It may reasonably be hoped, moreover, that it will be long before the powers it confers, already beginning to slumber upon the pages of the statute books, will again be evoked. These are abundant reasons for abstaining from further notice of them, either here or in the second part of this work, to which they would more appropriately belong.

Instance jurisdiction.

As *instance* courts of admiralty, the district courts have cognizance of all civil causes (other than those of prize) of admiralty, as contradistinguished from common law, jurisdiction.

Seizures on navigable waters.

The most important class of these cases, so far as they have as yet been authoritatively and definitively determined, is that of all seizures under laws of impost, navigation, or trade, of the United States, where the seizures are made on the high seas, or on waters which are navigable from the sea by vessels of ten or more tons burden. This class, and this alone, it will be recollected, is expressly designated in the 9th section of the judicial act, above recited. There are, however, other laws prohibiting acts of a

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maritime character, and subjecting the property of the offender to forfeiture. Of this description is the act of April 20, 1818,[1] relative to our neutral relations, and the acts for the suppression of the slave trade.

Jurisdiction of seizures questioned.

But though it may now be regarded as definitely settled, that cases of this nature are cognizable on the admiralty side of the district courts, the construction which has thus been given to the constitution and the judicial act, was, at first, repeatedly and earnestly controverted; and serious doubts have, I perceive, lately been expressed of its soundness, by a learned jurist, whose opinions are, throughout this country, universally and most justly regarded with very high respect.[2] The question was one of great practical importance, because upon its decision it depended whether the mode of proceeding in these cases was to be according to the civil or the common law; that is, whether the trial should be by the court or a jury.[3] The judicial act, as we have seen, invests the district courts with "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, *including* all seizures," &c. One ground of objection was, that congress did not intend to declare such seizures to be of admiralty jurisdiction. The word "including," it was argued, was not to be construed cumulatively as referring to "jurisdiction," but to "cognizance," and that con-

Importance of the question.

Grounds of objection.

[1] Ch. 88: 3 Stat. at Large, 447.

[2] Kent's Commentaries upon American Law, vol. 1, 350.

[3] By the process act of May 8, 1792 (ch. 34, § 2: 1 Stat. at Large, 275), it is enacted that the forms and modes of proceeding in suits of admiralty and maritime jurisdiction, shall be according to the principles, rules and usages, which belong to courts of admiralty, as contradistinguished from courts of common law. And, indeed, without this provision, the courts would probably have considered themselves bound to adopt the course of proceeding prescribed by it, as implied by the terms in which this branch of jurisdiction is conferred.

gress meant only to declare such seizures to be cognizable in the district courts. This construction, it was said, was corroborated by the next succeeding clause, "saving to suitors, in all cases, the right of a common law remedy, when the common law was competent to give," clearly indicating an intention not to extend the admiralty jurisdiction beyond its proper limits. In England, cases of this nature were, and for a long period had been, cognizable, not in the admiralty, but in the court of exchequer; and, though the proceeding was *in rem*, it was according to the course of the common law, and the trial was by jury.

The common law, therefore, did afford a remedy, through the instrumentality of the court of exchequer; and it was as competent for congress to ordain a court of exchequer, as a court of admiralty; as indeed it had done for the adjudication of seizures of land, and on waters not navigable from the sea, by boats of ten tons burden. But the objection was supposed to rest on a still stronger ground. As "cases arising under the laws of the United States," no doubt could be entertained of the power of congress to declare them cognizable in the district courts; but unless, according to the just interpretation of those terms in the constitution, they were cases "of admiralty and maritime jurisdiction," congress had no authority to declare them to be so, and thus exclude the privilege of a trial by jury. That such was their character was denied, upon the ground that they were cases of common law jurisdiction in England, by reference to whose laws and to the structure of whose judicatories, it was said the terms of the constitution ought to be construed. It was contended, moreover, that, admitting them, in the language of the constitution, to be cases of admiralty and maritime jurisdiction, they were not *civil*

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causes according to the terms of the judicial act. It was admitted, however, that all seizures of this nature were cognizable in the colonial vice-admiralty courts of this country, and of the West Indies. This question was first presented for decision in the supreme court in the case of *La Vengeance*, a French privateer, seized and libeled for exporting arms and ammunition to a foreign country, in contravention of the laws of the United States. The court, after advisement, pronounced the following judgment: "We are perfectly satisfied upon the points that have been agitated in this cause. In the first place we think it a cause of admiralty and maritime jurisdiction. The exportation of arms and ammunition is, simply the offense; and exportation is entirely a water transaction. It appears, indeed, on the face of the libel, to have been commenced at Sandy Hook, which certainly must have been upon the water. In the next place we are unanimously of opinion, that it is a civil cause: It is a process of the nature of a libel *in rem;* and does not in any degree touch the person of the offender. In this view of the subject, it follows, of course, that no jury was necessary, as it was a civil cause."[1] 3 Dallas, 297. This question was afterwards several times agitated in cases of seizure under various laws, but the supreme court have uniformly sustained the early decision in this case of *La Vengeance. The United States* v. *The Schooner Sally*, 2 Cranch, 406; *The Same* v. *The Schooner Betsy*, 4 Cranch, 433; *The Samuel*, 1 Wheat., 9. *The Octavia*, id., 20; *The Sarah*, 8 Wheat, 391. The question must, therefore, it is presumed, be regarded as definitively settled; though it would certainly have been more satisfactory had the course of judicial reasoning, which originally led to its decis-

[1] *Criminal* causes in the English Admiralty were tried by jury.

ion,[1] been stated with more of that fullness, perspicuity and precision, by which the later decisions of the supreme court are in general so eminently distinguished.

Seizures, where cognizable.

In order to give jurisdiction to the district court of any particular district, it is sufficient if the *seizure* was made in such district, without regard to the place where the forfeiture accrued. *Keen* v. *The United States*, 5 Cranch, 304; see also 1 Paine's Rep., 40.

Valid subsisting seizure necessary.

But where the seizure is upon the high seas, and without the limits of a judicial district, the case is cognizable in any district into which the property may be brought. *The Sloop Abby*, 1 Mason, 360.

There must be in all cases a good subsisting seizure at the time when the libel or information is filed; and, therefore, where the collector, in pursuance of directions from the treasury department, had explicitly relinquished the seizure, and restored the property before such proceeding had taken place, jurisdiction was held not to have attached. *The Brig Ann*, 9 Cranch, 289; see also *The Josefa Segunda*, 10 Wheat., 312. But to constitute an abandonment after seizure there must be an unequivocal act of dereliction. *The Abby*, 2 Mason, 360.

Decisions in cases of seizure conclusive.

The jurisdiction of the districts courts, in cases of seizure, is exclusive of all other courts; and the general rule is, that their decisions upon questions of forfeiture, whether of condemnation or *acquittal*, unless reversed upon appeal, are conclusive, not only with respect to the title to the property seized, but

[1] In the subsequent case of the *U. S.* v. *The Betsy* (4 Cranch, 443, *note*), it was remarked by CHASE, J., that the case of *La Vengeance was well considered;* and he took occasion to add that the "reason of the legislature for putting seizures of this kind on the admiralty side of the court was the great danger to the revenue if such causes should be left to the caprice of juries."

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as it regards the incidental rights and responsibilities of the parties concerned.

Therefore, though a collector or other officer acts at his peril in making a seizure, and is liable to an action in a state court for an unwarrantable seizure, the right of recovery against him depends, subject to certain qualifications, absolutely on the decision in the courts of the United States upon the question of forfeiture. A decree or judgment of condemnation is conclusive in his favor, and, on the other hand, if the seizure is adjudged tortious, such decision is equally conclusive against him in an action for damages. *Gelson et al.* v. *Hoyt*, 3 Wheat., 246; *Slocum* v. *Mayberry*, 2 Wheat., 1; see also *Rose* v. *Himley*, 4 Cranch, 241. This doctrine, independent of statutable provisions, would, in general, be applicable in its full extent to cases of seizure under mere municipal laws, as the revenue laws, insomuch that after a decision in the district court in favor of the claimant upon the question of forfeiture, the seizing officer could not protect himself in an action for damages by proof of probable cause. *The Palmyra*, 12 Wheat., 1, 17. But in order to mitigate the operation of this rigorous rule against public officers whose duty it is to make seizures, it was provided, by the act of 24th February, 1807, "that when any prosecution shall be commenced on account of the seizure of any ship or vessel, goods, wares or merchandise made by any collector or other officer, under any act of congress authorizing such seizure, and judgment shall be given for the claimant or claimants, if it shall appear to the court before whom such prosecution shall be tried, that there was *a reasonable cause of seizure*, the said court shall cause a proper certificate or entry to be made thereof; and, in such case, the claimant or claimants shall not be entitled to costs, nor shall the person who made the seizure,

Certificate of reasonable cause of seizure.

or the prosecutor, be liable to suit, action or judgment on account of such seizure or prosecution; *Provided*, That the ship or vessel, goods, wares or merchandise, be, after judgment, forthwith returned to such claimant or claimants, his, her, or their agents."[1]

Grant or denial of certificate conclusive.

A certificate granted in pursuance of this act, in case of acquittal, is a positive bar to an action against the seizing officer, while, by an acquittal without such certificate, the seizure is definitely settled to be a tortious act. *Gelson et al.* v. *Hoyt*, 3 Wheat., 246. This provision is copied verbatim from the 89th section of the act relative to the collection of duties, of March 2, 1799,[2] with the addition only in the first clause of the words, "made by any collector or other officer, under any act of congress authorizing such seizure."

Applicable to seizures quasi jure belli.

Seizures under laws authorizing the exercise, to a limited extent, of belligerent rights, or *quasi* belligerent rights, as those relative to piracy, are considered as analogous, in this respect, to captures strictly *jure belli;* and proof of probable cause is admissible in defense against a claim for damages, without any statute to warrant it. *The Palmyra*, 12 Wheat., 1, 17; *The Marianna Flora*, 11 Wheat., 1.

Decisions of foreign admiralty courts conclusive.

The general doctrine that the decisions of a court of admiralty are conclusive, is applicable as well to the judgments of foreign courts, as to those of our own country. But it is well settled that the tribunals of one country may, nevertheless, examine the jurisdiction of those of another, and disregard their decisions as *coram non judice*, when it appears that they acted without authority. The point was luminously discussed and adjudicated in the case of *Rose* v. *Himley*, 4 Cranch, 241. The question in this case respected the effect of the sentence of a French court

[1] Ch. 19: 2 Stat. at Large, 422.

[2] Ch. 22: 1 Stat. at Large, 695.

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of admiralty in St. Domingo, condemning an American vessel and cargo, and purporting to be in conformity with a municipal regulation, prohibiting all intercourse with the revolted blacks, and authorizing the seizure of all vessels found within two leagues of the coast, though in fact the seizure was in that case made more than ten leagues from the coast, and the vessel was never carried within the territorial limits of France; and it was held to be competent for the courts of this country not only to examine the *constitution of the court* in which the decree of condemnation was pronounced, in order to ascertain whether, so far as *its powers depended upon the law of nations*, it possessed those which it professed to exercise, but to inquire also concerning the actual *situation of the particular thing* on which the sentence had passed, for the purpose of deciding whether that thing was in a state which subjected it to the jurisdiction of the court passing sentence. It was added, however, that, so far as the authority of a foreign court depends on municipal regulations, it is the judge of its own jurisdiction, and its decision is to be respected, provided the jurisdiction exercised be such, that its sovereign had a right, by the laws of nations, to confer it.

Cargo distinguishable from vessel, when.

A question somewhat analogous to this, though resting upon peculiar grounds, was decided in the case of *Slocum* v. *Mayberry*, 2 Wheat., 1. By the embargo act of April 25, 1808,[1] the collectors of customs were "authorized to detain any vessel ostensibly bound with a cargo to some other port of the United States, whenever, in their opinion, the intention was 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 known thereupon."

[1] Ch. 66, § 11; 2 Stat. at Large, 499.

In virtue of this act, the surveyor of customs of the port of Newport, under the direction of the collector, had seized a vessel with a cargo on board, ostensibly bound to some other port of the United States. The owners of the cargo brought an action of replevin for its recovery, and having obtained a judgment in the supreme court of Rhode Island, the case was removed to the supreme court of the United States by writ of error.

It was contended by the counsel for the plaintiff in error first, that the act under which the seizure was made justified the seizure of the cargo as well as of the vessel; and, second, that the case being brought under the cognizance of the United States, and within the jurisdiction of their courts, by the just exercise of an authority by one of their officers, the state court had no right to interfere and arrest the seizure by its process.

When the cargo is not subject to seizure, it is recoverable in state court.

On the part of the defendant in error it was, among other things, insisted that the act of congress authorized the seizure and detention of the *vessel* only, and conferred no authority for the seizing officer to detain the *cargo*, beyond the momentary detention unavoidably incident to the seizure and securing of the vessel; so that, as to the cargo, the officer in continuing the detention, could not be said to be acting under any law of the United States; that the subject matter of the suit in the state court presented nothing for the judicial powers of the United States to act upon, and that there was, therefore, no impediment to the interposition of the State court to protect the rights and restore the property of the defendant in error; and of this opinion were the supreme court. The judgment of the state court was, therefore, affirmed.

It is not easy, perhaps, to deduce from this case any definite general principle, which, while it is

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The case, in truth, was an embarrassing one; and that it was felt to be so by the court, is inferable from the cautious manner in which they have endeavored to guard against misapprehension, by the distinct assertion of certain principles, which it might otherwise be supposed were impugned by their decision.

Otherwise state court cannot interfere.

"The judiciary act," said the Chief Justice, "gives to the federal courts exclusive cognizance of all seizures made on land or on water. Any intervention of a state authority which, by taking the thing seized out of the possession of the officer of the United States, might obstruct the exercise of this jurisdiction would unquestionably be a violation of the act; and the federal courts, having cognizance of the seizure, might enforce a redelivery of the thing, by attachment or other summary process, against the parties who should divest such a possession. The party supposing himself aggrieved by a seizure cannot, because he considers it tortious, replevy the property out of the custody of the seizing officer, or of the court having cognizance of the cause. If the officer *has a right, under the laws of the United States, to seize for a supposed forfeiture*, the question whether that forfeiture has been actually incurred belongs exclusively to the federal courts, and cannot be drawn to another forum; and it depends upon the final decree of such courts; whether such seizure is to be deemed rightful or tortious. If the seizing officer should refuse to institute proceedings to ascertain the forfeiture, the district court may, upon the application of the aggrieved party, compel the officer to proceed to adjudication, or to abandon the seizure." "This, however, being an action which takes the thing out of the possession of

the officer, could certainly not be maintained in a state court, if, by the act of congress, *it was seized for the purpose of being proceeded against in the federal court.*" "Had this action been brought for the *vessel* instead of the cargo, the case would have been essentially different. The detention would have been *by virtue of an act of congress*, and the jurisdiction of a state could not have been sustained. But the action having been brought for the cargo, *to detain which the law gave no authority*, it was triable in the state courts."

Jurisdiction of marine contracts and torts, its extent; conflicting opinions concerning.

The district courts, as instance courts, also have cognizance of *marine torts*, and of *marine contracts*. But the task which devolved upon the courts, of determining the precise limits of their powers with respect to these subjects, has been found exceedingly perplexing; has led to many conflicting decisions in the district and circuit courts; and, even now, can hardly be said to have been fully accomplished. Several circumstances conspired to cause the embarrassment which has been experienced.

The language of the constitution, as we have seen, is general, that "the judicial power of the United States shall extend to *all cases* of admiralty and maritime jurisdiction; and that of the judicial act is equally so, except that, instead of conferring upon the district courts jurisdiction of *all cases*, it confers it only in "all *civil* causes of admiralty and maritime jurisdiction;" and except, also, that it specifies one description of the causes, viz.: *seizures;* as we have seen above. The point to be settled, therefore, was, what causes *are* of admiralty and maritime jurisdiction. It was a question of great practical importance, and the controversy to which it led is one of the most remarkable in the history of our national jurisprudence. It is worth while, therefore, to devote a few pages to its elucidation.

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Outline of the controversy.

In all the considerable maritime countries of continental Europe there were courts corresponding substantially with the courts of admiralty in England, and administering justice in common with them, according to principles, in their nature, of universal applicability, but yet differing from them, in some degree, both in regard to their structure and the scope of their power. Colonial vice-courts of admiralty also existed in this country before our separation from Great Britain, established by the crown and possessing a jurisdiction conferred by the commissions under which they acted and by acts of parliament, confessedly exceeding that of the admiralty in England.

Under these circumstances it was not easy to decide even by what standard this general grant of jurisdiction was to be measured. And, accordingly, we find that while one judge has expressed the opinion that our courts are to be governed in their decisions by the maritime code we possessed anterior to the revolution, and by the particular laws since established by our own government,[1] a second has said that the words of the constitution declaring that the judicial power shall extend to all cases of admiralty and maritime jurisdiction must be taken to refer to the admiralty and maritime jurisdiction of England (4 Dallas, 426, 429); a third, referring to the admiralty courts of other nations, has asked, if the district court, by its act of organization, has exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, why should it be restricted in its cognizance to such cases as belong to the English courts of admiralty as instance courts more than those of any other nation? (1 Paine's Rep., 111, 117), and a fourth has strongly intimated, that recourse may rightfully be had for guidance and direction to

[1] Peters's Ad. Decisions, 113.

the codes and usages of all maritime nations, including our own country in its colonial state. 2 Gallis., 398.

Contest in the English courts.

It was, however, most natural and convenient at least, to refer to the records of English jurisprudence for a just interpretation of the terms of the grant. But unfortunately, their import in that country had been fluctuating for centuries. The English court of admiralty was of great antiquity, and its powers originally were very extensive. But during the reign of Richard II two statutes were passed, intended to limit and define its powers, which, according to the interpretation given to them by the courts of common law, greatly abridged its former jurisdiction. This construction was, however, strenuously controverted by the civilians, and a long and acrimonious contest ensued, in the course of which numerous writs of prohibition were issued by the court of king's bench, to restrain the exercise by the admiralty, of powers claimed on the one side and denied on the other. At length, however, in 1632, an agreement was entered into for the adjustment of this harassing controversy, signed in presence of the king, by all the judges of the court at Westminster, and by the judge of the court of admiralty, and ratified by the king in council. To the terms of this compromise the rival jurisdictions appear for a while to have conformed; but its authority was afterwards denied and disregarded by the common law courts. See the case of *De Lovio* v. *Boit*, 2 Gallis., 398; the arguments of counsel and the notes of the reporter in the case of *United States* v. *Bevins*, 3 Wheat., 336; note "*a*" appended to the case of *The United States* v. *Wiltberger*, 5 Wheat., 106; the opinion of Mr. Justice JOHNSON in the case of *Ramsay* v. *Allegre*, 12 Wheat., 614; and the numerous authorities there cited.

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Under this state of the law, it is not surprising that learned judges should have entertained discordant views of the extent of the jurisdiction of the admiralty courts of the United States. To what extent this has occurred may be learned from the opinions of Mr. Justice STORY in the case of *De Lovio* v. *Boit*, and Mr. Justice JOHNSON in the case of *Ramsey* v. *Allegre;* the attentive study of which will enable the student to obtain a pretty full view of the debatable ground pertaining to this subject. These opinions both bear upon their face the evidence of distinguished ability and profound research; but they stand in strong and irreconcilable opposition to each other. The learned judges appear to entertain very different sentiments relative to the comparative merits and value of the common law and admiralty tribunals, and consequently of the policy of extending or restricting the remedies afforded by them respectively; and considering the diversified and uncertain character of the tests to be applied to the subject, it is neither unreasonable nor disrespectful to suppose, that this circumstance may have had some influence upon their particular conclusions.

De Lovio v. Boit.

In the case of *De Lovio* v. *Boit*, the question was, whether a suit could be maintained on the admiralty side of the district court upon *a marine policy of insurance*. The novelty and importance of the question induced the court to enter into a thorough original examination of the whole jurisdiction of the admiralty. The result of this examination with respect to the English court of admiralty, was summed up in the following propositions: 1. That the jurisdiction of the admiralty, until the statutes of Richard II, extended to all maritime contracts, whether executed at home or abroad, and to all torts, injuries and offenses on the high seas, and in ports and havens, as far as the ebb and flow of the

tide. 2. That the common law interpretation of these statutes abridges the jurisdiction to things wholly and exclusively done upon the sea. 3. That this interpretation is indefensible upon principle, and the decisions founded upon it are inconsistent and contradictory. 4. That the interpretation of the same statutes by the admiralty, does not abridge any of its ancient jurisdiction, but leaves to it cognizance of all maritime contracts, and of all torts, injuries and offenses upon the high seas, and in ports as far as the tide ebbs and flows. 5. That this is the true limit which, upon principle, would seem to belong to the admiralty; that it is consistent with the language and intent of the statutes; and is supported by analogous reasoning and public convenience, and a very considerable weight of authority. That, under all the circumstances, the courts of law and admiralty in England are not so tied down by a uniformity of decisions, that they are not at liberty to entertain the question anew, and to settle the doctrines upon their true principles; and that this opinion is supported by some of the best elementary writers in that kingdom.

But, admitting the binding authority in England, of the common law decisions, affecting the jurisdiction of the admiralty, the court was of opinion that "in the United States we are at liberty to re-examine the doctrines, and construe the jurisdiction of the admiralty upon enlarged and liberal principles." Having arrived at this general result, Mr. Justice STORY proceeded to discuss the question, what is the true interpretation of that clause of the constitution, "all cases of admiralty and maritime jurisdiction"? If we examine the etymology or received use of the words "admiralty" and "maritime jurisdiction," we shall find that they include jurisdiction of all things done upon and relative to the sea, or in other

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Neither the first nor the second of these tests were considered admissible. To adopt them, it was said, would be to apply to our own courts statutable provisions, designed only to regulate the high court of admiralty in England, and not extending in terms or in effect to the colonies. It would moreover involve qualifications of jurisdiction which are arbitrary in themselves, inapplicable to our situation, and contradictory to the commissions and practice of the colonial vice-admiralty courts. And even if we were to adopt this exposition, the question would still remain whether we are to be governed by the doctrines of the common law, or of the admiralty.

With respect to the third exposition, viz.: the admiralty jurisdiction acknowledged and exercised

in the United States at the American revolution, it was remarked, that, "tested by this exposition, the admiralty jurisdiction of the United States would be as large as its most strenuous advocates ever contended for."

It was observed, also, that the constitution not only confers *admiralty* jurisdiction, but the word "*maritime*" is superadded, seemingly, *ex industria*, to remove every latent doubt. The disputes and discussions respecting what the admiralty jurisdiction was, could not but be well known to the framers of that instrument. One party sought to limit it by locality; the other by the subject matter. It was wise, therefore, to dissipate all question, by giving cognizance of all "cases of maritime jurisdiction," or, what is precisely equivalent, of all maritime causes. Upon any other construction, the word "maritime" would be mere tautology; but in this sense it has a peculiar and appropriate force.

The language of the constitution, it was supposed, would, therefore, warrant the most liberal interpretation; and it might "not be unfit to hold, that it had reference to that maritime jurisdiction which commercial convenience, public policy, and national rights have contributed to establish, with slight local differences, over all *Europe:* that jurisdiction which, under the name of consular courts, first established itself upon the shores of the Mediterranean, and, from the general equity and simplicity of its proceedings soon commended itself to all maritime states; that jurisdiction, in short, which, collecting the wisdom of the civil law, and combining it with the customs and usages of the sea, produced the venerable *Consolato del Mare*, and still continues, in its decisions, to regulate the commerce, the intercourse, and the welfare of mankind."

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At all events, it was said, there was no solid reason for constructing the terms of the constitution in a narrow and limited sense, or for ingrafting upon them the restrictions of English statutes, or decisions at common law. The doctrine that would extend the statutes of Richard and the narrow and perplexed doctrines of the common law to the present judicial power of the United States, was declared to be little short of an absurdity; and irreconcilable, moreover, with the decisions of the courts of the United States, and particularly with the decisions of the supreme court, declaring all seizures under the laws of impost, navigation and trade, on waters navigable from the sea, by boats of ten or more tons burden, within the districts of the United States, as well as upon the high seas, to be causes of admiralty and maritime jurisdiction, although it was held by the courts of common law in England, after the statutes of Richard, that the admiralty had no jurisdiction of things done within the ebb and flow of tide, in ports, creeks and havens. And considering the advantages resulting to the commerce and navigation of the United States, from a uniformity of rules and decisions in all maritime questions, the conclusion was, that national policy as well as judicial logic require the clause of the constitution to be so construed, as to embrace *all maritime contracts, torts and injuries*, or, in other words, to embrace *all those causes, which originally and inherently belonged to the admiralty, before any statutable restriction.*

With regard to *torts* and *injuries*, the admiralty jurisdiction over them was necessarily bounded by locality; but it was held to extend "over all *contracts* (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations),

which relate to the navigation, business or commerce of the sea."

Finally, Mr. Justice STORY proceeded to the inquiry, what are properly to be deemed "maritime contracts." "In this particular," he observed, "there is little room for controversy. All civilians and jurists agree, that in this appellation are included, among other things, *charter parties*, *affreightments*, *marine hypothecations*, *contracts for marine service in the building, repairing, supplying and navigating ships; contracts between part owners of ships; contracts and quasi contracts respecting averages, contributions and jettisons*, and *policies of insurance*. And in point of fact," he added, "the admiralty courts of other foreign countries have exercised jurisdiction over policies of insurance as marine contracts; and a similar claim has been uniformly asserted on the part of the admiralty of England."

The judgment of the court accordingly was, "that policies of insurance are within (though not *exclusively* within) the admiralty and maritime jurisdiction of the United States."

This decision was pronounced in 1815; and the doctrine of it was re-asserted and acted upon in the same court in 1822, in the case of *Peele et al.* v. *The Merchant's Insurance Company*, 3 Mason, 27.

Ramsey v. Allegre.

The case of *Ramsey* v. *Allegre*, in which the above mentioned opinion of Mr. Justice JOHNSON was delivered, was decided in 1827. It was a suit by libel *in personam*, originally brought in the district court for the district of Maryland, to recover of the defendant, as owner, ship's husband or a consignee of the schooner Dorothea, for work and labor performed, and materials furnished for the use of the schooner to equip and prepare her for a voyage on the high seas. The district court dismissed the libel upon the ground that the libelant had waived his right to

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This decision was affirmed in the circuit court, and came before the supreme court by appeal from the decree of affirmance. Upon the authority of the case of *The General Smith* (4 Wheat., 438), it was assumed by the counsel for the appellant, and tacitly admitted by the counsel for the respondent, that the district courts, proceeding as courts of admiralty and maritime jurisdiction, might, in general, take cognizance of suits by material men, either *in personam* or *in rem*. The argument turned, therefore, chiefly upon the effect of the note, and the court in deciding the case confined itself to that point alone, and affirmed the decree upon the ground that "it did not appear by the record that the note had been tendered to be given up, or actually surrendered at the hearing in the court below, *it not being necessary to consider the general question of jurisdiction.*"

But Mr. Justice JOHNSON thought proper to place his decision upon different and higher grounds, and to avail himself of the occasion to inculcate the necessity of checking what he considered the "silent and stealing progress of the admiralty in acquiring jurisdiction to which it had no pretensions." He accordingly entered into a comprehensive survey and examination of the history and present state of the admiralty jurisdiction over contracts in England. His conclusion was, that the extensive jurisdiction exercised by the admiralty before the statutes of Richard II, was founded in usurpation, and required to be restrained; that the decisions of the courts of common law upon these statutes, and relative to the extent of the admiralty jurisdiction generally, were sound; that it belonged of right to these courts to restrain the admiralty within proper bounds; that

their adjudications afford the only safe and authoritative exposition of the laws upon the subject, and that it was incorrect, therefore, to characterize the jurisdiction once in possession of the admiralty, but now exercised by the courts of common law, as a disputed jurisdiction. He insisted, therefore, that, with the single exception of seamen's wages, there was *no contract* upon which a suit *in personam* could be maintained in the admiralty, and that there was not the slightest ground for saying that there was a *concurrent* jurisdiction in matters of contract between the admiralty and the courts of common law,[1] the rule running through all the cases being, that if the

[1] In the case of *De Lovio* v. *Boit*, as we have seen, the decision was, that the district courts possess jurisdiction (as courts of admiralty) of suits on marine policies of insurance, *concurrently* with the courts of common law, *i. e.*, the state courts. And in a note subjoined to the case (by the learned judge who delivered the opinion, it is presumed,) it is said, "there can be no possible question that the courts of common law have acquired a concurrent jurisdiction, though, upon the principles of the ancient common law, it is not easy to trace a legitimate origin to it." 2 Gallison, 476. This doctrine of a concurrent jurisdiction between the district courts as courts of admiralty, and the state courts, has also received the solemn sanction of the courts of New York. In the case of *Hallet* v. *Novion* (14 Johnson, 273; S. C., 16 Johnson, 327), and of *Percival* v. *Hickey* (18 Johnson, 257), which were cases of marine tort, the admiralty jurisdiction of the district courts was largely and ably discussed. In both cases it was strenuously contended that the state courts had no jurisdiction. The question in both cases was examined and decided chiefly upon English authorities. In the first case it was held that the state court had no jurisdiction, because the question presented by it was a question of *prize*, and therefore exclusively cognizable in the admiralty. In the second case the jurisdiction of the state court was sustained upon the ground that the case, though of admiralty jurisdiction, and therefore cognizable in the district court as such, belonged to the instance and not to the prize jurisdiction, and was one, therefore, of which, from its nature, according to the English decisions, the courts of common law, as well as the courts of admiralty, might, and in fact did, exercise jurisdiction. See Kent's Commentaries, vol. 1 (3d ed.), 377, note *c*; and 1 Story's Commentaries on the Constitution of the U. S., 533, note.

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common law can give full redress, that alone takes away the admiralty jurisdiction.

The contract of bottomry, though sometimes cited as an instance of concurrent jurisdiction, served only to illustrate this rule; for, if executed by the master, the only remedy was by proceeding *in rem*, and it was, therefore, exclusively cognizable in the admiralty, but if executed by the owner, it became a personal contract, and as such was always enforced in the courts of common law, like the contract of *respondentia*, which, though as much a maritime contract as bottomry, gives no jurisdiction to the admiralty either *in rem* or *in personam*. He considered the doctrine that the admiralty and maritime jurisdiction, vested by the constitution of the United States, was that which the English admiralty possessed, or pretended to, before the time of Richard II, as wholly untenable and not warranted (as was supposed in the case of *De Lovio* v. *Boit*) by the early American decisions, the weight of authority being against it; and as it regarded the more recent decision in the case of *De Lovio* v. *Boit*, it was in direct conflict with a decision in the circuit court for the sixth circuit.

It was admitted by Mr. Justice JOHNSON that there is a class of cases which may at first view appear to maintain the doctrine that the admiralty possesses a jurisdiction *in personam*. The cases of *Manro* v. *Almeida* (10 Wheat., 472), and *Sweet* v. *Wolff* (3 Term Rep., 323), were cases of this description. But though the proceeding in these cases was in form *in personam*, yet they were cases *quasi*, and in substance, *in rem*, in which the admiralty had jurisdiction of the principal question, not of contracts, but marine torts and prize causes, or their incidents, the process *in personam* being only the means of getting possession of the *res subjecta;* that is, of exercising

an unquestionable jurisdiction *in rem*. He admitted, also, upon the authority of the *St. Jago de Cuba* (9 Wheat., 409), that in a case where a hypothecation would have been legal and valid, the claims of material men may be satisfied out of money in court.

Mr. Justice JOHNSON, in conclusion, scrutinized the case of the *General Smith* (4 Wheat., 438), which has so often and so confidently been quoted as supporting the doctrine that the admiralty possesses a general jurisdiction *in personam and in rem*, of suits by material men. The case was this: The vessel was owned in Baltimore, and the libelant furnished for her use various articles of ship chandlery to equip her for a foreign voyage. The libel set forth these facts, and prayed the usual process against the ship, and that she should be sold under a decree of the court, to pay and satisfy the libelant's claim. The district court ordered the ship to be sold, and decreed that the libelant should be paid out of the proceeds. This decree was, on appeal, affirmed *pro forma*, in the circuit court, and came before the supreme court on further appeal.

The only point directly in judgment, it will be seen, was, whether a suit in the district court, as a court of admiralty, could be maintained by material men against *a domestic ship*, in a state where the *local law gave no specific lien*. The supreme court decided that such a suit could not be maintained; but put its decisions exclusively upon the ground that the common law, which was the law of Maryland, gave no lien,[1] and the ship not being a *foreign*

[1] In New York a lien is given by statute, in favor of material men and shipwrights, and for wharfage and the expenses of keeping the vessel in port, when the debt amounts to fifty dollars; which lien may be enforced by a summary proceeding before certain judicial officers of the state. (2 Revised Statutes, 493.) And in the case of *The Ship Robert Fulton* (1 Paine, 620), it was held that the district courts in this

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vessel, the admiralty law gave none. The court took occasion, however, to state its views of the admiralty jurisdiction over suits of this nature somewhat at large, and laid down the doctrine that "the admiralty rightfully possesses a general jurisdiction in cases of material men," and remarked that, "if this had been a suit *in personam*, there would not have been any hesitation in sustaining the jurisdiction of the district court."

The court then proceeded to draw a distinction between the case of repairs made, and necessaries furnished, to a foreign ship, or a ship in a port of the state to which she does not belong, in which case, it is said, that the general maritime law, following the civil law, gives the party a lien on the ship itself for his security; and the case of such repairs made and necessaries furnished in the port or state to which the ship belongs, in which case the municipal law of that state is to govern, and no lien is implied unless it is recognized by that law, and in pursuance of this distinction, as already stated, the judgment of the court below was reversed. To the correctness of this decision of the question directly before the court, it is unnecessary to say, Mr. Justice JOHNSON fully

state, as courts of admiralty, have a concurrent jurisdiction with the state courts to enforce this lien; and that the right to maintain this jurisdiction in a particular case, attaches and belongs to that court which first exercises it, and takes possession of the thing.

Since the decision in the case of the *General Smith*, the jurisdiction of the national courts to enforce the lien of a material man given by a state law on a domestic vessel, has become firmly established by a series of judicial decisions. See, on this subject, *Conkling's Admiralty*.

This jurisdiction was asserted, as well *in rem* as *in personam*, by the 12th of the rules of admiralty practice, prescribed in 1844 by the supreme court. See 3 Howard, or Conkling's Admiralty, appendix. But, in 1859, the rule was altered so as to limit the jurisdiction to process *in personam*, unless a lien was also given by the maritime law. See *The Steamer St. Lawrence* (1 Black's S. C. Rep., 522), where the reasons for this alteration are stated and explained.

assented. But he denied unequivocally most of the other doctrines advanced by the court, and summed up what he considered to be the law upon the subject in the following propositions, viz. :

"That in case of contracts, it (the admiralty) has no jurisdiction at all *in personam*, except as incident to its jurisdiction *in rem*.

"That with regard to the contracts of shipwrights and material men in her home port, the vessel cannot be subjected, unless by express hypothecation by the owner.

"That on her voyage, and where the master is destitute of other means of raising the necessary funds, she may be so subjected by the master, but it must be by actual hypothecation.

"But when the ship has been sold for other claims, and the money is in the registry, so that the master no longer has it it in his power to raise money on her bottom to satisfy demands which have been legally incurred, cases may arise in which the claims of material men and shipwrights, and of the master himself, may be sustained without actual hypothecation."

From this brief analysis of the opinion of Mr. Justice JOHNSON, it is obvious that, in his judgment, the grant of admiralty and maritime jurisdiction in the constitution and judicial act, ought to be construed by reference to the acknowledged limits of that jurisdiction in England at the time when the constitution was framed.

The late Mr. Justice BALDWIN, soon after his appointment, took occasion in the circuit court also very emphatically to declare his unqualified dissent from the doctrines of the case of *De Lovio* v. *Boit*, relying for their refutation, likewise, on the decisions of the English common law courts.

But these decisions, made in the course of a long and bitter contest with the high court of admiralty,

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have at length ceased to trammel the independence and obscure the judgments of American judges. After having been, in several instances, virtually disregarded, their authority as a test of the extent of the admiralty jurisdiction of our courts, was, at length, unequivocally denied by the supreme court in the case of *Smith et al.* v. *Condry* (1 Howard, 28); and the doctrine of that case has been distinctly reiterated in the case of *The New Jersey Steam Navigation Company* v. *The Merchants' Bank of Boston* (7 Howard, 344); and again in the case of *Rich et al.* v. *Lambert* (12 id., 347). It may now, therefore, be said, in general, that the admiralty jurisdiction of the United States extends to all contracts, claims and services, essentially maritime; among which are bottomry bonds, contracts of affreightment, including charter-parties, and *quasi* contracts respecting the averages, contributions and jettisons, and contracts for the conveyance of passengers, pilotage on the high seas, wharfage, agreements of consortship, surveys of vessels damaged by the perils of the seas, the claims of material men and others for the repair and outfit of ships belonging to foreign nations, or to other states, and mariners' wages; and also to civil marine torts and injuries: among which are assaults or other personal injuries, collisions, spoliation and damage, consisting of illegal seizures or other depredations on property, illegal dispossession, or withholding possession from the owners of ships, commonly called possessory suits, disagreement among part owners as to the employment of ships, cases of seizure under municipal authority, for supposed breaches of revenue, or other prohibitory laws, and cases of salvage.[1]

Subjects to which the admiralty jurisdiction of the district court extends.

[1] See an admirably reasoned essay on the extent of the admiralty and maritime jurisdiction of the courts of the United States, by the learned and distinguished judge of the district of Maine, appended to the case of *The Huntress*, Davies, 93.

There remained, however, another point to be determined, and it has proved a very fruitful source of controversy. To constitute a maritime contract, cognizable in admiralty, it is indispensable that it should relate to commerce carried on by water; and to render a tortious act thus cognizable it must be shown to have been committed, or, at least, begun, on water. But all waters are not comprehended within the admiralty jurisdiction; and it accordingly became necessary to determine to *what* waters it extended. That, in addition to the open sea it comprised waters extending inland not within the body of a county, was of course undeniable; while, on the other hand, it was at first tacitly admitted that it did not extend to inland waters having no navigable communication with the ocean. But how was it with navigable rivers flowing into the ocean? This question was, for the first time, brought distinctly under the consideration of the supreme court, in the case of *The Thomas Jefferson*, which was a suit in admiralty for a seaman's wages earned above tide water, on the river Mississippi.[1] The decision of the court was that the admiralty jurisdiction extended up such rivers as far as the flow and ebb of tide, and *no further*, and it was accordingly held that the suit could not be maintained. This rule was persistently adhered to for more than a quarter of a century.[2] In one of the cases just cited, however (that of *Waring* v. *Clark*, a cause of collision originating far up the river Mississippi), it was objected that the place where the collision happened was *within the body of a county*, and the jurisdiction was denied on that ground. The objection was overruled by the

To what waters it extends.

To waters infra corpus comitatus.

[1] 10 Wheat., 428.

[2] *Paroux* v. *Howard*, 7 Peters, 524; *Orleans* v. *Plabus*, 11 Peters, 175; *Waring* v. *Clark*, 5 Howard, 441; *New Jersey Navigation Company* v. *Merchants' Bank*, 6 Howard, 344.

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court, and this decision has been reiterated in subsequent cases.[1]

Declared to extend to inland waters.

Upon this footing stood the subject of the admiralty jurisdiction in 1851, when in a case of collision originating on Lake Ontario, and instituted under the act of February 26, 1845, ch. 20,[2] the supreme court saw fit to subject this much contested branch of jurisdiction, as far as it depended on locality, to a rigorous re-examination. The scrutiny resulted in the conviction that its limitation to tide water was in itself unreasonable and inconvenient, and was neither enjoined nor warranted by a just interpretation of the constitution, and the prior decisions of the court in conflict with this conclusion were accordingly solemnly overruled. Mr. Justice DANIEL alone, of the eight judges present, dissenting.[3]

The doctrine of this case has been steadily maintained and unsparingly applied by the supreme court in the numerous cases that have since been brought under its consideration.[4]

[1] See *The Commerce*, 1 Black's S. C. R., 574.

[2] 5 Stat. at Large, 726.

[3] *The Genesee Chief*, 12 Howard, 443.

[4] *Fretz* v. *Bull*, 12 Howard, 466; *The Magnolia*, 20 Howard, 296; *The Niagara*, 21 Howard, 7; *Sturges* v. *Clough*, 21 Howard, 451; *Allen* v. *Newberry*, 21 Howard, 244; *The Brig. Gen. R. H. Stokes*, 22 Howard, 48; *Pierce* v. *Page*, 24 Howard, 228; *The Commerce*, 1 Black, 574. This last was a case of collision originating on the Hudson river in New York, and the court expressly decided that to bring such a case within the admiralty jurisdiction, it is not necessary to show that either of the vessels was engaged in foreign commerce, or commerce between the states. It ought, therefore, doubtless to be considered as overruling the previous decision in *The Goliah* (21 Howard, 248), where it was held that a suit in admiralty could not be maintained for supplies furnished to a steamer navigating the river Sacramento, in California, because she was engaged in trade exclusively within the State of California; and the decree of the district court, in favor of the libelant, was reversed on this ground. The case of *Allen* v. *Newberry* (21 How., 244), had been previously decided at the same term. It arose under the act of 26th February, 1845, and was founded on a contract of affreightment

The principle, as explained and illustrated in these cases, is, that the admiralty jurisdiction, as a branch of the judicial power conferred by the constitution, subject, however, to such restrictions as congress may see fit to impose, extends to all navigable waters, whether salt or fresh, whether tide waters or not, and wherever situated, which are subservient to the purposes of commercial intercourse.

The particular question before the court, in the case of *The Genesee Chief*, was, whether congress

The act Feb. 26, 1845, ch. 20.

for the transportation of goods on Lake Michigan. In this case it was very properly held that the admiralty jurisdiction of cases arising on the great lakes and their connecting waters, was limited to vessels employed in commerce between ports or places in different states or territories, for such is the express language of the act. But the court saw fit, it seems, to ingraft another limitation on this jurisdiction, by restricting it, in cases of affreightment, to contracts for the conveyance of goods from a port in one state to a port in another state—a restriction for which the act furnishes no warrant. The same judge who had pronounced the judgment of the court in this case, delivered the opinion of the court also in *The Goliah*, and, referring to the decision in *Allen* v. *Newberry*, he observes that the restriction imposed by the act of 1845, "was regarded by the court as but declaratory of the law, and that it existed independently of that statute." But in *The Commerce*, as we have seen, this is expressly denied. It is true this case was a case of tort, and *The Goliah* was a case of contract; but it is hardly to be imagined that the jurisdiction was supposed to be affected by this difference, for there is not the slightest warrant for such a supposition in any sound principle of law applicable to the subject, nor in any antecedent decision of the court. It seems very clear, therefore, that the decision in *The Goliah* is overruled by that in *The Commerce*. The truth is, the notion that the admiralty jurisdiction is in any respect dependent on the power to regulate commerce, is a bald fallacy. The admiralty jurisdiction, like the power to regulate commerce, is given by the constitution, each independently of the other. They are kindred subjects, however, and congress in exercising its authority over one of them, ought, undoubtedly, not to lose sight of the other. If the interests of commerce require the imposition of new limitations upon the admiralty jurisdiction, congress should impose them; but the courts have no such discretionary authority. There has been a great deal of speculation of latter years, relative to maritime liens, which, I take leave, with deference, to say, is less suitable on the bench of a judicial tribunal than in a legislative hall.

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had authority to pass the act of 1845. It seemed clear upon the face of the act that it had been carefully framed with reference to the law as then understood, excluding the admiralty jurisdiction from all other than tide waters, and, consequently, that congress could not have intended to extend it to the lakes; but that, under a mistaken view of the subject, it was designed, in virtue of the power to regulate commerce among the several states, to apply the admiralty forms of procedure and the rules of the maritime law to the cases described in the act, saving to both parties the right of trial by jury. But the supreme court, seeing that the act could not be upheld as an exercise of the power to regulate commerce, proceeded to inquire whether it might not be held valid as an act to enlarge the admiralty jurisdiction of the district courts; and having, as already stated, arrived at the conclusion that the constitution admitted of its extension to inland waters, the court held the act constitutional on that ground. Under the authority of this decision, a limited admiralty jurisdiction has, accordingly, ever since, been freely exercised by the courts for the several judicial districts bordering on the great lakes and the straits connecting them; as the admiralty jurisdiction, untrammed by the restrictions imposed by this act, has been, on navigable rivers elsewhere, throughout the Union.[1]

[1] Touching the true character of the act of 1845, see further, Conkling's Admiralty, 2d ed., vol. 1, p. 7–18. I have met with nothing in the reports of judicial decisions more surprising and unaccountable than the assumption by the supreme court in *The Genesee Chief*, and in the subsequent case of *The Magnolia* (20 Howard, 296, 300), that the admiralty jurisdiction was excluded from the great lakes by the terms of the 9th section of the judiciary act. The language of the act is: "and shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of

Effect of the repeal of an act pending an appeal.

It is an important rule in regard to all admiralty cases, that an appeal suspends the sentence altogether, and that the cause is to be heard and decided in the appellate court, according to the existing law,

ten or more tuns burden, within their respective districts as well as upon the high seas." Act of 24th September, 1789, ch. 20, § 9: 1 Stat. at Large, p. 76. I can trace this novel assumption to nothing, unless it be to the latter clause of the provision above recited, "including all seizures * * * where the seizures are made," &c. But this clause refers exclusively to municipal seizures under laws of impost, &c., and has no relation whatever to suits by private persons. No *seizure* is made anywhere in such suits. As to them the jurisdiction conferred on the district courts by the 9th section of the judiciary act is exactly co-extensive with that conferred by the constitution; and this having been adjudged to extend to inland waters, it follows that the district courts were already invested with it when the act of 1845 was passed. The jurisdiction described in this act accordingly thus becomes a senseless anomaly. A considerable proportion of the proper civil jurisdiction is not embraced by it, and the criminal and prize jurisdictions are absolutely excluded. The only imaginable necessity there is for an act of congress respecting inland waters, is for the purpose of placing revenue or other municipal seizures, made on such waters, upon the same footing as that on which such seizures made on waters navigable from the ocean are placed by the judiciary act; and this is what the act of 1845 does not accomplish. Its only effect is to restrict instead of enlarging the admiralty powers of the district courts conferred by the judiciary act, with respect to cases arising on the lakes, by limiting those powers to the cases specified in the act. Can it be doubted that it ought to be repealed?

Since the publication in an antecedent edition of the foregoing part of this note, its statements have been fully confirmed by the supreme court, and the admiralty jurisdiction of the courts of United States in all cases arising on inland waters, except those comprised within the reservation of a common law remedy and "*any concurrent remedy which may be given by the state laws*," where the vessel is employed, by the act of February 26, 1845, ch. 20, is declare to be exclusive, and the laws of the western states purporting to confer upon the state courts and justices of the peace jurisdiction *in rem*, are, accordingly, held to be void. *The Moses Taylor*, 4 Wallace, 411; *The Hive*, id., 555. But while this edition is passing through the press a bill has been introduced in the senate of the United States for the purpose of giving to state courts admiralty jurisdiction, concurrent with the district courts of the United States, in cases of maritime contracts and torts upon *all* navigable rivers above the ebb and flow of tide.

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as if no sentence had been pronounced. If therefore the law under which a sentence of condemnation was pronounced is repealed after the sentence in the court below and before final sentence in the appellate court, no sentence of condemnation can be pronounced, but the decree of the court below, although correct when made, must be reversed. *Yeaton et al.* v. *The United States*, 5 Cranch, 281; *The United States* v. *Preston*, 3 Peters, 57.

Rights of foreign consul as claimant.

A foreign consul has a right to institute a proceeding or to interpose a claim in the admiralty in a case involving the rights of his fellow-citizens without a special authority from those for whose benefit he acts; and he may do so in behalf of *subjects unknown* of his nation. But he cannot receive actual restitution of the thing in controversy without such special authority; nor can restitution be decreed without proof of the individual proprietary interest. *The Bello Corrunes*, 6 Wheat., 152; *The Antelope*, 10 Wheat., 66; *The London Packet*, 1 Mason, 14.

Common law jurisdiction.

3. As courts of *common law* jurisdiction, the district courts possess:

Seizures.

First. Exclusive original cognizance of all seizures on land or on waters not navigable from the ocean by boats of ten or more tons burden, made under the laws of the United States.

In regard to seizures of this description, the jurisdiction of the district courts corresponds with that of the court of exchequer in England. The proceedings, as in that court, are instituted by information *in rem*, and the trial of issues of fact is by jury.[1] This distinction between the two classes of seizures, specified in the judicial act, was first authoritatively recognized in the case of *The United States* v. *The Schooner Betsy et al.* (4 Cranch, 443), and was sub-

[1] See, *post*, Practice in Cases of Seizure.

sequently fully explained and definitively established in the case of *The Sarah*, 8 Wheat., 391.

Penalties and forfeitures.

Second. Exclusive original jurisdiction, with some exceptions,[1] of suits for penalties and forfeitures incurred under the laws of the United States.

What are to be deemed such.

Under the various prohibitory statutes of the United States, denouncing penalties, forfeitures and fines, though in different forms of language, it is not always easy to decide whether the case belongs to the head of civil jurisdiction, and is therefore exclusively cognizable by action of debt or information of debt in the district courts; or of criminal jurisdiction, and, therefore, cognizable also in the circuit courts. A question of this nature arose in the case of *The United States* v. *Mann*, 1 Gallison, 3 and 177. It was a criminal information in the circuit court for an alleged violation of the first section of an act of January 9, 1809 (one of the embargo acts), the language of which (applicable to this question) is as follows: "The offenders, their aiders and abettors, shall, upon conviction, be adjudged guilty of a *high misdemeanor and fined* a sum by the court before which a *conviction* is had, equal to four times the value," &c.

The 12th section declares that all penalties and forfeitures incurred by force of the act, *unless therein otherwise before directed*, may be prosecuted, sued for and recovered by action of debt, or by indictment or information. It was held, that the first section, in itself considered, created an *offense* punishable *criminaliter* and cognizable in the circuit court; and that, admitting it to fall within the description of "penalty and forfeiture" in the 12th section, it was also within the exception of cases "otherwise" provided for.

The language of the first section was considered as clearly indicating a criminal offense. It speaks of

[1] See, *ante*, Jurisdiction of the Circuit Courts.

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Suits by aliens. *Third.* The district courts are invested with jurisdiction concurrently with the courts of the several states and the circuit courts, of all causes where *an alien sues for a tort only in violation of the laws of nations, or a treaty of the United States.* But in regard to this head of jurisdiction, I have not met with any judicial decision.

Suits by or on behalf of the United States. *Fourth.* These courts possess jurisdiction, concurrently in like manner, of all suits at common law where the United States, or an officer thereof, sues under the authority of an act of congress.[1] The most important suits, and those of the most frequent occurrence, of this nature, are suits against delinquent officers, and upon bonds for duties.

The judicial decisions relative to this head of jurisdiction have already been stated in treating of the jurisdiction of the circuit courts.

Suits against consuls. *Fifth.* The only remaining class of cases over which the 9th section of the judicial act confers jurisdiction upon the district courts is, that of all suits against consuls, or vice-consuls, except of criminal prosecutions, where the punishment may exceed the specified degree. This jurisdiction is declared to be exclusive of the state courts. The terms by which it is delegated, it will be observed, embrace both criminal and civil suits. And by the 11th section of

[1] We have already seen, however, that of suits founded upon seizures on land, and for penalties and forfeitures (which are also suits at common law, where the United States sue), the jurisdiction of the district courts is exclusive.

the judicial act, it is declared that the circuit courts "shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable therein." The effect of these two provisions, construed independently of the constitution and of the 13th section of the judicial act, would obviously be to confer on the district courts exclusive jurisdiction of all civil suits against consuls and vice-consuls, and upon the district courts and circuit courts conjointly, exclusive jurisdiction of all offenses committed by these functionaries. But the constitution (art. 1, § 2) provides that "the supreme court shall have original jurisdiction in all cases affecting ambassadors, and other public ministers and *consuls;*" and the 13th section of the judicial act declares that the supreme court shall have "original, but not exclusive, jurisdiction" in all suits in which a consul or vice-consul shall be a party." The ninth and eleventh sections must, therefore, be construed in subordination to these provisions; and the jurisdiction of the district and circuit courts conferred by these sections is thus rendered concurrent with that of the supreme court. And such seems to have been the view of the subject taken by the circuit court of the United States for the district of Pennsylvania, in the case of *The United States* v. *Ranara*, 2 Dallas, 297.

Equity jurisdiction.

4. As courts of *equity*, the jurisdiction of the district courts is, as we have seen, exceedingly limited,[1] insomuch that it has often been said in general terms that they have no equity jurisdiction. Indeed, before the act of May 15, 1820, conferring equity jurisdic-

[1] That is to say, of those not invested with the original jurisdiction of the circuit courts: of which see, *post*.

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tion in a particular case,[1] this was strictly true, because the general authority that had been conferred upon the district judge,[2] to grant injunctions where the party has not had sufficient time to apply to the circuit court, and which, when granted, are to continue only until the next succeeding session of the circuit court (unless longer continued by order of that court),[3] amounts to nothing more than a power to do a particular act auxiliary to the jurisdiction of the circuit courts. In fact, this power is to be considered as conferred upon the district judge rather in his capacity as a member of the circuit court than as the judge of the district court; and, being exercised in suits prosecuted in the circuit court, the injunction, of course, issues from that court. The only decision I have met with relative to this authority is in the case of *Parker* v. *The Judges of the Circuit Court of Maryland*, 12 Wheat., 561.

In that case several sessions of the circuit court had elapsed after the injunction was granted by the district judge. No order had been made at the next succeeding term for its continuance; but two successive motions had been made at subsequent sessions, to dissolve the injunction, which motions were denied. The question was, whether the injunction was to be considered as still in force; and it was held, that, as it had obviously been regarded and treated by the circuit court as subsisting and valid, and as, in refusing to dissolve it, the court had expressly declared its opinion in favor of its justice and propriety, it ought to be regarded as having been virtually continued or renewed.

[1] See the first pages of this chapter.

[2] *Vide* ibid.

[3] These limitations are supposed no longer to exist. *Vide* ibid.

Of the district courts invested with extraordinary jurisdiction.

District courts invested with all the original jurisdiction of the circuit courts, superadded to their own proper powers, are coeval with our national judicial system, having been established by the judicial act of 1789, in the then secluded districts of Maine, forming a part of Massachusetts, and of Kentucky, being a part of Virginia. More than a score of acts have since, from time to time, been passed for the purpose either of giving or taking away this extraordinary jurisdiction; and, at the dates of the former editions of this work, the courts of this description were so numerous as, for this and other reasons, to require a somewhat extended notice. I propose now to dispose of them very summarily.

These courts were devised to supply the want of circuit courts in those districts for which it was not deemed expedient to provide them. But, by two recent acts of congress, all the judicial districts of the United States have been comprised within the ten circuits formed by those acts, and a circuit court has been established in each of them. The first of these acts is that of July 15, 1862 (ch. 78: 12 Stat. at Large, 576), which includes all the districts except those of California and Oregon; and the second is that of March 3, 1863 (ch. 100: 12 Stat. at Large, 794), which increases the judges of the supreme court from nine to ten, and constitutes the districts of California and Oregon the tenth circuit. This act expressly repeals all prior acts conferring circuit court powers on the district courts in these two states, and the former act repeals, in terms, all laws giving such powers to the courts for the districts of Texas, Florida, Wisconsin, Minnesota, Iowa and

PART 1. Kansas; *but it is silent* in this particular with respect to the courts for the districts of Western Virginia, the northern and middle districts of Alabama, the northern district of Mississippi, the western district of Louisiana, the northern district of Georgia, and, when sitting at Greenville, South Carolina, all of which, I believe, were invested with the powers of a circuit court. It is pertinent to add, moreover, that the act of March 3, 1837 (5 Stat. at Large, 176), passed, like the above-mentioned act of 1862, for the purpose of re-arranging the districts into circuits, also expressly repealed all prior acts investing the courts of the districts by the act brought for the first time into the circuits of their extraordinary powers. It seems, difficult, therefore, to account for the omission in the act of 1862, and the omission may inspire doubts as to its legal consequences. It appears to be improbable that congress designed to leave the courts for the six districts above mentioned in possession of their extraordinary jurisdiction; and the supposition of an assumption by congress that the introduction of circuit courts into those districts would, by implication, deprive the district courts of this jurisdiction, seems still more objectionable, because such a supposition would impute to congress gross inconsistency. The most probable explanation seems to be that the fact of the possession by these courts of their extraordinary jurisdiction was overlooked. But be the omission intentional or accidental, the question arises whether or not the courts concerned have in fact been divested of this jurisdiction—a question which it may require an authoritative judicial decision to determine. The co-existence in the same district of a circuit court, and a district court having the powers of a circuit court, is not an absurdity, nor is it without precedent. By the act of 1857, above cited, the district court of

Western Virginia, which had long been invested with circuit court powers, was expressly deprived of them, and at the next session of congress (see 5 Stat. at Large, 215) these powers were restored by the simple repeal of so much of the act of the year before as repealed the prior act by which they have been conferred. In this predicament stands the question in point of legislation; and the learned reader will probably discover in it satisfactory reasons for concluding that the courts in question are still in possession of their extraordinary jurisdiction. It is probable, also, that this extraordinary jurisdiction will, before long, be conferred upon the courts of other districts to be hereafter formed upon the admission of new states into the Union.

Causes removable from state courts.

Suits commenced in state courts may be removed into these courts under the twelfth section of the judiciary act, as into a circuit court.[1]

Writs of injunction.

In common with the circuit courts these courts possess the power, as courts of equity, to grant injunctions, and being, as such, always open for the purpose of issuing process, the judge doubtless possesses this power in vacation.

CHAPTER XII.

OF THE COURT OF CLAIMS.

Neither of the courts treated of in the foregoing chapters is invested with any authority to take cognizance of private claims against the United States for the purpose either of adjudication or inquiry. But out of the multifarious transactions and business of government, requiring the agency of so vast a number of ministerial officers and private persons, many such claims must unavoidably arise,

[1] *Vide, supra*, Jurisdiction of the Circuit Court.

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to which a deaf ear could not, without gross injustice, be indiscriminately turned; and which the executive departments lack authority to recognize, or, in the adjustment of which, errors may have been committed or injustice otherwise done. The only remedy in all such cases was an application to congress; and applications of this nature at length became so numerous and burdensome as to demand the institution of a special judicial tribunal for their examination. An act of congress was accordingly passed, February 24, 1855 (ch. 122: 10 Stat. at Large, 612), instituting a *Court of Claims*.

Organization.

The court was made to consist of three judges, to be appointed by the president and senate, and to hold their offices during good behavior; and, as no times were fixed for its sessions, it was, by implication, at all times open; and, as provision was made for its accommodation at the national capital, and not elsewhere, it was in like manner there located; and its sessions are in fact held in a room in the capitol.

Jurisdiction.

The court is authorized and required to "hear and determine all claims founded upon any law of congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which may be suggested to it by a petition filed therein; and also all claims which may be referred to" it "by either house of congress."

Claims, how preferred.

The claimant is required "to set forth a full statement of his claim, and of the action thereon in congress, or by any of the departments, if such action has been had."

The court has exercised the authority conferred upon it by the act "to establish rules and regulations for its government," by prescribing a carefully devised set of rules, which may be found in the

appendix. The first of these rules requires the "action" to be instituted by a printed petition, addressed to the court, and signed by the claimant or his counsel. The second rule prescribes with minuteness the structure of the petition.

Petition and its contents.

The court is empowered "to appoint commissioners to take testimony, to be used in the investigation of claims that may come before it; to prescribe the fees they shall receive for their services; and to issue commissions for the taking of such testimony, whether the same be taken at the instance of the claimant or of the United States; and also to issue subpœnas to require the attendance of witnesses; which subpœnas shall have the like force as if issued from a district court of the United States, and compliance therewith shall be compelled under such rules and orders as the court * * * shall establish." In all cases, when it can conveniently be done, testimony shall be taken in the county where the witness resides. The commissioners are authorized to administer an oath or affirmation to the witnesses brought before them.

Court to appoint commissioners and issue commissions.

The 19th rule provides for the appointment of permanent and of special commissioners, and determines the form of the commission to each. The several judges of courts of record, for the time being, in the states and territories, are appointed commissioners.

The court is required to keep a record of its proceedings, and, at the commencement of each session of congress, and at the commencement of each month during its session, to "report to congress the cases upon which they shall have finally acted, stating in each the material facts which they find established by the evidence, with their opinions in the case, and the reasons upon which such opinion is founded." Dissenting opinions and the briefs of counsel are

Proceedings of the court to be reported to congress.

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required to be appended to the report, and the whole to be printed. An adverse decision, confirmed by congress, is declared to be final.

Court may refuse to take testimony—when.

When the claim, as set forth in the petition, appears to be groundless, the court may refuse to direct the taking of evidence subject to the dissent of congress.[1]

Cross-examination.

Witnesses may be cross-examined on written interrogatories or orally.

Documentary evidence.

The court is empowered "to call upon any of the executive departments for any information or papers it may deem necessary, and have the use of all recorded and printed reports made by the committees of each house, when deemed to be necessary in the prosecution of the duties assigned by this act." But no such call upon the head of a department shall be answered, "if, in his opinion, it would be injurious to the public interest" to do it. In those cases which are decided in favor of the claimant, the court is required to frame a bill or bills adapted to effectuate its decision; and when the aggregate amount adjudged to several distinct claimants is less than $1,000, their cases may be grouped in one bill. The proceedings throughout, in taking evidence, are regulated with great precision by the rules of the court.

Briefs.

The claimant is required to file or serve a full *brief* within thirty days before the hearing of his cause, and the professional representative of the United States within twenty days after. All items of claim not specified in the claimant's brief are to be deemed to have been waived. Briefs and testimony are to be printed, and copies thereof delivered to the judges at least one day before the hearing. (See appendix—Rules of the Court of Claims.) Such was the court of claims as originally

[1] Nevertheless, one of the rules of the court directs the clerk to "enter, *as of course*, an order for taking testimony" on the filing of a petition. (See Appendix, Rule 36.) It is therefore on motion or objection that the court denies the order.

established by the act of February 24, 1855, ch. 122. The act contains other provisions, which have been repealed or modified by subsequent acts. An amendatory act was passed August 6, 1856, which has also been repealed or superseded. The next of these acts is the highly important act of March 3, 1863, ch. 92: 12 Stat. at Large, 765. It increases the number of judges to five, one of whom is to be appointed chief justice, and largely extends its powers; it enacts—

Act of March 3, 1863. Five judges.

"That all petitions and bills praying or providing for the satisfaction of private claims against the government, founded upon any act of congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, shall, unless otherwise ordered by resolution of the house in which the same are presented or introduced, be transmitted by the secretary of the senate, or the clerk of the house of representatives, with all the accompanying documents, to the court aforesaid."

Petitions and bills to be transmitted to the court.

The act extends the jurisdiction of the court to—

"All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the government against any person making claim against the government in said court; and, upon the trial in any such cause, it shall hear and determine such claim or demand, both for and against the government and claimant; and if, upon the whole case, it finds that the claimant is indebted to the government, it shall render judgment to that effect, and such judgment shall be final, with the right of appeal, as in other cases herein provided for. Any transcript of such judgment, filed in the clerk's office of any district or circuit court of the United States, shall be entered upon the records of the same, and shall, *ipso facto*, become and be a judgment of such district or circuit court, and shall be enforced in like manner as other judgments therein."

Offsets, &c., to be admitted.

Judgment to be rendered for sum due to the United States.

Judgment to be enforced by district or circuit courts.

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Sessions to commence first Monday of December.

This act requires the court to hold "one annual session, commencing on the first Monday of October (since changed to the first Monday of December), in each year, and continuing so long as may be necessary for the prompt despatch of the business of the court."

Power to administer oaths.

Seal.

Petitions to be verified, &c., in what form.

The judges and clerk of the court are invested with authority to administer oaths or affirmations, to take acknowledgments in writing, and give certificates of the same; and the court is to have a seal, with such device as it may order. All petitions are to be verified by the affidavit of the claimant, his agent or attorney, stating that no assignment of the claim, or any part of it, or any interest therein, has been made, except as in the petition stated; that the claimant is justly entitled to the amount claimed, after allowing all claims and offsets; and that he believes the facts as stated in the petition to be true; and no judgment can be rendered in favor of the claimant unless, if he be a citizen of the United States, the petition avers that the claimant, and, when the claim has been assigned, the original and every prior owner, has, at all times, borne true allegiance to the government of the United States.

No adjudication in favor of a disloyal citizen.

Jurisdiction not to extend to treaty stipulations.

The jurisdiction of the court is declared not "to extend to or include any claim against the government not pending on the first day of December, Anno Domini eighteen hundred and sixty-two, growing out of, or dependent on, any stipulation entered into with foreign nations or with the Indian tribes."

Claimants may be examined.

At the instance of the counsel of the United States, the court may order the claimant or claimants, or any one or more of them, to appear, on reasonable notice, before a commissioner and be examined, on oath or affirmation, touching the claim in question.

Valid claims, how paid.

Claims finally adjudged in favor of the claimaint are to be paid on the presentation of a duly certified

copy of the judgment to the secretary of the treasury, with or without interest, as prescribed by the act. All claims are barred by the lapse of six years, with a saving, however, in favor of married women, minors, persons beyond seas, and of idiots, lunatics and insane persons, who are allowed three years after the disability has ceased.

Limitation to six years.

Fraud, or any attempt to practice it, "in the proof, statement or allowance of any claim, or any part of any claim, against the United States," works its forforfeiture; but such fraud must be specially found by the court. In all such cases, however, an appeal may be taken to the supreme court "on all questions of law, in the same manner herein provided for in other cases."

Section five enacts that from the final judgments of the court, when the amount in controversy exceeds three thousand dollars, an appeal may be taken, within ninety days, to the supreme court, under such regulations as that court may direct:

Right of appeal to supreme court.

"And when the judgment or decree will affect a class of cases, or furnish a precedent for the future action of any department of the government, in the adjustment of such class of cases, or a constitutional question, and such facts shall be certified to by the presiding justice of the court of claims, the supreme court shall entertain an appeal on behalf of the United States, without regard to the amount in controversy."

In what cases without regard to amount in controversy.

[Rules have been prescribed by the supreme court regulating appeals from the court of claims. See appendix, rules of this court.]

But the 14th and last section of this act provides, "that no money shall be paid out of the treasury for any claim passed upon by the court of claims, till after an appropriation therefor shall be estimated for by the secretary of the treasury;" and, an appeal having been brought, pursuant to the 5th section,

Construction of the 14th section of the act.

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that section was held to have been virtually repealed by the above recited 14th section. The Chief Justice, speaking for the court, is reported to have said:

"The court has fully considered the able and instructive argument of counsel upon the question of jurisdiction, which presents itself at the threshold of this cause, and has found itself constrained to the conclusion that, under the constitution, it can exercise no appellate jurisdiction over decisions of the court of claims. We think that the authority given to the head of an executive department, by necessary implication, in the 14th section of the amended act, to revise all the decisions of this court, requiring payment of money, denies to it the judicial power, from the exercise of which appeals can be taken to this court. The reasons which necessitate this conclusion may be more fully announced hereafter. At present we restrict ourselves to this general statement, and to the direction that the case be dismissed for want of jurisdiction."

From this decision Justices MILLER and FIELD are reported to have dissented.[1]

The 14th section repealed.

The decision led to the repeal, by the act of March 17, 1866, already cited, of this 14th section, and a provision giving an appeal within ninety days after the passage of the act in cases theretofore decided by the court of claims.

Members of congress are by this act (of 1863) forbidden to practice in this court.

By the act of March 17, 1866 (ch. 19: 14 Stat. at Large, 9), the regular session of the court is made to commence on the first Monday of December in each year; and it requires the clerk of the court, at the end of every term, to "transmit a copy of the

Copy of decisions to be transmitted to heads of departments, &c.

[1] That a sense of offended dignity should have been aroused by this remarkable enactment was natural; and if the learned reader should be led to surmise that the majority of the court were in some slight measure unconsciously biased by this feeling, he will, doubtless, while rendering due homage to the unyielding virtue of the minority, feel inclined to excuse the error.

decisions thereof to the heads of departments; to the solicitor, comptrollers and auditors of the treasury; to the chiefs of bureaus, and to other officers charged with adjusting claims against the United States."

The act of May 9, 1866 (ch. 75), extends the jurisdiction of the court to—

The court empowered to grant relief in cases of loss of papers.

"The claim of any paymaster, quartermaster, commissary of subsistence, or other disbursing officer of the United States, or of his administrators or executors, for relief from responsibility on account of losses by capture or otherwise, while in the line of his duty, of government funds, vouchers, records and papers in his charge, and for which such officer was or is held responsible: *Provided*, that an appeal may be taken to the supreme court, as in other cases."

Whenever the court shall have ascertained that the loss was without fault or negligence it shall in its decree set forth the amount thereof, which shall be allowed to the claimant on the settlement of his accounts.

The act of 1863 having, as we have seen, given to the United States a *qualified* right of appeal from the adverse decisions of the court of claims, without regard to the amount in controversy, the supplemental act of June 25, 1868 (ch. 71: 15 Stat. at Large, 75), *removes the limitation* imposed by the act of 1863, and extends the right of appeal by the United States to *all* adverse decisions.

Right of appeal in favor of United States extended.

This act also abolishes the offices of solicitor, assistant solicitor and deputy solicitor, created by the prior acts, and charged with the duty of attending to the rights and interests of the United States in all cases brought before the court of claims, and substitutes the attorney-general of the United States, who, "with his assistants," is required to "attend to the prosecution and defense of all matters and suits in the court of claims on behalf of the United

Attorney-general and his assistants to supersede solicitor, &c.

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States." And the act accordingly directs the appointment by the president and senate of two assistant attorneys-general, to hold their offices for four years, at salaries of $4,000; and the attorney-general is also empowered to appoint two additional clerks.

New trial.

At any time within two years after a final disposition of any suit or claim, the court, on satisfactory proof of any fraud, wrong or injustice to the United States in the prosecution of any claim, may grant a new trial.

It having, by a proviso to section three of an appropriation act passed July 2, 1864 (ch. 210, 13 Stat. at Large, p. 351), been enacted "that in the courts of the United States there shall be no exclusion of any witness on account of color, nor in civil actions because he is a party to, or interested in, the issue tried;" and this proviso having, by the second section of another appropriation act passed March 2, 1867 (ch. 66, 14 Stat. at Large, p. 440), been declared applicable to all suits in which the United States shall be a party, the act of 1868, now under consideration,

Plaintiff or claimant not a competent witness in support of a claim.

ordains "that no plaintiff or claimant, or any person from or through whom any such plaintiff or claimant derives his alleged title, claim or right against the United States, or any person interested in any such title, claim or right, shall be a competent witness in the court of claims in supporting any such title, claim or right, and no testimony given by such

But may be examined in behalf of the United States.

plaintiff, claimant or person shall be used," reserving to the United States, however, the right to examine the claimant, &c., as provided by the act of 1863.

Transmission of papers.

The act prescribes minute and exact regulations, requiring, in specified cases, the transmission by the court of copies of petitions to the heads of the executive departments, and the transmission, also, of various documents, statements, copies and abstracts

from these departments to the attorney-general and his assistants, at the request of these officers.

Certain claims upon executive departments to be referred to the court.

And when any claim is made upon any executive department, involving disputed facts or controverted questions of law, where the amount in controversy exceeds 3,000 dollars, or where the decision will affect a class of cases, or furnish a precedent for the future action of any executive department in the adjustment of a class of cases, without regard to the amount involved in the particular case, or where any authority, right, privilege or exemption is claimed or denied under the constitution of the United States, such department is by the act authorized to cause such claim, with all the vouchers, papers, proofs and documents pertaining thereto, to be transmitted to the court of claims, to be there proceeded in as if originally commenced therein. The same power is also specifically conferred on the secretary of the treasury, to be exercised upon the certificate of any auditor or comptroller of the treasury. This power of reference is, however, expressly restricted to cases of a nature which, by law, makes them cognizable by the court of claims at the voluntary suit of the claimant.

And by secretary of the treasury on the certificate of, &c.

Aliens not permitted to sue in certain cases, unless, &c.

The act of July 27, 1868 (ch. 276, 15 Stat. at Large, 243), disqualifies aliens to sue in any court of the United States for any cause of action depending on certain specified acts of congress, with a proviso in favor of "aliens who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts." Such aliens are to retain "the privilege of prosecuting claims against the government in the court of claims, as now provided by law." This act contains also other provisions which it is unnecessary to notice, because they relate to matters soon to become obsolete.

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Report to congress.

Lastly, the act makes it the duty of the clerk of the court to transmit to congress, at the commencement of every December session, a full and complete statement of all the judgments rendered by the court during the previous year, stating their amounts and the parties in whose favor rendered, together with a brief synopsis of the nature of the claims adjudicated.[1] The act repeals all provisions of any act "incompatible" with it.

As to the *nature* of the jurisdiction with which the court of claims is invested, it may, it is presumed, be safely asserted that it is both legal and equitable; and this definition, while it conveys a just notion of its extent, serves also to determine its limits. The court can dispense no favors—it can confer no gratuities; but, within the prescribed limits of its jurisdiction, it is bound to award and enforce justice according to the principles and rules of decision governing courts of equity, as well as courts of law.

The practice of the court may be sufficiently learned from its rules. (See Appendix—Rules of the Court of Claims.)[2]

[1] I have received a printed copy (just in season to notice it) of the report made at the commencement of the present session of Congress, containing a statement of more than eighty judgments rendered by the court during the year ending December 6, 1869, from which it appears that about one-third of the claims preferred were dismissed; and that, in the others, sums varying in amount from a few hundred dollars to $125,300 were awarded to the claimant.

[2] The professional representatives of claimants before the court, it will be observed, are, in the rules, sometimes denominated solicitors and sometimes counselors. The rules are silent relative to the qualifications of the practitioners of the court, and prescribe no conditions of admission. The just inference seems to be that all persons who have been admitted to practice in any of the other courts of the United States, and probably, also those admitted to practice in the superior courts of the states, are permitted to appear in this court. Nor can I find any provision for the service of any coercive or mandatory process of the court, except the subpœna; nor for the attendance of minis-

It was not until after the foregoing part of this chapter was written that I became aware of the published reports of the decisions of the court of claims, and, consequently, I could only give the general outline of its jurisdiction as declared by statute, and of its practice as regulated by its rules. But, in accordance with the plans I have pursued with respect to the other courts, I propose now to add a summary reference to the adjudications of the court, more exactly defining its powers and its practice, and a few others also distinguished by their importance.[1] A considerable proportion of these decisions, relative to the jurisdiction of the court, however, were in cases arising out of the rebellion, and generally depended on acts of congress having the same origin. This class of cases will soon be, if they are not already, disposed of, and few, if any, new suits of this nature are likely to be instituted.

These decisions may, therefore, without harm, be in general passed over.

The act of February 24, 1855, establishing the court of claims, is entitled "An act to establish a court for the *investigation* of claims against the United States;" and, accordingly, as we have seen,

terial officers to enforce order in the court. Possibly there may be some provisions of this nature in some act relating to the District of Columbia which has escaped my observation, and which are understood to extend to this court.

[1] There are now three handsome and neatly printed volumes of these reports, and I learn that a fourth is in preparation, and will shortly appear. They commence with the decisions made in the year 1863, and terminate with those made at December term, 1867. The reporters are Messrs. Nott and Huntington, the former of whom is one of the judges of the court (and to the latter of whom it affords me much pleasure to acknowledge my obligation for much useful information); and they appear to me to have executed their task with skill and fidelity. The judgments of the court evince a degree of ability, learning and industry, exceedingly creditable to its judges.

PART 1. while it requires this court to "*hear and determine* all claims," &c., and denominates its determinations, "*decisions*," it nowhere empowers the court to pronounce *judgments*, or clothes it with authority to enforce its decisions; but, on the contrary, requires a formal report of them to congress, and a legislative act to carry them into effect; nor was the court authorized to have a *seal*. *Nource's Case*, 2 C. Cls. R., 214. Its functions, therefore, were exactly analogous to those of a master in chancery acting under an order of reference.

The act of March 3, 1863, changed its character in this respect by investing it with the attributes of a judicial tribunal empowered to pronounce authoritative "judgments and decrees," subject only, like those of the circuit and district courts, to the appellate jurisdiction of the supreme court.

It repealed all laws inconsistent with its provisions; but it left unchanged the enumeration contained in the original act of the subjects of its jurisdiction,—among which, it will be remembered, is that of "*all* claims founded upon any act of congress."

Two years after the passage of this act a suit was brought (*Alire's Case*, 1 C. Cls. R., 233), to establish the claimant's right to a bounty land warrant for one hundred and sixty acres of land. The claim was, of course, founded upon an act (or rather two acts) of congress. It had already been presented for allowance at the pension bureau, and had been denied, on the ground that it was not within the province of these acts. The decision of the commissioner of patents had been affirmed by the secretary of the interior on appeal; and his decision in such cases had by law been declared final.

Adverse decision of executive department no bar to

One of the defenses set up in behalf of the United States was this decision, which, it was contended, was conclusive, and, consequently, that the claim

was not within the jurisdiction of the court. The court held the objection invalid. This suit, the court said, was not an appeal from the decision of the executive department. It was an original judicial proceeding to which the petitioner had a right to resort, and which the court was bound to entertain.

the jurisdiction of the court.

It was objected also that the Indian troubles, in which the claimant served, did not constitute a "war," in the sense contemplated by the act. This objection was also overruled, and it was "adjudged and decreed, that the said Julian Alire, the claimant, is entitled to have and recover of and from the United States one military land warrant for one hundred and sixty acres of land for services," &c.; and it was further adjudged and decreed that the said military bounty land warrant be made, issued and delivered to the claimant by the proper officer; and it was ordered that the decree be certified by the clerk, under the seal of the court, and transmitted to the secretary of the interior. One of the judges is said to have dissented, but it is not stated upon what ground. The arguments of counsel are not reported; but in the elaborate and obviously well considered opinion of the court there is no intimation of any doubt suggested by the counsel, or entertained by the court that the case was, in its nature, one to which the jurisdiction of the court extended. It was a claim "founded upon an act of congress," and, therefore, directly within the very terms of the enactment defining that jurisdiction. But the decree, on an appeal to the supreme court, was, nevertheless, reversed for want of jurisdiction in the court of claims; the court being of opinion, that, according to the true construction of the acts of 1855 and 1863, they conferred no authority upon the court of claims to render any judgment or

The jurisdiction of the court limited to pecuniary claims.

PART 1. decree, except "*for money found due from the government to the petitioner.*" [1]

[1] This construction was founded upon the direction contained in the seventh section of the act of 1863, "that in all cases of final judgments by said courts, or on appeal by the said supreme court, where the same shall be affirmed in favor of the claimant, the sum due thereby shall be paid out of any general appropriation made by law for the payment and satisfaction of private claims, on presentation to the secretary of the treasury of a copy of the said judgment, certified by the clerk of said court of claims, and signed by the chief justice, or, in his absence, by the presiding judge of said court." This sweeping limitation, it will readily be seen, equally embraces, as well, the other classes of cases confided to the court of claims, viz.: those grounded upon any regulation of an executive department, and those grounded upon any contract, express or implied, with the government of the United States—as those founded on a law of congress. The first duty of a judicial tribunal, when called upon to expound a legislative act, is to ascertain, if possible, its intent, and so to interpret it, if its words will permit, as to effectuate that intent. If this comprehensive limitation of the jurisdiction conferred by the first section of the act establishing the court was intended, is it not reasonable to conclude that such intent would have been directly expressed? Statutes, moreover, are to be so construed, if possible, as to give full effect to all their provisions; and the same rule is equally applicable to two or more acts in *pari materia*. A construction of these acts, the opposite of that given to them by the supreme court, would have been in accordance with this rule; the construction, on the contrary, which that court saw fit, by vague implication, to put upon a provision contained in one of them, greatly limits, and, *pro tanto*, repeals an enactment of paramount importance contained in the other. Besides, there was an obvious and sufficient reason for designating the fund out of which a "judgment" for a sum of money awarded to the claimant should be paid; there was none for designating the mode in which "decrees" like that before the court should be effectuated. Nor can I see any serious difficulty in avoiding the grave responsibility of curtailing the jurisdiction of the court of claims so unequivocally conferred; for I am unable to discern any valid objection to the conclusion that the provisions of the seventh section of the act of 1863 were intended to be limited to the class of cases to which they *are adapted*, with no intention to interfere with other cases embraced by the language of the first section of the act of 1855. Such a construction, to say the least, would have been less objectionable than that which, by vague implication, converts the former into a destructive weapon covertly directed against the latter. Some of the statements, in the opinion of the court, of the provisions

United States not responsible for consequences of public acts.

It is a principle firmly established by a series of decisions in this court, that the United States can in no case be held liable to contractors for losses to which they may be subjected in consequence of the *public* acts of the government, whether legislative or executive. A contractor, accordingly, can obtain no reparation in the court of claims for losses resulting from an act of congress increasing the duties on goods he had contracted to furnish (*Deming's Case*, 1 C. Cls. R., 190); nor for losses suffered in consequence of an executive order for the removal of troops causing delays and additional expense in the execution of his contract. *Jones and Brown's Case*, id., 383. The doctrine of these cases is, that the United States as a contractor cannot be held responsible for the acts of the United States as a lawgiver. It was virtually reasoned out with distinguished ability and fullness by Chief Justice CASEY, and established by the court, in Latham's Case, 1 C. Cls. R., 149. If it seems rigorous at first blush, it must be remembered that it only places contractors with

of the acts in question are surprisingly erroneous. A single instance will suffice to show its remarkable inaccuracy in this respect. "Nor," say the court, "does either court (the supreme court or the court of claims) possess any authority to render such a judgment, as is apparent from a perusal of the seventh section of the act of 1863, and *which is the only one providing for the rendition of a judgment or decree in any case.*" This section contains no such provision, nor a single sentence importing, directly or indirectly, any such purpose. The court are equally in error in asserting the lack of authority to render judgments derivable from other sections of the act. The third and fifth sections clearly imply this authority, and the third directly enjoins its exercise; and it provides, moreover, for the filing of transcripts of the judgments of this court, for balances found due from claimants to the United States, with the clerks of the district and circuit courts of the United States, whereby such judgments shall become "*ipso facto*" judgments of such courts. The fifth section gives an appeal to each party "from any final judgment or *decree*" of the court, when the amount in controversy exceeds $3,000, and, in certain specified classes of cases, whatever may be the amount.

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the United States upon precisely the same footing as all other contractors. Private interests must yield to public exigencies, and the hardship in the one case is no greater than in the other.

An order not a regulation.

A "*regulation of an executive department*," in the sense intended in the act of 1855, in defining the jurisdiction of the court, is a rule made by the head of a department regulating its action. An order designating a clerk to perform an extra service is not a regulation. *Harvey's Case*, 3 C. Cls., 38.

Duties voluntarily paid not recoverable.

The act of February 26, 1845 (ch. 22, 5 Stat. at Large, 727), recognizing the just claim of an importer of merchandise to the restoration of duties unlawfully exacted and paid thereon, neverthelss forbids the secretary of the treasury to refund such duties, and denies a right of action against the collector, unless they were paid under protest in writing, signed by the claimant, setting forth distinctly and specifically the grounds of objection to the payment thereof.

In *Schlesinger's Case* (1 C. Cls. R., 16), the claimants had imported iron and steel, and had paid certain duties thereon, which, it afterwards appeared, were not demandable by law, but which both the claimants and the collector supposed to be lawful, and which were accordingly paid without protest.

To the petition setting forth these facts the solicitor for the United States demurred, assigning for cause of demurrer:

1. That the court had not jurisdiction; congress having, by the act above cited, provided a remedy by suit against collectors, and thereby excluded a resort to any other.

2. That the duties were paid *without protest.*

3. That there was no cause of action set forth in the petition.

The court were of opinion, that, although cases of compulsory payment might occur in which a suit might be maintained in that court against the United States without a protest, yet that the policy of the act extended as well to such suits as to suits against a collector, which really were suits against the United States; and that, as a general rule, no action could be maintained without a protest. The case was held to be, moreover, within the well-settled rule that money voluntarily paid was not by law recoverable. The demurrer was accordingly sustained, and the petition *dismissed.* (See *Appendix*, Rule 11 of C. Cls.)

The court has no jurisdiction of a suit against a state, or in which a state is necessarily impleaded, as a party defendant; nor of an action against the United States for aiding in the "wrongful diversion of the proceeds of lands," to which the claimants assert a right. *The Milwaukee & Rock River Canal Company's Case*, 1 C. Cls. R., 187.

The court has no jurisdiction of a suit against a state, nor against the United States, for a tortious act.

No action on the case for damages, or of assumpsit, can be maintained in the court of claims against the United States, for the use, by a subordinate officer of the government, of the claimant's patented machine. *Pitcher's Case*, 1 C. Cls. R., 7.

United States not responsible for infringement of patent by subordinate officer.

An act of congress, passed in 1797 (1 Stat. at Large, 513), entitles the defendant, in a suit instituted by the United States in a circuit or district court, to recover a debt alleged to be due from him, to prove that he is entitled to "credits;" provided, they are shown to have been presented to the accounting officers of the treasury, and by them disallowed; or if it shall appear at the trial that the defendant is then in possession of such vouchers, not before in his power to procure, and that he was prevented from presenting them at the treasury, for allowance by absence from the United States, or some unavoid-

Balance found in favor of the defendant at the suit of United States.

PART 1. able accident. It is thus sometimes made to appear that the defendant has a just claim to a balance in his favor. But the act prescribes no means by which such balance shall be rendered available. It has, however, to a greater or less extent, been customary, in such cases, to instruct the jury to find the amount of the extra credits; and in the southern district of New York it was, it seems, the practice, in rendering a judgment that the defendant go without day, to adjudge also that he was entitled to be paid the sum so certified. This was done by the circuit court in *Tillou's Case*, in which a large sum was found to be due to the defendants. A motion was thereupon made, in behalf of the United States, for a new trial, and denied. For the purpose of obtaining the balance so adjudged to them, the defendants resorted, as claimants, to the court of claims, and, to establish a right of recovery, they relied on the judgment of the circuit court as conclusive.

The decision of the court was in their favor. In a learned and elaborate opinion, pronounced by the Chief Justice, it was held (Judge LORING dissenting, and Judge COX, not having heard the argument, taking no part in the decision), that the question had been rightfully and properly submitted to the jury in the circuit court, and that the verdict and judgment had become conclusive, in virtue of the seventh article of the amendments of the constitution, ordaining that "no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law;" the only such mode being a new trial in the court in which the verdict was rendered. *Tillou's Case*, 1 C. Cls., 220.

But on appeal to the supreme court the judgment was reversed—that court being unanimously of opinion, that, as the right of set-off did not exist at

common law, and the state law being inapplicable to the case, this right could, accordingly, be conferred only by an act of congress; the question must depend exclusively upon the just construction of the act of 1798, above quoted; and that, as this act purported only, in guarded terms, to confer upon the defendant the privilege of showing that he is justly entitled to credits, which had been denied to him at the treasury, this privilege extends no further than to allow him thereby to reduce, *pro tanto*, the amount for which he would otherwise be liable, or to defeat any recovery against him, if the credits to which he is entitled equal or exceed that amount. It was, accordingly, held, that the act did not warrant a judgment against the United States for any excess of credit, and, consequently, that the judgment relied on by the defendant, in the court of claims, was invalid, and ought not to have been received as evidence. *The United States, Appellants*, v. *Tillou*, 3 C. Cls. R., 454.[1]

Such balance not recoverable in court of claims without evidence *aliunde*.

Touching the degree of strictness required in pleadings, the following extract from the opinion of the court in *Price's Case* (1 C. Cls. R., 195) will serve to some extent, and, as well, perhaps, as any general formula can, to guide the pleader:

Rules of pleading less technical than at common law.

"We do not intend that our proceedings shall, in all respects, conform to or be regulated by the common law

[1] The supreme court express no disapprobation of the practice of instructing the jury to ascertain and certify the amount due the defendant, but, on the contrary, re-affirm the views expressed by that court in *De Groot* v. *The United States* (5 Wallace, 422), in which it was said, that, although no judgment can be rendered against the United States, it may be judicially ascertained that, on striking a balance of just demands, the government is indebted to the defendant in an ascertained amount. But it is not to be disguised that it leaves the defendant — dragged into court as a debtor, though, in fact, a creditor, and that, too, by a plaintiff not chargeable with costs — in a predicament little creditable to the nation.

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system of special pleading; constituted as this court is, it is not requisite that the pleadings before it should necessarily present a single issue for its consideration, as is in general considered indispensable in trials by jury. We propose to be governed by the substance of things rather than by forms and technicalities. The exact rules of pleading are not necessarily adapted to our jurisdiction."

Joinder of petitioners when inadmissible.

The joinder in the same petition of persons having no common interest is too gross a departure for established rules of pleadings to be tolerated. *Wilson's Case*, 1 C. Cls. R., 377.

Demurrer.

Pleadings are to be taken strictly against the pleader, who is always supposed to state his case as favorably as the truth will warrant; and if a petition will not bear this test, it will be dismissed on demurrer. *Merchants' Exchange Company's Case*, 1 C. Cls. R., 332. Nor can there be a recovery founded on evidence of facts not alleged. *Brown & Co.'s Case*, 1 C. Cls. R., 318.

Alleged agency and official character to be proved.

When, in a suit to recover the price of goods alleged to have been sold to an agent of a quartermaster, all the allegations of the petition are denied, the claimant must prove the appointment of those persons. *Calkins's Case*, 1 C. Cls. R., 382.

When previous application to department must be averred.

In cases specified in the second rule of the court (see Appendix—Rules of Court of Claims), unless a previous application to the proper executive department be averred, the petition will be dismissed. *Id.*

Court equally divided, case dismissed.

In a case in which the judges were agreed upon the facts, but were equally divided touching the law, the case was dismissed to the end that the claimant might take his appeal.

Joinder of agent will not vitiate.

The joinder of the agent, with his principal as claimant in the petition, will not defeat the action. *Ramsdell & Smith's Case*, 2 C. Cls. R., 508.

An agreement to accept less than is due is not binding.

In this case it was also held that an agreement on the part of a contractor to accept a part in lieu of

the whole of the sum to which by the terms of his contract he was entitled, is *nudum pactum*, although the agreement was required and given through a military commission. CHAP. 13.

CHAPTER XIII.

OF THE TERRITORIAL COURTS.

In virtue of the third section of the fourth article of the constitution of the United States, by which it is declared that, "The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," the United States possess plenary and undivided sovereignty over the immense regions thus confided to their care; and in the exercise of this trust, congress has, from time to time, established territorial governments over defined portions of the national domains. Many of the territories thus formed have successively been constituted states, and, as such, admitted into the union. The following extract from the judgment of the supreme court, pronounced by Chief Justice MARSHALL, in *The American Insurance Co. et al.* v. *Canter* (1 Peters, 546), cannot fail to be appreciated by the student as a clear and instructive exposition of the political condition of the territories, and of the source and nature of the judicial powers with which they are invested:

"It has been contended that, by the constitution, the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction, and that the whole of their judicial power must be vested in 'one supreme court, and such inferior courts as congress shall from time to time ordain and establish.' Hence, it has been argued that congress could vest admiralty jurisdiction in courts created by the territorial legislatures.

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"We have only to pursue this subject one step further to perceive that this provision of the constitution does not apply to it. The next sentence declares that 'the judges, both of the supreme and inferior courts, shall hold their offices during good behavior.' The judges of the inferior courts of Florida hold their offices for four years. These courts, then, are not constitutional courts, in which the judicial power conferred by the constitution on the general government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined by the third article of the constitution, but is conferred by congress in the execution of those general powers which that body possesses over the territories of the United States. Although admiralty jurisdiction can be exercised in the States in those courts only which are established in pursuance of the third article of the constitution, the same limitation does not apply to the territories. In legislating for them, congress exercises the combined powers of the general and of the State government."

The organic acts of the seven existing territories are in most respects alike. The executive power "in and over the territory" is vested in a governor appointed by the president and senate, who holds his office four years, unless sooner removed by the president. He is commander-in-chief of the militia and superintendent of Indian affairs. He has a qualified veto and pardoning power; and is charged with the duty of taking care that the laws be faithfully executed. There is a secretary appointed in like manner, who, in case of a vacancy in the office of governor, is temporarily invested with his powers and performs his duties.

The legislative power of the territory is vested in the governor and a legislative assembly, consisting of a council and a house of representatives chosen by the people. The legislative power extends "to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of" the organic act; but no law can be passed interfering with the primary disposition of the soil; no tax can be imposed upon the property of the United States, and the property of non-residents cannot be taxed higher than that of residents.

The judicial power is vested in a supreme court, district courts, probate courts and justices of the peace. The supreme court consists of a chief justice and two associate justices appointed by the president and senate, who are required annually to hold a term of the court at the seat of government of the territory. They hold their offices for four years. The territory is to be divided (by law of the territory) into three judicial districts, and a district court is to be held in each, by one of the justices of the supreme court assigned for the purpose, "at such times and places as shall be prescribed by law." This is the language of all the organic acts. But, by a general act (August 16, 1856, ch. 124, 11 Stat. at Large, 49), the judges of the supreme court of the several territories, or a majority of them, are required, "when assembled at their respective seats of government, to fix and appoint the several times and places of holding the several courts in their respective districts, and limit the duration of the terms thereof. *Provided*, that the said courts shall not be held at more than three places in any one territory: And *provided further*, that the judge or judges holding such courts shall adjourn the same, without day, at any time before the expiration of such terms, whenever, in his or their opinion, the further continuance

PART 1. thereof is not necessary." By another general act (June 14, 1858, ch. 166, 11 Stat. at Large, 366), the several judges are "authorized to hold court within their respective districts, in the counties wherein, by the laws of the said territories, courts have been or may be established, for the purpose of hearing and determining all matters and causes, except those in which the United States is a party: *Provided*, that the expenses thereof shall be paid by the territory, or by the counties in which said courts are held, and the United States shall in no case be chargeable therewith." This act, it will be seen, provides for the appointment of special sessions of the district courts for the accommodation of private suitors alone. In speaking of "the counties wherein, *by the laws of the territory*, courts are held, it infers either a forgetfulness of the above recited act of 1856, requiring *the judges* to appoint the *places* as well as the times of holding the courts, or else the assumption that the authority of the judges was limited to a designation of the particular places for the sessions of the court, *in the counties* already designated for that purpose by law. The former inference seems the more probable. The judges are appointed for the term of four years, and no authority is given or recognized by law to remove them from office. And yet, they have, in several instances, been superseded by the appointment of others in their place. The jurisdiction of the supreme and district courts, both original and appellate, and that of the probate court and of justices of the peace, "shall be as limited by law: *Provided*, that justices of the peace shall not have jurisdiction of any matter in controversy where the title or boundaries of land may be in dispute, or where the debt or sum claimed shall exceed one hundred dollars;[1] and the said supreme and district

[1] In the territory of Colorado this limitation is $300.

courts, respectively, shall possess chancery as well as common law jurisdiction." From the final decisions of the district courts, writs of error and appeals are allowed to the supreme court of the territory under such regulations as shall be prescribed by law; and writs of error and appeals from the final judgments of the supreme court to the supreme court of the United States, in the same manner and under the same regulations as from the circuit courts of the United States, where the value of the property, or the amount in controversy, to be ascertained by the oath or affirmation of either party, or other competent witnesses, exceeds one thousand dollars;[1] and from *all* decisions whether of the supreme or district courts, or of either of the judges, upon a writ of *habeas corpus* involving the question of personal freedom.

The district courts are severally invested with "the same jurisdiction in all cases arising under the constitution and laws of the United States as is vested in the circuit and district courts of the United States." The first six days of every term of the district courts, or so much thereof as shall be necessary, are to be appropriated to the trial of causes arising under the constitution and laws of the United States, and the appellate power of the supreme court of the territory extends to cases of this description in like manner as to others. The *clerks* of the supreme court and of the several district courts are appointed by these courts respectively, and by the general act of August 16, 1856, ch. 124, the judges are forbidden to appoint more

[1] In the Territory of Washington this limitation is $2,000. A writ of error from the supreme court of the United States to the supreme court of a territory may be issued by the clerk, and the citation may be signed by the chief justice of the latter court. *Sheppard* v. *Wilson*, 5 Howard, 210.

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than one. There is a territorial *attorney*, and a *marshal*, appointed by the president and senate for the term of four years.[1]

The territorial government of NEW MEXICO was established by the act of September 9, 1850, ch. 49; that of UTAH by an act of the same date, ch.. 51; that of WASHINGTON by the act of March 2, 1853; ch. 90; that of COLORADO, by the act of February 28, 1861, ch. 59, amended by the act of March 2, 1863, ch. 70; that of DAKOTA, by the act of the same

[1] As a question of strict statute construction, the fees to which the territorial attorneys and marshals, and the clerks of the territorial courts, are entitled are left in great uncertainty. The oldest of the existing territories are New Mexico and Utah, organized in 1850, and the organic acts gave to these officers the same fees as they received in the territory of Oregon. In each of the subsequent organic acts, a like reference is made to Oregon, Utah or some other prior acts, each successive reference being, in effect, to the act organizing Oregon. But this last act refers to the act organizing Wisconsin, passed in 1836, which gives to these officers the same fees as are allowed to the attorneys, marshals and clerks of the *Northern District of New York*. Six of the eight territories have been organized by laws passed since the passage of the fee bill of February 26, 1853, printed in the appendix, and the references these laws contain to prior organic acts plainly infer that they were drawn up and passed either without a recollection of the existence of the act of February 26, 1853, or under the impression that this act does not embrace the territories. It is highly probable, however, that its provisions are in fact applied at the treasury department to territorial officers.

The political condition of the people of the territories is anomalous. The laws by which they are severally constituted territories are, in effect, their constitutions. But they had no voice in their enactment, and have no power to alter them. The extent to which they enjoy the privilege of self-government is determined by a superior power, and may, at the pleasure of the same power, be abridged. They have no voice in the choice of their chief executive and judicial officers, and no control over their conduct. These officers are generally persons of whom they have never heard, arbitrarily selected, without regard to their fitness for the posts they are to fill. It is, to say the least, doubtful whether the territorial governments are a boon to the inhabitants. They contribute little to the security of the rights of persons or property, while they are an impediment to the exercise of the right of self-protection.

date, ch. 86; that of IDAHO, by the act of March 3, 1863, ch. 117, and March 2, 1867, ch. 151; that of MONTANA, by the act of May 26, 1864, ch. 95; and that of WYOMING, by the act of July 25, 1868, ch. 235.

CHAPTER XIV.

OF THE CONCURRENT JURISDICTION OF THE NATIONAL AND STATE COURTS.

In political communities, where there are courts invested with concurrent jurisdiction, there is a possibility of their being brought into collision with each other, and danger, consequently, of unseemly and mischievous interruptions in the orderly and peaceful administration of justice. In this country the danger of conflict is enhanced by the co-existence of such courts deriving their being and authority from different and independent sources; some of them from the constitution and laws of their respective states, and the others from the constitution and laws of the United States. Not that there is any thing in this relation to vary their correlative obligations cautiously to abstain from all unnecessary interference with each other; but that, as experience has to some extent demonstrated, these obligations may be less sensibly felt or less faithfully observed.

It is not my purpose here to attempt to define more particularly than I have already done, the limits of the concurrent jurisdictions of the national and state courts; but, at the conclusion of this summary view of the jurisdiction of the former, it is proper to advert to a general rule which it has been found necessary, as well in this country as in England, to adopt as a safeguard against judicial conflict. A particular notice of the rule is rendered the more important by an application which has, in one

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instance, been made of it by the supreme court of the United States, because, if the principle adopted by the majority of the court in that instance is to be adhered to, it can hardly fail seriously to impair the efficacy and value of remedies in admiralty, especially in favor of mariners.

The rule is this: that between courts of concurrent jurisdiction, the court that first obtains possession of the controversy, or of the property in dispute, must be allowed to dispose of it finally without interference or interruption from the co-ordinate court. This well-settled rule is equally applicable between courts of equity and courts of common law, and between different courts of common law; and it has repeatedly been asserted and enforced by the supreme court between the national and state courts. This was done in the case of *Hagan* v. *Lucas*.[1] A judgment had been obtained in the state court of Alabama, and, in virtue of an execution issued thereon, the sheriff had levied on certain slaves as the property of the defendants. Lucas, a third person, claimed the slaves as his property, and, under a statute of Alabama, they were delivered to him upon his giving a bond for their forthcoming, if it should be found that they belonged to the defendants. Proceedings were thereupon had in the state court, according to the provisions of the state law, to try the right of property. Pending these proceedings a judgment was obtained in a suit at common law by another creditor against the same defendants in the district court of the United States exercising the powers of a circuit court, and the same slaves were levied on by the marshal under an execution from that court. The state court decided, that, under these circumstances, the property could not lawfully be taken in execu-

[1] 10 Peters, 400.

tion by the marshal upon process from the district court, and, the case having been brought before the supreme court of the United States by writ of error under the twenty-fifth section, the judgment of the state court was affirmed, in obvious accordance with the rule under consideration.

The rule was again applied in the case of *Freeman* v. *Howe et al.*,[1] on a writ of error to the supreme court of Massachusetts. The case, as succinctly and clearly stated by Mr. Justice NELSON, in pronouncing the decision of the court, was this: Selden White, of the state of New Hampshire, in 1856, instituted a suit in the circuit court of the United States for the district of Massachusetts against the Vermont and Massachusetts Railroad company, a corporation under the laws of Massachusetts, to recover certain demands claimed against the defendants. The suit was commenced in the way usual in that state, by process of attachment and summons. Freeman, the marshal and plaintiff in error, to whom the processes were delivered, attached a number of railroad cars, which, according to the practice of the court, were seized and held as a security for the satisfaction of the demand in suit, in case a judgment should be recovered. After seizure, and while the cars were in the custody of the marshal, they were taken out of his possession by the sheriff of the county of Middlesex, under a writ of replevin in favor of Howe and others, citizens of Massachusetts, and the defendants in error, issued from a state court. The plaintiffs in the replevin suit were mortgagees of the Vermont and Massachusetts Railroad company, including the cars in question, in trust for bondholders, to secure the payment of a large sum of money which remained due and unpaid. The defendant, Freeman, in the replevin

[1] 24 Howard, 450.

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suit, set up, by way of defense, the authority by which he held the property under the circuit court of the United States, which was overruled by the court below, and judgment rendered for the plaintiffs. It was to reverse this judgment of the state court that the writ of error was brought; and the supreme court were unanimously and clearly of opinion that the judgment was erroneous, and, accordingly, reversed it.

By force of the attachment from the circuit court, the property was brought into the custody and under the jurisdiction of that court, and upon it devolved the authority and duty to determine the rights of the parties with respect to it; and it was a mistake to suppose that this court was not competent to the protection of those rights; for although the plaintiffs in the replevin suit were citizens of Massachusetts, and could not therefore institute an independent original suit in the circuit court of the United States for the district of Massachusetts against the railroad company whose domicile was there, yet they might have filed a bill in equity in that court, of which it could have entertained and would have been bound to exercise jurisdiction, as incidental to its jurisdiction in the pending suit at law, and to protect and enforce the rights of these plaintiffs. Their resort to the state court, therefore, was unnecessary as well as unlawful.

In each of these two cases, it will be seen, the competing parties stood, as such, with respect to each other, upon a footing of equality. Each claimed a right at common law to satisfaction out of the property in question; and each resorted to a court of common law for redress by means of its common law process. These were cases, therefore, to which the applicability of the rule was unquestionable. But is it applicable to the widely different case of suitors in

different courts, one of whom, in the character of an ordinary creditor, is prosecuting a suit at common law for the recovery of his demand, and the other is seeking, by a suit *in rem* in a court of admiralty, to enforce a paramount lien conferred by the maritime law? This was the question in the intermediate case of *Taylor et al.* v. *Carryl*,[1] already alluded to.

In a suit commenced in the supreme court of Pennsylvania against the owner, resident in Ireland, of the bark *Royal Saxon*, this vessel was taken into custody by the sheriff of the county of Philadelphia, on a writ of foreign attachment. An application was soon afterwards made by the plaintiffs for an order of the court directing a sale of the bark on the ground of her being chargeable and perishable; and the order having been granted, she was sold by the sheriff on the 9th of February, 1848. But while the motion for the order of sale was pending, the seamen on board the bark filed their libel in the district court of the United States for the eastern district of Pennsylvania, sitting in admiralty, for the balances of wages due to them respectively, and a warrant of arrest, in due form, was issued against the bark. On the same day, the marshal made his return to the warrant that he had "attached the bark *Royal Saxon*, and found a sheriff's officer on board, claiming to have her in custody." The captain appeared and filed an answer to the libel, admitting the demands of the seamen. Soon after, on the 25th of January, he exhibited a petition in the district court, stating the pendency of the suits; that the bark was liable to him for advances; that she was subject to heavy charges, and could not be employed, and therefore, he, with the approbation of the British consul, evidence of which accompanied the petition,

[1] 20 Howard, 583.

PART 1. prayed a sale of the bark for the benefit of all persons interested. The order was granted, after due inquiry, on the 9th of February, and the bark was sold by the marshal on the 15th of that month, at which time the purchaser took possession. The purchaser at the sale made by the sheriff, under the order of the state court, thereupon brought an action of replevin in the state court against the purchaser at the sale by the marshal. On the trial, the court charged the jury that the court of admiralty could not lawfully proceed against the bark while she was in the custody of the sheriff, and that the plaintiff had the better title. A verdict having been rendered by the jury in accordance with this instruction, and a final judgment thereon having been given by the supreme court of Pennsylvania, a writ of error was brought under the 25th section, to reverse the judgment. The case was very elaborately argued, and is stated by Mr. Justice CAMPBELL, who delivered the opinion of the court, to have been very maturely considered by the court. The case was held not to be distinguishable in principle from that of *Hagan* v. *Lucas*, already mentioned. The applicability of the rule, it was said, did not depend on the nature of the rights in question. The bark, being in the lawful custody of the sheriff, in virtue of the process of the state court, was beyond the reach of process from any other court, whether a common law court, proceeding as such, or a court of admiralty in a suit *in rem*, to enforce a maritime lien, constituting an acknowledged right of priority over all other claims. No valid arrest could therefore be made by the marshal under the warrant of the district court; the order of sale granted by that court was consequently made without authority, and the purchaser under it, therefore, acquired no title to the vessel; and the judgment of the state court was accordingly affirmed.

Mr. Chief Justice TANEY, in an opinion strongly marked by that extraordinary perspicacity, precision and force which usually characterize his judicial utterances, earnestly combated the opinion of the majority of the court, and Mr. Justice WAYNE, Mr. Justice GRIER and Mr. Justice CLIFFORD concurred with him. He denied that the case before the court was one of conflict between the jurisdiction and rights of a state court and the rights of a court of the United States; a conflict between sovereignties, both acting by their own officers, within the spheres of their acknowledged powers. It was not a question between the relative powers of a state and the United States acting through their judicial tribunals, but merely concerning the relative powers and duties of a court of admiralty and a court of common law, in the case of an admitted maritime lien. It was true the court of admiralty was a court of the United States, and the court of common law was a court of the state of Pennsylvania. But the very same questions may arise, and indeed have arisen, where both courts are created by and acting under the same sovereignty. And the relative powers and duties of a court of admiralty and a court of common law could, upon no sound principles, be different, because the one was a court of the United States and the other the court of a state. The same rules which would govern under similar circumstances, where the process of attachment or a *fieri facias* had issued from a circuit court of the United States, exercising a common law jurisdiction, must govern in this case. The court of admiralty and the court of common law have each their appropriate and prescribed sphere of action, and can never come in conflict unless one of them goes outside of its proper orbit; and a court of common law, although acting under a state, has no right to place itself within the sphere of action

PART 1. appropriated peculiarly and exclusively to a court of admiralty, and thereby impede it in the discharge of the duties imposed upon it by the constitution and laws.

"There are some principles," he proceeded to observe, "which have been so long and so well established, that it is sufficient to state them without referring to authorities."

The lien of seamen for their wages is prior and paramount to all other claims on the vessel, and must be first paid.

By the constitution and laws of the United States, the only court that has jurisdiction over this lien, or authorized to enforce it, is the court of admiralty, and it is the duty of that court to do so.

The seamen, as a matter of right, are entitled to the process of the court to enforce payment promptly, in order that they may not be left penniless and without the means of support on shore. And the right to this remedy is as well and firmly established as the right to the paramount lien.

No court of common law can enforce or displace this lien. It has no jurisdiction over it, nor any right to obstruct or interfere with the lien, or the remedy which is given to the seaman.

A general creditor of the ship-owner has no lien on the vessel. When she is attached (as in this case), by process from a court of common law, nothing is taken or can be taken but the interest of the owner after the maritime liens are satisfied. The seizure does not reach them. The thing taken is not the whole interest in the ship; and the only interest which this process can seize is a secondary and subordinate interest, subject to the superior and paramount claims for seamen's wages; and what will be the amount of those claims or whether any thing will remain to be attached, the court of common law

cannot know until they are heard and decided upon in the court of admiralty."[1]

The chief justice added, that he did "not understand these propositions to be disputed;" and he proceeded at length to deduce from them a conclusion the opposite of that at which a majority of his brethren had arrived. It was perfectly clear, he said, that, if the ship had been seized by common law process from a court of the United States for a debt due from the owner, the possession of the marshal under that process would have been superseded by process from the admiralty upon a preferred maritime lien; and the fact that in the case before the court the process was from a common law court of a state, and served by its own officer, could make no difference. A state court has no more right to impede the admiralty in the exercise of its legitimate powers, than a common law court of the United States. The sheriff, as the ministerial officer of the court, can have no greater power over the vessel than the court whose process he executes. He seizes what the court has a right to seize, and has no possession beyond it. If the interest over which the court has jurisdiction is secondary and subordinate to the interest over which the admiralty has exclusive jurisdiction, his possession is secondary and subordinate in like manner, and subject to the process on the superior and paramount claim. The circumstance that the processes were respectively served by officers of different courts was wholly immaterial. In the case of *The Flora* (1 Hagg., 298), the vessel had been seized by a sheriff on pro-

[1] It is an established principle in admiralty, that all persons who have any claims upon the ship or other property proceeded against, are permitted, and are by public notice, to be invited to appear in court, and not only to claim any surplus that may remain after satisfying the maritime lien, but also, if they see fit, to contest its validity.

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cess from the king's bench. She was afterwards, while in possession of the sheriff, arrested on process from the admiralty on a prior maritime lien, and was sold by the marshal while the sheriff still held her under the common law process; and the sale was held valid by the king's bench.

That court did not seem to have supposed that there was any conflict of jurisdiction in the case, or that its officer had been improperly interfered with by the marshal; nor did the king's bench hold that there was any incongruity in the possession of the sheriff and the marshal at the same time. On the contrary it was conceded that the possession of the sheriff was no obstacle to the arrest by the marshal, nor any impediment to the exercise by the court of admiralty of its appropriate and exclusive jurisdiction, in enforcing claims prior and superior to that of the attaching creditor. Between that case and the case before the court, the chief justice said he could discern no substantial difference.

Precisely the same question, moreover, he added, had been decided by the circuit court for the district of Massachusetts, twenty years ago, in the case of *Certain Logs of Mahogany, Thomas Richardson, Claimant* (2 Sumner, 589), and also by the district court for the district of Maine, thirty years ago, in the case of *Poland et al.* v. *The Freight and Cargo of the Spartan*, Weare's R., 143.

In both of these cases the question was fully considered by the court; and in both it was held that a previous seizure under process of attachment from a state court could not prevent the admiralty from proceeding *in rem*, to enforce the preferred liens of which it has exclusive jurirdiction.

After pointing out what he conceived to be the broad and palpable distinctions between the case in judgment and that of *Hagan* v. *Lucas*, and a brief

notice of some of the deplorable consequences to which the novel principle adopted by the court, if followed out to its legitimate results would inevitably lead, Mr. Chief Justice TANEY concluded his opinion with an instructive and highly significant reference to the protracted and impassioned controversy in England relative to the extent of the admiralty jurisdiction.

Commending this remarkable case to the examination and impartial meditations of the reader, I here dismiss it.

PART II.

OF THE PRACTICE OF THE SEVERAL COURTS OF THE UNITED STATES IN THE EXERCISE OF THEIR ORIGINAL AND APPELLATE JURISDICTION IN CIVIL ACTIONS AT COMMON LAW.

CHAPTER I.

OF THE PRACTICE OF THE SUPREME COURT IN SUITS ORIGINALLY COMMENCED THEREIN.

The original jurisdiction of the supreme court, as already shown, is defined in the constitution, and is limited to cases in which a state is a party, and to cases affecting ambassadors, other public ministers and consuls; and we shall now see that, so far as this branch of its jurisdiction is concerned, congress has done little more than merely to organize the court; having omitted, with the exception of a few very general provisions, to regulate its proceedings.

The authority conferred by the judicial act of 1789, to issue writs, to make all rules necessary for the orderly conducting of business, to administer oaths, to grant new trials, and to punish for contempt, has already been stated in treating of the jurisdiction of this court.

By the same act, the courts of the United States are empowered in certain cases, "to require the parties to produce books or writings in their possession or power which contain evidence pertinent to the

PART 2. issue."[1] These provisions are applicable to the supreme court as well as to the circuit and district courts. But their particular consideration will be deferred until the practice of these latter courts comes to be treated of.

By the act of September 29, 1789, passed, it will be remarked, a few days after the judiciary act, entitled "An act to regulate processes in the courts of the United States," it is enacted "that all writs and processes, issuing from the supreme or circuit court shall bear *teste* of the chief justice of the supreme court; and, if from a district court, shall bear *teste* of the judge of such court, and shall be under the seal of the court from whence they issue, and signed by the clerk thereof. The seals of the supreme and circuits courts are to be provided by the supreme court, and of the district courts by the respective judges of the same.[2]

These two acts (excepting one other, fixing the compensation of the judges) are the only laws passed at the first session of congress relating to the judiciary; and the scanty provisions above referred to are the only ones to be found in them relative to the practice of the supreme court in the exercise of its original jurisdiction.

Under this state of the law, the court held its first session (at New York, then the seat of government), in February, 1790, where the following RULES (together with two others only, regulating the admission of attorneys and counselors), were "declared and established."

Ordered, that the seal of the court shall be the arms of the United States, engraved on a piece of steel of the size of a dollar, with these words in the margin: "The seal of the Supreme Court of the

[1] Act of 24 Sept., 1789, ch. 20, § 15: 1 Stat. at Large, 73.
[2] Ch. 21, § 1: id. 93.

United States;" and that the seals of the circuit courts shall be the arms of the United States, engraved on circular pieces of silver, of the size of a half-dollar, with these words in the margin, viz.: in the upper part, "The seal of the Circuit Court;" and in the lower part the name of the district for which it is intended.

Ordered, that (unless, and until it shall be otherwise provided by law), all process of this court shall be in the name of "the President of the United States."

The act of September 29, 1789, above cited, was, by its terms, limited in duration to the end of the next succeeding session of congress; it was however, by subsequent acts, continued until 1792, when a permanent act, usually denominated the *Process Act*, was passed.[1]

The first section of this act is as follows: "All writs and processes, issuing from the supreme or a circuit court, shall bear *teste* of the chief justice of the supreme court, or (if that office shall be vacant) of the associate justice next in precedence; and all writs and processes, issuing from a district court, shall bear *teste* of the judge of such court, or (if that office shall be vacant) of the clerk thereof, which said writs and processess shall be under the seal of the court from whence they issue, and signed by the clerk thereof. The seals shall be provided at the expense of the United States."

The second section provided that the forms of process, and the forms and modes of proceeding in suits at common law, which had been adopted by the several courts under the prior law should continue; subject however to alterations and additions by rules of court.

[1] Act of May 8, 1792, ch. 36: 1 Stat. at Large, 275.

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By an act passed at the next succeeding session of congress, "in addition to" the judiciary act, the subject of the power of the courts to regulate their own proceedings, is resumed and provided for more in detail as follows: "it shall be lawful for the several courts of the United States, from time to time, as occasion may require, to make rules and orders for their respective courts, directing the return of writs and processes, the filing of declarations and other pleadings, the taking of rules and the entering and making up judgments by default, and other matters in vacation; and otherwise, in a manner not repugnant to the laws of the United States, to regulate the practice of the said courts, respectively, as shall be fit and necessary for the advancement of justice, and especially to that end, to prevent all delays in proceedings."[1]

As the supreme court has not hitherto thought proper to prescribe the mode of procedure in causes originally instituted in that court, by any complete body of prospective rules, but has contented itself with making, from time to time, such orders in each particular case as seemed proper and necessary, it is proposed briefly to notice such of the reported cases of this description as tend to elucidate the subject.

In the case of *Van Strophorst et al.* v. *The State of Maryland* (2 Dall., 401),[2] there having been a voluntary appearance on the part of the state, a motion was made in behalf of the plaintiff for a commission to examine witnesses in Holland; but without naming the commissioners. To this motion the counsel for the defendant assented; but the

[1] Act of March 2, 1793, ch. 22, § 7: 1 Stat. at Large, 335.

[2] This and the cases subsequently cited, in which a state was the party defendant at the suit of an *individual plaintiff*, it will of course be understood, arose before the amendment of the constitution depriving the supreme court of jurisdiction in such cases.

court refused to award the commission until the commissioners were named, which being done, the motion was granted.

In the case of *Oswald* v. *The State of New York* (2 Dall., 402), a motion was made that the marshal return the writ; and the court, after advisement, granted a rule in the following terms: "*Ordered*, that the marshal of the New York district return the writ to him directed in this cause before the adjournment of this court, if a copy of this rule shall be seasonably served upon him or his deputy, or otherwise, on the first day of the next term. And that, in case of a default, he do show cause therefor, by affidavit taken before one of the judges of the United States."

At the same term (August, 1792,) the attorney-general having moved for information relative to the system of practice by which attorneys and counselors of this court shall regulate themselves, the chief justice, at a subsequent day, laid down the following general rule: "The court considers the practice of the courts of king's bench and chancery in England as affording outlines for the practice of this court; and they will, from time to time, make such alterations therein as circumstances may render necessary."

In the case above cited of *Oswald* v. *The State of New York*, at the succeeding term, *Proclamation* was made, "that any person having authority to appear for the state of New York is required to appear accordingly;" and no person appearing, it was ordered, on motion, that "unless the state of New York appears by the first day of the next term to the above suit, or show cause to the contrary, judgment will be entered by default against the said state." 2 Dallas, 415.[1]

[1] This practice, it will be seen, was subsequently changed, and the plaintiff is to proceed *ex parte*.

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In the case of *Chisholm* v. *The State of Georgia* (2 Dall., 419,) the marshal of the district of Georgia having returned the writ, "Executed as within commanded, that is to say, served a copy thereof on his Excellency Edward Telfair, Esq., Governor of the State of Georgia, and one other copy on Thomas P. Carnes, Esq., the attorney-general of the said State;" the counsel of the state of Georgia thereupon presented to the court a written remonstrance and protestation on behalf of the state against the exercise of jurisdiction in the cause; but, in pursuance of their instructions, declined taking any part in arguing the question. It was, however, elaborately argued on the other side, by Mr. Randolph, the attorney-general, as counsel for the plaintiff.

At a subsequent day, the judges, *seriatim*, pronounced their opinions at great length upon this interesting question, and decided (Judge IREDELL dissenting) that the court possessed, and was bound to exercise, jurisdiction in the case. Whereupon, it was *ordered* "that the plaintiff in this cause do file his declaration on or before the first day of March next.

"That certified copies of the said declaration be served on the governor and attorney-general of the state of Georgia on or before the first day of June next.

"That unless the state shall either in due form appear, or show cause to the contrary, in this court, by the first day of the next term, judgment by default shall be entered against the said state."[1]

[1] To this case the reporter has appended the following notes: "In February term, 1794, judgment was rendered for the plaintiff and a writ of inquiry awarded. The writ, however, was not sued out and executed; so that this cause and all other suits against states were swept at once from the records of the court by the amendment to the federal constitution, agreeably to the unanimous determination of the judges in *Hollingsworth et al.* v. *Virginia*, argued at February term, 1798. See the report of the case, 3 Dall., 378."

In the case in equity of *Grayson* v. *The State of Virginia* (3 Dallas, 320,) the subpœna having been returned executed, the plaintiff moved for a distringas to compel the appearance of the state. The court postponed its decision on the motion in consequence of a doubt whether the remedy to compel such appearance *should be furnished by the court itself or by the legislature.* At a subsequent term the court, "after a particular examination of its powers," determined that, though "the general rule prescribed the adoption of that practice which is founded on the custom and usage of courts of admiralty and equity," still the court was "also authorized to make such deviations as are necessary to adapt the process and rules of the court to the particular circumstances of this country, subject to the interposition, alteration and control of the legislature." Under this view of its powers and duties, the court, therefore, made the following general orders:

"1. *Ordered*, that when process at common law or in equity shall issue against a state, the same shall be served upon the governor or chief magistrate and the attorney-general.

"2. *Ordered*, that process of subpœna issuing out of this court in any suit in equity shall be served on the defendant sixty days before the return day of the said process; and further, that if the defendant, on such service of the subpœna, shall not appear at the return day contained therein, the complainant shall be at liberty to proceed *ex parte*."[1]

In the case of *The State of New Jersey* v. *The People of the State of New York*, in equity, the ser-

[1] These two general orders are embodied and numbered 5, in a set of rules adopted by the supreme court at December term, 1858, the rest of which, except such as are directory to the clerk, relate, chiefly or wholly, to the appellate jurisdiction of the court, and will be noticed in their appropriate places in the sequel.

PART 2. vice of the subpœna to appear and answer having been made upon the acting governor of the state of New York *only*, the marshal of the southern district returning that the attorney-general was not found in his district, the service was held to be insufficient. The rule required a service on both, and must be literally observed. 3 Peters, 461. At a subsequent term, the subpœna having in the meantime been regularly served, and the state of New York having failed to appear, it became necessary for the complainant again to apply to the court for further assistance and direction. The court took occasion to review the antecedent cases, and Chief Justice MARSHALL concluded its opinion as follows: "It has been settled by our predecessors, on great deliberation, that this court may exercise its original jurisdiction in suits against a state, under the authority conferred by the constitution and existing acts of congress. The rule respecting the process, the persons on whom it is served, and the time of service is fixed. The course of the court on the failure of the state to appear, after the due service of process, has been also prescribed. In this case the subpœna has been served as is required by the rule. The complainant, according to the practice of the court, and according to the general order made in the case of *Grayson* v. *The Commonwealth of Virginia*, has a right to proceed *ex parte;* and the court will make an order to that effect, that the cause may proceed to a final hearing. If, upon being served with a copy of such order, the defendant shall still fail to appear, or show cause to the contrary, this court will, as soon thereafter as the cause shall be prepared by the complainant, proceed to a final hearing and decision thereof. But inasmuch as no final decree has been pronounced, or judgment rendered, in any suit heretofore instituted in this court, against a

state, the question of proceeding to a final decree will be considered as not conclusively settled, until the case shall come on to be heard in chief." 5 Peters, 284.

It will be seen from these cases, that in suits against a state, if the state shall neglect to appear on due service of process, no coercive measures are to be resorted to, to compel appearance; but the plaintiff will be allowed to proceed *ex parte*. And such was expressly said to be the settled practice of the court in the case of *The State of Massachusetts* ads. *The State of Rhode Island*, 12 Peters, 755.

In the case just cited, which was a bill in equity for the purpose of ascertaining and determining the true boundary line between the parties, the state of Massachusetts had appeared and put in an answer and plea, and then at a subsequent term, by her counsel, moved to dismiss the bill on the ground that the court had no jurisdiction of the cause. This motion the court held itself bound to entertain. 12 Peters, 657. The motion having been denied,[1] a motion was made in behalf of Massachusetts for leave to withdraw her plea, and also her appearance. The motion was granted, and leave was at the same time given to Rhode Island to amend her bill. At the next term (1839), nothing having in the meantime been done on the part of Massachusetts in pursuance of the leave given, and Rhode Island having (though not till the second day of that term) amended her bill, it was ordered by the court that Massachusetts be allowed until the first Monday of the next August to elect whether she would withdraw her appearance; and if her appearance should

[1] The objection was that the controversy related, not to a question of property, but simply of jurisdiction, and was, therefore, as it was insisted, not a judicial but a political question. On this ground Chief Justice TANEY dissented from the decision of the court.

PART 2. be withdrawn within the time limited, that Rhode Island should be thereupon at liberty to proceed *ex parte*. And if the appearance of Massachusetts should not be so withdrawn, it was ordered, that then the said state should answer the amended bill, on or before the second day of January, 1840. The case had been brought before the court on a motion in behalf of the complainant, that the defendant be required to answer within some short period to be fixed by the court, so as to enable the complainant to bring the cause to a hearing during the same term; which motion was denied. 13 Peters, 23. At the next term (January, 1840), the defendant having in the meantime made her election to put in a plea and answer to the amended bill, the case was brought to argument on the sufficiency of the plea and answer. A preliminary question arose as to the party whose right it was to begin and close the argument. The court considered the rule of the English Chancery to be, that this right pertains to the party who puts in a plea which is the subject of discussion, and that it belonged, therefore, to the state of Massachusetts. 14 Peters, 210. The plea was overruled, on the ground that it was multifarious; and it was ordered, that the defendant answer the bill on or before the first day of the next term. Ib. At the next term (January, 1841), the counsel for the defendant filed a demurrer to the bill, which was argued and overruled, and thereupon the defendant was ordered to answer the bill on or before the next August. 15 Peters, 233. When the case was before the court in 1840, the court laid down the important principle that, in suits between states, it was incumbent on the court to take care that full opportunity should be afforded to each party to bring before the court what it might conceive to be the merits of its side of the case, in such manner as

to entitle it to a direct decision upon them; and that the court was bound, if necessary, so to modify the technical rules of pleading as to secure this end.

In 1846 the cause was brought to a final hearing on its merits, and was elaborately argued. The state of Rhode Island having, in the opinion of the court, failed clearly to establish its right of jurisdiction over the disputed territory, the bill was, for that reason, dismissed. 4 Howard, 591.

The State of Missouri v. *The State of Iowa* (7 Howard, 660) was also a suit in equity to settle a question of boundary, the bill having been filed by the state of Missouri, "with the consent of the state of Iowa." A cross bill was also filed by the state of Iowa. The court, having, by its decree, designated what it deemed to be true boundary line, decreed that the state of Missouri be perpetually enjoined from exercising jurisdiction to the north of it, and that the state of Iowa be in like manner enjoined from exercising jurisdiction to the south of it. The court also appointed commissioners to run and mark the line, and to erect durable monuments with proper inscriptions; a moiety of the costs of the whole proceeding to be paid by each party. The commissioners were also directed to report to the court at its next term. This having been done, and no exception being taken to the report, it was confirmed, and the boundary line was accordingly finally declared and established. 10 Howard, 1.

In *The State of Georgia* v. *Grant*, 6 Wallace, 241, the court said when a party wishes to file a bill in equity in the supreme court it is usual to hear a motion in his behalf for leave to do so.

The State of Florida v. *The State of Georgia* gave rise to a new, important and difficult question. Like the preceding cases, the controversy concerned the boundary line between the two states. The bill hav-

PART 2. ing been filed, and a subpœna, on motion, awarded by the court at December term, 1850, "against the state of Georgia" (11 Howard, 293), at December term, 1854, Georgia having in the meantime answered the bill, and other steps having been taken, but the cause not being ready for a final hearing, the attorney-general of the United States filed an information setting forth that the United States were materially interested in the controversy on account of the bearing it had upon the extent of the public lands obtained by the purchase of Florida; and upon this ground he moved for leave not only to be heard, but to adduce evidence in behalf of the United States.

By the decision of a majority of the court pronounced in an elaborate opinion delivered by the Chief Justice, he was permitted to do this. Mr. Justice M'LEAN, Mr. Justice DANIEL, Mr. Justice CURTIS and Mr. Justice CAMPBELL dissenting, and the two latter assigning the reasons of their dissent at length. It was conceded by the court that the United States could not be made a *party* to the suit; but the jurisdiction exercised by the court in suits between states being in its nature *sui generis*, no rules of procedure having been prescribed by law to regulate its exercise, and no means having been provided for a revision of the judgment to be pronounced, the court felt itself to be at liberty, and deemed it to be its duty, to disregard the technicalities and forms applicable to ordinary litigation, and allow the attorney-general to intervene, and to adduce proofs and arguments to be considered by the court in deciding the question before it. 17 Howard, 478.

The only case ever brought to trial by jury before the supreme court, of which I have met with any report, is that of *The State of Georgia* v. *Brailsford et al.* (3 Dall., 1), which was a feigned issue, and affords nothing worthy of remark in this place.

The foregoing abstract presents, in substance, all the written materials for the compilation of a system of practice in proceedings in the supreme court as a court of original jurisdiction.

A few general directions will, therefore, complete all that will be attempted under this head.

Process.] In actions at law against a state, as there can be no actual arrest, the first process is a summons. This writ is directed to the marshal of the district comprising the state, or (when it is divided into more than one district) a part of it, and, as has been seen above, must be served upon the chief executive magistrate and the attorney-general of the state. Should the state fail to appear, it may well be doubted, since the annunciation of the principle stated in the case of *Rhode Island* v. *Massachusetts*, whether the court would now make an order, like that entered in the case of *Oswald* v. *The State of New York*, that, unless the defendant "appears by the first day of next term, or shows cause to the contrary, judgment will be entered by default against said state." Judging from the language held by the court in more recent cases, it seems more probable that an actual trial would be considered an indispensable prerequisite to any conclusive decision upon the rights of the parties.

In suits against ambassadors, or other public ministers or their domestics or domestic servants (if indeed any such suits can be maintained), the same form of process ought doubtless to be resorted to; since by the act of April 30, 1790,[1] it is enacted (in accordance with the law of nations), "That if any writ or process shall, at any time hereafter, be sued forth or prosecuted by any person or persons, in any of the courts of the United States, or in any of

[1] Ch. 9, § 25: 1 Stat. at Large, 112.

PART 2. the courts of a particular state, or by any judge or justice therein, respectively, whereby the person of any ambassador or other public minister of any foreign prince or state, authorized and received as such by the President of the United States, or any domestics or domestic servant of any such ambassador or other public minister, may be arrested or imprisoned, or his or their goods or chattels be distrained, seized or attached, such writ or process shall be deemed and adjudged to be utterly void, to all intents, constructions and purposes, whatsoever."

As to the description of persons who fall under the denomination of domestics and domestic servants, and touching the true construction of this act (which is substantially a transcript of the statute of 7 Anne, chap. 12, § 34), see 8 Mod., 388; 3 M. & S., 284; Barnes, 370, 374, 375; 1 Wm. Bl., 471; 3 Burr., 1478, 1676, 1731; 1 Burr., 401; 3 Wils., 33; 1 Wils., 20, 78; Fitzg., 200; 2 Stra., 797; 2 L. Raym., 1524; 4 Burr., 2017; 3 T. R., 79; 3 Camp., 47.

By the next section it is declared that all persons convicted of suing forth or prosecuting any such writ or process, and all officers executing the same, "shall be deemed violators of the laws of nations and disturbers of the public repose, and imprisoned not exceeding three years, and fined at the discretion of the court; *Provided, nevertheless*, that no citizen or inhabitant of the United States who shall have contracted debts prior to his having entered into the service of any ambassador or other public minister, which debts shall be still due and unpaid, shall have, take or receive any benefit of this act; nor shall any person be proceeded against by virtue of this act, for having arrested or sued any other domestic servant of any ambassador or other public minister unless the name of such person be first registered in the office of the secretary of state, and

by such secretary transmitted to the marshal of the district in which congress shall reside, who shall, upon receipt thereof, affix the same in some public place in his office, whereto all persons may resort and take copies without fee or reward."

In actions personal against a citizen by an ambassador or other public minister; and by or against consuls (who are not entitled to the immunities of public ministers), the process would doubtless be the writ of *capias ad respondendum*, upon which the defendant might be held to bail (upon filing an affidavit for that purpose, according to the English practice), or not, according to the nature of the plaintiff's demand.

Pleadings.] The jurisdiction of the courts of the United States being special and limited, it is a fundamental rule of pleading (as will be fully explained and illustrated in treating of the practice of the other courts), that the jurisdiction of the court must distinctly appear upon the face of the plaintiff's declaration. Depending, therefore, as it does in this court (as a court of original jurisdiction), entirely upon the *character of the parties*, that character must be distinctly averred.

Judgment and Execution.] As we have already seen, the form and effects of judgments and executions in the circuit and district courts are regulated by the laws of the respective states. But the acts of congress are silent with respect to these particulars, as it regards the supreme court, except in conferring the authority to make rules. In the exercise of this power, should circumstances call it into action, it may be supposed that, as against individual defendants, the court would adopt the laws of the states of which such defendants were citizens or residents.

What form of process would be devised to enforce a judgment against a state, when the judgment

PART 2. would otherwise be ineffectual, is a grave question upon which no conjecture will be hazarded. In the case of *Chisholm* v. *Georgia*, and again in that of *Rhode Island* v. *Massachusetts*, referred to above, the want of any legislative provision on this subject was strenuously insisted on at the bar, as an insuperable obstacle to the exercise of jurisdiction.

Mr. Justice BALDWIN, in pronouncing the decision of the court in the latter case, has given an interesting and instructive summary of the English decisions relating to the question.

In the former case the point was left untouched by the court; in the latter case, which, it will be recollected, involved no question of property, but concerned only the rights of sovereignty and jurisdiction, one answer given to the objection by the counsel for Rhode Island was, that the decree of the court asked for by that state would execute itself, by definitively settling the question in issue between the parties, and actually vesting the rights decreed. The court seems to have concurred in this view of the subject, and no doubt is intimated that it would be the duty of the court to adjudicate upon any question suitable for judicial cognizance when called upon to do so by a suit between states; and this, as we have seen, the court has not hesitated to do, in subsequent cases, and to enjoin obedience to its decree.

In conclusion, it is proper to add, that, by a rule of the supreme court, all motions to the court are required to be reduced to writing, briefly stating the facts and the objects of the motion. This rule is doubtless applicable as well to cases of original as of appellate jurisdiction.[1]

[1] The form of compliance with this rule may be seen, for example, in *White's Administrator* v. *The United States*, 1 Black, 501, and *Rice* v. *The Minnesota and Northwestern R. R. Co.*, 21 Howard, 82.

CHAPTER II.

OF THE PRACTICE OF THE CIRCUIT AND DISTRICT COURTS IN CIVIL ACTIONS AT COMMON LAW, INCLUDING CAUSES REMOVED FROM THE STATE COURTS.

SECTION I.

AS REGULATED BY STATUTE.

Several statutable provisions, directly or indirectly relating to the practice of these courts, have already been recited, or referred to, at the commencement of the preceding chapter, and need not, therefore, be here particularly noticed, although it is indispensably necessary that the student should bear them in mind as equally applicable to these courts. Others will be hereafter cited under particular heads to which they respectively relate. But those which constitute the basis of the practice in suits at common law, in both the circuit and district courts, throughout the Union, are the following:

The second section of the temporary act of 29th Sept., 1789 (the first section of which has already been given verbatim in the preceding chapter), enacts "That until further provision shall be made, and except where, by this act or other statutes of the United States, is otherwise provided, the forms of writs and executions, except their style and modes of process and rates of fees, except fees to judges, in the circuit and district courts, in suits at common law, shall be the same in each state respectively, as are now used or allowed in the supreme courts of the same. And the forms and modes of proceeding in causes of equity, and of admiralty and of maritime jurisdiction shall be according to the course of the civil law; and the rates of fees the same as are or were last allowed by the states respectively in the court exercising supreme jurisdiction in such causes."[1]

[1] Ch. 21: 1 Stat. at Large, 93.

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Under this simple and highly judicious regulation these courts went into action.

At the third session of congress the forms of process and modes of proceeding in the courts having in the mean time become in some degree settled in conformity with the act just recited, the permanent act of May 8, 1792, usually denominated the Process Act, was passed (the first section of which has also been recited in the preceding chapter), the second section of which is as follows:

"The forms of writs, executions and other process, except their style,[1] and the forms and modes of proceeding in suits in those of common law, shall be the same as are now used in the said courts [the supreme, circuit and district courts], respectively, in pursuance of the act entitled 'An act to regulate process in the courts of the United States' [the act of 29th September, 1789, above cited]; in those of equity and in those of admiralty and maritime jurisdiction, according to the principles, rules and usages which belong to courts of equity, and to courts of admiralty, respectively, as contradistinguished from courts of common law; except so far as may have been provided for by the act to establish the judicial courts of the United States; subject, however, to such alterations and additions as the said courts, respectively, shall, in their discretion, deem expedient, or such regulations as the supreme court of the United States shall think proper from time to time, by rule, to prescribe to any circuit or district court concerning the same: *Provided*, that on judgments in any of the cases aforesaid, where different kinds of executions are issuable in succession, a *capias ad satisfaciendum* being

[1] The words "*except their style*," must have been inadvertently copied from the first act. In that act they referred to the style of processes (*i. e.*, the name of the authority under which they were issued) in the state courts, and were therefore appropriate and necessary; but as they stand in this act, they refer to process in the courts of the *United States*, in the style of which it was not intended to make any alteration. They have accordingly been inoperative in practice.

one, the plaintiff shall have his election to take out a *capias ad satisfaciendum* in the first instance."[1]

By the first act, therefore (of 29th September, 1789), the then existing systems of practice in the several states were temporarily adopted as the practice of the circuit and district courts, in and for those states respectively; subject, however, to be modified by rules of court; and, by the act last recited, the system of practice thus introduced into the courts of the United States was sanctioned and permanently established; subject, however, to the like power of modification, as circumstances and convenience might require.

[1] Ch. 36: 1 Stat. at Large, 275. The power conferred by this act on the supreme court, to prescribe rules of procedure to the circuit and district courts, remained wholly dormant until the year 1822, when a body of rules was framed and promulgated to regulate the practice of the circuit courts in equity. These rules continued in force until 1842, when a more complete set of rules of equity practice was prescribed; and, on the 23d of August of that year, an act was passed conferring this power in very comprehensive as well as explicit terms. The enactment here referred to is as follows: "The supreme court shall have full power and authority, from time to time, to prescribe, and regulate and alter, the forms of writs and other process to be used and issued in the district and circuit courts of the United States, and the forms and modes of framing and filing bills and libels, answers and other proceedings and pleadings, in suits at common law, or in admiralty, and in equity pleadings in the said courts, and also the forms and modes of taking and obtaining evidence, and of obtaining discovery, and generally the forms and modes of drawing up, entering and enrolling decrees, and the forms and modes of proceeding before trustees appointed by the court, and generally to regulate the whole practice of the said courts, so as to prevent delays, and to promote brevity and succinctness in all pleadings and proceedings therein, and to abolish all unnecessary costs and expenses in any suit therein." Act of August 23, 1842, ch. 188, § 6; 5 Stat. at Large, 516.

In the year 1845, the supreme court promulgated another body of rules to regulate the practice in causes of admiralty and maritime jurisdiction. With respect to proceedings at common law this power has never been executed.

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It is proper here also to say, that subsequent changes in the modes of proceeding in the state courts, whether introduced by the legislature or by the courts themselves, are wholly inapplicable, *per se*, to the national courts. It is competent for the judges of the latter courts, in the exercise of the large discretionary powers with which they are invested, to adopt such innovations, by rule, if they think proper; but until so adopted, they are wholly inoperative in these courts. With respect to another highly important enactment, adopting the laws of the states (except where the constitution, treaties or statutes of the United States otherwise require or provide), as rules of decision in trials at common law, in cases where they apply, the operation, as we have seen, is otherwise. This provision is prospective, and questions are to be decided according to the laws of the state in which the court is sitting, as they exist when such questions arise. But to determine with certainty whether the question falls under the one or the other of these provisions is not always quite easy. The student will, however, find a very able interpretation of them in the cases of *Wayman et al.* v. *Southard et al.*, 10 Wheat., 1, and the *Bank of the United States* v. *Halstead*, 10 Wheat., 51; more full citations of which have been given in the first part of this treatise.

The provision of the process act under consideration, it must be observed, is applicable only to the states which composed the Union at the time of its passage. But, by an act passed May 19, 1828,[1] it was extended to the states subsequently admitted into the Union, and, by an act passed August 1, 1842,[2] the act of 1828 was extended to the states

[1] Ch. 68: 4 Stat. at Large, 278.

[2] Ch. 109: 5 Stat. at Large, 499.

admitted during the intermediate years. The first section of this last-mentioned act is as follows: CHAP. 2.

"The forms of mesne process, except the style, and the forms and modes of proceeding in suits in the courts of the United States, held in those states admitted to the Union since the twenty-ninth day of September, in the year seventeen hundred and eighty-nine, in those of common law shall be the same in each of the said states, respectively, as are now used in the highest court of original general jurisdiction of the same, in proceedings in equity, according to the principles, rules and usages which belong to courts of equity, and in those of admiralty and maritime jurisdiction, according to the principles, rules and usages which belong to courts of admiralty, as contradistinguished from courts of common law, except so far as may have been otherwise provided for by acts of congress; subject, however, to such alterations and additions as the said courts of the United States, respectively, shall, in their discretion, deem expedient, or to such regulations as the supreme court of the United States shall think proper, from time to time, by rules, to prescribe to any circuit or district court concerning the same."

The act of 1842 merely ordains that the provisions of the act of 1828 "shall be, and they are hereby, made applicable to such states as have been admitted into the Union since the date of said act." The second and third sections of the act of 1828 contain important provisions applicable to the old as well as new states. They are as follows:

"SEC. 2. That, in any one of the United States, where judgments are a lien upon the property of the defendant, and where, by the laws of such state, defendants are entitled, in the courts thereof, to an imparlance of one term or more, defendants, in actions in the courts of the United States, holden in such state, shall be entitled to an imparlance of one term.

"SEC. 3. That writs of execution and other final process issued on judgments and decrees, rendered in any courts of the United States, and the proceedings thereupon, shall be

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the same, except their style, in each state, respectively, as are now used in the courts of such state, saving to the courts of the United States in those states in which there are not courts of equity, with the ordinary equity jurisdiction, the power of prescribing the mode of executing their decrees in equity by rules of court. *Provided, however,* that it shall be in the power of the courts, if they see fit in their discretion, by rules of court, so far to alter final process in said courts as to conform the same to any change which may be adopted by the legislature of the respective states for the state courts."

The fourth and last section of the act directs that its provisions shall not extend to the national courts in Louisiana.[1]

It may not be useless to pause here, for a moment, at the close of this general outline, for the purpose of stating with precision its practical result, which may be summed up as follows:

In order to determine a question of practice (unless it relates to imprisonment for debt),[2] we are to ascertain, 1, whether it is specifically prescribed by any act of congress; if not, 2, whether it is so by the rules of the court in which it arises; and, if not, then finally, we are to inquire what was the practice upon the point in question in the supreme court of the state where the question arises, on the 29th of September, 1789, or if the question arises in one of the states since admitted into the Union, or if it concern final process, what was the practice of the state court on the first of May, 1842. A careful and judicious application of these tests, though the

[1] The case of *Amis* v. *Smith* (16 Peters, 303), contains an instructive commentary on this act. See, also, the case of *Sears* v. *Eastburn* (10 Howard, 187), where it is held that a statute of a state, admitted into the Union since 1789, abolishing the action of ejectment and substituting an action of trespass, is binding on the circuit court of the United States in that state.

[2] *Vide, post,* BAIL AND EXECUTION.

process may in some instances require time and patience, cannot fail to lead to a correct decision.

Having premised thus much, it remains, as far as the nature of the subject will conveniently permit, to lay down more particular directions for the institution of suits, and for their management through the various stages of their progress. But to do this with that degree of minuteness which is found in books treating of the practice of a single court, as of the king's bench in England, or of the supreme court of the state of New York, for example, so as to afford a perfect guide in regard to every particular, *in every district of the Union*, while it would be superfluous, would at the same time be impracticable.

Many things, however, are common to all the circuit and district courts in every state. These I shall endeavor, as far as I am able, to make plain; and shall, moreover, with regard to the two districts in the state of New York, descend somewhat more into particulars.

SECTION II.

OF THE SEVERAL FORMS OF ACTION.

Suits at law, whether personal, mixed or real, may be maintained in these courts in all the forms of action pursued in the superior courts of the several states embraced within their several respective jurisdictions.

SECTION III.

OF THE LIMITATION OF ACTIONS.

Although acts of limitation, embracing particular descriptions of actions, have from time to time been passed by congress, no general statute of limitations has yet been enacted.

Special provision has, however, been made for certain cases. By the act to establish and regulate the post-office department, of March 3, 1825, suits

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against the sureties in the official bonds of postmasters are required to be brought within two years after the default of the principal.[1]

By the act of April 30, 1790, for the punishment of certain crimes against the United States,[2] prosecutions for treason or other capital offenses, willful murder and forgery excepted, were limited to three years; and it was also further enacted, that no person should be prosecuted, tried or punished for any offense not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same should be found or instituted within two years from the time of committing the offense, or incurring the fine or forfeiture. In the case of *Adams, qui tam*, v. *Wood* (2 Cranch, 336), this latter provision was held to be applicable prospectively to penalties and forfeitures imposed by subsequent acts. And although it speaks only of prosecutions by indictment and information, it was held to extend to actions of debt for the recovery of statute penalties.

But by the act of March 26, 1804, the period of limitation for prosecutions for fines or forfeitures arising under the *revenue laws* of the United States was extended to five years[3] instead of the three years' limitation prescribed by the collection act of March 2, 1799, ch. 22. And by the act of April 20, 1818, relating to the importation of slaves, prosecutions for penalties and forfeitures incurred under it, were also limited to *five years*.[4]

[1] Ch. 64, § 3: 4 Stat. at Large, 102. But this limitation shall not be considered as running in any state or part thereof, the inhabitants whereof have been, by the proclamation of the president, declared in a state of insurrection, during the time the insurrection shall continue. Act of July 11, 1862, ch. 139: 12 Stat. at Large, 530.

[2] Ch. 9, § 32: 1 Stat. at Large, 119.

[3] Ch. 40, § 3: 2 Stat. at Large, 290.

[4] Ch. 91, § 9: 3 Stat. at Large, 450.

By the copyright act of February 3, 1831, prosecutions for any forfeiture or penalty incurred under that act were limited to *two* years.[1]

By the act of April 10, 1806, suits on marshals' bonds were limited to *six* years; saving the rights of infants, *feme coverts*, and persons *non compos mentis*, for three years after the removal of their disabilities.[2] And in the case of *Montgomery* v. *Hernandez et al.* (12 Wheat., 129), it was held that, where after a breach of the condition of a marshal's bond, the proceeding out of which the liability arose was suspended by appeal, whereby the right of action of the party injured was also suspended, the period of limitation did not commence until after the determination of the appeal.

The foregoing are, it is believed, all the provisions to be found in the permanent acts of congress relative to this subject, until the act of February 28, 1839, by the fourth section of which it is enacted, "That no suit or prosecution shall be maintained for any penalty or forfeitures, pecuniary or otherwise, accruing under the laws of the United States, unless the same suit or prosecution shall be commenced within *five* years from the time when the penalty or forfeiture accrued: *Provided*, that the person of the offender, or the property liable for such penalty or forfeiture, shall, within the same period, be found within the United States; so that the proper process may be instituted and served against such person or property therefor."[3]

The language of this enactment, it will be perceived, is very comprehensive. It seems to have been intended to embrace every description of penalty or forfeiture imposed by any act of congress

[1] Ch. 16, § 12: 4 Stat. at Large, 436.
[2] Ch. 21, § 4: 2 Stat. at Large, 274.
[3] Ch. 36, § 4: 5 Stat. at Large, 321.

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then in force, or which might be subsequently enacted; and every form of prosecution, whether by indictment, information, libel or action of debt, and whether *in personam* or *in rem*, for the recovery of such penalty or forfeiture. If this be the true construction of it, it will be seen that it supersedes, and, therefore, virtually repeals, all the other enactments above mentioned, except so much of the crimes act of 1790 as relates to other forms of punishment, and the provisions relative to suits on marshals' bonds.[1]

With the exceptions above specified, all actions, whether real, personal or mixed, and whether arising *ex contractu* or *ex delicto*, are left subject to the local legislation of the several states, so far as such legislation is applicable; for it has never been doubted that state limitation acts were embraced by that provision of the judiciary act of 1789, by which it is declared that "the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials *at common law*, in the courts of the United States, *in*

[1] Nevertheless, it was deemed expedient, for some reason, expressly to repeal the provisions of the acts of 1790 and 1804, mentioned in the text, with respect to cases arising under the revenue laws, which, of course, remain subject to the five years' limitation prescribed by the act of 1839. Act of March 3, 1863, ch. 76, § 14: 12 Stat. at Large, 741.

By another act of the same date (ch. 81, § 7: 12 Stat. at Large, 757), it is enacted, "that no suit or prosecution, civil or criminal, shall be maintained for any arrest or imprisonment made, or other trespasses or wrongs done or omitted, or act omitted to be done, at any time during the present rebellion, by virtue or under color of any authority derived from, or exercised by, or under the president of the United States, or by or under any act of congress, unless the same shall be commenced within two years next after such arrest, imprisonment, trespass or wrong may have been done or committed, or act may have been omitted to be done: *Provided*, that in no case shall the limitation herein provided commence to run until the passage of this act, so that no party shall, by virtue of this act, be debarred of his remedy by suit or prosecution until two years from and after the passage of this act."

cases where they apply."[1] The laws, then, of each particular state, respectively, furnish the general rule of limitation in common law actions to the national courts, sitting in such state. These laws are a part of the *lex fori*, and are to be construed and applied by the national courts in the same manner as by the state courts. To illustrate what is here said, it will be sufficient to cite a single case, which I am induced to select, because, while it will serve the purpose of illustration as well as any other, it determines, moreover, a particular question of considerable practical interest. The case of *M'Elmoryle* v. *Cohen* (13 Peters, 312), presented the question whether the law of a state (Georgia) limiting the right of action (to five years) on *judgments obtained in courts other than the courts of such state*, was not a violation of that provision of the constitution of the United States, by which it is declared that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of other states. But the supreme court were unanimously and clearly of opinion that the case did not fall within the scope of this provision. The act of limitation in no respect impaired the validity or conclusiveness of the judgment as to the merits in the original suit; and only assumed to regulate the *remedy*—a power undeniably within the legislative authority of the states.

But there is one very numerous and important description of cases to which the state limitation acts *do not apply;* namely, those in which the United States are plaintiffs. It was so held by Mr. Justice STORY, in the case of *The United States* v. *Hoar* (2 Mason, 311); and in the case of *The United States* v. *Knight* (14 Peters, 301, 315), this doctrine was incidentally asserted by the supreme court, and treated

[1] Act of Sept. 24, 1789, ch. 20, § 31: 1 Stat. at Large, 173.

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as unquestionable. It is, in fact, but an application in this country of a long established doctrine of the common law, expressed by the familiar maxim, *nullum tempus occurrit regi;* a doctrine not founded in prerogative, even in England, but resting on a great principle of public policy, which pertains alike to all governments, viz.: that the public interests should not be prejudiced by the negligence of public officers, to whose care they are confided. This principle, it is obvious, comprehends suits instituted by public officers in behalf of the United States, no less than those brought in the name of the United States; and the doctrine, it is presumed, therefore, is alike applicable to both descriptions of cases.

In the case of *Brown* v. *Jones* (2 Gallis., 477), it was held by Mr. Justice STORY, that the statute of limitation of Massachusetts did not apply to suits in admiralty for seamen's wages. The terms of the act (which were substantially a transcript of the statute of limitations of 21 James), were not considered to be applicable to a proceeding in admiralty; the case moreover did not fall within the terms of the above mentioned provision contained in the judiciary act, adopting the laws of the states as rules of decision in trials at common law; and, inasmuch as the admiralty and maritime jurisdiction is confided exclusively to the courts of the United States, it was doubted whether a statute of limitations of a state could, *proprio vigore*, apply to suits on the admiralty side of these courts. And in the case of *Willard* v. *Dorr* (3 Mason, 91), it was further held that the statute of Anne, limiting suits in the admiralty for seamen's wages to six years, is not operative in the courts of the United States; the colonial vice-admiralty courts not being named in the act—there being no evidence that this limitation had in fact ever been adopted by them—and it being by no

means clear, even if it was known to have been so adopted, that it would, therefore, be binding on the admiralty courts of the United States.

It follows, therefore, from this brief analysis, that all prosecutions or suits for penalties or forfeitures are to be commenced within *five* years; that suits on marshals' bonds are to be brought within *six* years; that with regard to all other suits in which the United States are plaintiffs there is *no limitation;* that all suits at common law between private parties are governed in this respect by the laws of the state in which they are prosecuted; and that in regard to suits of admiralty jurisdiction (except such as are brought to enforce municipal forfeitures), there is no statute limitation—these being subject only to such limitations as result from those principles of justice and expediency which regulate the exercise of admiralty jurisdiction.

The better opinion seems to be that, in suits on penal statutes, the statute of limitations need not be pleaded; but may be taken advantage of under the general issue. Buller's Nisi Prius, 195; *Parsons* v. *Hunter*, 2 Sumner, 419.

SECTION IV.

WHO ARE PRIVILEGED FROM ARREST.

The immunity from arrest of ambassadors, other public ministers, their domestics and domestic servants, has already been sufficiently stated and explained in the preceding chapter.

Senators and representatives in congress are also privileged from arrest in all cases, except treason, felony and breach of the peace, during their attendance at the session of their respective houses, and in going to or returning from the same. Const. U. S., art. 1, § 6; see *Lewis* v. *Elmendorf*, 2 Johns. Cas., 222.

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The non-commissioned officers, musicians, seamen and mariners in the *naval service* of the United States are exempted during the term of their service from all personal arrests, for any debt or contract.[1] And no non-commissioned officer, musician, or private in the *army* of the United States, "shall be arrested, or subject to arrest, or be taken in execution for any debt, under the sum of twenty dollars, contracted before enlistment, nor for any debt contracted after enlistment."[2]

By the common law, parties to a suit, their attorneys, counsel and witnesses, are privileged from arrest, while going to, attending upon, and returning from, court; and such it is believed is the rule in all the districts of the union. This privilege, however, extends only to exemption from *arrest*, and does not preclude the service of a mere summons to answer. Peters's C. C. Rep., 41. In *Hurt's* case (4 Dall., 387; *S. C.*, 1 Wash. C. C. Rep., 186), it was held that the court, in which a witness is attending, has authority to discharge him from arrest made under process from another court. A witness attending the circuit court for the district of Pennsylvania was accordingly discharged from arrest in virtue of process issued by the supreme court of the state.[3]

[1] Act of July 11, 1798, ch. 72, § 5: 1 Stat. at Large, 594.

[2] Act of March 16, 1802, ch. 9, § 23; 1 id., 132.

[3] The process in this case was *a capias ad satisfaciendum*. The motion to discharge was resisted on the ground that this privilege did not extend to *arrest in execution;* and in addition to several English authorities cited in support of it, the case of *Starret* (1 Dall., 356) was relied upon, in which Chief Justice M'KEAN, at *nisi prius*, recognized this distinction between mesne and final process, and refused to discharge a witness taken in execution. It was contended, moreover, that the discharge would subject the sheriff to an action for an escape, should the state court adhere to this decision of the Chief Justice. But the circuit court denied the existence of the distinction contended for, and held also that the discharge of the party, by a court having

SECTION V.

OF THE FIRST PROCESS.

We have already seen that the forms of process used in suits at law in the supreme courts of the several states are adopted by congress for the prosecution of suits in the national courts.[1]

In most of the states, it is believed, suits at law are commenced by the writ of *capias*, corresponding substantially with the English *capias ad respondendum*.

In the state of New York this was the only mode of instituting personal actions against natural persons, until, by the Revised Statutes, the plaintiff was permitted, at his option, to commence his suit by merely filing, in the office of the clerk of the court, a declaration; entering the usual rule to plead; and serving a copy of the declaration, together with a rule to plead, personally on the defendant. This legislative regulation has been adopted by rule in the circuit and district courts of the northern district.[2] In the southern district suits at law, not affecting the title or possession of

competent jurisdiction, would protect the sheriff, even though it should be considered erroneous by the court in which he might be sued for the escape.

[1] The practice of using parchment instead of paper for all writs was probably universally adopted originally in the federal courts. Whether the use of this material would be considered essential to the validity of process in these courts, the decisions of the courts, as far as I am informed, afford no means of determining. In the state courts of New York parchment was considered indispensable for this purpose, until, by an act of the legislature, passed in 1815, the use of paper was expressly authorized. Since that period, the practice of the state courts, in cases not otherwise provided for, has been adopted by general rules in each of the national courts in New York. In these courts, therefore, however it may be in other states, parchment is not now necessary.

[2] See Appendix, Rule 11, D. C. N. D. N. Y.

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[1] The following explanatory observations relative to the rules of the national courts in New York may be useful in this place. They were framed before the late radical reorganization of the state judiciary and the adoption of a new system of procedure; and, with slight exceptions, were in accordance with the antecedent practice of the former supreme court of the state. The new state code of practice has not been adopted by the national courts, and their practice remains unaltered.

By one of the rules of the circuit court of the southern district it is declared, that, "in cases not provided for by the rules of that court, the rules of the district court of the southern district of New York, for the time being, whether now in force or subsequently adopted, so far as the same are applicable, are to be considered as rules for this court." And by a rule of the district court, it is declared, that, "in all cases not provided for by the rules of this court, the rules of the circuit court, so far as the same may be applicable, shall regulate the practice of this court; and when there is no rule of the circuit court to apply, then the rules of the supreme court of this state, now in force, so far as the same may be applicable, shall govern." Except, therefore, in the few instances in which the rules of the two courts conflict, they are reciprocal in their operation so far as they are applicable. Hence the reference in the text to a rule of the circuit court as evidence of the practice in both courts. And with respect to the latter clause of the above cited rule of the district court, adopting, in cases not expressly provided for, the practice of the supreme court of this state — that, also, it will be perceived, is to be regarded as equally the rule of the circuit court. It is of some importance, therefore, to observe that these rules are understood to have been declared in 1838. The rules of the district court of the northern district underwent a general revision in 1831. Some of them have since been altered, and new rules have been added. They are conformable, as will be seen, in almost all respects to the practice of the supreme court of the state before the adoption of the present Code of Procedure, many of the most important innovations of latter years having been specially adopted by rule (though in a few instances, with some modification), and a general rule having been made adopting the existing practice of the supreme court of the state as regulated by the Revised Statutes and the rules of that court. See Appendix, Rule 83. And in the circuit court in this district a rule has been made declaring that, "in cases not provided for by the rules of this court, the rules of the district court for the northern district of New York, so far as the same are in their nature applicable, are to be considered as rules of this court." See Appendix, Rule 6, C. C, N. D. N. Y. These

In New England, the process is of a peculiar character. It authorizes the actual seizure, in the first instance, of the defendant's property, to be held as security to satisfy such judgment, if any, as may be obtained against him. In some, if not all of these states, this process also contains a command, for want of property, to take the body of the defendant. It is served according to circumstances, and at the election of the plaintiff, in either of the three following modes: 1. By attaching the property of the defendant only to a nominal amount, and summoning the defendant to appear; 2. By a seizure of all the property of the defendant, or a portion thereof sufficient to satisfy the plaintiff's demand; or, 3. By arresting the body of the defendant.

rules, therefore, taken in connection with the provisions of the judicial act adopting the laws of the states as rules of decision in the national courts (the two codes together covering as they do the whole field of litigation in suits at common law), have greatly simplified the proceeding of the courts of this district; and will, to a great extent, preclude the question (sometimes an embarrassing one), whether the point in judgment does or does not fall within the action of the state laws. Thus, for example, no doubt can be entertained upon the question whether the writ of right, or the action of dower, or of ejectment in the ancient form, may still be prosecuted in this court; the first two having been abolished, and the last having been modified by the abolition of fictitious parties, and otherwise by the Revised Statutes.

It is not to be understood, however, that the authority of the circuit and district courts to conform their practice to that of the state courts is unlimited. The laws of a state regulating the proceedings of its own courts cannot authorize the national courts to depart from the modes of proceeding prescribed by the constitution and laws of the United States. And, therefore, where, in an ejectment suit, the parties agreed to waive a trial by jury, and to submit both matters of fact and of law to the decision of the court, and a bill of exceptions, reciting all the evidence in the case, was taken to the decision, the supreme court refused to look into the alleged errors either of fact or law, in a proceeding so irregular, and affirmed the judgment. *Kelsey et al.* v. *Forsyth*, 21 Howard, 85; see, also, *Gild* v. *Frontin*, 18 Howard, 135; *Suydam* v. *Williamson*, 20 Howard, 428.

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Whence it issues.]. The process, in whatever form, issues from the court in which the suit is instituted, under the seal of the court which is affixed by the clerk, and under his signature.[1]

To whom directed.] It is directed to the marshal of the district, by his official description; or, when he or his deputy is a party, to such disinterested person as the court or a judge thereof shall appoint to execute it. In some of the districts certain official persons are designated by general rule to serve process in all cases in which the marshal or his deputy is a party. Thus, in the southern district of New York, the *sheriff and under-sheriff of the city and county of New York* are appointed both by the circuit and district courts for this purpose. And, in the northern district of New York, the *sheriff and the under-sheriff of the county of Oneida* are appointed for this purpose.[2]

Style.] In all the circuit and district courts, as well as in the supreme court, all process is in the name of the president of the United States, to which official description the words "*of America*" are usually, though it is presumed unnecessarily, added. Instead of the mandatory phrase ordinarily used in the state courts (process from which runs in the name of the *people*), viz., "*we command you*," the

[1] But, where there are several defendants residing in different districts in the same state, the suit may be instituted in either district, and a duplicate writ issued to the marshal of the other district, and the plaintiff may have execution directed to the marshal of either district. And when in a local action the defendant resides in a different district in the same state from that in which the suit is brought, the plaintiff may have original and final process against the defendant directed to the marshal of the district in which he resides. And when the land or other subject-matter of a local action lies partly in one and partly in another district in the same state, the action may be brought in either district. Act of May 4, 1858, ch. 27: 11 Stat. at Large, 272.

[2] Appendix, Rule 77, D. C.

words, *you are hereby commanded*, are, or ought to be, used.

Teste.] All process issuing from the circuit courts is tested in the name of the chief justice of the supreme court of the United States, or (if that office be vacant) in the name of the associate justice next in precedence; and all process issuing from the district courts is tested in the name of the judge, or (if the office be vacant) of the clerk of such court.

Return.] It is made returnable before the judge or judges of *the court*, by its descriptive appellation, thus: "Before the judges of the circuit (or the judge of the district) court of the United States, in and for the district of ..... The teste and return *days* being in some degree the subject of arbitrary regulation, different rules with regard to them may prevail in different districts.

By a rule of the circuit court of the southern district of New York, it is provided, concerning writs and process, that, "usually, they are to bear teste the day they are issued, and may be returned the same day, or any day thereafter (Sundays excepted), in term or vacation; but *alias* and *pluries* writs may be tested on the return day of the next preceding process; and writs of execution, attachments for contempt of court, or non-payment of costs, writs of error, mandamus, or inhibition, and writs on recognizance of bail in civil causes, must be returnable in term." In the district court of that district, the *capias*, except in suits on bail bonds, must be returnable in term.

In the circuit and district courts of the northern district, process issued in term may be tested on any day in that term, and made returnable on any day in the same term or the next term; and if issued in vacation, may be tested on any day of the preceding term, and made returnable on any day in the next

PART 2. term, in conformity with the practice of the supreme court of the state as prescribed by the Revised Statutes.[1]

With very few exceptions, no particular building is designated by law as the place in which the courts are to be held. It is, therefore, in general, sufficient, as well in the return as in the teste of writs, to name the city or village in which the court is next to sit, last sat or is sitting, as the case may be. Thus, in the northern district of New York, for example, the marshal is commanded to have the body of the defendant before the circuit or district court of the United States, in and for the northern district of New York, to be held at *Albany* (or elsewhere, as the case may be), in the said district, before the judges or judge of the said court, on the .... day of ..... next, to answer ..... &c., &c. And the teste is as follows: Witness ...., Esquire, Chief Justice of the supreme court of the United States (or, if in the district court, ..., Esquire, judge of the said court) at *Albany* (or elsewhere, as the case may be), the .... day of ....., in the year of our Lord, &c., &c.

But when the court-house is designated by law, it is proper, and perhaps necessary, that process should be made *returnable* at such particular place.

Service.] The writ may be served in any part of the district in which it is issued, in like manner as writs issued to sheriffs may be executed in their respective counties.

The service may be made either by the marshal, by his general deputy, or by a special deputy or bailiff constituted for that purpose, either by the marshal himself, or, it is presumed, by his general deputy. Such, at least, is the law in England, and in the state of New York. For, though the maxim

[1] Appendix, Rule 13, D. C.

delegata potestas non potest delegari will not permit a general deputy to delegate or assign his general authority, he may, nevertheless, appoint another to do a particular act. *Hunt* v. *Burrel et al.*, 5 Johns. Rep., 137.

At common law, in actions against several joint defendants, all must be served with process, or those not served must be prosecuted to outlawry, before the plaintiff is authorized to proceed in his action. This inconvenient rule has been variously modified in some of the states, by substituting some other proceeding to compel appearance as equivalent to outlawry. In others (such, at least, is the case in Pennsylvania and New York), the rule, as it respects actions arising on contracts, has been abolished altogether, so far as it presents an obstacle to the plaintiff's proceeding to judgment and execution against such of the defendants as are found. And, without descending to particulars, it is sufficient to remark, that, upon this point, the laws of the respective states furnish the rule of proceeding, and determine the force and effects of judgments and executions in suits of this description, in the several courts of the United States, in such states.

In each of the national courts in this state there is a rule ordaining that, "When the *capias* has been served on the real party intended, the plaintiff, before or after its return, *may amend, of course*, any error in the name of the party inserted in the process, giving the defendant notice of such amendment." And, by another rule of the circuit and district courts of the northern district, "the court will not entertain a motion to set aside the process or proceedings in a cause on the ground of the misnomer of the party arrested; but will leave him to his remedy by a plea in abatement."

[1] Appendix, Rules 15, 16, D. C.

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As it regards the mode of service and the duty of the marshal consequent thereupon, no precise directions can be given applicable to all the districts.

Where, by an act of congress, or by the local law and practice, the process in any given case requires the defendant to be held to bail, or to indorse his appearance upon the writ, it is the duty of the marshal to make an actual arrest, in order to compel a compliance with the exigency of the writ, and in default of such compliance to commit the defendant to prison. But, where no such act is required of the defendant, it is sufficient to show him the writ, and to serve him with a copy of it. Thus, by the Revised Statutes of the state of New York, when the *capias* "does not require the defendant to be held to bail, he may indorse his appearance on such writ, or, if he refuse to do so, the sheriff may return the writ personally served." And by a rule of the district court of the southern district of New York, "when bail is not required it shall be a sufficient service of the *capias* or other mesne process *in personam* for the marshal to show such process to the defendant, or offer to show it, and at the same time leave with him a true copy thereof. In which case the marshal shall indorse his return, '*personally served.*' The same rules and orders may be taken on filing such return, as if common bail had been filed, or the defendant had indorsed his appearance on such process." The rule of the circuit and district courts of the northern district is substantially the same.[1]

But in the *circuit* court of the southern district, it would seem the defendant in that court is required to indorse his appearance.

That civil process cannot be served on *Sunday*—but that after a negligent, though not after a voluntary escape, the defendant may be retaken on that

[1] Appendix, Rule 14, D. C.

day; that no man can be arrested in his own house, provided the outer door be shut—but that if the outer door be open, the officer, having gained admittance, may break an inner door to make an arrest; that the marshal may break open the outer door to retake a prisoner who has escaped, and that bail may do the same to arrest and surrender their principal—are principles which it is believed are recognized in all the districts in the union.

Jail liberties.] "Persons imprisoned on process issuing from any court of the United States, as well at the suit of the United States as at the suit of any person or persons in civil actions, shall be entitled to the like privilege of the yards or limits of the respective jails, as persons confined, in like cases, on process from the courts of the respective states, are entitled to, and under the like regulations."[1]

Under this act it is obligatory upon the sheriff to take a bond for the limits from a prisoner committed to his custody in virtue of process issued from a court of the United States, and false imprisonment would lie against him if he should refuse. By it congress have adopted the state laws relative to jail liberties, and the bond has the same incidents and legal effect as a bond taken under the laws of the state. *The United States* v. *Noah*, 1 Paine's C. C. R., 368.

According to the construction which has uniformly been given to the acts of congress adopting the state laws in relation to process, and the proceedings thereon, this act is doubtless to be considered as applying only to state laws in force at the time of its passage. It is on this account the more important here to notice an act of more recent date. By the act of 19th May, 1828,[2] it is enacted, "That writs

[1] Act of January 6, 1800, ch. 4, § 1: 2 Stat. at Large, 4.

[2] Ch. 68, § 3: 4 Stat. at Large, 278.

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of execution and other final process, issued on judgments and decrees rendered in any of the courts of the United States, and the proceedings thereon, shall be the same, except their style, in each state, as are now used in the courts of such state: *Provided, however*, that it shall be in the power of the courts, if they see fit, in their discretion, by rules of court, so far to alter final process in said courts as to conform the same to any change which may be adopted by the legislatures of the respective states for the state courts." In the case of *The United States* v. *Knight* (14 Peters, 301), this act was held to embrace the state laws in force at the date of its enactment relative to jail liberties. This, indeed, so far as private suitors alone were concerned, was considered very clear. But the case presented another very highly important question, viz.: whether the act embraced executions and the proceedings thereon *issued on judgments in favor of the United States*. It was insisted, by the attorney-general, that the United States were never to be considered as embraced in any statute, unless expressly named. But the court, admitting this to be the rule in constructing acts of limitation, overruled the objection, using the following humane, just and salutary language: "Without undertaking to lay down any general rule as applicable to cases of this kind, we feel satisfied that when, as in this case, a statute which proposes only to regulate the mode of proceeding in suits does not divest the public of any right—does not violate any principle of public policy; but, on the contrary, makes provisions in accordance with the policy which the government has indicated by many acts of previous legislation, to conform to state laws, in giving to persons imprisoned under their execution the privilege of jail limits, we shall but carry into

effect the legislative intent by construing the executions at the suit of the United States to be embraced within the act of 1828."

SECTION VI.

OF BAIL.

In what cases it may be exacted.

With the exception of two descriptions of suits (as far as I have been able to discover), the right to hold the defendant to bail is left by the laws of congress entirely at large, to be determined by the local laws and practice in each district.

It is now well settled by the decisions of the supreme court that the subject of arrest and bail belongs to the category of procedure. The prospective adoption of the state laws, by the judiciary act, as "rules of decision," does not, therefore, embrace it. It was provided for by the process acts of 1789 and 1792, by which the then existing state laws of procedure were adopted. The policy of these acts has since been extended to the new states; and, so far as final process is concerned, re-asserted, with regard to all the states, by the act of May 19, 1828, and again extended by the act of August 1, 1842.

The two descriptions of suits above referred to, in which bail is expressly required by act of congress, are those for *duties* and those for *pecuniary penalties*. They are, therefore, both comprehensive and important.

By the collection act of March 2, 1799, it is provided, "that in all cases in which suits or prosecutions shall be commenced for the recovery of *duties or pecuniary penalties* prescribed by the laws of the United States, the person or persons against whom process may be issued shall and may be held to special bail, *subject to the rules and regulations which prevail in civil suits in which special bail is*

PART 2. *required.*"[1] In actions upon penal statutes, according to the law of England and of most of the states, the defendant could not in general be held to bail. Hence the necessity of this enactment in regard to them; and suits for duties were doubtless included, for greater caution, on account of their paramount importance.

The right to exact bail from a defendant of course implies the right to imprison him if he fails to give bail; and, on the other hand, the abolition by law of the right to imprison implies the abolition of the right to hold to bail. It is proper, therefore, here to notice the late acts of congress relative to imprisonment for debt.

By the act of 28th February, 1839 (vol. 9, p. 962), it is provided that "no person shall be imprisoned for debt in any state on process issuing out of a court of the United States, where, by the laws of such state, imprisonment for debt has been abolished; and where, by the laws of a state, imprisonment for debt shall be allowed under certain conditions and restrictions, the same conditions and restrictions shall be applicable to the process issuing out of the courts of the United States; and the same proceedings shall be had therein as are adopted in the courts of such states." By an act of January 14th, 1841,[2] this act is declared to embrace future as well as existing state laws. The decision in the case of the *United States* v. *Knight*, just above cited, leaves little room for doubt that this act will be construed to embrace the United States in common with private suitors. The adoption by congress of a state law must be exactly equivalent (within the limits prescribed for the operation of such law) to the enactment of a law by congress in the same terms. It is presumed,

[1] Ch. 22, § 65: 1 Stat. at Large, 676.

[2] Ch. 2: 5 Stat. at Large, 410.

therefore, that even in suits for duties, whether actions of assumpsit (which, however, are of rare occurrence), or actions of debt on duty bonds, no bail can now be exacted where, by the local law, imprisonment for debt has been abolished, unless such law contains some exception which embraces the case.

In the case of *Leonard* v. *Caskin* (Bee's Rep., 146, which arose under an act of congress prior to that above cited, of 1799, but in which the terms of the enactment were exactly the same) it was decided, in reference to the law of the state of South Carolina and of England, that in an action upon a penal statute of the United States the defendant could not be held to bail, except in pursuance of a judge's order to be obtained upon an affidavit, satisfactorily showing probable cause of action. But, by an act of the legislature of South Carolina, passed in 1769, it is provided that no person shall be held to bail for debt, unless duly attested, &c.; nor *for any other cause*, without a judge's order on probable cause of action shown, to be indorsed on, or annexed to, the writ, &c. This decision, therefore, is in strict accordance with the qualification, "subject," &c., in the act of congress above recited.

By the Revised Statutes of New York it is declared "that no person shall be held to bail on a *capias ad respondendum*, unless the true cause of action be particularly expressed therein."

This provision, however, is only declaratory of the law as it was before, and is understood to mean no more than that, in order to hold the defendant to bail, it is necessary to insert the *ac etiam* clause in the writ.

This is also expressly required by the rule of the national courts in New York.[1] And the rules of the

[1] Appendix, Rule 17, D. C. N. D. of N. Y.

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courts in the southern district go further than this, and require the true cause of action to be expressed *in all cases*.

Bail to the arrest.

How taken.] In most, if not all, of the New England states, the distinction between bail for appearance and bail to the action does not appear to exist. But upon the service of the process, the persons who are to become bail, enter into their engagement as such by indorsing their names upon the writ; and by this single act become, or rather assume, the responsibility of special bail.

In the other states, the course of proceeding in this particular is understood to correspond substantially with that of the English courts.

In the northern district of New York, the practice, in this respect, is that prescribed by the Revised Statutes of the state of New York, and a former rule of the supreme court. Upon the arrest of the defendant, upon bailable process, the officer is authorized to exact a bond, with two sufficient sureties, in a penalty equal to the sum indorsed on the writ (which is usually about double the amount for which the action is brought), conditioned that such defendant will appear in the action, by putting in special bail within twenty days after the return day specified in the writ, and by perfecting such bail, if required, according to the rules and practice of the court.[1]

Before the passage of the act, the bond in use, *in terms*, required the defendant to appear on the return day of the writ; though in practice he was allowed twenty days thereafter for that purpose; so that the form here prescribed is in reality in conformity with the practice as it was before. But in

[1] Appendix, Rules 18, 24, D. C. N. D. N. Y.

the courts of the southern district, the time for putting in special bail, prescribed by the rules of these courts, is ten days after the return day of the writ. The form of the bond, in these courts, also continues the same as formerly, being, generally, for the appearance of the defendant on the return of the writ.

By whom taken.] When bail is tendered at the time of the arrest, and before the actual commitment of the defendant by the marshal to prison, it is obvious that the bond is to be taken by and to the marshal. But we have already seen[1] that persons arrested under the civil authority of the United States are to be committed to the custody of the sheriffs in their respective districts; that the responsibility of the officer, by whom the arrest has been made, ceases upon the delivery over of the prisoner; and that the sheriff immediately becomes liable in case of an escape. And, as this doctrine is laid down without qualification, it would certainly seem to follow that, when bail is tendered after the commitment of the defendant, the bond is to be taken by and *to* the sheriff. It is understood, however, that, so far as bail is concerned, the sheriff, upon the receipt of the prisoner, does not become the substitute of the marshal, but that it is the marshal and not the sheriff who is bound to receive bail when offered, and who, consequently, is responsible for the due appearance of the defendant, by putting in and perfecting special bail. In practice, when it is inconvenient for the marshal to be present in person, he may, doubtless, authorize the sheriff or keeper of the jail, for him and in his name, to receive the bond.

The form and legal effect of the security to be given; the obligation of the marshal to receive bail

[1] *Supra*, p. 202.

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when tendered; the power of the defendant voluntarily to surrender himself in discharge of his bail, and of his bail to surrender him; and, in short, the obligations, rights and responsibilities of all parties concerned, are regulated by the local law in each district, except in cases provided for by rules of court.

The provision contained in the Revised Statutes of New York, authorizing the surrender of the principal in the *bail bond* in discharge of his bail, has been expressly adopted by rule in the district court of the northern district of this state.[1] And also in the courts of the southern district.

Discharging the defendant and mitigating bail.] Before the statute of 12 Geo. I, which requires an affidavit of the debt or cause of action to be filed, preparatory to the issuing of process requiring the defendant to be held to bail, the practice prevailed in the English courts, of permitting a defendant, who had been held to bail, to summon the plaintiff before a judge to show cause of action; and if he failed in doing so, of discharging the defendant upon his indorsing his appearance before the return of the writ, or upon filing common bail if after; and when the indebtedness proved was insufficient in amount to justify a demand of bail in the sum exacted, the amount was mitigated. No such previous affidavit being required in New York, this early English practice was adopted here, and is to be regarded as existing in each of the three national courts in this state. It prevails also in the Pennsylvania districts.

Some diversity of opinion is understood to have prevailed in the national courts, relative to the right of a defendant to be discharged upon filing common bail, on the ground of his having been discharged as

[1] Appendix, Rule 68.

an insolvent debtor. The rule to be extracted from the few reported cases upon the subject seems to be, that this privilege does not extend to cases, either where the debt was contracted and made payable out of the state, although the discharge was granted within it, or, where the discharge was granted out of the state, although the debt was contracted and made payable within it; but that it is limited to cases where the debt has been incurred and made payable, and where the discharge has been granted, at least within the *same* state, if not in the state *where the question arises*. *Campbell* v. *Claudius*, Peters's C. C. Rep., 484; *Read* v. *Chapman*, id., 404; *Craig* v. *Brown*, id., 352.

Where, on a rule to show cause of action, the plaintiff produced a positive affidavit of debt, the allegation on the part of the defendant that a suit for the same cause of action had been instituted in another court, was not listened to. *Post et al.* v. *Sarmento*, 2 Wash. C. C. Rep., 198.

Proceedings in case the defendant fail to appear.] Of the responsibility of the marshal for the defendant's appearance by putting in special bail; of his remedy on the bail bond; and of the plaintiff's right to take an assignment of the bond, it is deemed unnecessary to treat at large. These are all matters concerning which resort must be had to the local law and rules of court, to ascertain both the remedy and the mode of pursuing it.

By the Revised Statutes of New York, the former regulations on this subject in this state were in some respects changed. These modifications are adopted in the courts of the northern district by their general rules adopting the practice of the supreme court of the state in cases not otherwise provided for.[1]

[1] Appendix, Rule 83, D. C.

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The rule of the district court for the southern district of New York is as follows: "In suits in which the United States shall be plaintiffs, or in which they shall be interested, though not plaintiffs, or in which the defendant shall be held to bail, the assignment of the bail bond, and the acceptance thereof, by the plaintiff's attorney, shall not be deemed to preclude him from excepting to the sufficiency of the special bail; and the marshal shall become responsible for good bail, in like manner as if the bail bond had not been assigned and accepted as aforesaid." In the courts for the northern district of New York there are also rules of the same import.

Extent of the liability of bail.] The Revised Statutes of New York contain a new provision upon this subject, which, as it will probably be regarded as affording a "rule of decision," operative in all the national courts in this state, it is proper to notice. Where the sheriff, upon the neglect of the defendant, and for his own indemnity, puts in special bail, it is enacted that "the putting in such bail by such officer shall not be deemed a performance of the condition of the bail bond taken on the arrest; but the officer may, notwithstanding, prosecute such bond, and recover the amount of all damages he may have sustained by the neglect of the defendant to put in bail."

Terms on which suits on the bail bond will be stayed or set aside.] These depend entirely upon the local practice and rules of the court.[1] In each of the national courts in New York there are rules upon this subject, corresponding substantially with the former

[1] In the state of New York the courts are, by statute, expressly authorized, in suits upon bail bonds which have been assigned to the plaintiff, to give such relief to defendants as may be just; and it is declared that all orders of the courts for that purpose shall have the effect of a defeasance of the bond. 2 R. S., 380.

practice, in this particular, of the supreme court of the state.[1] The rule of the circuit court of the southern district is substantially the same. These rules provide for the ordinary case of an application to be relieved from the consequences of a neglect to put in bail to the action in proper time, where no legal impediment has arisen to the further prosecution of the suit. But there are also extraordinary cases in which the bail are entitled to relief. As in the event of the death of either party at certain stages of the original suit.[2]

Filing common bail, or entering an appearance for the defendant.] It may sometimes happen, when the defendant neglects to appear in pursuance of the condition of the bail bond, that the plaintiff would prefer dispensing with special bail rather than incur the delay which would be occasioned by proceeding against the officer, to compel an appearance, or by taking an assignment of the bail bond. The laws of this state long since made provision for such a case. The former act authorized the plaintiff, in case the defendant did not appear within double the time allowed him for that purpose (forty days after the return day of the writ), to file common bail for the defendant, and then to proceed against him as if he had appeared by putting in special bail. This practice is supposed to be still subsisting in the national courts of the southern district. But, as by the rules of these courts, the defendant is allowed but *ten* days after the return day of the writ to put in bail, common bail may be filled by the plaintiff, it is presumed, after the lapse of twenty days. By the Revised Statutes the *form* of proceeding for this purpose is changed. The plaintiff is now authorized, after the expiration of the same time, to "enter the defend-

[1] Appendix, Rule 25, D. C. N. D.

[2] 2 Sand. Rep., 61, *b*; 1 Johns. Rep., 515; Cowp. R., 71.

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ant's appearance." And this, under the rules of the courts for the northern district, is the practice of these courts. The mode of entering the appearance, is by entering, in the common rule book, a rule that the defendant's appearance be, and the same is, hereby entered.

Special bail.

When and how put in.] The time allowed to the defendant to put in special bail depends upon the local law and rules of court. In the national courts for the southern district of New York, as we have seen, the time allowed in ordinary cases is *ten days* after the return day of the writ; and in suits upon bonds for the payment of duties, such bail is required to be put in, and if excepted to, justified, on the return day of the writ. In order to give effect to this latter regulation, the marshal ought to exact a bail bond, conditioned for the appearance of the defendant on such return day.

In the courts for the northern district, the time prescribed in ordinary cases is *twenty days* after the return day of the writ, in conformity with the practice in the state courts.[1]

The judges of the several courts may take acknowledgments of bail, in suits pending in their courts respectively. But the want of some further provision for the accommodation of suitors was early felt, and by the act of 8th May, 1792,[2] the clerks of the several courts were authorized, "in case of the absence or disability of the judges, to take recognizances of special bail, *de bene esse*." These provisions being found inadequate, an act passed in 1812 authorized the circuit court to appoint commissioners for that purpose; and by a subsequent act,

[1] Appendix, Rule 24, D. C.

[2] Ch. 36, § 10: 1 Stat. at Large, 275.

passed in 1817, the commissioners appointed in pursuance of it are empowered to act in cases pending in the district as well as circuit courts.[1]

And in those districts in which there are no circuit courts, and in which the district courts are invested with the original jurisdiction of the circuit courts, the power of appointing these commissioners is also exercised.

Who are disqualified from becoming special bail.] In each of the national courts in New York there is a rule prohibiting the marshal, his deputies and all other persons concerned in the service of process, from becoming bail, except for the purpose of surrendering the defendant; in which case the surrender must be made, in the courts in the southern district within *eight*, and in the district court of the northern district, within *fourteen* days, after special bail shall have been put in.[2]

It is a rule in the English courts, that no attorney shall become bail. This was the rule in the supreme court of New York, and is to be considered as a rule in the national courts here. The general qualification of bail is, that they should be housekeepers, or freeholders, and respectively worth double the sum for which the defendant is held to bail, after payment of all their debts. But in the courts for the southern district of New York it is provided by rule, that, in every recognizance of bail in a civil suit pending therein, the sum for which the suit is instituted shall be expressed in the bail piece, and every notice of bail shall express the sum demanded in the suit, and in such suits where the sum demanded exceeds ten thousand dollars, two or more bail may justify for proportionate parts of such amounts, in sums to be determined by the judge.

[1] See, *ante*, p. 106.

[2] Appendix, Rule 75, D. C. N. D.

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Excepting to and justifying bail.] The time allowed in the courts of the southern district of this state, for excepting and notice thereof, is *four days;* for justification, *four days.*

In the courts for the northern district the time allowed for exception and notice is *twenty days*, after notice of bail; the time for justification, *eight days*, of which *four days'* notice must be given.

In the northern district of New York bail may justify in open court, or before a judge at chambers, or before the clerk, with the right of appeal in the last case to the court or judge at chambers.

In the southern district, bail may justify before the clerk, or one of the commissioners to take affidavits, &c., appointed by the courts, with the like right of appeal.

Of bail in suits in which judgment may be rendered at the return term.

It is necessary here to notice certain descriptions of suits of great importance and of frequent occurrence, concerning which, congress has thought proper to prescribe regulations incompatible with the ordinary rules relative to bail.

By the act of March 3, 1797,[1] it is enacted, that, in suits against delinquent revenue officers or other persons accountable for public moneys, "it shall be the duty of the court where the same may be pending to grant judgment, at the return term, upon motion, unless the defendant shall, in open court (the United States' attorney being present), 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; specifying each particular claim so rejected in the affidavit, and that

[1] Ch. 20, § 3: 1 Stat. at Large, 512.

he cannot then come safely to trial. Oath or affirmation to this effect being made, subscribed and filed, if the court be thereupon satisfied, a continuance until the next succeeding term may be granted; but not otherwise, unless as provided in the preceding section." The preceding section referred to declares that in suits against public delinquents, *copies* duly authenticated, in the manner therein specified, of bonds, contracts or other papers on file in public offices at the seat of government, shall be received in evidence: "*Provided*, that where suit is brought upon a bond, or other sealed instrument, and the defendant shall plead '*non est factum*,' or, upon motion to the court, such plea or motion being verified by the oath or affirmation of the defendant, it shall be lawful for the court to take the same into consideration, and (if it shall appear necessary for the attainment of justice) to require the production of the original bond, contract or other paper specified in such affidavit." By the act of March 2, 1799,[1] it is enacted "That where suits shall be instituted on any bond for the recovery of duties due to the United States, it shall be the duty of the court where the same shall be pending to grant judgment at the return term, upon motion, unless the defendant shall, in open court, the United States attorney being present, make oath or affirmation that an error has been committed in the liquidation of the duties demanded upon such bond, specifying the errors alleged to have been committed, and that the same have been notified, in writing, to the collector of the district, prior to the commencement of the return term aforesaid; whereupon, if the court be satisfied that a continuance until the next succeeding term be necessary to the attainment of justice, and not otherwise, a continuance may be granted until the next succeeding term, and no

[1] Ch. 22, § 65: 1 Stat. at Large, 676.

PART 2. longer."[1] And in the act of March 3, 1825,[2] regulating the post-office department, it is enacted "That in all suits or causes arising under this act, the court shall proceed to trial, and render judgment the first term after such suit shall be commenced: *Provided, always*, that whenever service of the process shall not have been made twenty days at least previous to the return day of such term, the defendant shall be entitled to one continuance, if the court, on the statement of such defendant, shall judge it expedient: *Provided, also*, that if the defendant in such suit shall make affidavit that he has a claim against the general post-office, not allowed by the post-master-general, although submitted to him conformably to the regulations of the post-office, and shall specify such claim in the affidavit, and that he could not be prepared for the trial at such term for want of evidence, the court, in such case, being satisfied in those respects, may grant a continuance until the next succeeding term." This section is referred to, and its provisions expressly adopted by the act "to change the organization of the post-office department," &c., of July 2, 1836.[3]

To give effect, as far as possible, to these regulations, without at the same time dispensing with special bail, in those districts especially, in which

[1] In the case *Ex patrè Davenport*, 6 Peters, 661, it was decided, that, according to the true interpretation of this section, the legislature was to be considered as having intended no more than to interdict the defendant from delay by means of sham pleadings or other pretended defenses, in fraud of his obligation to make punctual payment. It was not intended to debar him from any plea which, upon general principles, could constitute a good defense upon the merits. And it was accordingly held that a plea of tender pleaded, in addition to *non est factum*, ought to have been received. See, also, to the same effect, *The United States* v. *Phelps et al.*, 8 Peters, 700.

[2] Ch. 64, § 38: 4 Stat. at Large, 113.

[3] Ch. 270, § 15: 5 Stat. at Large, 82.

Appendix, Rule 19, D. C., and, *infra*, declaration and notice of trial.

the forms of proceeding are borrowed substantially from the English courts, some special provision by rule regulating the mode of putting in and perfecting special bail is necessary. Such provision has been made by the courts for the northern district of New York.

In the courts for the southern district, provision for this class of cases has also been made.

Surrender.] The particular mode of proceeding to be pursued by the bail to effect a surrender of the principal, is of course to be determined by reference to the local law and usages of the courts. In the national courts of New York the course is specially prescribed by rules of court.

In the southern district the rules for this purpose are as follows:

"Bail, desiring to surrender the principal, or the principal wishing to surrender himself in discharge of his bail, may give two days' notice in writing to the attorney of the plaintiff, of the time and place of surrender.

"Two certified copies of the bail piece being produced to the judge, with proof of the due service of such notice, he will indorse on each a *committitur* of the principal to the custody of the marshal.

"On the written admission of the marshal, or due proof that the principal is in custody under such *committitur*, and no sufficient cause being shown to the contrary, the judge will immediately thereupon order an *exoneretur* to be entered.

"An *exoneretur* may be entered on filing the written consent of the plaintiff's attorney, without an order of the judge.

"An immediate *committitur* before notice given may be had on proof satisfactory to the judge that the principal is about to depart the district, or that the bail cannot with safety await the expiration of such notice before a surrender is made.

PART 2.

"In such case, the surrender shall be made in conformity to the present practice of this court, and may be made on the bail bond, or by putting in special bail, before a return of the writ."

The rules upon this subject of the courts of the northern district of New York, are in most respects conformable with the Revised Statutes of the state. They also provide, that when the plaintiff or his attorney, upon whom the rule to show cause is served, resides, at the time of service, more than one hundred miles from the place at which cause is to be shown, the service shall be made *eight* days before the time appointed in the order for showing cause, and that in other cases, *four* days shall be sufficient.[1]

By an act of congress, passed March 2, 1799, provision is made for the surrender of a defendant, who, having put in special bail in a suit in one district, is afterwards arrested in some other district, and committed to a jail, the use of which has been ceded to the United States for the custody of prisoners. It authorizes a surrender before a judge of the court, in which bail has been given, to the custody of the marshal of the district in which the defendant had been committed.[2]

In each of the national courts in this state, it is provided by rule, that, in cases falling within this provison, the surrender may be made *in the same manner* as in other cases.[3]

[1] Appendix, Rules 65, 66, 67, D. C.

[2] Chap. 32, 1 Stat. at Large, 727. The third section of this act provides, that defendants so surrendered "shall, unless sooner discharged by law, be holden in jail until final judgment shall be rendered in the suit in which he procured bail as aforesaid, and sixty days thereafter, if such judgment shall be rendered against him, that he may be charged in execution, which may be directed to, and served by, the marshal in whose custody he is."

[3] Rule 69, D. C. N. D.

In the courts for the northern district, it is further provided by rule, in accordance with the present law of the state, that bail *to the arrest* may surrender the principal, or he may surrender himself, "in the same manner and with the like effect as in case of special bail, except that two copies of the bail bond, proved to be such by the affidavit of the marshal, or his deputy, or of a subscribing witness, shall be used instead of certified copies of the bail piece.[1]

[1] Appendix, Rule 68, D. C. A question of jurisdiction occurs relative to suits against bail, and some other suits of a kindred nature to which it may not be amiss here briefly to advert. The question, as it respects bail, is this: Is it competent for the national courts to entertain jurisdiction, *without regard to the citizenship of the immediate parties*, of suits upon bail bonds taken, and recognizances entered into *in such courts respectively?* In the generality of cases, it is true, no such question can arise. Most of the suits in the courts of the United States are prosecuted either by the United States, by officers thereof, serving under the authority of an act of congress, by aliens, or by citizens of other states. In these cases, the bail usually being citizens of the state in which the suit is brought, no impediment to the exercise of jurisdiction exists. But *where the plaintiff is a citizen of the state in which the suit is prosecuted* (as he may be against an alien, or against a citizen of another state, who happens to be "found" in the state of which the plaintiff is a citizen), there would in such case, according to the general rule, be a want of proper parties to a suit against the bail. It would be a suit *between citizens of the same state*—a case to which the judicial power of the United States (except in a few specific cases arising under the laws of the United States) does not extend. So, too, when the plaintiff, instead of taking an assignment of the bail bond, and prosecuting in his own name, elects to seek satisfaction for the defendant's default in not putting in special bail to the action, against the marshal—and where *the latter is consequently obliged to resort to a suit on the bail bond* for his indemnity. And so, also, of suits upon bonds for the jail liberties, by the marshal or by a citizen plaintiff to whom the bond has been assigned.

To be obliged to resort to the state tribunals in these cases would, to say the least, be inconvenient. Indeed, the inconvenience attending the prosecution of suits against bail, even in a different *co-ordinate* court, has been considered to be of so serious a nature as to have led to the adoption of a rule, in England and in New York, requiring such suits to be brought in the same court in which the original action was

SECTION VII.

PROCEEDINGS FROM THE DECLARATION (INCLUSIVE) TO THE TRIAL; INCLUDING JUDGMENTS BY DEFAULT.

The defendant having perfected his appearance, is entitled, by the rules of the national courts in New York, at any time thereafter, to take a rule of course against the plaintiff requiring him to declare within twenty days after notice of such rule, or, in the courts of the southern district that *he be non-*

prosecuted, except in cases where its enforcement would be destructive of the remedy; as where the original suit is in a county court, and the bail resides without the limits of its jurisdiction. And upon this ground alone, proceeedings in such suits have frequently been set aside. Burr, 642, 1923; 3 Wils., 348; 8 T. R., 152; 2 Cowp., 396; 13 Johns. Rep., 424. Unless, therefore, it should be clearly shown that a suit brought in a state court, against bail, who had become such in a court of the United States, could not have been sustained in the latter court, we may suppose such suits would be dismissed; and hence the greater practical importance of this question.

If, as is probably generally supposed, the jurisdiction in question exists, it can only be, I apprehend, upon the ground that suits of this nature are to be regarded as mere *incidents* to the original suits that give rise to them, which the ends of justice require to be prosecuted in the same court; and as such are to be considered as falling within the spirit and intent of the constitutional and legislative provisions, by which the jurisdiction of the courts of the United States is defined. In other words, the jurisdiction in such cases is to be *implied*, from the grant of jurisdiction over the suits in which they have their origin. This is the view of the subject taken by Mr. Justice WASHINGTON in the case of *Bobyshall* v. *Oppenheimer*, 4 Wash. C. C., 482. But in the case of *Davis* v. *Packard* (7 Peters, 276, 285,) the supreme court seems to have taken the opposite view.

There are also other analogous cases; and, among these, may be mentioned actions *against the officers of the court for acts of negligence or misfeasance*, whereby the rights of parties litigant are defeated; such as the omission or refusal to return process, false return, escape, &c. The question of jurisdiction with respect to this last ground of action (*escape*) becomes especially interesting in this state, by reason of the peculiar form of the enactment contained in the late Revised Statutes, declaring the liability of sheriffs, for the safe custody of persons committed in virtue of civil process from the courts of the United States. These officers are declared to be "answerable *in the courts of the United*

prossed, and in the courts of the northern district, that *judgment of discontinuance be entered against him.*[1]

1. *Of the declaration.*

Of the formal parts of the declaration, it would be impertinent, for reasons already mentioned, to treat at large.

The common rules of pleading, except where they have been changed by the laws of the states or by rules of court, are in general strictly applicable to proceedings in the national courts. The pleader in these courts must, therefore, have recourse to the same treatises upon this science for direction, that he resorts to as his guide in the management of his causes in the state tribunal. It is true that many questions of pleading have arisen and been determined in the courts of the United States. But, as with few exceptions, they arose from no peculiarity

States." But, as the sheriff is always a citizen of the state, whenever the plaintiff happens to be a citizen, here again, there will, *prima facie*, be a want of proper parties. This statute contains, moreover, as we have seen, another qualification. The sheriff is to be "answerable in the courts of the United States, *according to the laws thereof.*" But the laws of the United States *are silent upon the subject.* It is true they declare that the laws of the several states shall be rules of decision when applicable in trials at common law; but the state laws by no means become laws of the United States, in the sense in which these terms are used in the constitution, and in the acts of congress, nor indeed in any proper sense. So that, according to the literal construction of the state law, it would seem to be at least questionable, whether in any case an action for escape from process issued by a court of the United States, can be maintained against a sheriff of the state of New York. Congress, it may be said, may remove this difficulty by yet legislating upon the subject. But, to say nothing of the constitutional impediments in the way of such a course (so far as suits between citizens of the same state are concerned), this could not be done without a departure, in some degree, from a great fundamental principle of our national jurisprudence, that of leaving all controversies properly falling within its scope to be determined by the *lex loci.*

[1] Appendix, Rule 27, D. C. N. D.

PART 2. in the constitution of these tribunals, but are in accordance with the decisions of other courts, proceeding according to the course of the common law, it would be foreign from the design of this work to notice them in detail.

There is, however, one rule applicable to the framing of the declaration in the national courts, of such vital importance as to require it to be impressively stated, and fully explained. For, although it was early established, and has ever since been uniformly adhered to, by the courts, either through inadvertence or misapprehension, it is is even yet frequently disregarded by the practitioner. It springs from the peculiar character of these courts, whose jurisdiction, while it extends to every species of litigation under every form, is yet so limited as to embrace but comparatively few cases specially circumstanced: whence it results that the legal presumption in regard to them is (not, as with regard to a court of general jurisdiction, that a cause is within its jurisdiction unless the contrary appears, but rather) that a cause is without their jurisdiction till the contrary is shown.

Ground of jurisdiction to be stated.] The fundamental rule, therefore, to which I refer, is this: That the facts or circumstances upon which the jurisdiction over the case depends, must be set forth in the declaration.

In some cases these facts and circumstances cannot fail to appear without any express averment for that purpose: as where the United States are plaintiffs; or where the postmaster-general sues in his own name in virtue of the acts of congress authorizing him to do so; or where the president, directors and company of the bank of the United States are a party. The jurisdiction in these cases, resulting as it does wholly from the character of the

parties, and that character being fully indicated by their names, is necessarily manifest. So, too, when the suit is for the infringement of a patent or copyright, or upon a debenture, or a *qui tam* action for a penalty accruing under the laws of the United States; the jurisdiction in these cases depending, as it does, entirely upon the nature of the controversy, must be manifest from the bare statement of the plaintiff's title.

But in the other classes of cases falling within the judicial power of the United States, the facts or circumstances giving jurisdiction must be expressly stated.

Character of the parties.] Thus in a suit between an alien and a citizen, the alienage of the one, and the citizenship of the other, must be stated. *Hodgson et al.* v. *Bewerbank et al.*, 5 Cranch, 303; *Jackson* v. *Twentyman*, 2 Peters, 136. And so, doubtless, when a state is plaintiff against an alien, the alienage of the defendant must be stated. When the suit is between citizens of different states the citizenship of the parties (so as to show, not only that they are citizens of different states, but also that one of them is a citizen of the state where the suit is brought) must be stated. *Brigham* v. *Cabot et al.*, 3 Dallas, 382; *Abercrombie* v. *Dupuis et al.*, 1 Cranch, 343; *Wood* v. *Wagnon*, 2 id., 9; *Capron* v. *Van Noorden*, id., 126; *Winchester* v. *Jackson et al.*, 3 id, 515; *Strawbridge et al.* v. *Curtis et al.*, id., 267; *Hope Insurance Company* v. *Boardman et al.*, 5 id., 57; *Sullivan* v. *Fulton Steamboat Company*, 6 Wheat., 450; *Breithaupt* v. *Bank of Georgia*, 1 Peters, 238. In a suit to recover the contents of a promissory note or other chose in action (except foreign bills of exchange and debentures), brought by an assignee of such promissory note, &c., it is necessary to aver that the original

PART 2. promisee, through whom the plaintiff claims to recover, is an alien or citizen of another state, as the case may be, so as to show that he also might have maintained an action in the court to recover such contents. *Turner* v. *The Bank of North America*, 4 Dallas, 8; *Montalet* v. *Murray*, 4 Cranch, 46.

The averment of citizenship must be positive, and must be in terms conformable with those of the constitution and judicial act conferring the jurisdiction. Thus, it is not sufficient to describe a party as *of*, or as *resident in*, a particular state; but he must be stated to be a *citizen of* the state. *Abercrombie* v. *Dupuis et al.*, 1 Cranch, 343; *Wood* v. *Wagnon*, 2 id., 9.

In a more recent case it has, however, nevertheless, been held that an averment, which is only *equivalent in import* to an averment of citizenship, is sufficient. *Gassies* v. *Ballou*, 7 Peters, 761. The defendant in that case was decribed as "now residing in the parish of West Baton Rouge, where the said Pierre Gassies caused himself to be naturalized an American citizen." This was held to be sufficient. "A citizen of the United States," say the court, "residing in any state of the Union is a citizen of that state."

In suits to which corporations aggregate are parties, the members of the corporation, as we have seen, are to be presumed to be citizens of the state by which the charter was granted. But this must clearly appear from the pleadings, and it has been a question what description is sufficient for this purpose. In *The Lafayette Insurance Company* v. *French et al.* (18 Howard, 404), in error from the circuit court for the district of Indiana, the plaintiffs, in their declaration, were averred to be citizens of Ohio, and they complained of the Lafayette Insur-

ance company, a citizen of the state of Indiana. The court held this description to be insufficient. It did not appear from it that the company was a corporation, or, if it was, by the law of what state it was created. And as to the allegation that it was a citizen of Indiana, no sensible meaning could be attached to it. No association of persons, whether incorporated by law or not, was a citizen within the meaning of the constitution. But the plaintiffs, in their replication to the defendant's plea, having averred that the defendants were a corporation, created under the laws of Indiana, having its principal place of business in that state, and the defendants having confessed these allegations by demurrer, this was held sufficient to bring the case within the decision of the court in *Marshall* v. *The Baltimore & Ohio Railroad Company* (16 Howard, 314), in which the allegation was, that the "defendants were a body corporate by the act of the general assembly of Maryland," and the prior decisions. In the only remaining case to which it is necessary to refer, that of *The Covington Drawbridge Company* v. *Shepherd et al.* (20 Howard, 227), in error from the circuit court for Indiana, the decision turned upon a provision in the constitution of the state of Indiana, which seems to have been overlooked, or not appreciated, in the case in 18 Howard. The plaintiffs, describing themselves as citizens of the state of Ohio, complained of "the Covington Drawbridge company, citizens of the state of Indiana, defendants in this suit;" and the only question before the supreme court was whether that description was sufficient to bring the case within the jurisdiction of the circuit court. The court held it to be so, on the ground, alone, that, by an article of the constitution of Indiana, it was ordained that every statute shall be a public law, unless otherwise declared in the statute itself. The

PART 2. description did not, *per se*, show the company to be a corporate body, but the act of incorporation did; and, being a public law, say the court, the circuit court and this court are bound to take judicial notice of it, without its being pleaded or offered in evidence. And, as to the citizenship of the persons composing the company, it was, in fact, expressly averred, and, if it had not been, the defendants would have been estopped by legal presumption from controverting it. It seems to follow, therefore, that when the act of incorporation is a public law of a state, made so by its own terms, or by a provision of the state constitution, it is sufficient in pleading, to name the corporation as designated in the act. But acts of incorporation are private acts, unless otherwise declared, and the chief justice, in pronouncing the judgment of the court, took occasion to give what he deemed a proper description in such cases. "If," he observes, "the act of incorporation had not been a public act of which the court is bound to take notice, then, undoubtedly, the proper description of the defendants would have been 'the Covington Drawbridge company, citizens of the state of Indiana, incorporated by that name by the said state, and having their principal place of business therein.'"

Amount in dispute.] But it will be recollected that in all those cases in which the jurisdiction depends upon the alienage or citizenship of the parties, it is also requisite, according to the 11th section of the judicial act,[1] in order to enable these courts to exercise jurisdiction, that the matter in dispute should exceed, exclusive of costs, the sum or value of five hundred dollars.

Until after the lapse of more than forty years from the establishment of the government, there had been no decision by the supreme court directly on the

[1] Act of September 24, 1789, ch. 20: 1 Stat. at Large, 73.

question whether it was not also incumbent on the plaintiff to insert in his declaration an allegation to this effect. But in the case of *Lessee of Lansing* v. *Dolph et al.* (4 Wash. C. C., 624), the circuit court for the district of Pennsylvania held such allegation to be indispensable. The question was discussed by Mr. Justice WASHINGTON with great clearness and force. "The amount or value in dispute," he observed, "is as essentially a ground of jurisdiction as the character of the parties. What reason can be given why the latter must be stated in order to give validity to the proceedings of the court, which does not apply with equal force to the latter? The ingenuity of the plaintiff's counsel has been taxed in vain to point out a difference, and we are quite satisfied that no difference exists."[1] And in the case of *Smith* v. *Jackson* (1 Paine, 486) Mr. Justice THOMPSON had expressed an opinion to the same effect. These judges considered the necessity of an averment of the requisite amount as clearly following from the principles so fully established with respect to citizenship and alienage, where these constitute the grounds of jurisdiction. In conformity with these decisions a like decision had been made in several causes in the district court of the northern district of New York. Under these circumstances, the author, in the first edition of this work, did not hesitate strongly to intimate his belief that an averment of the requisite amount in dispute was necessary.

But in the case of *Ex parte Martha Bradstreet*, decided in 1833 (7 Peters, 634), it seems to have been held otherwise.

[1] The case was an action of ejectment, in which the *damages* were laid at $3,000. But inasmuch as this action, though in form an action of trespass for the recovery of damages, is in reality brought to recover land, it was held that the claim of damages was merely formal, and that the value of the premises in question ought to have been stated.

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This decision appears to me to be at war with well-established principles, and with the whole current of previous reported decisions in the national courts upon this and analogous questions. It is a general principle with regard to courts of limited jurisdiction, that a cause is presumed to be without their jurisdiction unless it is expressly shown to be within it. This is the well-known doctrine of the English courts; and it was laid down and sanctioned by the supreme court of the United States in the early case of *Stanley* v. *The Bank of America* (4 Dall., 11), and has been repeatedly re-asserted and maintained in that court ever since. The decision in the case of Bradstreet is, that the plaintiff, without any averment for that purpose in his declaration, may prove on trial that the controversy involves the requisite amount.

But it is a rule of pleading that the plaintiff is bound to allege what it is necessary for him at the trial to prove, and, *e converso*, that he is not required, and will not be permitted, to prove what he has not alleged.

Chief Justice MARSHALL, in delivering the opinion of the court, refers to the practice, in the supreme court, of permitting a plaintiff in error to show by affidavit that the matter in dispute exceeds $2,000, so as to entitle him to a hearing there. It is true, that after considerable difficulty and embarrassment on this subject, that court made and adopted a rule authorizing this practice.[1] But this was done *ex necessitate*. There are no pleadings in this appellate court in which an allegation of the amount in litigation could with propriety be inserted, and no such form of trial as would afford an opportunity to prove it. There is a want of analogy, therefore, between the cases thus placed by the late Chief Justice in

[1] Appendix, Rule 13, S. C. U. S.

the same category; and he appears to me to have been misled by a fancied similitude, where none in reality existed. It is true he also refers to the practice of the other courts of the United States. "The practice," says he, "of this court *and of the courts of the United States*, is to allow the value to be given in evidence." But I have met with no reported decision in any of the other courts, affording the least countenance to such a practice, and those above cited show that, in the second and third circuits, it has been considered wholly inadmissible.

Why not, with equal propriety, permit the plaintiff, without any allegation to that effect, to *prove* that he is an alien, or a citizen of a different state? The circuit court can, in general, no more take cognizance of a case where the plaintiff claims less than five hundred dollars, than of an ordinary case where the adverse parties are citizens of the same state. The just rule of pleading, unquestionably is, that it should be made to appear affirmatively on the face of the plaintiff's declaration that the case is within the jurisdiction of the court; and this rule obviously demands as well an allegation of the requisite amount in controversy, as of the alienage or requisite citizenship of the respective parties.

Whether the decision in the case of Bradstreet will be adhered to, should the question be again brought before the supreme court and fully considered, I must be permitted most respectfully to doubt.

Although it appears to me to be idle, in giving a construction to the act in question, to attempt to make a distinction in this respect between the different forms of action, it is proper to remark that the case of Bradstreet was a writ of right, and that the decision is limited in terms to "cases where the demand is not for money, and the nature of the

PART 2. action does not require the value of the thing demanded to be stated in the declaration."

By the 20th section of the judicial act, it is declared that where a plaintiff in a circuit court, recovers less than the sum or value of five hundred dollars, he shall not be allowed, but, at the discretion of the court, may be adjudged to pay costs. It is, therefore, clear that congress contemplated the possibility of a valid recovery for less than the minimum sum or value prescribed by the 11th section, as a limit of jurisdiction. Indeed, in the early case of *Hulsecamp* v. *Teel* (2 Dallas, 358), in the circuit court for the district of Pennsylvania, this provision, concerning costs, was considered as sufficient of itself to vest jurisdiction; "since," say the court, "it would be impossible to adjudge that the defendant should pay costs, without taking cognizance of the cause." And in the case of *Green* v. *Liter et al.* (8 Cranch, 229), where the land to which the demandant in a writ of right claimed title, exceeded five hundred dollars in value, but the tenement held by the tenant, was of less value than that sum, and one of the questions upon which the circuit court divided, was, whether, under these circumstances, it had jurisdiction; the supreme court decided that it had jurisdiction; using the following language: "Taking the 11th and 20th sections of the judicial act of 1789, ch. 20, in connection, it is clear that the jurisdiction attaches where the property demanded exceeds five hundred dollars in value, and if, upon the trial, the demandant recovers less, he is not allowed his costs; but, at the discretion of the court, may be adjudged to pay costs." From this language it is obvious that the 20th section was considered as in some respect qualifying what would otherwise have been the operation of the 11th section. To what extent it is to have this

influence, seems not to have been settled. But it is by no means to be considered as conferring jurisdiction without regard to amount. Such a construction would virtually repeal the limitation in the 11th section and would of course render the allegation in question unnecessary. The 11th section, it will be perceived, speaks of the amount of the "*matter in dispute;*" while the 20th section speaks of the amount of the *recovery*. While, therefore, it was clearly intended, by the former of these sections, to limit the jurisdiction of the circuit courts to controversies involving more than five hundred dollars in amount, it seems to be hardly less clear from the two sections taken together that it was intended to authorize the *rendering of judgments* for a smaller amount. It was doubtless foreseen that suits would be instituted by plaintiffs having an unquestionable right in law to recover, but under mistaken though honest views, with respect to the amount to which they were entitled. Thus an action might be brought for the recovery of lands worth more than five hundred dollars, under the belief, on the part of the plaintiff, that his title extended to the whole premises, or to the entire interest therein, when it might appear upon the trial that he was entitled to recover only a part, worth less than that sum; or, in a suit for the recovery of a debt amounting to the requisite sum, the amount of the recovery might be reduced below it by set-off on the part of the defendant, of which the plaintiff previous to the commencement of his suit was not apprised or which he expected to be able successfully to resist. Considering the hardship of driving a party under such circumstances to a second suit in a different court, to say nothing of the danger of his ultimate defeat, upon the ground of a former suit for the same cause of action, it was probably deemed advisable to author-

PART 2. ize the court to render judgment in such cases, without regard to the amount found by the jury; subjecting the plaintiff to no other disadvantage than that of failing to recover, or, in the discretion of the court, of paying costs. This view of the intentions of the legislature appears upon the whole the best adapted to reconcile the two sections with each other, and the few decisions bearing upon the subject which have been made with both. But to lay down rules which, while upon the one hand they give full effect to the intentions of the legislature (admitting them to be as here stated), will upon the other preclude abuse, will probably be found no easy task.

In what manner the defendant may avail himself of the want of jurisdiction.

1. *When apparent on the face of the declaration.*] In the case of *The Lessee of Lansing* v. *Dolph* (4 Wash. C. C. Rep., 624), the plaintiff, having in his declaration omitted to show that the court had jurisdiction of the case by a proper statement of the facts on which the jurisdiction was supposed to depend, the court permitted the defendant to take advantage of the omission by motion to dismiss the suit, pending the trial; saying, however, that, if he intended to controvert the jurisdiction, he should have put it in issue by a plea, which he could not be permitted to do pending the trial. In another case in the same court, *Shute* v. *Davis* (Peters's C. C. Rep., 431), the jury having found a verdict for the plaintiff, the judgment was arrested. And, in a long series of cases, commencing at a very early period, judgments obtained in the circuit court have been reversed on a writ of error, by the supreme court, for want of jurisdiction apparent on the record. These are the only modes which appear, by any reported case that I have seen, to have been resorted to in the courts

of the United States to defeat a recovery on this ground. But if, according to the decision in *The Lessee of Lansing* v. *Dolph*, a motion to dismiss a cause for this defect can be entertained pending the trial, it may be presumed that it would be at any time before. Nor can I discern any reason why the expedient of a demurrer to the declaration may not be successfully resorted to. As far as I am aware, it is universally true that a demurrer is the proper form of defense to a declaration which does not show that the plaintiff has a right in law to maintain his action; and this right he cannot have in a court which by law has no jurisdiction of his case. If there are no express decisions on this subject in the English and American common law courts, the fact is easily accounted for. Being courts of general jurisdiction it is to be presumed in every case fit for judicial cognizance that they are competent to entertain it until the contrary is affirmatively shown by a plea in abatement; and it is, accordingly, in this mode only that their jurisdiction is brought into contest. But in courts of equity, whose jurisdiction like that of the courts of the United States is limited to certain descriptions of cases, a demurrer is the familiar and established mode of defense, on the ground of a want of jurisdiction, to the plaintiff's bill.

2. *When the declaration contains the requisite averments.*] The want of jurisdiction in the courts of the United States in nearly all instances, in actual litigation, results from the want of the requisite character as to citizenship or alienage in the parties; the jurisdiction in suits between private parties being, as we have seen, in general, limited to suits between citizens of different states, and between an alien plaintiff and a citizen, one of the parties, in both cases, being an inhabitant of the judicial district in which the suit is instituted. In such suits, where the requisite

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character of the parties was averred in the declaration, it was formerly the practice to allow the defendant to contest the truth of such averments at the trial, under the general issue. But, in the case of *D' Wolf* v. *Rebaud et al.* (1 Peters, 476), the supreme court said, "it has recently been decided by this court, on full consideration, that the question of citizenship constitutes no part of the issue upon the merits, and must be brought forward by a proper plea in abatement in an earlier stage of the cause."[1] The rule has ever since been adhered to, and is now firmly established. *Philadelphia, Wilmington & Baltimore R. R. Co.* v. *Quigley*, 21 Howard, 202. And it has also been held that a defendant, after having pleaded in bar, may be permitted by the court to withdraw his plea, and plead in abatement that the plaintiff is not a citizen of another state, as alleged in his declaration, but a citizen of the same state as the defendant, where the suit is pending. *Eberly et al.* v. *Moore et al.*, 24 Howard, 147. And, in this case, the jury having found a verdict in favor of the defendant, upon the issue on the plea of abatement, the cause was *dismissed*, and the supreme court affirmed the judgment. The defendant, however, holding the affirmative in such an issue, must establish the truth of his plea by proof.[2] It is neces-

[1] The decision here alluded to by the court was probably that of *Conrad* v. *The Atlantic Insurance Company*, 1 Peters, 386.

[2] A plea to the jurisdiction by a corporation may be put in by its attorney. *The Commercial R. R. Bank of Vicksburgh* v. *Slocomb*, 14 Peters, 60. An objection that the plaintiff, as administrator, *ad colligendum*, had not power to sue, should be taken by plea in abatement. *Ventris* v. *Smith*, 10 Peters, 161. And so, that he is not executor, or that his appointment as such is invalid. *Childress* v. *Emory*, 8 Wheaton, 642; *Kane* v. *Paul*, 14 Peters, 33. So also in an action by a corporation, must a denial of the corporate existence. *Conrad* v. *The Atlantic Insurance Company of New York*, 1 Peters, 386. And the non-joinder of a partner as a defendant in an action of assumpsit. *Barry* v. *Foyles*, 1 Peters, 311. A plea *puis darrien continuance* waives all prior pleas.

sary to bear it in mind, also, that if the issue be found in favor of the plaintiff, the judgment is peremptory and final, *quod recuperet;* and, in a case requiring the assessment of damages, the damages are assessed by the jury, as in the case of a plea in bar, though it is otherwise on demurrer to such a plea; the judgment in that case being *respondeat ouster*. *Eichorn* v. *Le Maitre*, 2 Wilson, 367; *Bowen* v. *Shapcott*, 1 East., 542—in both of which cases a misnomer was pleaded; *Haight* v. *Holley*, 3 Wendell, 258; *McCarter* v. *Chambers*, 6 id., 649; *Van Tine* v. *Crane*, 1 id., 524; *Bank of Orange* v. *Brown*, 3 id., 158; 1 Chit. Pl., 458; 2 Archb. Pr., 3.

With regard to the *amount in dispute*, it is to be observed, that if, as from the preceding review of the subject would seem to be the case, the jurisdiction is to be considered as depending, not upon the sum or value which the plaintiff shows himself *entitled in law to recover*, but upon the sum or value to which his *actual claim extends*, it follows that no more is required of him than to prove that what he claims a right to recover exceeds the sum or value of five hundred dollars. Doubtless, however, he is bound to show that his pretensions have some legal color to support them. But in the practical application of this test of jurisdiction to actions of tort, such as assault and battery, false imprisonment, trover, trespass and the like, it is not easy to perceive by what means the virtual defeat of the limitation in question is to be effectually guarded against.

When in such actions the *damages laid* are sufficient in amount, and the plaintiff, having at the trial established his right in law to recover, seriously insists that the injury of which he complains entitles

Wallace v. *McConnell*, 13 Peters, 136; and when matter in abatement is thus pleaded, the judgment, if against the defendant, is peremptory. *Renner* v. *Marshall*, 1 Wheat., 215.

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him to a recovery of more than five hundred dollars, how can it, with strict propriety, be said that the "matter in dispute" is sufficient to confer jurisdiction, even though it be ever so clear, that he ought not in justice to obtain a verdict for half that sum? But I have met with one reported case, from which it would appear to have been the understanding of the court in which it arose, that, in order to sustain the jurisdiction, it was necessary that the *verdict* should be for a sum, or thing in value, exceeding five hundred dollars. I refer to the case of *Denn* v. *Wright*, Peters's C. C. Rep., 64. It was an action of ejectment, and involved a question of boundary. The value of the land was stated in the declaration. The jury found for the plaintiff; and, in addition to their verdict, expressed an opinion as to the *metrical* extent of the plaintiff's rights. A motion in arrest of judgment was then made, upon the ground that the jury had not found that the value of the land exceeded five hundred dollars. To this motion Judge WASHINGTON replied as follows: "It would be sufficient to fix the jurisdiction if the value were now proved by witnesses, or an affidavit; and, as the evidence given of the tract, proved it to exceed, very far, the sum of five hundred dollars, the court cannot grant a rule to show cause why the judgment should not be arrested." By what arguments and views of the subject this motion was supported does not appear. But assuming, as appears to have been the fact, that the land really in dispute between the parties exceeded five hundred dollars in value, it seems to be inferable from the report that the idea was entertained, both by the counsel and the court, that the property *actually recovered* must exceed the sum. So far, however, as this case affords any sanction to such a doctrine, it appears to stand alone.

And it may not be amiss here also to remark, that, whichever might have been the true rule in this respect, the case seems not to be satisfactory upon other accounts. The question of value being in issue, the time to object to the sufficiency of proof upon that point was upon the trial; and the jury having found a verdict for the plaintiff, any supposed defect in such proof afforded no ground for a motion in arrest of judgment. The verdict, while it stood, was conclusive. For the purpose of sustaining the jurisdiction of the court, therefore, no further proof was necessary; to say nothing of the informality of receiving supplemental evidence in support of a verdict already entered.[1] But upon the supposition that there may be a valid recovery for less than five hundred dollars in value, it is proper to add, that, on another account, it is advisable, if not necessary, that the jury should find the value of the property to which the plaintiff proves himself to be entitled; because, under this construction of the law, a general verdict would not necessarily imply that the value of the thing actually recovered exceeded five hundred dollars; while it is certain that the 20th section of the judicial act (whatever may be its true construction in other respects) prohibits the *allowance* of costs to a plaintiff who recovers less than that sum, and authorizes the court, in its discretion, to subject him to the payment of costs. In order to enable the court, therefore, to adjudicate upon the question of costs, the value of the property recovered should be determined; and this should be done by the verdict; both because, being a matter of fact, it ought to be decided by the jury, and because the *record* should contain every thing requisite to show the legality of the judgment. Nothing more, how-

[1] See the remarks of THOMPSON, J., upon this latter feature of the case in *Smith* v. *Jackson*, 1 Paine, 486.

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ever, is supposed to be necessary, than for the jury to declare by their verdict, whether the value exceeds, or falls short of, five hundred dollars.[1]

In the case of *Skillern's Executors* v. *May's Executors* (6 Cranch, 367), a decree of the circuit court had been reversed in the supreme court, and the cause remanded to the circuit court for further proceedings, in conformity to the judgment of the supreme court. The cause being before the court below upon the mandate, it was then for the first time objected, that it did not appear from the pleadings that the court had jurisdiction in the case; and the question before the supreme court, upon a certificate of disagreement between the judges of the circuit court, being whether the cause could still be dismissed for want of jurisdiction, the supreme court directed the following opinion to be certified: "It appearing that the merits of this cause had been finally decided in this court, and that its mandate required only the execution of its decree, it is the opinion of this court that the circuit court is bound to carry that decree into execution, although the jurisdiction of that court be not alleged in the pleadings."

Place of arrest.] It is not necessary, in pursuance of the 11th section of the judicial act, to aver that the defendant was an inhabitant of, or was found in, the district in which the suit is prosecuted at the time of serving the writ. The exemption from arrest out of the district is not construed as a restriction upon the jurisdiction of the court, but only as securing a personal privilege to the defendant, which, by

[1] There is a slight inconsistency between the 11th and 20th sections of the judicial act, not altogether unworthy of notice. The former confers jurisdiction where the matter in dispute "*exceeds*" the sum or value of five hundred dollars; and the latter denies costs where "*less than*" the sum or value of five hundred dollars is recovered. But suppose the recovery be for exactly that sum?

a voluntary appearance, he may waive. *Gracie et al.* v. *Palmer et al.*, 8 Wheat., 699.

Of the filing of the declaration, absolutely or *de bene esse;* of the rule to plead; of the service of the declaration, and of the notice of such rule; of amending the declaration, &c., &c., it is deemed unnecessary to treat. A knowledge of the practice relative to these particulars in the state courts, and a resort to the rules of the national courts respectively, cannot fail to afford the requisite information.

The practice of these courts in the New York districts corresponds in these respects with the former practice of the supreme court of the state, being regulated in conformity therewith in most instances by express rules.[1]

But we have seen that there are cases in which the United States are entitled to judgment upon the return of the process against the defendant. In these cases the defendant may be required to plead *instanter*. For the rules upon this subject of the national courts in New York, *vide*, *post*, "*Notice of trial.*"

2. *Judgment by default.*

There is little that demands special notice under this head. In each of the national courts in New York the practice appertaining to it corresponds, in general, exactly with the former practice of the supreme court of the state. In a few particulars it differs.

According to a rule in each of these courts, the party in whose favor a default has been entered, may, on *any day* afterward in term, have a rule entered for such judgment as is to be rendered by law by reason of such default.

[1] *Vide, post, "Notice to the adverse party—service thereof—agents."*

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Damages are to be assessed by the clerk, or upon writ of inquiry (before the marshal), as in the supreme court of the state.

In the circuit and district courts of the northern district, fourteen days' notice of assessment and six of countermand are required, without regard to the defendant's residence; but in these courts, as in the supreme court of the state, no such notices are required, except in cases in which the defendant has appeared by attorney, or has given notice of his intention to appear and defend the action.

The notice may be for *any day* in term.[1]

In the circuit and district courts of the southern district, in all cases in which the United States are plaintiffs, or are interested, judgments by default may be entered up in vacation as of the preceding term.

In the circuit and district courts of the northern district this may be done in certain cases and under certain circumstances.[2]

It is proper to notice, in this place, a provision contained in the twenty-sixth section of the judicial act of 24th September, 1789, which is as follows: "That in all causes brought before either of the courts of the United States, to recover the forfeiture annexed to any article of agreement, covenant, bond or other specialty, where the forfeiture, breach or non-performance shall appear by the default or confession of the defendant, or upon demurrer, the court before whom the action is shall render judgment therein for the plaintiff, to recover so much as is due according to equity. And when the sum for which judgment should be recovered is uncertain, the same shall, if either of the parties request it, be assessed by a jury.[3]

[1] Appendix, Rules 30, 31, D. C. N. D.

[2] Rule 19, D. C.

[3] Ch. 20: 1 Stat. at Large, 73.

I have not met with any reported case in which the construction of this enactment has been drawn into question. It probably had no other design than effectually to secure to defendants who might suffer judgment to pass against them by default, in all the courts of the United States (whatever might be the laws of the respective states), the benefit of the rule that penalties, as such, are not recoverable; but only such damages as have been actually sustained by the plaintiff.

3. *Of proceedings between the declaration and plea.*

The proceedings here more especially referred to are oyer, bills of particulars, bringing money into court, and the consolidation of suits.

With respect to the three first of these points the laws of the United States are silent, and the practice of the national courts presents no peculiarities to be noticed.

The consolidation of suits, however, is expressly provided for by law, and is therefore understood as prevailing and so far as the act of congress extends, as resting upon the same footing in the national courts in each of the states and territories.

By the act of July 22, 1813, it is enacted, "That whenever causes of like nature, or relative to the same question, shall be pending before a court of the United States, or the territories thereof, it shall be lawful for the court to make such orders and rules concerning proceedings therein, as may be conformable to the principles and usages belonging to courts, for avoiding unnecessary costs or delay in the administration of justice; and, accordingly, causes may be consolidated, as to the court shall appear reasonable. And if any attorney, proctor or other person, admitted to manage or conduct causes in a court of the United States or of the territories

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The precise nature and extent of the authority here conferred does not appear to have been determined by judicial exposition. It would seem, however, that the legislature had in view a more comprehensive power than that of merely consolidating actions, subject to the limitation under which it is exercised in the courts of England and of the state of New York; where it is applicable only to actions brought by the same plaintiff against the same defendant for the causes of action which may be joined. It probably was intended to vest large discretionary powers to prevent abuse by *all* such "orders and rules" as are "conformable to the principles and usages of courts;" of which the consolidation of suits being the most usual, and depending upon principles the best defined, was on that account specified, without any intention thereby to limit the scope of the preceding clause. Thus, for example, in New York, where several causes had been carried down for trial at the suit of the same plaintiff, all depending upon the same questions of law, the judges at the circuit have frequently exercised the power, when, upon the trial of one of such causes, those questions were decided against the plaintiff, or a special verdict was found, of refusing to try the others until such decision should be pronounced erroneous by the supreme court, or until the plaintiff's right to recover upon such special verdict should be established.

So in an English case, on a rule to show cause why the proceedings in all the cases, to the number

[1] Ch. 14, § 3: 3 Stat. at Large, 19.

of thirty-seven, should not be stayed and abide the event of a special verdict, already taken in one of them, Lord KENYON said it was a scandalous proceeding; they all depended precisely upon the same title, and ought to be all tried upon the same record; and the rule was made absolute. See 2 Sellon's Practice (Dublin Ed. of 1796), 229.

The practice of consolidating actions had always prevailed in the state of New York, as derived from the common law, and received the express sanction of the legislature by the act of April 21, 1818, and again in the last revision.

Independently, therefore, of the above recited act of congress, it would have prevailed in the national courts of this state.

The laws of New York also contain another provision upon this subject, which is to be regarded as operative in the national courts here.

By the Revised Statutes it is enacted that when several suits shall be commenced against "joint and several *debtors*," the plaintiff may in like manner consolidate them. This enactment, relating, as it does, to procedure, must be considered as operative in each of the national courts of New York, under their rules, made subsequent to its passage, adopting the practice of the supreme court of the state in cases not otherwise specifically provided for.

4. *Of pleas, replications, &c., and demurrers.*

The order, form and requisites of the various pleadings between the declaration and issue are to be determined by reference to the laws, and to the practice of the superior courts of the several states, in connection with the rules of the particular court in which the suit is pending.

The only mode by which a party is permitted to avail himself of the defects of form is by special

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demurrer; it being declared by the judicial act "That no summons, writ, declaration, return, process, judgment or other proceedings in civil cases, in any of the courts of the United States, shall be abated, arrested, quashed or reversed for any defect or want of form; but the said courts, respectively, shall proceed and give judgment according as the right of the cause and matter in law shall appear unto them, without regarding any imperfections, defects or want of form in such writ, declaration or other pleading, return, process, judgment or course of proceeding whatsoever, *except those only* in cases of demurrer, which the party demurring *shall specially set down and express*, together with his demurrer as the cause thereof.[1]

In each of the national courts of New York the rule to plead, answer or join in demurrer is a rule of twenty days after service of notice thereof, and of a copy of the pleading to be answered; except the rule to join in demurrer to a plea in abatement, which is a rule of four days; and except, also, that a plea in abatement must be served in the northern district in four days, and in the southern district in ten days, after service of the declaration and rule to plead.[2]

In these courts, common rules, or rules of course, are entered at any time, pleadings are filed and served, dilatory pleas are to be sworn to, special pleas are to be signed by counsel, defaults for not pleading or answering are to be entered, notice of special matter may be given with the general issue, &c., &c., according to the original practice of the supreme court of the state and of the king's bench.[3]

In the courts of the northern and southern districts of New York there is a rule directing "that no plea

[1] Act of September 24, 1789, ch. 20, § 32: 1 Stat. at Large, 73.

[2] Appendix, Rule 28, D. C. N. D.

[3] Graham's Practice, 229; Rule 83, D. C. N. D. N. Y.

shall be received in any suit upon a bond executed to the United States for payment of duties, or in any suit instituted upon a bail bond taken in consequence of such suit, unless such plea shall be accompanied by an affidavit of the truth of the matter in the said plea contained."[1]

And, in actions founded on contract, the defendant is required to annex to his plea of the general issue, and to file therewith an affidavit that he has a good and substantial defense upon the merits, as he is advised by his counsel and verily believes, together with a certificate of counsel that he so advised the party; otherwise, such plea may be treated as a nullity. It is required, also, that special pleas or demurrers to pleadings shall be accompanied by a certificate of a counselor of the court, that, in his opinion, the special plea or demurrer is well founded; otherwise, the plea or demurrer may be treated as a nullity.[2]

5. *The issue.*

The English practice of making up an issue roll or paper book preparatory to the trial of issues of fact was, several years ago, in New York, abolished by law as useless and expensive; and the practice of the supreme court of the state (in cases not otherwise provided for), having since been adopted by rule in each of the national courts in the state, it would seem to be no longer necessary to make up an issue roll in them. The *nisi prius* record, or, as it was in later years called in New York, the circuit roll, is not, strictly speaking, applicable to the courts of the United States in which all trials are at bar. But it is convenient and useful for the court to be furnished at the trial with copies of the pleadings in

[1] Appendix, Rule 23, D. C. N. D. N. Y.

[2] Appendix, Rule 28, D. C. N. D.

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their proper order; and perhaps the spirit of the rules of the national courts in New York, adopting the practice of the supreme court of the state, requires it to be done. When there is an issue upon demurrer to be argued, it is incumbent on the party demurring to make up the demurrer book and furnish copies to the judges.

6. *Judgment as in case of nonsuit.*

The practice under this head of the national courts for each of the districts of New York, is regulated by their rules. The rule of the circuit court of the southern district is as follows: "Motion for judgment that the suit be dismissed for not going to trial, may be made after the discharge of the jury, in the same term for which notice of trial was given, or at the next term; and the plaintiff shall not be permitted to stipulate to try the cause at the next term, unless upon sufficient excuse, to be approved by the court, for not having proceeded to trial; and if the costs ordered to be paid on permission to stipulate be not paid within twenty days after such permission, the defendant may, after demand and service of a certified copy of the order to pay costs and the taxed bill, on filing an affidavit of such demand and service, and on non-payment, enter judgment as in case of nonsuit, in the same manner as if no permission had been given."

The rules upon this subject of the circuit and district courts for the northern district are less rigid with respect to the privilege of stipulating, being in conformity with the practice in this respect of the supreme court of the state.[1] It will be perceived, that as in the courts of the northern district the notice of trial is in all cases a notice of fourteen

[1] Rules 62, 63, D. C.

days, and the notice of motion a notice of eight days, it is at all times in the power of the defendant's attorney, by proper diligence, to obtain a judgment as in case of nonsuit, or to compel the plaintiff to stipulate, at the next term after his default in not noticing his cause for trial.

7. *Evidence.*

This is an important title and requires to be treated somewhat at length; for though it is not compatible with the design of this work to discuss at large all kinds of legal evidence, much less to enter into an extended dissertation upon the general rules of evidence, the constitution and laws of the United States contain, as will be seen, several important provisions relative to the subject demanding particular notice. These together with the judicial decisions to which they have given rise, will therefore be stated though, from the nature of the case, the manner of doing it must necessarily be desultory.

Of the mode of authenticating the legislative acts, judicial and other records of the several states, and the effect thereof as evidence.

The government of the different states being severally independent and, *sub modo*, foreign with respect to each other, it was deemed necessary by the framers of the constitution of the United States to provide against the inconveniences likely to result in judicial proceedings from this relation.

By section one of the fourth article of the constitution, it is accordingly declared that "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And congress may, by general laws, prescribe the manner in which such acts, records,

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and judicial proceedings shall be proved, and the effect thereof."

In pursuance of this authority, congress, by the act of May 26, 1790,[1] enacted:

"That the acts of the legislature of the several states shall be authenticated by having the seal of their respective states affixed thereto; that the records and judicial proceedings of the courts of any state shall be proved or admitted, in any other court within the United States, by attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have, by law or usage, in the courts of the states from whence the said records are, or shall be taken."

By a supplemental act of March 27, 1804,[2] it is further enacted:

"SEC. 1. That from and after the passage of this act, all records and exemplifications of office books, which are or may be kept in any public office of any state, not appertaining to a court, shall be proved or admitted in any other court or office in any other state, by the attestation of the keeper of the said records or books, and the seal of his office thereto annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county or district, as the case may be, in which such office is or may be kept; or of the governor, the secretary of state, the chancellor or keeper of the great seal of the state, that the said attestation is in due form, and by the proper officer; and the said certificate, if given by the presiding justice of a court, shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and seal of his office, that the said presiding justice

[1] Ch. 11: 1 Stat. at Large, 122.
[2] Ch. 56: 2 Stat. at Large, 298.

is duly commissioned and qualified; or if the said certificate be given by the governor, the secretary of state, the chancellor or keeper of the great seal, it shall be under the great seal of the state in which the said certificate is made. And the said records and exmplifications, authenticated as aforesaid, shall have such faith and credit given to them in every court and office within the United States, as they have by law or usage in the courts or offices of the state from whence the same are or shall be taken.

"SEC. 2. That all the provisions of this act, and the act to which this is a supplement, shall apply, as well to the public acts, records, office books, judicial proceedings, courts, and offices of the respective territories of the United States, and countries subject to the jurisdiction of the United States, as to the public acts, records, office books, judicial proceedings, courts and offices, of the several states."

With respect to the legislative acts of the several states, it has been held, that the great seal of the state alone, affixed to copies thereof, without the attestation of any officer, is a sufficient authentication; this being all that the act in terms requires; the seal being in fact the highest test of authenticity; and the legal presumption being, in the absence of proof to the contrary, that it was affixed by the officer having the custody thereof, and possessing competent authority to do the act. 4 Dall., 412; 11 Wheat., 392; see also Peters's C. C. Rep., 352.

The records and judicial proceedings of the courts of the states are to be verified in strict conformity with the provisions of the act above cited. They must be attested by the clerks, under the seal of the court, and the judge, chief justice or presiding magistrate must certify that such attestation is in due form. A certificate from the presiding judge, that the person whose name is signed to the attestation is clerk of the court, and that the signature is his proper handwriting, without stating that the attestation is *in due*

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But the question, by far the most important and difficult which has arisen under these provisions, is as to the *force and effect of judgments rendered in one state, in the courts of other states.* The great question for decision was, whether a judgment rendered in one state was to be regarded in the courts of other states as a *foreign* judgment, and so, inconclusive between the parties, or as a domestic judgment, and consequently conclusive upon their rights. The question, after much discussion and contrariety of opinion, has, however, long since been definitively settled. The constitution, in conformity with a principle of the common law founded in comity, secures the *admissibility* of such records as evidence, but leaves it to congress to prescribe, first, the *tests* of their genuineness, and second, their *legal effect* as evidence. Congress has exercised this power, and, in regard to the latter branch of it, has made the authenticated exemplification of a record out of its proper state equivalent to the record in its proper state. It is therefore evidence of the highest nature, viz.: *record evidence*, and not to be contradicted but by a plea of *nul tiel record.* Not that a record thus authenticated is held to be absolutely and under all circumstances conclusive, so as in all cases necessarily to preclude every other plea, for this would be to give it an efficacy superior to what the orignal would possess where the judgment was pronounced. But the principle established is, that the record of a

judgment of a state court, duly authenticated, shall have the same credit, validity and effect in the courts of every other state that it has in the courts of the state where it was rendered. The proper inquiry, therefore, in every case is, what would be the effect of the record in that state?[1] *Mills* v. *Duryee*, 7 Cranch, 481; *Hampton* v. *M'Connel*, 3 Wheat., 234; *Mayhew* v. *Thatcher*, 6 Wheat., 129; *Hopkins* v. *Lee*, ib., 109: *Armstrong* v. *Carson*, 2 Dall., 302; *Green* v. *Sarmiento*, 3 Wash. C. C., 17; *Borden* v. *Fitch*, 15 Johns. Rep., 121; *Shumway* v. *Stilman*, 4 Cowen, 292.

[1] To this principle an important exception has, however, been asserted by the supreme court of the United States. The question arose, however, upon a statute of the state of New York, which was understood by the court to be peculiar to that state. The decision is, therefore, limited in its operation to the judgments of the courts of New York. The above mentioned statute authorizes a judgment against several joint debtors against whom process has been issued, and an execution against their joint property, although the process may have been served only on one of them; and the courts of New York, in giving a construction to this enactment, have held that in a suit on such a judgment it is to be deemed valid and obligatory upon an absent defendant, as *prima facie* evidence of his indebtedness to the plaintiff. A New York firm having, in virtue of this act, recovered a judgment in a court of that state against two defendants, who were citizens of Louisiana, one of whom only was served with process, a suit on this judgment was prosecuted in the circuit court of the United States for the district of Louisiana, against the other defendant; and the court, in accordance with what it deemed the sound construction of the act of congress of May 26, 1790, gave judgment for the plaintiffs upon the production of the record of the New York judgment without further proof. On a writ of error, to reverse this judgment, the act of congress above mentioned was held not to embrace a judgment of this description. Judgments obtained without notice to the defendant in the courts of one nation are uniformly disregarded by the judicial tribunals of other nations; such was the rule among the several states of the Union at the time the act of congress was passed; and the court were of opinion that there was nothing in the language of the act so clearly indicative of an intent to change it as to warrant a construction to that effect; a construction which, in the opinion of the court, was likely to lead to great injustice. *D'Arcy* v. *Ketchum et al.*, 11 Howard R., 165.

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The constitutional provision in question is not, however, to be understood as imposing any restriction upon the power of the states to legislate upon the remedy in suits on the judgments of other states, except so far as the merits of the original suits are concerned. The judgment is to be regarded as a debt of record, not examinable on the merits; but, in other respects, it is subject to the *lex fori*. And, therefore, in an action instituted in one state on a judgment obtained in another, a statute of limitations to suits on judgments of the former state may be pleaded. *M'Elmoyle* v. *Cohen*, 13 Peters, 312.

Relative to "*office books—not appertaining to a court*," no decisions deserving notice appear to have been made. The manner in which these are to be proved is very plainly prescribed by the act, and they are, like the records of judicial proceedings, to have "such faith and credit given to them in every court and office within the United States as they have by law or usage in the court or offices of the state from whence the same are or shall be taken."

Public documents, books, records and papers in the offices of the heads of departments, attorney-general and solicitor of the treasury.

At the first session of congress an act was passed establishing the department of state, requiring the secretary to cause a seal of his office to be made, and ordaining that all copies of records and papers in his office authenticated under its seal should be evidence equally as the original record or paper.[1]

In 1823 it was made the duty of the secretary of the treasury, upon the application of any person claiming to be interested in or entitled to land under a grant or patent from the United States, to cause

[1] Act of Sept. 15, 1759, ch. 14, § 5: 1 Stat. at Large, 60.

copies of any papers filed and remaining in the treasury department to be made out and authenticated under his hand and seal, and such copies so authenticated were declared to be evidence equally as the original papers.

In 1849 (the early act, to be mentioned presently, providing for documentary evidence from the treasury department in suits against public debtors, having in the meantime been passed), the provisions of the act above recited relative to the state department were extended to the war, navy, treasury and post-office departments, and to the offices of the attorney-general and solicitor of the treasury.

These officers are required to provide a seal for their respective offices, and the act ordains that "all books, papers, documents and records" in these departments and offices "may be copied and certified under seal in the same manner as those in the state department may now by law be, and with same force and effect."[1]

The department of the interior having, during the same session, been created, the same provisions were subsequently extended to that also.[2]

Laws, &c., &c., or other public documents of foreign governments, relating to the title of lands claimed by or under the United States.

By the first section of the act of February 22, 1849, ch. 61,[3] as amended by an act passed a few days afterwards, it is enacted:

[1] Act of February 22, 1849, ch. 61: 9 Stat. at Large, 346.

[2] Act of May 31, 1854, ch. 60: 10 Stat. at Large, 297. By this section it is also enacted that "in all cases where a seal is necessary by law to any commission, process or other instrument provided for by the laws of congress, it shall be lawful to affix the proper seal by making an impression therewith directly on the paper to which such seal is necessary, which shall be as valid as if made on wax or other adhesive substance."

[3] 9 Stat. at Large, 346, 350.

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"That it may and shall be lawful for the keepers or persons having the custody of the laws, judgments, orders, decrees, journals, correspondence or other public documents of any foreign government or its agents, relating to the title to lands claimed by or under the United States, on the application of the head of one of the departments,[1] the solicitor of the treasury, or the commissioner of the general land office, to authenticate the same under his hand and seal, and certify the same to be correct and true copies of such laws, judgments, orders, decrees, journals, correspondence or other public documents, and when the same shall be certified by an American minister or consul, under his hand and seal of office, or by a judge of one of the United States courts, under his hand and seal, to be true copies of the originals, the same shall be by him sealed up and returned to the solicitor of the treasury, who shall file the same in his office, and cause it to be recorded in a book to be kept for that purpose. A copy of said laws, judgments, orders, decrees, journals, correspondence or other public documents so filed, or of the same so recorded in said book, may be read in evidence in all courts where the title to land claimed by or under the United States may come in question, equally with the originals thereof."

Certificates of congressional proceedings.

By another act, certificates of the proceedings of the two houses of congress are made evidence in the national courts. The enactment for this purpose is brief, and is as follows: "That extracts from the journals of the senate, or of the house of representatives, and of the executive journal of the senate, when the injunction of secrecy is removed, duly certified by the secretary of the senate or clerk of the house of representatives, shall be admitted as evidence in the several courts of the United States, and

[1] The language of the act (obviously a mistake) is, "of one of the head of one of the departments."

shall have the same force and effect as the originals thereof would have if produced in court and proved.[1]

Consular certificates.

Consuls and vice-consuls of the United States are authorized, in the ports or places to which they are severally appointed, to receive the protests or declarations which such captains, masters, crews, passengers and merchants, *as are citizens of the United States*, may respectively choose to make there; and also such as any foreigner may claim to make before them relative to the personal interests of the citizens of the United States; and the copies of such acts, duly authenticated by them, under the seal of their consulates respectively, are evidence in all courts of the United States equally as the originals would be.[2] But the certificates of consuls are not evidence, except in those cases in which they are made so by the laws of the United States. They are not, therefore, evidence of foreign laws. 2 Cranch, 187. See, also, 16 Com. Law Rep., 40.

Evidence in suits against public debtors.

Upon this subject, the laws of the United States contain the following important provisions, viz.:

"That in every case of delinquency, where suit has been, or shall be instituted, a transcript from the books and proceedings of the treasury, certified by the register, and authenticated under the seal of the department, shall be admitted as evidence, and the court trying the cause shall be thereupon authorized to grant judgment and award execution accordingly. And all copies of bonds, contracts, or papers, relating to, or connected with, the settlement of any account between the United States and an individual, when certified by the register to be true copies of the

[1] Act of August 8, 1846, ch. 107: 9 Stat. at Large, 80.

[2] Act of April 14, 1792, ch. 24, § 2: 1 Stat. at Large, 254.

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The fourth section of this act contains also another provision relative to suits in which the United States are plaintiffs, which, though not strictly pertinent to the subject under consideration, is of too much importance to be passed over without notice. It is as follows:

"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 should be proved, to the satisfaction of the court, that the defendant is, at the time of trial, in possession of vouchers, not before in his power to procure, and that he was prevented from exhibiting a claim to such credit, at the treasury, by absence from the United States, or some unavoidable accident."[2]

But it is sufficient to show that the claim was presented for allowance at any time before the trial. It need not have been presented before the commencement of the suit. *The United States* v. *Hawkins*, 10 Peters, 125. At the passage of this act, and until 1817, there were in the treasury department but one

[1] Act of March 3, 1797, ch. 20, § 2: 1 Stat. at Large, 512.

[2] Act of March 3, 1797, ch. 20, § 4: 1 Stat. at Large, 512.

comptroller and one auditor. By an act of March 3, of that year,[1] several offices connected with the war and navy departments were abolished, and one additional comptroller, and four additional auditors were added to the officers in the treasury department.

It was further provided, that, in future, all claims and demands whatever, by the United States or against them, and all accounts whatever, in which the United States are concerned, either as debtors or creditors, should be settled and adjusted in the treasury department. And it was by the 11th section of this act also declared, that "the provision, above cited, of the act of 1797, directing that a transcript from the books and proceedings of the treasury, certified by the register, shall be admitted as evidence, be extended in regard to the accounts of the war and navy departments, to the auditors respectively charged with the examination of those accounts, and that certificates, signed by them, shall be of the same effect as that directed to be signed by the register." In order clearly to understand the practical operation of this provision, it is necessary to attend to the provisions of the fourth section of the act, prescribing some of the duties of the several auditors, and designating the descriptions of accounts which they are respectively authorized to certify.

It is declared to be the duty of the *first auditor* "to receive all accounts accruing in the treasury department, and, after examination, to certify the balance and transmit the accounts, with the vouchers and certificate, to the *first comptroller*, for his decision thereon."

The *second auditor* "is to receive all accounts relative to the pay and clothing of the army, the subsistence of officers, bounties and premiums, military

[1] Ch. 45: 3 Stat. at Large, 366.

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The *third auditor* is in like manner to receive, certify and transmit "all accounts relative to the subsistence of the army, the quartermaster's department, and, generally, all accounts of the war department, other than those provided for."

The *fourth auditor* is in like manner to receive, certify and transmit "all accounts accruing in the navy department, or relative thereto."

The *fifth auditor* is "to receive all accounts accruing in, or relative to, the department of state, the general post-office, and those arising out of Indian affairs, and examine the same, and thereafter certify the balance, and transmit the accounts, with the vouchers and certificate, to the *first comptroller*, for his decision thereon."

But an act "to change the organization of the post-office department," &c., passed July 2, 1836, section 8,[1] provides for the appointment of a new officer, to be called the *auditor of the post-office department;* and by the 15th section of this act it is enacted "that copies of the quarterly returns of postmasters, and of any papers pertaining to accounts in the office of the auditor of the post-office department, certified by him, under his seal of office, shall be admitted as evidence in the courts of the United States; and in every case of delinquency of any postmaster or contractor, in which suit may be brought, the said auditor shall forward to the attorney of the United States certified copies of all papers in his office tending to sustain the claim; and in every such case a statement of the

[1] 9 Stat. at Large, 462.

account, certified as aforesaid, shall be admitted as evidence, and the court trying the cause shall be thereupon authorized to give judgment and award execution, subject to the provisions of the thirty-eighth section of the act to reduce into one act the several acts establishing and regulating the post-office department, approved March third, eighteen hundred and twenty-five."

This section also contains a provision of the same nature as that contained in the fourth section of the act of 1797, just above cited, viz., that "no claim for a credit shall be allowed on the trial but such as shall have been presented to the said auditor, and by him disallowed in whole or in part, unless it shall be proved to 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 to the auditor a claim for such credit, by some unavoidable accident."

The foregoing enactments relative to the use of treasury transcripts have given rise to several important judicial decisions, from which the following rules may be deduced:

1. That these transcripts are evidence only of such transactions as are shown by the books of the treasury department, and of which the officers of that department have official knowledge. Thus, they are evidence of advances of money made directly to the defendant, through the ordinary official channels, but not of the receipt of moneys by him from the hands of another disbursing officer. *The United States* v. *Buford*, 3 Peters, 12. Nor of a payment made at the treasury to another person on the order or bill of exchange of the defendant. *United States* v. *Jones*, 8 Peters, 375. Nor of a payment to the agent of the defendant under a power of attorney to receive the money. *The United States* v. *Jones*,

PART 2. id., 387. The officers of the treasury could have no official knowledge that the defendant ever gave the order, bill of exchange, or power of attorney; they might have been forgeries; and to make the transcript evidence in such cases, there should be annexed to it a copy, certified under the second section of the act of 1797, above quoted, of the instrument in virtue of which the money was drawn.

To a copy thus certified and annexed, the court would be bound to give the same effect that the original, if produced, would have. But the defendant would be at liberty to impeach the evidence, and, under peculiar circumstances of alleged fraud, the court might require the production of the original instrument, and enforce its order by a continuance of the cause from time to time till the original should be produced.

2. That the defendant is entitled to the credits given to him in the certified account; and by claiming those credits he does not waive or in any degree impair his right to object to the insufficiency of the evidence furnished by the transcript of the items of debit. He is entitled to the full benefit of the decision of the treasury officers on his vouchers without reference to the charges against him. The counsel for the United States, having produced a treasury account, has no power to limit its effect injuriously to the defendant by offering to use it for a limited purpose; nor can he withdraw it altogether without the assent of the defendant, except by an abandonment of the suit.

3. In every treasury account on which suit is brought, the law requires the *credits* to be stated as well as the debits.

4. In making a "transcript from the books and proceedings of the treasury" evidence, the law does not mean the statement of an account in gross, but

a statement of the *items*, both of debits and credits, as they were acted upon by the accounting officers of the treasury department.

Such a statement is indispensable, on the one hand, to enable the defendant to object to what he deems improper charges against him, and, on the other hand, to give proper effect to the provision that the defendant shall be allowed no credit on vouchers which have not been rejected by the treasury officers, unless he can show that it was out of his power to present them for allowance. The following charge in a treasury transcript was therefore held to be inadmissible as evidence: "1818, June 22. To account transferred from the books of the second auditor for this sum, standing to his debit, under said contract, on the books of the second auditor, transferred to his debit on those of this office, $45,000."

But the transcript need not contain the particular items in each quarterly return; and, in a suit against a collector of customs, it is sufficient if the transcript states the aggregate amount of bonds and duties accruing within the quarter, and refers to an abstract containing the particular items. *The United States* v. *Hoyt*, 8 Peters, 375; *Hoyt* v. *The United States*, 10 Howard, 109.

Competency of witnesses.] By the "*Act in relation to the competency of witnesses, and for other purposes*," passed July 16, 1862 (ch. 189, 12 Stat. at Large, 588), congress saw fit to enact "that the laws of the state in which the court shall be held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, in equity and admiralty." And, as in some of the states the common law rules of evidence had still been adhered to, it was, *by a proviso in the appropriation act* of July 2, 1864 (ch. 210, 13 Stat.

PART 2. at Large, 351), enacted, "that in the courts of the United States there shall be no exclusion of any witness on account of color, nor, in civil actions, because he is a party to, or interested in, the issue tried."[1] This proviso was, however, at the next session, amended as follows: "*Provided further*, that, in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with, or statement by, the testator, intestate or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. 13 Stat. at Large, 533. But in *another appropriation act*, passed March 2, 1867 (ch. 166, 14 Stat. at Large, 457), it is enacted, the above mentioned proviso of the act of 1864 "shall be construed to embrace all suits to which the United States shall be a party in the court of claims, either *plaintiff* or defendant."[2]

These signal relaxations of the laws of evidence might well awaken some solicitude touching their practical effects, and lead to some antidotal legislation; and, accordingly, it was, by the act of February 25, 1868 (ch. 13, 15 Stat. at Large, 37), enacted—

[1] It had already been repeatedly decided by the supreme court (whether soundly or not) that the laws of the several states defining the competency of witnesses were to be regarded and applied in the courts of the United States as rules of decision in trials at common law within the purview of the 34th section of the judiciary act. See 1 Black, 430; 2 id., 535, and *Ryan* v. *Bradley*, 1 Wallace, 66. It may reasonably be doubted whether it would not have been expedient for congress to let the matter rest here instead of forcing this improvement in the law of evidence upon the states which had not yet become sufficiently enlightened clearly to discern its merits.

[2] In the case of *Jones et al.* v. *The United States* (1 Court of Claims Rep., 383), decided October term, 1865, it had, in a very able judgment pronounced by Judge NOTT, been held that the act of 1864 did not extend to the court of claims.

"That no answer or other pleading of any party, and no discovery or other evidence obtained by means of any judicial proceeding from any party or witness in this or any foreign country, shall be given in evidence, or in any manner used against such party or witness, or his property or estate, in any court of the United States, or in any proceeding by or before any officer of the United States, in respect to any crime, or for the enforcement of any penalty or forfeiture by reason of any act or omission of such party or witness: *Provided,* that nothing in this act shall be construed to exempt any party or witness from prosecution and punishment for perjury committed by him in discovering or testifying as aforesaid."

By the above cited act of March, 1867, the abolition of the long established rules of the common law, by which parties and persons otherwise interested in judicial proceedings were held incompetent to testify as witnesses, became total and absolute in civil causes in all the courts of the United States as far as congress had power so to render it. But one of these courts was held in one of the rooms of the capitol, and was always in session during the winter sessions of congress. A convenient opportunity was thus afforded to members of congress of witnessing or otherwise learning the practical operation of this new order of things.

It may, therefore, well be regarded as a significant, if not instructive, fact, that, after an experiment of little more than a year, it was, by an act passed June 25, 1868 (ch. 71, 15 Stat. at Large, 75), ordained—

"That no plaintiff or claimant, or any person from or through whom any such plaintiff or claimant derives alleged title, claim or right against the United States, or any person interested in any such title, claim or right, shall be a competent witness in the court of claims in supporting any such title, claim or right, and no testimony given by such plaint-

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iff, claimant or person shall be used: *Provided*, that the United States shall, if they see cause, have a right to examine such plaintiff, claimant or person as a witness, under the regulations and with the privileges provided in section eight of the act passed March third, eighteen hundred and sixty-three, entitled "An act to amend an act to establish a court for the investigation of claims against the United States," approved February twenty-fourth, eighteen hundred and fifty-five."

It is highly commendable, no doubt, in congress to look sharply to the pecuniary interests of *The United States;* but the United States, in this sense, is but another name for the several persons, collectively, who compose the American people; and, if the revival of the common law rules excluding parties and persons interested from the witnesses' stand had, by so brief an experiment, been shown to be necessary for the protection of the rights and interests of the former, it may, without intentional disrespect, be suggested that the thousands of individual suitors who throughout the Union are daily subjected to the same perilous ordeal, if such it be, ought not to have been overlooked; nor, if only for the sake of consistency, should it have been forgotten that a vast proportion of the legal controversies to which the United States are parties are carried on in the district courts.[1]

Process to obtain the attendance of witnesses.] The usual process to compel the attendance of witnesses in court, is the writ of supbœna; or, if the

[1] The legislature of New York has taken another still more extra ordinary step in its career of innovation, in allowing persons charged with criminal offenses, by indictment or otherwise, at their option, to testify as witnesses: "but" (adds the act) "the neglect or refusal of any such person to testify shall not create any presumption against him." It is, I trust, superfluous to observe that the national courts have no authority to adopt this act. Congress alone has power to do this.

party have in his possession any written instrument, &c., which it is desired to have in evidence, a subpœna *duces tecum*. Without any legislative provision upon the subject, it is obvious that this writ would be inefficacious beyond the limits of the district in which it might be issued. The judicial act is silent on this subject, but by the act of March 2, 1793,[1] this writ may run to all places not more than one hundred miles distant from the place of holding the court at which the attendance of the witnesses is required, although without the district.

If the witness is in custody he may be brought into court to testify, by *habeas corpus ad testificandum;* this being one of the purposes for which the courts of the United States are expressly authorized, as we have seen, to issue the writ of *habeas corpus*.

In England,[2] and in New York,[3] this writ may be obtained upon application to a judge at chambers, as well as upon motion in open court; a privilege of considerable importance to suitors, inasmuch as without it they would sometimes be unable to secure the presence of witnesses in season to testify. But, though the *judges* of the United States are, generally, authorized to issue the writ of *habeas corpus*, to inquire into the cause of commitment, it seems questionable, at least, whether the authority to issue the writ of *habeas corpus ad testificandum* is not limited to the *courts*, in session. The authority to issue this latter writ is understood not to be restricted to cases in which the party whose evidence is desired is held in custody under the authority of the United States, but that it extends to those also in which he is held under the authority of a state. The application for this writ ought to be upon affidavit, stating

[1] Ch. 22, § 6: 1 Stat. at Large, 333.

[2] 1 Archb. Practice, 151.

[3] 2 N. Y. Revised Statutes, 559.

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the materiality of the witnesses, as the party is advised by his counsel and believes, but does not require a previous notice to the opposite party.

In determining the fees which a sheriff ought to receive for bringing up a person to testify, the courts of the United States would doubtless have recourse to the laws of the state in which the service was performed.

Penalty of not obeying the subpœna.] A person who, after being regularly served with a subpœna, refuses or neglects to attend the trial, may be proceeded against by attachment. It is presumed also that an action on the case may be maintained against him. In England and New York, in addition to these remedies, there is also an action given by statute, in which the damages sustained, together with a penalty, may be recovered. But the acts of congress are silent upon the subject.

Before an attachment will be granted against a witness for not attending a trial, it must appear that a subpœna was personally served upon him a reasonable time before the trial, and that the fees allowed by law were paid or tendered to him. In England an attachment for non-attendance as a witness will not, it seems, be granted, unless the motion therefor "be brought forward as soon as possible." Tidd's Practice, 738. Nor is it the practice in the courts of that country to grant an attachment in the first instance; but only a rule *nisi*. See the cases cited, 1 Archb. Practice, 152; particularly 5 Taunt., 260, and 6 Taunt., 9. These cases also show the great caution observed in the English courts in the exercise of this extraordinary jurisdiction. "It must be a perfectly clear case," say the court in 6 Taunt., 9, "to call for an attachment." And it would seem that it will not be granted when the witness has even a plausible excuse. The rule in

New York also formerly was, in ordinary cases of disobedience of a subpœna, to grant only a rule to show cause, in the first instance. 2 Caines' Rep., 92. But if it is shown that the witness is guilty of willful contempt, as where at the time of the service of the subpœna, he positively refuses to attend, the rule is peremptory for an attachment. 2 Johns. Cas., 109. In Pennsylvania, it seems, the practice is to grant the attachment in the first instance, merely upon proof of due service of the subpœna, and of the non-attendance of the witness. 2 Dallas, 333; id., 335. And such, I understand, is the present practice of the courts of New York.

In a case pending several years ago in the circuit court of the United States for the northern district of New York, an application on behalf of the plaintiff for an attachment, founded on an affidavit merely stating the service of the subpœna, and the non-attendance of the witness, was denied. But on a renewal of the motion upon a supplemental affidavit, showing that a large sum was claimed in the action; that the witness was the defendant's son, and had charge of his business out of which the suit arose; and that he was in good health when the subpœna was served, only a few days before the application, an attachment was granted.

Witnesses' fees.] In courts of the United States, witnesses are entitled to the sum of one dollar and fifty cents for each day's attendance at the court; to the further sum of five cents per mile, for traveling from their place of abode to the place where the court is holden, and to the like allowance for returning.[1] The sum, therefore, which it is necessary to tender upon serving a subpœna, is one dollar and fifty cents for one day's attendance, and ten cents for each mile of the distance between the residence

[1] Act of February 26, 1853, ch. 80. See Appendix.

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of the witness and the place where the court is to be held.

Witnesses whose attendance is required at any court in behalf of the United States, must "be subpœnaed to attend and testify generally in their behalf, and not depart the court without leave of the court or district attorney;" and they are to appear before the court or grand jury, or both, as required by the court or district attorney.[1]

Witnesses, subpœnaed in more than one suit between the same parties, are entitled to but one travel fee, and one per diem compensation, to be taxed in the first cause disposed of, and in the other causes in succession for further attendance.

Other modes of obtaining testimony.

In England the process of subpœna furnishes the only direct means possessed by the courts of law of obtaining the testimony of witnesses, except in suits commenced in any of the courts at Westminster, for a cause of action which arose in India; in which case these courts are authorized by statute (13 Geo. III) to "award a writ in the nature of a *mandamus* or commission for the examination of witnesses in that country." 1 Archb. Practice, 154. A practice, however, prevails in England, when a witness is going abroad, or is so ill that it is not likely he will be able to attend the trial, of applying to the court in term for a rule, or to a judge at chambers in vacation for a summons, to show cause why the witness should not be examined upon interrogatories; or, if it is impossible to bring the witness to the judge's chambers to be examined, as if he is too ill, or out of the country, or the like, the motion is to show cause why he should not be examined upon interrogatories before certain commissioners to

[1] Act of February 16, 1853, § 3: Appendix.

be appointed and approved of by the parties. A copy of the rule or summons thus obtained is served upon the attorney; but if, at the time of showing cause, the opposite party does not consent, there is an end of the proceeding; the court having no direct means of compelling him. 1 Archb. Practice, 153, 154. It may be proper to remind the student, also, that the court of chancery in England has power in certain cases, upon a bill filed for that purpose, to order testimony to be taken in *perpetuam rei memoriam*. 1 Maddock's Chancery, 152, *et seq.*

But by the laws of the United States this important subject, as will be seen, is more amply provided for by authorizing the taking of

Depositions de bene esse.

The judicial act of 1789 ordains that—

"When the testimony of any person shall be necessary in any civil cause depending in any district in any court of the United States, who shall live at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of such district, and to a greater distance from the place of trial than as aforesaid, before the time of trial, or is ancient, or very infirm, the deposition of every such person may be taken *de bene esse*, before any justice or judge of any of the courts of the United States, or before any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, or judge of any county court or court of common pleas of any of the United States, not being of counsel or attorney to either of the parties, or interested in the event of the cause, provided that a notification from the magistrate before whom the deposition is to be taken to the adverse party, to be present at the taking of the same, and to put interrogatories, if he think fit, be first made out and served on the adverse party, or his attorney, as either may be nearest, if either is within one hundred miles of the place of caption, allowing time for their attendance after notified, not

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less than at the rate of one day, Sundays exclusive, for every twenty miles' travel. And every person deposing as aforesaid shall be carefully examined and cautioned, and sworn or affirmed to testify *the whole truth*, and shall subscribe the testimony by him or her given, after the same shall be reduced to writing, which shall be done only by the magistrate taking the deposition, or by the deponent in his presence. And the depositions so taken shall be retained by such magistrate until he deliver the same with his own hand into the court for which they are taken, or shall, together with a certificate of the reasons as aforesaid, of their being taken, and of the notice, if any, given to the adverse party, be by him, the said magistrate, sealed up and directed to such court, and remain under his seal until opened in court. And any person may be compelled to appear and depose as aforesaid, in the same manner as to appear and testify in court."

It is also by this section further provided that evidence thus taken may be used on the trial of any cause—

"If it shall appear to the satisfaction of the court that the witnesses are then dead, or gone out of the United States, or to a greater distance than as aforesaid from the place where the court is sitting; or that, by reason of age, sickness, bodily infirmity or imprisonment, they are unable to travel and appear at court, but not otherwise. *Provided*, that nothing herein shall be construed to prevent any court of the United States from granting a *dedimus potestatem*, to take depositions according to common usage, which power they shall severally possess; nor to extend to depositions *in perpetuam rei memoriam*, which if they relate to any matters that may be cognizable in any court of the United States, a circuit court, on application thereto, made as a court of equity, may, according to the usages of chancery, direct to be taken."[1]

The modes of obtaining evidence mentioned in the proviso being already in use and well understood,

[1] Act of September 24, 1789, ch. 20, § 30: 1 Stat. at Large, 73.

nothing more was necessary with regard to them than to recognize them as admissible in the national courts, in order to forestall any inference against the power of these courts to resort to them. But the provisions for the taking of depositions *de bene esse* were substantially new both in our own country and in that whence the forms of most of our judicial proceedings are derived. In New York, at least, no trace of any similar proceeding occurs until several years afterwards.[1] Hence the propriety of prescribing with so much precision the forms of the proceeding.

The circumstances under which depositions de bene esse may be taken and used.] By recurring to the act above recited, it will be seen that the testimony to be thus taken can only be of some person who lives at a greater distance than one hundred miles from the place of trial, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district, and to a greater distance from the place of trial than as aforesaid, or is ancient, or very infirm.

With regard to the first description of persons whose testimony may be thus taken, viz., those who live more than one hundred miles distant from the place of trial, it is settled that the act embraces as well those who live out of the district as those who live in it. *Petapsco Insurance Co.* v. *Southgate*, 5 Peters, 604.

And the certificate of the officer by whom the deposition was taken, specifying the residence of the witness, and stating it to be more than one hun-

[1] *Conklin* v. *Hart*, 1 Johns. Cas., 103, is the first reported case in which it was sanctioned by the supreme court, though in the case of *Mumford* v. *Church*, id. 150, decided at a subsequent term of the same year, it is said to be the established practice of the court. It afterwards received the express sanction of the legislature.

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dred miles distant from the place of trial, is sufficient evidence, *prima facie*, of such residence.

Nor is it incumbent on the party offering the deposition to prove that the witness *continues* to reside more than a hundred miles distant. The opposite party is, however, at liberty to prove that the witness has removed within the reach of a subpœna after the deposition was taken, and if it also appears that the party offering the deposition knew of such change of residence the deposition cannot be read.

But, with regard to all the other descriptions of persons named in the act, except the first, the disability of the witness must be shown to be subsisting at the trial.

When the deposition is taken on the ground of the remote residence of the witness, and the witness lives out of the district, it need not be shown that he has been subpœnaed.

The service of the subpœna in such a case would be an idle ceremony. But where the witness resides within the district, and therefore within the reach of a subpœna, it is presumed that the party offering the deposition is bound to prove the service of a subpœna. Id.

By whom taken.] The officers designated in the act to take these depositions, are, as we have seen,

The judges of the United States;

The chancellors, the judges of the supreme or superior courts, and the judges of the county courts or courts of common pleas of the several states, and the mayors or other chief magistrates of cities in the several states.

To these are to be added the commissioners appointed by the courts of the United States to take affidavits and acknowledgments of bail, &c.

In what manner to be taken and transmitted.] The first step in the proceeding is to apply to some

one of the above mentioned officers before whom the witness can most conveniently be brought, to take the deposition, upon an affidavit setting forth the grounds of the proceeding, so as clearly to bring the case within the provisions of the act; and in order to enable the officer to determine whether a notice to the opposite party or his attorney, if he has one, is required (which, it will be recollected, is the case when either party or his attorney resides within one hundred miles of the place of caption), the affidavit should state the residence of the party and of his attorney. Having obtained an order for the examination, a notice of the time and place appointed for that purpose (if the case requires it) is to be served on the opposite party or his attorney, as the case may be. When notice is required, the officer cannot proceed to examine the witness without proof of its service. If the person to be examined refuses to attend voluntarily, he may, in the language of the act, "be compelled to appear and depose in the same manner as to appear and testify in court." This part of the act, however, does not appear by any reported case to have received any precise judicial interpretation, and it is to be regretted that its provisions, in this particular, are not more definite and precise. Whether the officer before whom the deposition is to be taken is authorized to issue a summons in the nature of a subpœna, and if so, whether he would be authorized in case of disobedience to follow it up by a warrant or attachment to bring the witness before him; or whether a subpœna from the court in which the cause is pending, where the deposition is taken in the same district, is to be resorted to, and obedience enforced by attachment as in ordinary cases; and, where the deposition is taken out of the district, whether the process of the circuit or district court for the district

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in which the proceeding takes place, can, in like manner, be resorted to, are questions to which no certain answer is furnished by the act. The phraseology of the act ("in the same manner," &c.) seems to favor this latter construction. This construction may also, perhaps, be considered as deriving some additional countenance from the provisions of a more recent act of 24th January, 1827,[1] prescribing the mode of compelling the attendance of witnesses before comissioners acting under a *dedimus potestatem*, in the United States, which is by subpœna issued by the clerk of any court of the United States for the district in which the commission is to be executed, upon application to him for that purpose. *See post, Depositions taken in virtue of a dedimus potestatem or commission.*]

If, upon the appearance of the witness before the officer, it should clearly appear that the alleged ground of the proceeding does not exist—as that the witness does not reside more than one hundred miles, &c., or is not about to remove, or is not aged or very infirm—it would be the duty of the officers to refuse to take the deposition.

The witness is to "be carefully examined and cautioned, and sworn or affirmed to testify the whole truth." He is to be examined *ore tenus* as in court, and his evidence carefully reduced to writing either by the examining officer or by the deponent himself in presence of the officer. When the examination in behalf of the party at whose instance it is taken, is finished, if the adverse party is present he may have the witness further examined, and his evidence reduced in like manner to writing. The deposition must be signed by the deponent. It is then either to be retained by the officer until the session of the court and be by him in person delivered in open

[1] Ch. 4: 4 Stat. at Large, 197.

court, or, together with a certificate of the reasons of the proceeding, and of the notice if any given to the adverse party, be by him sealed up and directed to the court; in which case it must remain under his seal until opened in court. In short, the directions of the act must in all things be strictly pursued, or the deposition cannot be read, unless by express consent. 7 Wheat., 426; 1 Peters, 351; see, also, 1 Wheat., 15. The mode of transmission is not prescribed by the act. In practice it is usual to employ the mail for that purpose, directing to the clerk of the court. Care must however be taken, either by suitable indorsement or otherwise, to apprise the clerk of the nature of the inclosure, in order to prevent him from opening it, as an ordinary letter, out of court. If so opened, it would be rejected. 8 Cranch, 70.

By designating the mail, as the usual instrument of transmission, it is by no means intended to intimate that a suitable private agent might not with equal propriety be employed for this purpose; of whom, however, it would probably be required that he should appear personally in court and testify to the fact of his having received the deposition duly sealed from the hands of the officer, and that it had not subsequently been out of his possession or opened.

The certificate of the officer.] The only facts to which the magistrate is by the terms of the act expressly required to certify, are the reasons of his taking the deposition, and the notice, if any, given to the opposite party. As to these facts the certificate is indispensable, parol evidence at the trial to supply the want of it being inadmissible. *Harris* v. *Wall*, 7 Howard, 693. In the case here cited it is said, also, to be "reasonable" that the *notice* should specify the ground of the proceeding.

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The certificate is held to be good evidence also, provided it is sufficiently explicit, of a compliance with the act in other particulars, viz., of the fact that the deposition was reduced to writing either by the magistrate himself or by the deponent in his presence, and that it was afterwards subscribed by the deponent. *Bell* v. *Morrison*, 1 Peters, 351. But it must be full and explicit (id.); and is not conclusive. *Dick* v. *Runnels*, 5 Howard, 7.

It has been held that the requisite official character of the person by whom a deposition has been taken, is sufficiently established *prima facie* if it appears upon the face of the deposition. 1 Paine, 358. Whether it ought not to appear from the certificate, or be otherwise shown, that the officer was not of counsel or attorney for either party, may possibly be made a question. It would seem reasonable, however, his official character being shown, that his competency in this respect should be presumed, until disproved.

Objections to the competency of a witness should be made at the time of taking the deposition, if the party attends, and the grounds of the objection are known to him; and, if not so made, will be presumed to have been waived. 1 Paine, 400. But if the facts upon which the objection rests are unknown to the party when the deposition is taken, he may object when it is read in evidence. Id. [For more particular directions, see Appendix, *Practical Forms*.[1]]

[1] In the case of *The Steamboat Declaration* (13 Howard, 383), the supreme court, adverting to the increased facilities at the present day compared with those existing at the date of the passage of the judiciary act of 1789, for transmitting and returning commissions, took occasion pointedly to express its disapprobation of the practice of taking depositions *ex parte*, on account of its great liability to abuse, except for the purpose of mere formal proof (of the execution, for example, of a legal instrument), or to verify some isolated fact, such as a demand of payment, or notice to an indorser.

Depositions taken in virtue of a dedimus potestatem or commission.

The judicial act, as we have seen, merely confers upon the courts of the United States the power to issue commissions in general terms. Upon this footing the subject continued to rest until 1827, when a new and important act was passed in relation to it. The structure of our judicial system enabled congress authoritatively to bring into requisition the instrumentality of each of the national courts, for the purpose of compelling the attendance of witnesses before commissioners appointed by any one of them, acting in any part of the United States. This, under proper restrictions, was done by the act of 24th January, 1827,[1] which is as follows:

"SEC. 1. That whenever a commission shall be issued, by any court of the United States, for taking the testimony of a witness or witnesses, at any place within the United States, or the territories thereof, it shall be lawful for the clerk of any court of the United States, for the district or territory within which such place may be, and he is hereby empowered and required, upon the application of either of the parties in the suit, cause, action or proceeding, in which such commission shall have issued, his, her, or their agent or agents, to issue a subpœna or subpœnas for such witness or witnesses, residing within such district or territory as shall be named in the said commission, commanding such witness or witnesses to appear and testify before the commissioner or commissioners, in such commission named, at a time and place in the subpœna to be stated, and if any witness, after being duly served with such subpœna, shall refuse or neglect to appear, or, after appearing, shall refuse to testify (not being privileged from giving testimony), such refusal or neglect being proven to the satisfaction of any judge of the court, whose clerk shall have issued such subpœna or subpœnas, he may thereupon proceed to enforce obedience to the process,

[1] Ch. 4: 4 Stat. at Large, 197.

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or punish the disobedience, in like manner as any court of the United States may do in case of disobedience to process of *subpœna ad testificandem* issued by such court; and the witness or witnesses in such cases shall be allowed the same compensation as is allowed to witnesses attending the courts of the United States: *Provided*, that no witness shall be required to attend at any place out of the county in which he may reside, nor more than forty miles from his place of residence, to give his or her deposition under this law.

"SEC. 2. That whenever either of the parties in such suit, cause, action or proceeding, shall apply to any judge of a court of the United States, in the district or territory of the United States, in which the place for taking such testimony may be, for a *subpœna duces tecum*, commanding the witness, therein to be named, to appear and testify before the said commissioner or commissioners, at the time and place in the said subpœna to be stated, and also to bring or carry with him or her, and produce to such commissioner or commissioners, any paper, writing, or written instrument, or book, or other document supposed to be in the possession or power of such witness, such judge being satisfied by the affidavit of the person applying, or otherwise, that there is reason to believe that such paper, writing, written instrument, book, or other document, is in the possession or power of the witness, and that the same, if produced, would be competent and material evidence for the party applying therefor, may order the clerk of the court, of which he is a judge, to issue such *subpœna duces tecum*, accordingly; and if such witness, after being served with such *subpœna duces tecum*, shall fail to produce any such paper, writing, written instrument, book, or other document, being in the possession or power of such witness, and described in such *subpœna duces tecum*, before, and to such commissioner or commissioners, at the time and place in such subpœna stated, such failure being proved to the satisfaction of the said judge, he may proceed to enforce obedience to the said process of *subpœna duces tecum*, or punish the disobedience, in like manner as any court of the United States may do, in case of disobedience to like process issued by such court; and

when any such paper, writing, written instrument, book, or other document, shall be produced to such commissioner or commissioners, he or they shall, at the cost of the party requiring the same, cause to be made a correct copy thereof, or of so much thereof as shall be required by either of the parties: *Provided*, that no witness shall be deemed guilty of contempt for disobeying any subpœna directed to him by virtue of this act, unless his fee for going to, returning from, and one day's attendance at the place of examination, shall be paid or tendered to him at the time of the service of the subpœna." [1]

Although the proper office of a commission is to obtain the evidence of witnesses residing beyond the reach of the process of the court, yet it may be resorted to by consent of parties, for the purpose of examining witnesses residing within the reach of process. 4 Wheat., 508. And though thus taken, the deposition is absolute. Id.

[1] By an act, doubtless designed mainly to meet exigencies originating in the rebellion, special provision is made for taking the testimony of witnesses residing in the United States, on commission or in compliance with letters rogatory in suits pending in the courts of foreign countries, in which the government of such foreign country is a party, or has an interest. The district judges are required to issue a summons to the witnesses named, specifying a time for the attendance of the witness at a specified place, not exceeding one hundred miles from the witness's place of residence, and requiring his attendance. Act of March 3, 1863, ch. 95: 12 Stat. at Large, 769.

The same act directs that when, in a suit in which the United States are parties, or have an interest, the testimony of any witness is taken in a foreign country, on commission, or in pursuance of letters rogatory, the testimony of such witness shall be returned by the commissioner or court to the minister or consul of the United States nearest the place where it has been taken, who, on receiving the same, shall indorse thereon a certificate stating the time when, and the place where, it was received, and that it is in the same condition as when received; and shall transmit the commission or letters rogatory so executed and certified by mail to the clerk of the court from which the same issued in the manner in which his official dispatches are transmitted to the government, and the evidence so taken shall be read on the trial, without objection as to the mode of return.

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The circumstances under which a commission will be issued, and the mode of obtaining, executing and returning it, in the several districts, depend upon the laws and practice of the respective states, and the rules of the several courts of the United States. 3 Cranch, 293.

The practice of the circuit and district courts of the southern district of New York, relative to commissions is fully regulated by rules of court.

The rules of the district court for the northern district of New York provide that commissions for the examination of non-resident witnesses may issue by order of the court in term, or of the judge thereof in vacation, in the manner, and subject to the regulations (so far as the same are applicable), *mutatis mutandis*, prescribed by the Revised Statutes of the state; and also that such commissions may be issued by consent, but the agreement for that purpose must be in writing, and filed in the clerk's office, and the commission be indorsed by the clerk, under his signature, *allowed by consent of parties.*[1]

The decisions which have been made in the national courts, upon this subject, do not appear to require particular notice. They may be found under the following references: 2 Dall., 401; 4 id., 410; 3 Cranch, 293; 4 id., 224, 228; 2 Wheat., 371; 1 Gall., 166; 1 Wash. C. C. Rep., 43, 144; 2 id., 7, 223, 356; 3 id., 226; 4 id., 186.

Depositions in perpetuam rei memoriam.

In addition to the general provision in the judicial act authorizing the circuit courts, on application to them as courts of equity, to direct these depositions

[1] See Appendix, Rules 43, 44, D. C. N. D. N. Y. The provisions of the New York Revised Statutes, thus adopted, are very judicious. They were printed in a note in former editions of this work; but being numerous, they are omitted for the sake of brevity.

to be taken, it is, by the act of 20th February, 1812,[1] declared, "That in any cause before a court of the United States, it shall be lawful for such court, in its discretion, to *admit in evidence* any deposition taken *in perpetuam rei memoriam*, which would be so admissible in a court of the state wherein such cause is pending, according to the laws thereof."

Congress not having prescribed the mode of taking depositions of this nature, it may be presumed to have been intended by this enactment to authorize the use, in the courts of the United States, of those taken according to the state laws.

Order for the production of books and writings.

By the 15th section of the judicial act,[2] the courts of the United States are empowered—

"In the trial of actions at law, on motion, and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery; and if a plaintiff shall fail to comply with such order to produce books or writings, it shall be lawful for the courts, respectively, on motion, to give the like judgment for the defendant as in cases of nonsuit; and if a defendant shall fail to comply with such order to produce books or writings, it shall be lawful for the courts, respectively, on motion as aforesaid, to give judgment against him or her by default."

Considering the importance of the power conferred by this section, it is to be regretted that its scope and objects have not been more fully and clearly defined. And the few reported cases in which it has been judicially noticed seem to shed little light upon its true construction. One highly important ques-

[1] Ch. 25, § 3: 2 Stat. at Large, 679.

[2] Act of September 24, 1789, ch. 20: 1 Stat. at Large, 73.

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tion to which it is likely to give rise is, whether a party can be compelled, in pursuance of it, to produce papers to be used by the adverse party *for any other purpose, except as evidence upon the trial.* The courts are authorized, "*in the trial* of actions at law," to compel the parties to produce books and writings "which *contain evidence* pertinent to *the issue.*" This language certainly seems to imply that the legislature had no intention beyond that of enabling a party to obtain evidence. And such, it is inferable, was the view of the subject entertained by the circuit court, for the district of Pennsylvania, in the cases reported in 1 Wash. C. C. Rep., 298, 243, and 3 Wash. C. C. Rep., 381; and, indeed, by the supreme court in *Thompson* v. *Selden*, 20 Howard, 194.

But then, on the other hand, the act proceeds to declare that parties may thus be required to produce, &c., "in cases and under circumstances where they might be compelled to produce the same by *the ordinary rules of proceeding in chancery.*" It seems clear, therefore, that this provision was intended as a substitute, so far as written documents are concerned, for a bill of discovery in equity in aid of jurisdiction at law.

And such was said to be its intention by the circuit court for the district of Pennsylvania, in the case of *Geyger's Lessee* v. *Geyger*, 2 Dallas, 332; where, however, its design is spoken of as being "to obtain from the adverse party the production of deeds and papers relative to the *litigated issue.*"

But the remedy by bill of discovery is by no means restricted to the object above mentioned. It may be resorted to at any stage of the suit, and even in contemplation of a suit at law, to enable the complainant advantageously to prosecute or defend such suit. 1 Mad. Ch., 160, *et seq.* And, indeed, it is

sometimes as indispensable to the plaintiff to enable him to declare or reply, and to a defendant to enable him to frame his plea, that he should have a knowledge of the contents of documents in possession of the adverse party, as it is that he should be furnished with proper evidence upon the trial. A power of this nature has long been sparingly exercised by the common law courts in England, and by the supreme court of New York; but neither in England nor here does the remedy appear to have been considered as available for the mere purpose of procuring evidence to be offered in proof on the trial. 1 Tidd's Pr., 440; 1 Taunt., 384; 4 id., 157; 1 Brod. & Bing., 318; 11 Johns. Rep., 245, note *a;* 19 id., 268.

By the Revised Statutes of New York, however, the power in question is expressly conferred upon the supreme court of the state.

It is declared that the court "shall have power, in such cases as shall be deemed proper, to compel any party to a suit pending therein to produce and discover books, papers and documents in his possession or power, relating to the merits of any such suit, or of any defense therein."

It is made the duty of the court, "by general rules," to "prescribe the cases in which such discovery may be compelled, and the proceedings for that purpose," where the same are not by the statute itself provided; and, in doing so, the court are required to "*be governed by the principles and practice of the court of chancery in compelling discovery*, except that the cost of such proceedings shall always be awarded in the discretion of the court."

It is further provided, that, "to entitle a party to any such discovery, he shall present a petition, verified by oath, to the court, or to any justice thereof, or to any circuit judge in vacation, upon which an

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order may be granted by the court or such officer for the discovery sought, or that the party against whom the same is sought should show cause why the prayer of such petition should not be granted."

The court is also required to "provide by general rules for staying the proceedings of any party against whom such discovery shall have been ordered, until the same shall have been complied with or vacated;" and, in case of a party refusing or neglecting to obey such order, the court are authorized to "nonsuit him," or to "strike out any plea or notice he may have given," or "to debar him from any particular defense in relation to which such discovery may be sought."

This statute also contains this further important provision, viz.: that the books, papers and documents produced under any order made in pursuance of it, "shall have the same effect, when used by the party requiring them, as if produced upon notice according to the practice of the court." It is clear that the terms used in this statute to confer the power with which it invests the supreme court of New York are, in some respects, more comprehensive than those employed by congress in the 15th section of the judicial act. It will be seen, however, that the two acts concur in expressly referring to the usages of the courts of equity in compelling discovery, as furnishing the true limits of the authority intended to be conferred. And if, as we have seen, there is much in the terms of the 15th section, from which it may be inferred that the national legislature intended only to provide an easier method of obtaining evidence to be used upon trials, it will be perceived, also, that a similar inference might very naturally be drawn with respect to the intention of the legislature of New York, from the language of the enactment last above cited, prescribing the *effect* of books, &c.,

when produced. They are to "have the same effect, when used by the person requiring them, as if produced upon notice," that is, obviously, the same effect *as evidence.*

Under these circumstances it is proper to see what construction has been given to the New York statute by the court whose duty it is to carry it into effect.

By the 28th rule of that court, it is provided, that "application may be made in the manner provided, by the Revised Statutes, to compel the production and discovery of books, papers and documents, relating to the merits of any suit pending in this court, or any defense in such suit, in the following cases:

"1. By the plaintiff, to compel the discovery of papers or documents in the possession or under the control of the defendant, which may be necessary to enable the plaintiff to declare or answer any pleading of the defendant.

"2. The plaintiff may be compelled to make the like discovery of papers or documents, where the same shall be necessary to enable the defendant to answer any pleading of the plaintiff.

"3. The plaintiff may be compelled after declaring, and the defendant after pleading, to produce and discover all papers or documents, on which the action or defense is founded.

"4. After issue joined in any action, either party may be compelled to produce and discover all such books, papers and documents as may be necessary to enable the party applying for such discovery, to prepare for the trial of the cause."

From this judicial exposition of the New York statute, it will, therefore, be at once perceived, that it is considered as warranting the interposition of the court to compel the production and discovery of books, papers and documents, not merely as evi-

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dence, but for *every purpose* connected with the advantageous prosecution or defense of a suit at law. Whether the 15th section of the judicial act will warrant a similar construction, is a question upon which I shall not presume to express an opinion.

As it regards the *form and manner* in which this power of the courts of the United States is to be invoked and exercised, it is not to be expected that entire uniformity will exist in this respect among the several courts. Reasonable *notice* to the opposite party is, however, expressly required by the act, and indeed would doubless have been held to be indispensable by the courts, if it had not thus been prescribed.

The statute of New York, as we have seen, requires that the application for discovery shall be made by petition, verified by oath; and the 29th rule of the supreme court of the state requires that the petition "shall state the facts and circumstances on which the same (the discovery) is claimed, and shall be verified by affidavit, stating that the books, papers and documents, whereof discovery is sought, are not in the possession nor under the control of the party applying therefor, and that the party, making such affidavit, is advised by his counsel, and verily believes, that the discovery of the books, papers or documents, mentioned in such petition, is necessary to enable him to *declare or answer, or to prepare for trial, as the case may be.*"

In the circuit and district courts for the northern district of New York, a rule has been adopted, similar, in substance, to the foregoing; except that, instead of the concluding clause of the rule of the state court, the petitioner is required to state, in general terms, that the production of the books or writings mentioned in his petition is necessary to

enable him "*safely to proceed in the prosecution or defense* (*as the case may be*) *of his suit.*" [1] This modification, it will doubtless be seen, has reference to the uncertain extent, as above explained, of the power in question.

By another rule of this court (in conformity with the practice of the state court) it is provided that the petition may be presented *to the judge of the court in vacation* as well as to the court in term.

The rule to be granted is a rule to show cause, and is to be served, together with a copy of the petition, upon the *attorney* of the opposite party a reasonable time, to be prescribed in the order, before the day therein appointed for showing cause.

The order is also to specify the *manner* in which the books or writings are to be produced, and may require the party either to produce and deposit the same with the clerk of the court, or to deliver to the petitioner, or his attorney, copies thereof verified by oath.[2]

All these regulations are in conformity with the practice of the supreme court of the state.

By a rule of the state court it is also expressly provided that such order shall operate as a stay of all other proceedings in the cause, until it shall be complied with or vacated; and that the party obtaining such order shall, after the same shall have been complied with or vacated, have the same time to declare, plead or answer, to which he was entitled at the making of the order.

By a rule of the circuit and district courts for the northern district of New York,[3] the practice of the supreme court of the state, in all cases not otherwise provided for, is adopted, "*so far as the same*

[1] Appendix, Rule 39, D. C. N. D. N. Y.
[2] Appendix, Rules 40, 41, 42, D. C. N. D. N. Y.
[3] Ibid., Rule 83.

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may be applicable." Whether the last above mentioned rule of the state court, especially the latter clause of it, is *applicable*, will depend upon the question whether the 15th section of the judicial act authorizes the interposition of the courts of the United States *before issue joined*, or for any other purpose than to enable a party to obtain evidence to be used upon the trial. The same remark, it will readily be seen, is applicable to all but the last provision of the 28th rule of the state court above recited.

This inquiry seemed to me due to the importance of the subject. But it may not be amiss before dismissing it, to consider the act and the form of proceeding under it when restricted to its narrowest scope, as merely affording the means of compelling the production of books and papers to be used as evidence in a trial about to take place in a cause already at issue.

It is very clear that the act was not designed, when used for this purpose, to interfere with the familiar practice of giving notice to the opposite party to produce a paper for the purpose of securing the right to give secondary evidence of its contents in case of its non-production; but to superadd the consequences, mentioned in the act, against the delinquent party. It is manifest, that to entitle the defendant to judgment, as in case of non-suit, or the plaintiff to a judgment by default, he must have first obtained an order of the court, on motion and notice, requiring the production of the books or writings in question; and so it was held in *Thompson* v. *Selden*, 20 Howard, 194. The more convenient and beneficial practice would seem to be to apply for a peremptory order, previous to the trial; but in *Dunham* v. *Riley* (4 Wash. C. C. R., 126) Mr. Justice WASHINGTON is reported to have said, that "this order need not be absolute when moved for, but may be *nisi*, unless

cause be shown *at the trial.*" In general it would be more conducive to justice to have the parties informed of their rights and obligations in this respect beforehand.

8. *Summoning and returning jurors, their qualifications, &c.*

Instead of adopting prospectively the laws of the several states prescribing the qualifications of jurors, and the mode of summoning them, it was the practice of congress, until lately, to adopt the existing state regulations with respect to these particulars, from time to time, by successive enactments for this purpose.[1] The last act upon the subject, and by which all prior correspondent enactments are wholly superseded, is that of July 20, 1840. It prescribes "That jurors to serve in the courts of the United States, in each state respectively, shall have the like qualifications, and be entitled to the like exemptions, as jurors of the highest court of law of such state, now have and are entitled to, and shall hereafter, from time to time, have and be entitled to, and shall be designated by ballot, lot or otherwise, according to the mode of forming such juries now practiced and hereafter to be practiced therein, in so far as such mode may be practicable by the courts of the United States, or the officers thereof; and for this purpose the said courts shall have power to make all necessary rules and regulations for conforming the designation and impaneling of juries, in substance, to the laws and usages now in force in such state; and, further, shall have power, by rule or order, from time to time, to conform the same to any change in these respects which may be hereafter

[1] See § 29 of the Judiciary Act of 1789, ch. 20: 1 Stat. at Large, 73, and the act of May 13, 1800, ch. 61: 2 Stat. at Large, 82.

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adopted by the legislatures of the respective states for the state courts." [1]

This act, it will be perceived, is prospective; and, unlike the correspondent preceding acts, it expressly recognizes the grounds of *exemption* prescribed by the state laws. It was doubtless designed to embrace petit jurors for the trial as well of criminal as of civil causes; and grand as well as petit jurors. Rules have been framed for giving it full effect in the northern district of New York, and it is presumed in the other districts also.[2]

By the 29th section of the judiciary act of 1789,[3] it is enacted that "writs of *venire facias*, when directed by the court, shall issue from the clerk's office, and shall be served and returned by the marshal in his proper person, or by his deputy, or in case the marshal or his deputy is not an indifferent person, or is interested in the event of the cause, by such fit person as the court shall specially appoint for that purpose, to whom they shall administer an oath or affirmation, that he will *truly and impartially serve and return such writ.* And when, from challenges, or otherwise, there shall not be a jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court where such defect of jurors shall happen, return jurymen *de talibus circumstantibus* sufficient to complete the panel; and when the marshal or his deputy are disqualified as aforesaid, jurors may be returned by such disinterested person as the court shall appoint."

[1] Act of July 20, 1840, ch. 47: 5 Stat. at Large, 394.

[2] See Appendix, Rule 46, N. D. N. Y. This act is still in force, but other regulations of great importance, respecting the qualifications of grand jurors, have, by a recent act of congress, been superadded to meet the exigencies of an insurrection against the national government, which, however, will find a more appropriate place in the fourth part of this work treating of criminal proceedings.

[3] Ch. 20: 1 Stat. at Large, 73.

In the state of New York, while, as formerly, jurors were selected by the sheriff, as in England, *ad libitum*, from the body of the county, there was no room for doubt that if the sheriff was a party or otherwise interested in the event of the suit, he was thereby disqualified for serving the venire, and that this would be good ground of challenge to the array. But after the law was altered in this respect, and petit jurors were required to be drawn by lot by the county clerk, the question arose, in the case of *Woods* v. *Rowan & Coon* (5 John. Rep., 133), whether it was still a valid ground of objection to the array that the sheriff by whom the jurors had been *summoned* was a party to the suit. The court decided this question in the affirmative, chiefly on the ground, that though the sheriff no longer possessed the power to designate the jurors, yet that, under various pretexts, he might omit to summon those named in the panels whom he might wish to exclude.

The act of 29th April, 1802, enacts that from and after the passage thereof "no special juries shall be returned by the clerks of any of the circuit courts; but that in all cases in which it was the duty of the clerks to return special juries before the passing of this act, it shall be the duty of the marshal for the district where any circuit court may be held, to return special juries in the same manner and form as by the laws of the respective states the said clerks were required to return the same."[1]

Waiver of trial by jury.] By an act of congress passed March 3, 1865 (ch. 86, 13 Stat. at Large, 501), the right of trial by jury may, in civil cases in the circuit courts of the United States, be *waived* by voluntary agreement of parties. The enactment is as follows:

[1] Ch. 31, § 30: 2 Stat. at Large, 167.

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"SEC. 4. *And be it further enacted,* That issues of fact, in civil cases in any circuit court of the United States, may be tried and determined by the court without the intervention of a jury, whenever the parties, or their attorneys, of record, file a stipulation in writing with the clerk of the court waiving a jury. The finding of the court upon the facts, which finding may be either general or special, shall have the same effect as the verdict of a jury. The rulings of the court in the progress of the trial, when excepted to at the time, may be reviewed by the supreme court of the United States upon a writ of error, or upon appeal, provided the rulings be duly presented by a bill of exceptions. Where the finding is special, the review may also extend to the determination of the sufficiency of the facts found to support the judgment."[1]

Jurors' fees.] Jurors are entitled to a compensation of two dollars for each day's attendance in court; and to five cents a mile for traveling, in going to and returning from the place of holding the court.[2]

Before the passage of the act here cited, the fees of jurors were prescribed by the act of 28th February, 1799. The old as well as the new act gave per diem compensation, and the practice under it was for the marshal, at the adjournment of the court, to pay the jurors for each day's attendance, without regard to the particular nature of the services they had been required to perform. It seems highly improbable that congress designed to alter this practice. But the act of 1853 contains a provision that appears,

[1] This enactment is doubtless traceable, directly or indirectly, to the New York CODE—*ter quaterque execrandus.* Under what view of the subject it could have been deemed necessary or expedient to assert the right of excepting to the decisions—"rulings"—of the court in the progress of the trial, and to have them reviewed by the supreme court, is not obvious. Was it intended to confer a right to a writ of error or appeal, without regard to the nature of the suit or the amount in dispute?

[2] Act of February, 26, 1853, ch. 80, § 3: 10 Stat. at Large, 168. See Appendix, where this act will also be found.

nevertheless, to infer such a purpose. It is this: "*In cases where the United States are parties*, the marshal shall, on the order of the court, to be entered in its minutes, pay to the jurors and witnesses all such fees as they may appear by such order to be entitled to, which sums shall be allowed him at the treasury in his accounts." With respect to witnesses, this provision is intelligible and unobjectionable, and in accordance with antecedent usage, except that, so far as I am informed, no order of the court was supposed to be required to authorize the payment by the marshal of the compensation due, to wit: for attendance in behalf of the United States. Witnesses are summoned to testify in particular specified causes; and, in suits between private parties, may conveniently, and in justice should, be paid by the party at whose instance they attend. But it is otherwise with jurors, and it seems most probable that they were inadvertently coupled in this enactment with witnesses, without any actual design to introduce an innovation scarcely susceptible of practical application.

9. *Notice of trial.*

In the circuit and district courts for the southern district of New York eight days' notice of trial is to be given.

In the district court for the northern district of New York fourteen days' notice of trial and six days' notice of countermand are to be given in all cases, without regard to the defendant's place of residence, as in the supreme court of New York.[1] In each of these courts, a note of the issue, and of the pleadings and attorneys' names, must be delivered to the clerk, on or before the Thursday preceding the term, who is required, as early as the

[1] Appendix, Rule 31, D. C.

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following day, to have the calendar of causes to be tried, made up, arranging them according to the dates of their issues.[1]

There are, however, certain descriptions of cases, as already shown, in which the United States are entitled, under certain circumstances, to judgment against the defendant, at the return term of the process by which he is brought in to answer. With the rigid enforcement of this right, the regular service of a notice of trial is, of course, incompatible. And, for the regulation of the practice, in one of those cases, the following rules have been adopted by the district court for the southern district of New York, and are also to be considered as operative in the circuit court for that district:

"In suits in behalf of the United States, in which the plaintiffs are by statute entitled to judgment at the return term of the writ, the declaration may be filed in open court on the day the writ is returned; and proper proceedings may be thereon taken for perfecting judgment *instanter*, unless a plea is filed and a continuance of the cause allowed by the court.

"If the defendant pleads to any such suit, the district attorney may have the cause placed on the calendar at the same term, and may, without other notice, bring the same to trial when called, unless, at the instance of the defendant, the court shall grant a continuance in the cause."[2]

The rules upon this subject of the courts for the northern district of New York, are substantially the same as the foregoing.[3]

A civil cause may, by consent of the attorneys on both sides, be lawfully referred for decision to a referee. *Heckers* v. *Fowler*, 2 Wallace, 123. The

[1] Appendix, Rule 45, D. C. N. D.

[2] Rules 209, 210, D. C.

[3] Appendix, Rules 20, 21.

action was for breach of covenant, in the circuit court of the United States for the southern district of New York. It was referred to a referee "to hear and determine all the issues therein," who reported that there was due to the plaintiff from the defendants the sum of $9,000, besides costs. He filed his report with the clerk of the court, who entered judgment thereon. On writ of error to the supreme court these proceedings were held regular and valid.

SECTION VIII.

PROCEEDINGS FROM THE TRIAL TO THE EXECUTION, INCLUSIVE.

1. *Of the trial and its incidents.*

No one acquainted with the manner of conducting trials in the courts of a state, is likely to be at a loss in the management of a trial in the national courts of that state. There is nothing in the organization of these courts, nor in the acts of congress regulating the proceedings, which necessarily leads to any diversity of practice in this respect, between them and the courts of the several states in which they act. The jurors are called and sworn; may be fined for non-attendance; may be challenged upon the same grounds, and the challenge is tried in the same manner in each. To these grounds are, however, to be added other special grounds, specified in the act of June 17, 1862, ch. 103, applicable alike to civil and criminal trials, and designed to exclude from the jury box all disloyal persons. *Vide infra*, part 4, section 4. And by an act of March 3, 1865, ch. 86, it is enacted, that "all challenges, whether to the array of panel or to individual jurors for cause or favor, shall be tried by the court without the aid of triers." But whether this provision is applicable to civil as well as criminal cases can only be determined by judicial interpretation. With the exception of the fourth section, which is totally foreign to this

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question, the act relates rigorously to criminal prosecutions; and it would be no unreasonable application of the rule *noscitur a sociis*, to adjudge the abolition of triers to be limited to such prosecutions. The case is opened; the witnesses are called, sworn and examined, in the same manner; and the rules of evidence are the same;[1] it is in like manner the duty of the judge to decide pertinent questions of law as they arise, and equally the right of the parties to except to his decisions; a plea *puis darrien continuance* may in like manner be pleaded; a demurrer to evidence may in like manner be put in; the verdict is in like manner either general or special, or (when the state practice admits it) may be taken, subject to the opinion of the court, on a special case; a juror may, under like circumstances, be withdrawn, and the rules with regard to damages are the same, excepting always such modifications as may have been introduced by special rules of court, in relation to such of these particulars, as from their nature, are subject to judicial discretion.[2]

[1] In some of the states the parties in a suit are, by statute, permitted to testify in their own behalf, and also to call each other as witnesses. Doubts were entertained whether this great innovation upon a fundamental principle of the common law was within the provision of the thirty-fourth section of the judicial act of 1789, adopting the laws of the several states as rules of decision in trials at common law. This question has at length received an affirmative answer in *Vance* v. *Campbell et al.*, 1 Black, 427; *Haussknecht* v. *Claypool et al.*, 1 Black, 431; and *Wright* v. *Bales*, 2 Black, 535. And by a *proviso* to the third section of a *general appropriation act*, passed July 2, 1864, ch. 210, it is enacted "That in the courts of the United States there shall be no exclusion of any witness on account of color; nor in civil actions, because he is a party to, or interested in, the issue tried." By the laws of the state of New York the privilege of testifying, first limited to the parties to civil actions, has subsequently been extended to the accused in criminal cases.

[2] In the circuit and district courts for the southern district of New York, when two counsel on each side sum up to the jury, the arguments are to be heard alternately, and not from both counsel consecutively on the same side, as had before been the practice.

When at any session of a circuit or district court the trial or hearing of a cause, civil or criminal, having been begun, shall not be concluded before the arrival of the time fixed for the commencement of another session, it may, nevertheless, be continued and completed. Act of March 2, 1855, ch. 140: 10 Stat. at Large, 630.

A usage prevails in the national courts of praying instructions to the jury at the close of the trial, on all such questions of law as the case is supposed to involve. These questions are generally very formally drawn up in writing. They are frequently divided and subdivided, and spun out to such a degree, that, being presented to the court not until the case is just about being submitted to the jury, and sometimes not until this has been done, the court finds it embarrassing to deal with them. It has, however, been very properly held, that the court is not restricted to the terms and forms of instruction required by the parties, simply deciding whether it will give or withhold the particular instructions prayed for; but that it is sufficient to instruct the jury on such questions of law as appear to the court to be applicable to the evidence, and in such terms as it shall see fit, leaving it to the parties, respectively, to except to the refusal of the court to give any other or further instructions; for "while," says Mr. Justice DANIEL in delivering the opinion of the court, "in trials at law, it is invariably true that the decision of questions upon the weight of evidence belongs exclusively to the jury, it is equally true that wherever instructions upon evidence are asked from the court to the jury, it is the right and the duty of the court to judge of the relevancy, and by necessary implication, to some extent, upon the certainty and definiteness of the evidence proposed. Irrelevant, impertinent or immaterial statements, a

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court cannot be called upon to admit as the groundwork of instructions; it is bound to take care that the evidence on which it shall be called to act is legal; and that it conduces to the issue on behalf either of the plaintiff or of the defendant." *Roach* v. *Bullings*, 16 Peters, 319, 323; *Clymer's Lessee* v. *Dawkins et al.*, 3 Howard, 674, 688; *Law* v. *Cross*, 1 Black, 533.

It has, with great propriety, been held that a judge has no right to charge the jury upon a hypothetical case. *The United States* v. *Breiting*, 20 Howard, 252. "It is," said the chief justice in pronouncing the decision, "clearly error in a court to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered. The instruction presupposes that there is some evidence before the jury, which they may think sufficient to establish the facts hypothetically assumed; and, if there is no evidence which they have a right to consider, then the charge does not aid them in coming to correct conclusions, but its tendency is to embarrass and mislead them. It may induce them to induge in conjectures, instead of weighing the testimony." If a series of propositions be embodied in the instructions given, and the instructions be excepted to in mass, if any one of the instructions is correct, the exception will be overruled. *Johnson* v. *Jones et al.*, 1 Black, 209. A bill of exceptions should contain only so much of the evidence as is necessary to present the legal question for the consideration of the appellate court. Id.

There is another decision touching the power and duties of the court too important to be passed over without notice. In the case of *Mitchell* v. *Harmony* (13 Howard, 115, 130) it is asserted to be the practice of the state courts in some of the states to express their opinions upon questions of fact as well as of law, and New York was said to be one of those

states, and it was held not to be improper, where this is customary in the local tribunals, for the national courts to follow their example.

In the case before the court, the trial took place in the circuit court for the southern district of New York, and seems to have been well adapted to test the propriety of the usage in question; the language of the court, in expressing its opinion upon the sufficiency of the evidence, on some of the most material questions of fact in the case, having been very decided, and this being one of the grounds of exception on which the writ of error was founded. The judgment was, however, affirmed on the ground that the questions of fact were in reality submitted to the jury, the judge, in conclusion, having observed to them "that if they agreed with him in his view of the facts, they would find for the plaintiff; otherwise, for the defendant." Mr. Justice DANIEL, in a very forcible opinion, dissented from the decision.

It is the duty of the court to guard against surprise, when in the course of a trial a right is asserted upon one of two inconsistent grounds; yet this is a matter of practice and discretion, and not a ground for a writ of error. *Turner* v. *Yates*, 16 Howard, 14. Nor is the omission of the court below to instruct the jury upon a point of law, unless requested to do so. *Peacock* v. *Dialogue* (2 Peters, 1); nor the denial of a prayer, unless the entire prayer, as made, ought to have been granted. *Columbia Insurance Co.* v. *Lawrence*, 2 Peters, 25. If evidence offered be admissible for any purpose, it is not error to overrule a general objection to it. The party objecting should in such a case pray an instruction limiting the effect of the evidence to the particular purpose for which it is admissible. *Kelly* v. *Jackson*, 6 Peters, 622. The court is not bound to repeat to the jury essentially the same proposition in different forms.

PART 2. Id. It is not the province of the court to advise the jury concerning the comparative weight of different parts of the evidence. *Crane* v. *Morris's Lessee*, 6 Peters, 598.

Special cases.] The English practice (designed to save the delay and expenses incident to special verdicts and bills of exceptions), where a difficulty in point of law arises upon the trial of permitting general verdicts to be found, subject to the opinion of the court on a special case, has always prevailed in the state of New York. But in one essential particular, the New York practice differed from the English. In England, the case does not contain the *evidence* given at the trial, but a statement of the *facts proved;* so as to present merely the questions of law reserved; the case being settled at the trial before the jury is discharged, where, if any difference of opinion arise about a fact, the opinion of the jury is taken, and the fact is stated accordingly. 1 Archb. Practice, 193. But here the practice was to state the evidence at length, from which the court were to draw such conclusions as, in their opinion, the jury ought to have drawn, had they been required to pass upon it. See *inter al.*, 15 Johns. Rep., 409. By a late rule of the supreme court of New York this departure from the English practice is, however, abrogated. But it is understood still to subsist in each of the national courts in New York; being expressly recognized by a rule of the court for the northern district,[1] and indirectly by a rule of the courts of the southern district.

As to the mode of preparing and settling cases, see, *post, New Trial.*

[1] Appendix, Rule 49, D. C.

Bill of exceptions—Demurrer to evidence—Special verdict.

To entitle a party to take an exception to the admission of evidence, whether written or oral, by the court, he must specify the particular ground of his objection to its admission. A mere general objection is insufficient, and will be regarded by the appellate court as nugatory; nor ought objections in this form to be tolerated at the trial. *Camden* v. *Doremus et al.*, 3 Howard, 515, 530.

The insertion of the charge of the court at large in a bill of exceptions, upon a general exception to the whole charge, is inadmissible, and the judges of the circuit and district courts are expressly forbidden by a rule of the supreme court to allow bills of exceptions thus framed; but "the party excepting" is "required to state distinctly the several matters of law in such charge to which he excepts; and such matters of law, and those only," are to "be inserted in the bill of exceptions, and allowed by the court."[1] Yet, although a bill of exceptions is improperly drawn, if the court can ascertain the substance of the facts, and the questions of law on which the court instructed the jury are apparent, it will nevertheless proceed to decide the cause.[2] But when the charge embraces several distinct propositions, and exception is taken to it in gross, if the charge was right on any one of the propositions, the judgment will be affirmed. *Lincoln* v. *Claflin*, 7 Wallace, 132.

An error apparent on the face of the record is open to revision and correction on a writ of error, although there is a bill of exceptions not embracing it; but this rule does not extend to erroneous decisions of

[1] Appendix, Rule 4. See, also, *Simpson* v. *The Westchester Railroad Company*, 3 Howard, 553; *Barrow* v. *Rear*, 9 id., 366.

[2] *The United States* v. *Morgan et al.*, 11 Howard, 154.

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In the case of *Simpson* v. *Westchester R. R. Co.*, just above cited, on a motion for a *certiorari*, to bring up parts of the charge which it was alleged had been improperly omitted, it was held, that the court had not the power to correct any errors or omissions that might have been made in the circuit court in framing the exception; nor could the court regard any part of the charge as the subject-matter of revision, except what had been certified to have been excepted to by the judges, or one of them, under seal. If the portion of the charge to which the diminution is suggested, was in fact embraced in the exceptions, and the omission of it is a clerical error, then, upon producing a copy of the exception properly certified, the plaintiff in error will be entitled to a *certiorari* in order to supply the defect. But the court can in no respect alter or amend the exception certified under the seals of the judges of the circuit court, either by referring to the charge at length, or to the notes of the presiding judge.[2]

Whether a bill of exceptions returned with a writ of error presents for revision any question of law in such form as to enable the court to decide upon it, or only a mass of conflicting evidence on which no jurisdiction can be exercised on writ of error, is a question to be decided only on final hearing, and not on motion to dismiss the writ of error. *Minor* v. *Tillitson*, 1 Howard, 287.

An exception must be distinctly taken at the trial, and while the jury are at the bar; and, strictly, the

[1] *Suydam* v. *Williamson et al.*, 20 Howard, 427.

[2] The charge in the case before the court had been delivered by Mr. Justice BALDWIN, who had in the mean time died.

bill of exception should then be tendered to the judge for his signature, but it may, according to common usage, be signed *nunc pro tunc*, after the trial, provided the exception be taken and noted with sufficient certainty by the judge at the time. *Ex parte Martha Bradstreet*, 4 Peters, 106; *Sheppard et al.* v. *Willson*, 6 Howard, 260; *Barton* v. *Forsyth*, 20 id., 634; *The United States* v. *Breitling*, 20 id., 252; 2 Black, 563; id., 671.

According to the laws of New York a bill of exceptions taken at the trial (of a cause in the supreme court) is to be returned to the court at its next term, where, according as the court shall be of opinion that the exceptions are well or ill founded, a new trial will be granted, or a judgment rendered in pursuance of the verdict; in which latter case a writ of error may be brought to the court of last resort. This practice, however, it will readily be seen, is not applicable to the courts of the United States. In them, as in the English courts, judgment is rendered upon the verdict of course, and regularly the party can only avail himself of his bill of exceptions by writ of error. But by a rule of each of the national courts of New York the advantages of the state practice are virtually secured; for it is thereby provided that a bill of exceptions may, before judgment, be used instead of a case, on motion for a new trial.[1]

According to the practice of the supreme court of New York, bills of exceptions operate *per se* to stay proceedings. *Hasbrouck* v. *Tappen*, 15 Johns. Rep., 182. But, as we have just seen, they have a new and peculiar character imparted to them by a statute

[1] Appendix, Rule 51, D. C. See, *post*, *New Trial*. This practice has also been virtually sanctioned by a decision of the supreme court, independently of any rule of court, in *The United States* v. *Dashiel*, 4 Wallace, 182, where it was held that a motion for a new trial was not a waiver of a bill of exceptions.

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of the state; their office, in the first instance, being merely to bring before the court *in which the suit is pending* the question presented by the exceptions, in order to enable that court to decide whether a judgment ought to be rendered on the verdict, or a new trial granted. In that court, therefore, it is consistent and proper that they should operate of course to stay proceedings.[1] But it is otherwise in the courts of the United States; and this, it is believed, is a case in which the practice of the supreme court *would not apply* in the national courts for this state.

In the courts of the southern district, therefore, it is expressly provided by the rule last above cited, that a bill of exceptions thus used instead of a case shall have the same effect in staying proceedings. In the courts of the northern district an order is necessary.[2]

The mode of drawing up, amending and settling a bill of exceptions, demurrer to evidence, and special verdict, in the national courts of New York, is prescribed by their rules. A *special verdict* may properly be resorted to where there is no dispute about the facts; but, in order to enable the appellate court to act upon it, it must state, not the evidence, but the facts as found or agreed upon; and the consideration of the appellate court is limited to the facts so stated. If it is desired to obtain a review of the rulings of the court in admitting or excluding evidence, it can be only by a bill of exceptions. But whichever of these expedients is adopted, it must be done in due form; and, therefore, where a paper

[1] But to prevent improper delay, the court has adopted a rule permitting them to be argued out of their order upon the calendar, as *frivolous*, unless the party excepting shall, before the term at which the cause is noticed for argument, obtain from the judge who tried the cause, and serve upon the opposite party, a certificate that there is probable cause to stay proceedings.

[2] Appendix, Rule 51.

purporting to be a history of the trial, signed by the judge, and certified as correct by the counsel of the defendant in error, was filed in the office of the clerk of the circuit court, after the writ of error was issued, and was returned with the record, it was treated as nugatory; and no error otherwise appearing in the record, the judgment was affirmed. *Suydam* v. *Williamson et al.*, 20 Howard, 428.

By a rule of the circuit court of the southern district of New York, "where a case shall be made with leave to turn the same into a special verdict, or bill of exceptions, the party shall not be at liberty to do either at his election, but the court may, if they think proper, prescribe the one which he shall adopt."

In the courts of the northern district of New York there is no express rule upon this subject, and the practice of the supreme court of the state in relation to this point is therefore operative therein.

Nonsuit.] In the case of *Doe* v. *Grymes et al.*, in error from the circuit court for the district of Georgia (1 Peters, 469), the question was, whether the court below had authority to order a peremptory nonsuit against the will of the plaintiff, and *it was held that it had not;* although the exercise of such an authority was conceded to be in conformity with the practice of the state courts in Georgia (or at least of some of them), and in accordance with the uniform antecedent practice of the circuit court from which the record came. It follows, therefore, from this decision, that the courts of the United States do not possess this authority in any of the districts; or, at least, that it cannot be exercised, where, as in the case decided, some evidence has been given. The language of the court indeed, although used in reference to the particular cause before it, is unqualified, by even an intimation, that such a power could, under any circumstances, be exercised; and in the

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case of *D' Wolf* v. *Rabaud et al.*, subsequently decided at the same term (1 Peters, 476, 497), as also in several other more recent cases, the court referred to the doctrine of this case as universally applicable.

But it has, nevertheless, been held, that, in these states where this practice prevails, the defendant has a right, at the close of the evidence in behalf of the plaintiff, to pray the court to instruct the jury that there is no evidence upon which they can lawfully find a verdict for the plaintiff, and that it is the duty of the court to give such an instruction, when, in its opinion, the evidence is legally insufficient to warrant such verdict. In such case, it becomes, say the court, "imperative upon the jury to find a verdict for the defendant." This practice answers the purpose of a *demurrer to evidence*, and should be tested by the same rules. *Park* v. *Ross*, 11 Howard, 362, 373.

2. *Of motions in arrest of judgment—for judgment non obstante veredicto—and repleader.*

The legal grounds upon which these motions are founded are to be sought for in the well known elementary treatises. The form and manner in which they are to be brought before the court depend upon local usage and the rules of the court. In each of the national courts of New York (in conformity with the practice in this particular of the supreme court of the state), motions in arrest of judgment belong to the class of enumerated motions. The clerk must therefore be furnished with a note of the issue, and the cause to be placed upon the calendar.[1]

Preparatory to bringing the motion before the court, a notice thereof, together with copies of the pleadings upon which it is founded, or of so much thereof as may be necessary to the full understanding of the question, is to be served upon the opposite

[1] Appendix, Rules 53, 55, D. C. N. D. N. Y.

party. In the courts of the southern district, this is a notice of four days. In the courts for the northern district, it is in all cases a notice of eight days; and (as of all special motions, enumerated and non-enumerated) must be for the first day in term.

In the courts for the southern district, it must also, like all other *enumerated* motions, be for the first day, subject, however, to the following qualification: "If, however, sufficient cause is shown therefor, an order may be obtained from the court or a judge, permitting such notice to be given for any other day of the term, including times to which the court may stand adjourned."

At the opening of the argument, in each of these courts, the judges are to be furnished with copies of the pleadings, or of so much thereof as may be necessary; and also with a note of the points or questions intended to be made by the respective parties. In the courts for the northern district, a similar note must be furnished to the opposite counsel.[1]

Motions for judgment *non obstante veredicto*, and for a repleader, in each of these courts are non-enumerated motions, and are, of course, to be brought on as such. In the courts for the southern district of New York, the notice is four, and in the courts for the northern district, eight days.

As all these motions must be made before judgments, and as in the national courts (the trials being at bar), the time requisite for giving notice and preparing the necessary papers would not otherwise be afforded, an order to stay proceedings must be obtained.

[1] Appendix, Rules 54, 56, D, C.

3. *New trial.*

The power to grant new trials is expressly conferred on the courts of the United States by the judicial act of 24th September, 1789. Section 17 declares "that all the said courts of the United States shall have power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law." By section 18 it is enacted, "that when, in a circuit court, judgment upon a verdict in a civil action shall be entered, execution may, on motion of either party, at the discretion of the court, and on such conditions, for the security of the adverse party, as they may judge proper, be stayed forty-two days from the time of entering judgment, to give time to file in the clerk's office of said court a petition for a new trial. And if such petition be there filed within said term of forty-two days, with a certificate thereon from either of the judges of such court, that he allows the same to be filed, which certificate he may make or refuse, at his discretion, execution shall, of course, be further stayed to the next session of said court. And if a new trial be granted, the former judgment shall be thereby rendered void." [1]

The *circuit courts*, it will be seen, therefore, are authorized to grant new trials *after* judgment; and in order to afford to the unsuccessful party ample time to decide upon the expediency of making an application and filing his petition for this purpose, may, in their discretion, direct a stay of execution for the period of forty-two days. These legislative provisions are not, however, to be regarded as peremptorily prescribing a particular mode by which, alone, suitors are to seek, and the courts to grant,

[1] Ch. 20: 1 Stat. at Large, 73.

relief in this respect. Accordingly, general rules have been framed in each of the national courts of New York, in conformity with the practice, in this particular, of the supreme court of the state. By rules of the circuit court for the southern district, and of the district court for the northern district, it is in substance provided, that motions to set aside a nonsuit or verdict, except for irregularity, shall be brought before the court upon a *case*, to be prepared by the party intending the motion: a copy of which must be served, within four days after trial,[1] upon the opposite party, who may, within four days after such service, prepare amendments thereto, and serve a copy thereof upon the party who prepared the case; who may then, within four days thereafter, serve the opposite party with a notice to appear within convenient time, and not more than four days after the service of such notice, before the judge who tried the cause, to have the case and amendments settled; and the judge is thereupon to correct and settle the same, as he shall deem to consist with the truth of the facts. And if the parties shall omit within the several times above mentioned (unless the same shall be enlarged by the judge), the one to propose amendments, and the other to notify an appearance before the judge, they shall respectively be deemed, the former to have agreed to the case as prepared, and the latter to have agreed to the amendments as proposed; and if the party shall omit to make a case within the time above mentioned, unless such time shall be enlarged, he shall be deemed to have waived his right to make such case.

But it is also further provided, that, "if judgment has been rendered upon a verdict, the party intend-

[1] In the southern district, the language of the rule is, "before judgment is rendered and entered upon such verdict."

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ing to move for a new trial shall give four days' notice in writing to the opposite party of any motion to stay execution thereon, and also of the petition intended to be filed pursuant to the 18th section of the act of September 24, 1789, unless a shorter time be allowed by the court or judge." [1]

But where the motion is founded upon *irregularity*—as the misbehavior of the jury, the improper conduct of the prevailing party towards the jury or witnesses, perjury upon the trial, &c., to which must be added (though not strictly falling under the head of irregularity), the discovery of new and material evidence after the trial—the motion is brought on upon affidavit. In either case, an order to stay proceedings is necessary.

According to the practice of the circuit court for the first circuit, a motion for a new trial will not be entertained, in a case in which a bill of exceptions has been taken, unless the bill of exceptions is waived. *Cunningham et al.* v. *Bell et al.*, 5 Mason, 161.

4. *Of Costs.*

It is now well understood, and may be considered as perfectly settled, that the successful party is, in general, entitled to recover his costs of suit. This right with regard to some descriptions of suits is expressly, and with regard to all indirectly, recognized throughout the whole code of legislation applicable to the subject.

The judicial act of 24th September, 1789, ch. 20, sec. 11, as we have seen, restricted the original civil jurisdiction of the circuit courts in all cases, to suits in which the matter, exclusive of costs, exceeded the sum or value of $500. And, for the purpose of more effectually enforcing this limitation, the 20th section not only denied costs to a plaintiff, except the United

[1] Appendix, Rules 47, 48, N. D.

States, who should recover less, but also empowered the court, in its discretion, to adjudge costs against him.

But this restriction in point of amount to which the jurisdiction of the circuit courts was thus originally subjected, has, by subsequent legislation, as already shown, been considerably narrowed. Of suits in favor of the United States; suits to which the bank of the United States is a party; suits for the infringement of rights secured by letters patent and copy-rights; and suits upon debentures by assignees; these courts, as already shown, have been invested with jurisdiction without regard to the amount in dispute; and, by the act of February 3, 1831, respecting copy-rights, "full costs," and, by the patent act of July 4, 1836, "costs," are given in all cases of recovery under them.

By the act of 8th May, 1792, it is declared, "that in every prosecution for any fine or forfeiture incurred under any statute of the United States, if judgment is rendered against the defendant, he shall be subject to the payment of costs; and if any informer or plaintiff on a penal statute, to whose benefit the penalty, or any part thereof, if recovered, is directed by law to accrue, shall discontinue his suit or prosecution, or shall be nonsuit in the same, or, if upon trial a verdict shall pass for the defendant, the court shall award to the defendant his costs, unless such informer or plaintiff be an officer of the United States, specially authorized to commence such prosecution; and the court, before whom the action or information shall be tried, shall, at the trial, in open court, certify upon record that there was reasonable cause for commencing the same, in which case no costs shall be adjudged to the defendant."[1]

[1] Ch. 34, § 5: 1 Stat. at Large, 275.

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By the act of 28th February, 1799, it is further declared, "that, if any informer on a penal statute, and to whom the penalty, or any part thereof, if recovered, is directed to accrue, shall discontinue his suit or prosecution, or shall be nonsuited in the same, or if, upon the trial, judgment shall be rendered in favor of the defendant, unless the informer be an officer of the United States, he shall be alone liable to the clerks, marshals and attorneys for the fees of such prosecution; but if such informer be an officer whose duty it is to commence such prosecution, and the court shall certify that there was reasonable ground for the same, then the United States shall be responsible for such fees."[1]

An act of February 24, 1807,[2] contains a similar provision relative to costs in cases of *seizure*, by any collector or other officer, for which see part III.

And by the act of 22d July, 1813, it is provided, "That whenever there shall be several actions or processes against persons who might be legally joined in one action or process, touching any demand or matter in dispute before a court of the United States, or of the territories thereof, if judgment be given for the party pursuing the same, such party shall not thereon recover the costs of more than one action or process, unless special cause for several actions or processes shall be satisfactorily shown on motion in open court."[3]

It remains only to refer the reader to the act of congress already cited, prescribing the fees or "compensation" allowable for professional and official services in the courts of the United States. The

[1] Ch. 19, § 8: id., 624.

[2] Ch. 19, § 1: 2 Stat. at Large, 422.

[3] Ch. 14, § 1: 3 Stat. at Large, 19. The second section contains similar provisions relative to proceedings by libel and information upon seizures.

design of the act is to determine the amount of costs recoverable from the unsuccessful party throughout the Union, and not to interfere between the attorney and his client; and so the act, in the first section, declares. The necessity of frequent recurrence to the act seems to furnish a more than sufficient apology for inserting it in the appendix to this work.[1] Subject to the restriction imposed by the twentieth section of the judiciary act, there seems to be little room for doubt that in the courts of the United States the successful party is entitled to recover costs according to this act.

5. *Of the judgment.*

When a verdict is given, the party for whom it is given may immediately thereafter enter a rule for judgment *nisi causa.*

At common law, in ordinary cases, this rule does not expire until after the four days, exclusive of the day on which it was entered; but, if there are not four days remaining in term after the verdict, in that case the rule expires, and judgment may be signed on the last day of the term. 1 Arch. Pr., 200; Salk., 77; 2 Bos. & Pul., 393. And such is the practice of the national courts for the northern district of New York; it being provided by their rules, that the rule for final judgment shall become absolute, unless cause to the contrary be shown in four days after the entry thereof, if there shall be so many days remaining in term; and if not, then unless cause to the contrary be shown during the term.[2]

[1] Act of Feb. 26, 1853, ch. 80. See appendix. An act purporting to be amendatory of this act was passed August 16, 1856 (ch. 124), but it does not alter the tariff of fees allowed by the original act. It consists of new miscellaneous regulations intended to guard the treasury, and relating mainly to public officers.

[2] Appendix, Rule 32, D. C.

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In each of the national courts in New York, the clerk is authorized by rule to tax costs and sign judgment records.[1]

Liens, when to cease.] By the act of July 4, 1840, it is provided that judgments and decrees thereafter rendered in the circuit and district courts of the United States, within any state, "shall cease to be liens on real estate or chattels real in the same manner, and at like periods as judgments and decrees of the courts of such state *now* cease by law to be liens thereon."[2]

6. *Execution.*

When to issue.] The right at common law to issue an execution immediately after judgment is qualified and in some degree abridged by the laws of the United States. The twenty-third section of the judicial act of 24th September, 1789, forbids the issuing of an execution upon a judgment in the district or circuit courts, "in any case where a writ of error may be a *supersedeas*,"[3] until the expiration of ten days after judgment.

[1] Appendix, Rule 79, D. C. N. D.

[2] Ch. 43, § 4: 5 Stat. at Large, 392.

[3] Unless the clause quoted in the text means *in any case where a writ of error may be brought*, it seems not easy to discern its practical import; and to express that meaning the words are not well chosen. At common law a writ of error is always a *supersedeas*. Indeed the preceding clause of the section, limiting the operations of writs of error in this respect to cases in which the writ shall be sued out and served within ten days after judgment, infers this. The interpretation above suggested seems, therefore, to be unavoidable, and, if so, it follows that in no case subject by law to revision on writ of error, can an execution issue until the expiration of ten days after judgment. And such, I imagine, was Mr. Justice WASHINGTON'S view of the subject in 4 Wash. C. C. R., 388, where an execution was set aside upon the ground of its having been issued within ten days after judgment, although no writ of error had in fact been sued out. See further on this subject, Part V. It is true there are cases in which courts, in their discretion, have refused to permit a writ of error to operate as a *supersedeas*, and have,

And by the act of 19th May, 1828, it is enacted, "that in any one of the courts of the United States, where judgments are a lien upon the property of the defendant, and where, by the laws of the state, defendants are entitled, in the courts thereof, to an imparlance of one term or more, defendants in actions in the courts of the United States, holden in such state, shall be entitled to an imparlance of one term." [1]

The term "imparlance" is understood here to mean a stay of execution.

Form of executions and proceedings thereon.] The third section of the act last above cited directs that "writs of execution issued on judgments, in any of the courts of the United States, and the proceedings thereon shall be the same, except their style, in each state respectively, as are *now* used in the courts of such state: *Provided, however*, that it shall be in the power of the courts, if they see fit in their discretion, by rules of the court so far to alter final process in said courts as to conform the same to any change which may be adopted by the legislature of the several states for the state courts." [2]

By the act of 8th May, 1792, it is provided, "that where different kinds of executions are issuable in succession, a *capias ad satisfaciendum* being one, the plaintiff shall have his election to take out a *capias ad satisfaciendum* in the first instance." [3]

upon application and sufficient cause shown, allowed an execution to be issued, notwithstanding a writ of error had been sued out; as where it appeared from the admission of the plaintiff in error or his attorney that the writ of error was brought for the purpose of delay; or where it was brought against good faith, or a positive agreement. 1 Arch. Pr., 221. But whether the exercise of such a discretionary power by the courts of the United States would be compatible with the statute regulations stated in the text may be doubted.

[1] Ch. 68, § 2: 4 Stat. at large, 278.

[2] As to the change introduced by this section, *vide, supra.*

[3] Ch. 34, § 2: 1 Stat. at Large, 275.

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By the act of February 28, 1839, "to abolish imprisonment in certain cases," it is enacted, "that no person shall be imprisoned for debt in any state, on process issuing out of any court of the United States, where, by the laws of the state, imprisonment for debt has been abolished; and where, by the laws of the state, imprisonment for debt shall be allowed, under certain conditions and restrictions, the same conditions and restrictions shall be applicable to the process issuing out of the courts of the United States; and the same proceedings shall be had therein as are adopted in the courts of such state."[1] And by the act of 14th January, 1841,[2] this important enactment is expressly declared to be prospective, so as to embrace all future as well as existing state laws abolishing imprisonment for debt. According to the principle of construction applied by the court in the case of *The United States* v. *Knight* (14 Peters, 301), this act is doubtless to be considered as embracing process in behalf of the United States, as well as of private persons.

The provision contained in the act of March 2, 1793,[3] relative to the appraisement of goods taken in execution on a writ of *fieri facias*, is, it is presumed, superseded by the more comprehensive and mandatory provisions of the act of 1828, above cited.

As to the mode of proceeding in case of the death or removal of the marshal, having in his hands an execution partly executed, see part I.

[1] Ch. 35: 5 id., 321.
[2] Ch. 2: id., 410.
[3] Ch. 22, § 8: 1 Stat. at Large, 323.

Where to run.] In general, executions from the district and circuit courts are operative only in the districts in which the judgments are rendered. But to this there are the following exceptions:

The act of March 3, 1797, provides "that all writs of execution upon any judgment obtained for the use of the United States, in any court of the United States, in one state, may run and be executed in any other state, or in any of the territories of the United States, but shall be issued from, and made returnable to, the court where the judgment was obtained, any law to the contrary notwithstanding."[1]

And, by the act of 20th May, 1826, it is further provided, "that all writs of execution upon any judgment or decree obtained in any of the district or circuit courts of the United States, in any one state which shall have been, or may hereafter be, divided into two judicial districts, may run and be executed in any part of such state; but shall be issued from, and made returnable to, the court where the judgment was obtained, any law to the contrary notwithstanding."[2]

A considerable number of decisions have taken place in the national courts relative to executions and the proceedings thereon, but as they are only declarative of the general common law principles recognized in all courts of common law jurisdiction, or of the laws of the respective states, it does not fall within the design of this work to notice them.[3]

It results, then, that the forms of executions (except their style) from the courts of the United States, their force and effect, and the duty of the marshal in

[1] Ch. 20, § 6: Stat. at Large, 512.

[2] Ch. 124: 4 Stat. at Large, 184.

[3] The case of *Wayman et al.* v. *Southard et al.* (Wheat., 1), and of the *Bank of the United States* v. *Halstead* (10 id., 61), are exceptions to this remark, but have already been noticed in the first part of this work.

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levying, appraising (in some of the states), advertising and selling, are to be ascertained by reference to the laws of the respective states, as they were on the 19th of May, 1828, except in those states in which the law in relation to one or more of these particulars has since been changed, and the national courts in such states have also, in their discretion, adopted such innovations, by rule of court; and except also such subsequent state legislation as relates to imprisonment for debt, and which falls therefore within the purview of the acts of February 28, 1839, and 14th January, 1841.

The state of New York will serve as the most apposite example to illustrate what is here said. Since the 19th of May, 1828, a code of laws, in many respects new, and containing several provisions relative to the subject under consideration, has gone into operation. For instance, not to mention other changes, new regulations are introduced relative to the right of redeeming land sold by execution. These regulations being subsequent to the act of 1828 (which, it has been seen, is not prospective), and not being embraced by the act of 1839, would, *per se*, be inoperative in the national courts of the state of New York. But according to the principles established by the cases cited in the last preceding note; and by the case of *Ross et al.* v. *Duval et al.* (13 Peters, 45); and, indeed, by the express terms of the act of 1828, the national courts in New York had power to adopt these regulations by rule. This power has been exercised. By a rule of the district court for the northern district, made in 1831, and adopted by the circuit court, the practice of the supreme court of the state, as regulated by rules of court and by the laws of the state, is adopted;[1] and in the circuit court for the southern district, the fol-

[1] Appendix, Rule 83, D. C., and Rule 6, C. C.

lowing explicit rules have been made: "In the sale of real estate under execution issuing from this court, the marshal shall conform his proceedings to the directions of the law of this state, now in force, in relation to the sale of real estate on execution, and in addition to the certificate filed with the clerk of the county where the lands sold are situated, shall file a copy thereof with the clerk of this court."

"Redemption of lands, sold under execution out of this court, may be made in the same manner, and with like effect, and by the same persons, as prescribed by the law of this state now in force, and sales by the marshal shall be made subject to such redemption."

Again, in 1831, the legislature of the state of New York passed an act "to abolish imprisonment for debt, and to punish fraudulent debtors." It was probably within the large discretionary powers confided by law to the national courts, so far at least as imprisonment on final process was concerned, to adopt by rule the provisions of this state law. But the change was deemed too important to be introduced by judicial authority alone, and the act, therefore, continued to be inoperative in the national courts until it was expressly adopted by the act of congress of February 28, 1839.

In accordance with the policy originally adopted, and steadily adhered to, of requiring the national courts, in the administration of justice, to conform to the laws of the state in which they sit, congress have seen fit to ordain, "that on all judgments in civil cases, hereafter recovered in the circuit or district courts of the United States, interest shall be allowed, and may be levied by the marshal under process of execution issued thereon, in all cases where, by the laws of the state in which such circuit or district court shall be held, interest may be levied

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under process of execution on judgments recovered in the courts of such state, to be calculated from the date of the judgment, and at such rate per annum as is allowed by law on judgments recovered in the courts of such state."

SECTION IX.

The design of this section is to notice certain matters appertaining to the management of suits at common law, but not referable exclusively to any particular stage of the suit.

1. *Amendments and jeofails.*

Relative to this subject, the judicial act of 24th September, 1789, contains the following highly important provision, viz.:

"That no summons, writ, declaration, return, process, judgment, or other proceedings in civil cases, in any of the courts of the United States, shall be abated, arrested, quashed or reversed for any defect or want of form; but the said courts, respectively, shall proceed to give judgment according as the right of the cause, and matter in law, shall appear unto them, without regarding any imperfections, defects, or want of form in such writ, declaration, or other pleading, return, process, judgment, or cause of proceeding whatsoever, except those only in cases of demurrer, which the party demurring shall specially set down and express, together with his demurrer as the cause thereof. And the said courts, respectively, shall and may, by virtue of this act, from time to time, amend all and every such imperfections, defects, and wants of form, other than those only, which the party demurring shall express as aforesaid; and may, at any time, permit either of the parties to amend any defect in the process or pleadings, upon such conditions as the said courts, respectively, shall, in their discretion, by their rules prescribe."[1]

[1] Ch. 20, § 32: 1 Stat. at Large, 73.

It is obvious at first view, that the subtile niceties of the common law, in pleading, are here amply provided against, and that the authority conferred upon the courts to allow amendments, as well in matters of substance as of form, in furtherance of justice, is very extensive. The first reported case I have met with, in which this enactment was brought under minute consideration, is that of *Smith* v. *Jackson*, 1 Paine, 486. It is there said, as indeed is very clear, that every part of the section, except the last clause of it, relates to defects in matters of form; and that the last clause extends to matters of substance. And it was held that the defects in substance can only be amended while the proceedings are *in fieri*, and before judgment, and cannot, like mere formal defects, be disregarded by the appellate court. But in an anonymous case (1 Gallis. R., 22) the statute was held to be sufficiently comprehensive to embrace causes under appellate as well as original jurisdiction; and this decision is referred to with approbation in *Kennedy* v. *The Bank of Georgia* (8 Howard, 586, 610), where it is held that this power may be exercised by the supreme court upon a record before it on appeal, though the usual practice has been to remand the case to the circuit for amendment.

What is only matter of form, and what matter of substance, is a nice and often an embarrassing question.

The party demurring may indeed always avoid encountering it, by putting in a special demurrer, in all cases where the defect is not clearly one of substance; but the question will nevertheless occur, according to the above decision, upon motions to amend after judgment, and upon writ of error.

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2. *Death, and substitution of parties.*

The provisions of the laws of the United States against the abatement of suits by *death*, are very ample. Concerning the effect of marriage in this respect, they are silent: leaving such effect to be determined by the rules of the common law, or the statutes of the several states.

The 31st section of the judicial act is as follows:

"That where any suit shall be depending in any court of the United States, and either of the parties shall die before final judgment, the executor or administrator of such deceased party, who was plaintiff, petitioner, or defendant, in case the cause of action doth by law survive, shall have full power to prosecute or defend such suit, or action, until final judgment, and the defendant or defendants are hereby obliged to answer thereto accordingly; and the court before whom such case may be depending is hereby empowered and directed to hear and determine the same, and to render judgment for or against the executor or administrator, as the case may require. And if such executor or administrator, having been duly served with a *scire facias*, from the office of the clerk of the court where such suit is depending, twenty days beforehand, shall neglect or refuse to become a party to the suit, the court may render judgment against the deceased party, in the same manner as if the executor or administrator had voluntarily made himself a party to the suit; and the executor or administrator who shall become a party as aforesaid, shall, upon motion to the court where the suit is depending, be entitled to a continuance of the same until the next term of the said court. And if there be two or more plaintiffs, or defendants, and one or more of them shall die, if the cause of action shall survive to the remaining plaintiffs, or against the surviving defendant or defendants, the suit or action shall not be thereby abated; but such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff or plaintiffs, against the surviving defendant or defendants."[1]

[1] Ch. 20: 1 Stat. at Large, 73.

Several important decisions have been made relative to the construction of this section, and the practice under it, which it is proper here to state.

The section extends only to *personal* actions. When in a writ of right, therefore, the defendant died, without having appeared, it was held that the court had no authority to make the heirs parties; and also that a writ of error would lie, upon this ground, to reverse a judgment entered against them by default for want of a plea, in the original action, after having been made parties by rule of court. 7 Wheat., 530; see, also, 6 id., 260.

The executor or administrator is entitled to come in, *instanter*, and make himself a party, *upon motion*. 3 Cranch, 193, 206. If, upon application for this purpose, his representative character is contested, he must establish it by the production of his letters testamentary, or of administration; but after the order for his admission as a party, it is too late to question his right of representation. If the executor or administrator of the deceased party omits, voluntarily to make himself a party, the surviving party is then entitled to a *scire facias* against him to enable the court "to render judgment against the estate of the deceased party, in the same manner as if the executor or administrator had voluntarily made himself a party in the suit." The right to a continuance to the next term is given to the executor or administrator for the purpose of affording him time to prepare for the proper management of the suit, and does not extend to the other party. See, also, 1 Paine, 483.

In the case of *McCoul* v. *Lekamp's administratrix* (2 Wheat., 111), the plaintiff having died after issue joined, his administratrix resorted to a proceeding by *scire facias* for the removal of the action. While the suit was pending the administratrix married;

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which fact being pleaded, *puis darrien continuance*, the suit was held, upon common law principles, to have abated. A new *scire facias* was then sued out in the name of the administratrix and her husband, &c., and a recovery was obtained in the original suit. Upon error to reverse this judgment, one of the questions was, whether the second *scire facias* was authorized by the above recited section of the judicial act; and it was held that the abatement of the first *scire facias* did not in any manner affect the original suit; but that after such abatement, the administratrix, together with her husband, had the same right to institute a new proceeding by *scire facias*, as she alone, while *sole*, had to institute the first.

In the case of *Hatch* v. *Eustis* (1 Gall., 160), the defendant having died *after verdict* and *before judgment* his administrator was brought in by *scire facias;* and a judgment passed in favor of the plaintiff. Upon this judgment an execution was issued and returned *nulla bona testatoris*. Afterwards a *scire facias* was brought to revive the judgment against the administrator. *Held*, that the defendant was not precluded from pleading *no assets*. The court also took occasion to express strong doubts whether, before issuing his execution upon the original judgment, the plaintiff ought not to have sued out a second *scire facias*, to afford the administrator an opportunity to plead the want of assets or other matter of defense, which an executor may plead to a *scire facias* brought upon a final judgment against his testator.

3. *Security for costs.*

In the circuit court for the southern district of New York this subject is regulated by rule, as follows:

"If the plaintiff, at the commencement of the action, be, or pending the same become, a non-resident of

the state, or, if on demand in writing by the defendant's attorney, notice in writing of his residence shall not be given, the defendant may on proof of such non-residence, or failure, enter a rule of course, that the plaintiff give security for the defendant's costs, within ten days after service of a notice of the rule, or be *non-prossed*, which security shall be a bond filed in the clerk's office, duly executed by some sufficient person residing within the district, to the defendant, in the penalty of one hundred dollars (unless a larger penalty shall be directed by the court), with a condition that if the plaintiff shall discontinue his action, or if it be dismissed or *non-prossed*, or judgment pass against him therein, he shall pay all such costs as shall be adjudged or awarded against him in such action. And the sufficiency of the said security may be excepted to, and such security shall justify before the clerk, within the respective periods, and in like manner as is the practice with respect to special bail. And on failure of giving such security, or in default of such justification, and on due proof of the service of notice of such rule, and of any such default, a judgment of *non-pros* may be entered.

"When a suit shall be commenced for any such non-resident, and, also, when at any time pending the action, the plaintiff shall remove out of the district,[1] and the attorney shall thereafter proceed in such suit, without such security being given, he shall, in either case, be deemed to have become security for costs to an amount not exceeding one hundred dollars. Provided that this rule shall not apply where one of several plaintiffs resides within the district."

By a rule of the district court of the northern district of New York, which is also the rule of the

[1] There is, it will be perceived, an incongruity in these rules, in first providing for the case of non-residence within the *state*, and afterward within the *district*.

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circuit court, the provisions relative to this subject, contained in the Revised Statutes of New York, are expressly adopted.[1]

4. *Notices to the adverse party—Service thereof—Agents.*

In the national courts for the New York districts, these subjects are regulated by rules of court; and, it is presumed, also in the courts for the other districts of the Union.

The rules of the courts for the southern district are too numerous for insertion here. For those of the courts for the northern district of New York, see Appendix.

The rules of the courts for the southern district authorize a service upon the agent, or, where none has been appointed, by affixing in the clerk's office in all cases in which the attorney, &c., of the adverse party does not reside in the city of New York. By the rule of the district court for the northern district such service is permitted only when the attorneys, &c., of the adverse party do not reside within forty miles from each other.[2]

By the rules of the courts for the southern district, service may be made *upon a party who prosecutes or defends in person*, unless he is an attorney of the court, residing in the city of New York, by affixing the notice in the clerk's office.

The rule of the district court for the northern district requires, in such case, either a personal service, or a transmission by mail; or, under certain circumstances, a delivery to the jailer, or the sheriff, or one of his deputies; in conformity with the practice of the supreme court of the state.[3]

[1] Appendix, Rule 64.
[2] Appendix, Rule 5.
[3] Appendix, Rule 10.

5. *Affidavits.*

Affidavits to be read in the courts of the United States are to be taken only before either a judge of the United States, or a commissioner appointed for that purpose by the court in pursuance of the acts of congress.[1]

SECTION X.

OF THE REMOVAL OF CAUSES FROM THE STATE COURTS.

The twelfth section of the judiciary act, providing for the removal of causes from the state to the national courts, has already been recited, and the provisions made by a series of later acts, for the like removal of other descriptions of causes, have been summarily stated in the first part of this work.[2]

Under the twelfth section of the act of 1789, many cases have arisen, and some reported decisions, relating to the forms of procedure in such cases, require notice in this place.[3] The act, it will be

[1] *Vide, supra,* "Commissioners," p. 106, *et seq.* The judges and the justices of the peace of the several states are empowered to cause the arrest of persons charged before them with offenses against the United States, to admit to bail or commit such offenders, and require of them security to keep the peace, &c. *Vide, infra,* ch. 2, part 4. These powers imply authority to administer oaths and affirmations, and to take affidavits pertaining to the due exercise of such powers; and such oaths, &c., may incidentally be brought under the cognizance of the courts of the United States. But such state magistrates have not been empowered to take affidavits, either in criminal or civil cases, designed primarily to be read in the courts of the United States.

But many oaths are required by law which do not pertain to judicial proceedings; for example, in applications for pensions, and applications by inventors for letters patent; and it may be useful here to notice an act of congress, apparently designed to facilitate proceedings of this nature by empowering *notaries public* to administer oaths and affirmations, and to take acknowledgments in all cases in which state magistrates are by the laws of the United States authorized to exercise these powers. Act of September 16, 1850, ch. 52: 9 Stat. at Large, 449.

[2] *Vide, supra,* p. 126, *et seq.*

[3] Touching the jurisdiction conferred by this section, see part I.

PART 2. recollected, designated three different classes of cases in which the right of removal may be exercised, provided the matter in dispute exceeds the sum or value of five hundred dollars, exclusive of costs, viz.:

1. Suits by a citizen against an alien.

2. Suits by a citizen of the state where the suit is brought against a citizen of another state.

3. Suits between citizens of the same state, concerning the title of land, in which the party petitioning for removal claims under a grant from a state other than that in which the suit is pending, and his adversary claims under a grant from the state in which the suit is pending.

In the first two classes of cases, the right of removal is limited to the defendant; and as the proceeding in these cases is essentially different from that prescribed in the third, it is proposed to treat of them first in order.

At what time the application for removal must be made.] In the language of the twelfth section of the judiciary act, the defendant may "file his petition, *at the time of entering his appearance* in the state court;" and, according to the judicial construction which has been given to this clause, he is strictly limited to this time. Thus, when the appearance of the defendant was entered in September, and, in February following, the state court allowed the petition to be filed *nunc pro tunc* as of September, the circuit court refused to receive the cause, upon the ground that it could take jurisdiction only where the order for removal was obtained at the time of the defendant's appearing, and that the permission given by the state court to file the petition as of the preceding term did not alter the case. *Gibson* v. *Johnson*, Peters's C. C.; see, also, 1 Paine, 410.

But though the correctnes of this construction in the abstract has never been doubted, yet difficulties have arisen in its practical application. In the case of *Redmond* v. *Russel*, in the supreme court of New York (12 Johns., 153), the defendant put in special bail after the expiration of the term at which the *capias* against him was returnable, viz., on the 3d of September. On the 6th of the same month, the defendant's attorney gave notice to the plaintiff's attorney, that he should petition the court at the next term for a removal of the cause to the circuit court of the United States, and served him with a copy of the petition, but did not file the petition in the clerk's office; and the question upon the motion at the next term was, whether the defendant had complied with the provision of the act of congress, requiring him to "file his petition at the time of entering his appearance." A majority of the court were of the opinion that he had not, but that he ought to have literally *filed* his petition in the clerk's office on the day upon which he entered special bail; and on that ground alone denied his petition. Two of the judges, however, dissented from the decision, being of opinion that the appearance spoken of in the act of congress was an actual personal appearance, and in open court; and that, as the defendant had then for the first time appeared in this manner, he was entitled to have his cause removed. I am not apprised that this decision, or the grounds of it, have since been questioned in the court in which it occurred, and it will probably continue to be observed as a rule by the courts of New York. But whether the construction of the act assumed by the court was a sound one, appears to be at least questionable. For my own part, I cannot concur entirely in the views of the subject taken either by the majority or minority of the judges. It may, I think, well

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be doubted whether congress contemplated the *filing* of the petition under any circumstances *out of term*. The language of the act is, if the defendant shall, at the time of entering his appearance in such state court, "file a petition for the removal," &c., "and *offer* good and sufficient surety," &c., "it shall be the duty of the state court to accept the surety, and proceed no further in the cause." The filing of the petition and the offer of security seem, therefore, clearly to be here treated as simultaneous acts; and, if so, then, as one of these acts from its nature can be done only in open court, it follows that the other is also to be performed in open court.

Nor does this construction involve any inconsistency or serious inconvenience. The difficulty in the case arose wholly from the circumstance that the defendant had availed himself of the rule of practice in the court in which he was prosecuted, permitting him to defer entering his appearance, by putting in special bail, until *after* the term at which the process against him was returnable; instead of performing this act *during* term, as he might have done. Had he adopted this course, his right to have his cause removed would have been incontestible. But, having suffered this opportunity to pass unimproved, and having entered his appearance at a time when the court was not in session, and when, therefore, the concomitant acts required of him to effect a removal of his cause could not be performed, he was justly considered as having lost the right of removal by neglect. It is true that the process may sometimes be served so late in the term as not to afford sufficient time to the defendant to give the required notice[1] to the plaintiff of his intention to petition.

[1] In the case under comment in the text, it is remarked by the learned judge who delivers the opinion of the minority of the court, that the "statute does not require notice to be given" of the presentation of the

But, in such extraordinary cases, the defendant might, with propriety, and doubtless would, be relieved from embarrassment by an order to stay proceedings until the next term.

It has been held not to be necessary where there are several defendants that they should *all* petition for the removal of the cause at the same time; but that when their appearance is entered in the state courts at different times, they may *successively* present their petitions for removal; and if, eventually, all the defendants should not petition, the cause, as against those who have petitioned and obtained a removal, may be remanded to the state court. 1 Paine, 410.

The circumstance that an exception has been entered to the special bail does not affect the defendant's right to remove the suit. 1 Caines, 248.

In an action of ejectment, if the landlord, being an alien, is admitted to defend after judgment, by default against the casual ejector, he is in season to petition for a removal; for it is then that he first *appears*. 4 Johns. Rep., 493. And it was held by a majority of the court in this case, that he was entitled to such removal, notwithstanding that, by a statute of the state, the judgment against the casual ejector is to remain, when the landlord is let in to defend.

In what form and manner the application for a removal must be made.] Where there are several defendants, all must join in the petition for removal. *Smith* v. *Rives*, 2 Sumner, 338.

petition. This is true of the express terms of the act. But, independently of the impropriety, upon general principles, of permitting such a proceeding to be conducted *ex parte*, it can hardly be doubted that it is competent for the state courts, by general rules, to require a previous notice; and, according to the established practice of the courts in New York, notice must be given of *all* special motions in causes pending.

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In the first and second descriptions of cases, a petition is to be presented to the state court, stating the ground upon which the right of removal is claimed, as that the defendant is an alien and the plaintiff a citizen of the United States; or that the plaintiff is a citizen of the state in which the suit is brought, and the defendant a citizen of another state; and that the matter in dispute exceeds the sum or value of five hundred dollars. The statement of the grounds of removal must be positive and unequivocal. Thus it is not sufficient for the defendant to state that he is a *resident* of another state. He must aver that he is a *citizen* of another state. 3 Johns. Rep., 145.

It has, however, been held, that when, in an action sounding in damages, the plaintiff had laid his damages at more than five hundred dollars, and the defendant had been held to bail *upon the affidavit of the plaintiff* in more than that sum, this was sufficient proof that the cause involved the requisite *amount*. 2 Wash. C. C. Rep., 463.[1]

The petition should be verified upon oath, and a copy of it, together with a notice of the time and place of its presentation (as of any other special motion), should be served upon the attorney of the adverse party.

Of the *security* required by the act of the petitioner, that he will, on the first day of the next session of the circuit or district court to which the removal is to be made, enter therein copies of the process against him; that he will appear therein; and (if special bail was originally required) that he will enter special bail in the cause; it can only be said in general, that it must be such as is satisfactory to the state court. It ought doubtless to be a bond to the plaintiff, with at least one sufficient surety; the penalty of which,

[1] See further on this point, Part I.

especially in bailable actions, it is presumed, should be sufficient to cover the whole demand of the plaintiff, since the bail in the state court are to be absolutely discharged upon the allowance of the petition for removal. Perhaps it is to be inferred from the language of the act ("it shall be the duty of the state court *to accept* the surety," &c.), that the state court ought to retain the custody of the bond, to be delivered over to the plaintiff for prosecution, in the event of the non-performance of its condition by the defendant. If this is not the true construction of the act, then it is to be delivered to the plaintiff. The order to be entered is, that the security offered be accepted; that the cause be removed to the circuit (or district) court of the United States in and for the district of ——; and, if bail has been put in, that the bail of the defendant be discharged. Such order being entered, all further proceedings in the cause are suspended until the next session of the court to which the removal is directed to be made; at which time a certified copy of the order of removal and of the process by which the defendant was brought into the state court must be produced in the national court; upon the reading and filing whereof, it will be ordered by that court that the cause be entered therein. If bail has been entered, or was requisite in the state court, it must be put in also in the national court, within such time as is allowed for that purpose by the rules of the court.

As it regards the *third* description of suits which may be removed from the state to the national courts, the directions given in the act are so ample and explicit as to leave no great difficulty in their practical application.

Upon the question, what shall be considered as constituting grants from different states, the deci-

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sions that have been made have already been stated. Relative to another restrictive clause in the act I have not met with any decision. The action, in order to be the subject of removal, must be one in which the title "to lands *is concerned.*" It does not appear from any reported case which I have been able to find that any suit of this nature has been removed which was not brought *for the recovery* of lands thus claimed. But the language employed seems to have been intended to embrace all suits essentially depending upon such conflicting grants; as, for example, trespass *quare clausum fregit*, in which the plea of title is interposed.

This description of causes may be removed, as will be seen, *at any time before trial* and *at the instance of either party*, provided he stand in the prescribed predicament.

The motion is, in the first place, to require the opposite party to "inform the court whether he claims a right or title to the land under a grant from the state in which the suit is pending."

If he admits that he so claims, the party moving "may then, on motion, remove the cause for trial," &c., &c.; but if, on the other hand, he refuses to give the information required, he is to be precluded from pleading or giving in evidence such grant.

The whole design may, however, it is presumed, be embraced by one motion. The motion may, doubtless, be (upon notice to that effect) that the adverse party inform whether, &c.; and if he shall inform that he claims, &c., that then the cause be removed, &c.; but if he shall refuse to inform, &c., that then he shall not be allowed, &c.

When the removal is ordered at the instance of the defendant, such removal is, by the act, to be "under the same regulations as in the before mentioned case of the removal of a cause by an alien."

This provision doubtless refers to the security to be given by the defendant for entering in the circuit court, on the first day of its session, copies of the process against him, and for his appearing and entering special bail in the cause, if requisite.

On the footing rested the right of removal, until by the act of March 3, 1833 (ch. 57: 4 Stat. at Large, 632), it was extended to an additional class of cases, without regard to citizenship or the amount in controversy. Then followed a series of acts of a like nature, but embracing criminal as well as civil cases. These acts have been noticed in the first part of this work. They prescribe regulations, touching the cases to which they relate, some of which are not likely hereafter to arise, too numerous for recital in this place.

PART III.

OF THE PRACTICE OF THE DISTRICT COURTS IN CASES OF SEIZURE.

INTRODUCTION.

By the judicial act, the district courts are invested with exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation and trade of the United States, where the seizures are made on waters which are navigable from the sea, by vessels of ten or more tons burden, within their respective districts as well as upon the high seas; and also of all seizures on land, or other waters than as aforesaid, made under the laws of the United States. According to the judicial constructions which, at an early period, were given to this enactment, seizures of the first above mentioned description are of admiralty jurisdiction, and those of the second description, of common law jurisdiction.

The judicial proceedings in these cases are instituted and carried on under the authority, and in the name, of the United States, by public officers (attorneys of the United States) appointed for this purpose.

Admiralty jurisdiction was first exercised in this country by vice-courts of admiralty, deriving their powers from the commissions under which they acted, and from acts of parliament.

During the revolution, and until the adoption of the federal constitution, this branch of jurisdiction

PART 2. was exercised by state courts of admiralty instituted for that purpose.

At the first session of congress under the constitution, it was, as we have seen, temporarily provided that the forms and modes of proceeding in causes of admiralty and maritime jurisdiction should be according to the course of the civil law. And by the permanent act, commonly known as the process act, of May 8, 1792, it was enacted that the forms of proceedings in suits in admiralty and maritime jurisdiction should be according to the principles, rules and usages which belong to courts of admiralty, as contradistinguished from courts of common law, except so far as had been provided by the judicial act,[1] subject, however, to such alterations and additions as the courts should deem expedient, or such regulations as the supreme court should think proper, from time to time, by rule, to prescribe.[2]

No reason is perceived for the supposition that, by the reference contained in the act of 1789 to the civil law, congress intended to change the accustomed modes of proceeding which had prevailed in the colonial, and subsequently in the state, courts of admiralty; nor that, by the reference in the process act of 1792 to the usages of courts of admiralty, it was intended to prescribe different modes of procedure from those contemplated by the former act. The antecedent practice had been in substantial conformity with the civil law, and especially in the important particular (which it is probable congress had chiefly in view), of the form of trial. But certain forms and usages, originally peculiar to the common law, had been adopted by the British courts of admiralty, and thence ingrafted in our

[1] The provisions of the judicial act here referred to relate to the mode of proof and to appeals.

[2] Ch. 34, § 2: 1 Stat. at Large, 275.

own; and it was, probably, with a view to this circumstance, and for the express purpose of legalizing these modifications of the civil law forms of procedure, that a different phraseology was employed in the latter act.[1] With the exception of proceedings on seizures under the laws of impost, navigation and trade (which, as will be seen in the sequel, are, to a considerable extent, regulated by the collection act of 1799), and proceedings *in rem*, for the recovery of seamen's wages (which to some extent are also prescribed by the act of 1790, for the regulation and government of seamen, &c.), the admiralty jurisdiction has been left to be carried into effect with no other legislative direction than what was implied, *ex vi termini*, by its designation as such, and the injunctions above mentioned, contained in the acts of 1789 and 1792.

Actions in admiralty are eitheir *in rem*—against the thing; or *in personam*—against the person.

The party instituting the suit is called the *libelant*.

Where the action is *in rem*, it is entitled in the name of the libelant against the thing libeled; and he who appears and is admitted to defend is called the *claimant*. When the suit is *in personam*, the person against whom it is brought is called the *respondent*.

The officers of court, by whom proceedings in admiralty are conducted in behalf of suitors, are denominated *proctors* and *advocates* (names borrowed from the civil law), corresponding with attorneys and counselors in courts of common law.

The descriptions of actions of which it is proposed here to treat are suits *in rem*, prosecuted in the name and under the authority of the United States by the attorney of the United States for the district in which the action is brought; and they are instituted, some-

[1] See *Manro* v. *Almeida*, 10 Wheat. R., 473.

PART 3. times on the admiralty side, and sometimes on the common law side, of the court, according to circumstances.

With these explanatory observations, I proceed to the consideration of the particular subject indicated by the title to this part.

The foregoing introduction to the ensuing chapters, treating of the forms of procedure in cases of seizure, as well as the chapters themselves, were written with an exclusive view to seizures made "under laws of impost, navigation and trade." It was of this description of cases alone that jurisdiction was conferred by the ninth section of the judiciary act of 1789 upon the districts courts; and it may reasonably be doubted whether at the date of that act any others had been thought of. At the expiration of little more than twenty years, however, the exigencies of an expensive war with England led to the imposition of duties upon articles of domestic manufacture, and a final resort to seizure, confiscation and sale to enforce their payment. The laws enacted for this purpose ceased with the temporary emergency in which they originated. But the lapse of half a century brought another emergency no less urgent, imperatively demanding their revival, extension and indefinite continuance, and to these it is necessary now briefly to advert.

For the purpose of defraying the enormous current expenses of the civil war which broke out in the year 1861, and of providing for the payment of the vast national debt incurred in its prosecution, numerous laws have been enacted by congress, well known under the name of the INTERNAL REVENUE ACTS. An elaborate analysis of these acts would be inconsistent with the design of this work. But a brief

explanatory notice of them in this place may be found useful. To insure the collection of the onerous taxes they impose and to that end a compliance with their numerous requirements, the collectors are invested with very large powers. One of the coercive means employed is the liability of delinquents and culprits to the forfeiture of their goods, and seizures to enforce such forfeiture are declared to be cognizable as well in the circuit as in the district courts, although the jurisdiction of these latter courts had, as we have seen, by the ninth section of the judiciary act, been made exclusive in all cases of seizure.

In cases of indisputable delinquency the collector is authorized to take the goods of the delinquent into his possession, and, on due notice to the owner and his sureties, summarily to declare a forfeiture. But, in other instances of a nature to demand more thorough examination, resort is to be had to the circuit or district court of the United States, by the formal seizure of the goods supposed to have been forfeited, and the institution of a suit *in rem* for their condemnation. In cases of this description (which are designated in these statutes), this form of proceeding is expressly enjoined. This, however, seems to have been done for abundant caution; because such is the established mode of prosecution in the exercise, by the district courts, of the jurisdiction conferred by the ninth section of judiciary act of 1789, of all seizures on land as well as on water, "under the laws of the United States;" and, in the taking cognizance of this new class of cases, in addition to that of seizures under the "laws of impost, navigation and trade," it would, it may be presumed, have been regarded as a matter of course to deal with it in the same manner. Indeed, the rule prescribing the form of the information or libel of information upon seizures, comprises, in terms, as well seizures for the breach of any

PART 3.

"other laws of the United States" as those for the breach of the revenue and navigation laws. It will be perceived, therefore, that the proceeding *in rem*, dictated in the internal revenue laws, for the condemnation and sale of property seized under these acts, is identical with that described in the following chapters, in cases of seizure on land or on waters not navigable from the ocean by vessels of ten or more tons burden, except such slight and consistent modifications as the courts may have deemed it expedient to introduce by special rules, the better to adapt it to the nature of this new class of cases. A few such special rules will be found at the conclusion of the rules of the district court for the northern district of New York.

CHAPTER I.

OF THE SEIZURE.

Judicial proceedings *in rem*, for the purpose of enforcing a forfeiture, can be instituted only in pursuance of a previous seizure of the thing to be proceeded against. It is by virtue of the seizure that the thing is brought within the reach of the process of the court, and, constructively, into its possession; when, and not before, judicial cognizance attaches. *The Ann*, 9 Cranch, 289.

1. *How it is to be made.*

To constitute a valid seizure, there must be an open, visible possession claimed, and authority exercised under the seizure.

The party must understand that he is dispossessed, and that he is no longer at liberty to exercise any dominion over the property. But this by no means implies the necessity of employing physical force, where there is a voluntary acquiescence in the

seizure and dispossession. If the party, upon notice, agrees to submit, and actually submits to the command and control of the seizor, that is sufficient. *The Josepha Segunda*, 10 Wheat., 312. No record or memorandum of the seizure is necessary. 1 Gallis., 75.

There must be a good subsisting seizure at the time the action is commenced; and the jurisdiction acquired by the seizure may be lost by voluntary discharge or abandonment, and, in the case of a vessel, by subsequent escape or capture. *Hudson et al.* v. *Guestier*, 4 Cranch, 293.

But to constitute an abandonment after seizure, there must be an unequivocal act of restoration or dereliction. *The Abby*, 1 Mason, 360.

The practice prevailing in courts of admiralty of proceeding to the condemnation of prizes of war while lying in the ports of foreign neutral nations, has been held to be applicable also to municipal seizures. The principle on which the practice rests in cases of capture *jure belli* is, that the prize, when in a neutral port, is in the possession of the sovereign of the captor; the neutral sovereign having no right to divest the captor of his possession, because he can, by himself or by his courts, take no cognizance of the question of prize or no prize; and this principle is considered to hold good in cases of seizure for the violation of municipal regulations. *Hudson et al.* v. *Guestier*, 4 Cranch, 293. And it makes no difference that the seizure was beyond the territorial limits of the nation of the seizor, and the vessel carried directly to the neutral port. *S. C.*, 6 Cranch, 281, overruling the principle of the case of *Rose Himely*, 4 Cranch, 241. This case, however, turned upon the effect of a decree of condemnation by a French court; and I am not aware that the practice sanctioned by it, in respect to the

PART 3. courts of other nations where it prevails, has been enforced in our own courts; but their right to adopt it is strongly intimated in the case of *The Rover*, 1 Gallis., 75.

2. *By whom made.*

Officers of the customs.] By the 70th section of the act to regulate the collection of duties on imports and tonnage, passed March 2, 1799, it is enacted "that it shall be the duty of the several officers of the customs to make seizure of, and secure, any ship or vessel, goods, wares or merchandise, which shall be liable to seizure by virtue of this or any other act of the United States, respecting the revenue, which is now or may hereafter be enacted, as well without as within their respective districts."[1] And by the 27th section of the previous act of February 18, 1793, for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same, it is enacted "that it shall be lawful for any officer of the revenue to go on board of any ship or vessel, whether she shall be within or without his district, and the same to inspect, search and examine, and, if it shall appear that any breach of the laws of the United States has been committed, whereby such ship or vessel, or the goods, wares and merchandise, on board, or any part thereof, is or are liable to forfeiture, to make seizure of the same."[2]

The duty enjoined on the officers of the customs by the act of 1799, it will be seen, is limited to infractions of the laws "respecting the revenue." But the authority conferred on these officers by the act of 1793, to make seizures for "any breach of the laws of the United States," has been understood

[1] Ch. 22: 1 Stat. at Large, 678.
Ch. 8: 1 Stat. at Large, 315.

to extend to all the laws denouncing the penalty of forfeiture. *Gelson* v. *Hoyt*, 3 Wheat., 246. The revenue officers[1] of the United States may, therefore,

[1] By the act of March 2, 1799, to regulate the collection of duties on imports and tonnage, just cited, and which repealed all former acts on the same subject, and which still constitutes the basis of our impost system, all those parts of the United States which border on the sea coast, on water navigable from the ocean, and on the dominions of Great Britain, were divided into collection districts. Many of these districts have, by subsequent acts, been subdivided. For each of them a collector is appointed; for several of them a naval officer and one or more surveyors, and for others one or more surveyors only, are also appointed. These officers are all designated in the act of 1799 above referred to, and are all appointed by the president and senate. This act (§ 21) also requires the several collectors, with the approbation of the secretary of the treasury, to employ proper persons as inspectors, weighers, gaugers and measurers, at the several ports within their respective districts. And by the 7th section of the act of March 3, 1817 (3 Stat. at Large, 397), made perpetual by the act of March 6, 1822, ch. 56, the several collectors are authorized, with the approbation of the secretary of the treasury, to employ such number of persons as he shall judge necessary, as deputy collectors, who are declared to be officers of the customs. Collectors, naval officers, surveyors and deputy collectors, unquestionably, fall under the denomination, as used indifferently in acts of congress, of officers of the customs, or revenue officers. It has been adjudged that inspectors are also included under this denomination. *The United States* v. *Sears*, 1 Gall., 215. Weighers, gaugers and measurers, I infer, are not included. By the collection act of 1799, above referred to, the president is empowered, for the better securing the collection of the duties imposed on goods, wares, and merchandise, imported into the United States, and on the tonnage of ships or vessels, to cause to be built and equipped, and kept permanently in commission, so many revenue cutters, not exceeding ten, as may be necessary to be employed for the protection of the revenue. §§ 97, 100. It is by this act further provided, that to each of these vessels there shall be one captain, a master, and no more than three lieutenants or mates, first, second and third. These officers are to be appointed by the president; and it is expressly declared that they shall be *officers of the revenue*, and be subject to the direction of such collectors of the revenue, or other officers thereof, as, from time to time, shall be designated for that purpose. They are expressly empowered and directed to go on board all ships or vessels which shall arrive within the United States, or within four leaguss of the coast thereof, if bound for the United States, and to search and examine the same, and every

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be considered as specially charged with the duty of making seizures. But, being local, resident officers, their ability to execute this duty is necessarily limited to the land and the waters adjacent thereto.

Commanders of armed vessels.] Seizures on the high seas for offenses against laws which have an extra-territorial operation, such as the acts prohibiting the slave trade; acts for the suppression of piracy, non-intercourse and embargo acts, and the like, are generally made by the commanders of public armed vessels under the authority of acts of congress, or in pursuance of express instructions from the president which he is authorized by law to give.

Thus, by the act of May 10, 1800, in addition to the act of 1794, for the suppression of the slave trade in one of its forms, it is declared to be lawful for any of the commissioned vessels of the United States to seize and take any vessel employed in the interdicted trade.[1] And by the act for the same purpose, of March 2, 1807, the president is authorized to instruct and direct the commanders of armed vessels to seize and bring in vessels found on the high seas contravening the provisions of that act.[2] So, by the act of March 3, 1819, to protect the commerce of the United States and to punish the crime of piracy, authority is conferred on the president to

part thereof, &c., &c. §§ 98, 99. The collectors are also authorized, with the approbation of the secretary of the treasury, to employ open row and sail boats for the use of the surveyors and inspectors in going on board vessels. These cutters and boats are required, in order to distinguish them from other vessels, to carry an ensign and pennant, and, in case any vessel liable to seizure or examination shall not bring to on being required or chased, the master of the cutter or boat, after hoisting his pennant and ensign, and firing a signal gun, is authorized to fire at or into such vessel. §§ 101, 102.

[1] Ch. 51, § 4: 2 Stat at Large, 70.

[2] Ch. 22, § 7: 2 Stat. at Large, 426.

instruct the commanders of public armed vessels to subdue, seize, take and send into port, any piratical vessel, &c.[1]

Upon the report to the district attorney of a seizure by an officer acting in obedience to the law, it is a matter of course to institute judicial proceedings for forfeiture, provided the grounds of the seizure appear to have been sufficient.

Private citizens.] But seizures may also be lawfully made by any citizen. In the case of *The Caledonian* (4 Wheat., 100), the court say, "it is a general rule, that any person may seize any property forfeited to the use of the government, either by the municipal law, or by the law of prize, for the purpose of enforcing the forfeiture. And it depends on the government itself whether it will act upon the seizure. If it adopts the acts of the party, and proceeds to enforce the forfeiture by legal process, this is a sufficient recognition and confirmation of the seizure, and is of equal validity in law, with an original authority given to the party to make the seizure. The confirmation acts retroactively, and is equivalent to a command." This doctrine was reasserted in the case of *Taylor et al.* v. *The United States* (3 Howard, 197), where it is said to be wholly immaterial who makes the seizure, or whether it is irregularly made or not, or whether the cause assigned originally for the seizure be that for which the condemnation takes place, provided the adjudication is for sufficient cause.

3. *In what places.*

By a well settled rule of international law, every nation is entitled to exclusive jurisdiction, not only over the ports, harbors, bays, mouths of rivers and adjacent parts of the sea inclosed by headlands on

[1] Ch. 77, § 2: 3 Stat. at Large, 510.

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its coasts, but also to the distance of the range of a cannon shot from the shore along its entire maritime border. This rather indefinite limit, introduced since the invention of fire arms, is in accordance with the older rule of national law, *terræ dominium finitur, ubi finitur armorum vis;* and is generally understood to extend to a maritime league, or three miles from the coast. 1 Kent's Com., 3d ed., 28; Wheaton's Elements of International law, 142. Within these limits of exclusive territorial jurisdiction, the right of seizure is of course absolute and unqualified. It exists also beyond this limit; but is there qualified by the co-existence of equal rights in other nations. If the right is exercised in a manner unnecessarily vexatious and harassing to the commerce of other nations, they will resist such abuse of it. But, so long as it is exercised only in such manner as is reasonable and necessary for the purpose of securing the laws of the country from violation, foreign nations have no right to complain. *Church* v. *Hubbart*, 2 Cranch, 187; *Hudson* v. *Guestier*, 6 id., 281. Within the territorial limits of a foreign friendly power no nation has a right to make a seizure. But if a vessel of the United States be seized even within such limits, for a violation of our laws, the courts of the United States are bound to take cognizance of the case; the law not connecting such illegal seizure with the subsequent arrest under the process of the court. The offense against the foreign power must be adjusted between the two governments. A judicial tribunal cannot take cognizance of it. *The Ship Richmond* v. *The United States*, 9 Cranch, 102.

To guard more effectually against frauds on the revenue, it is provided by the 68th section of the duty act of 1799,[1] "that every collector, naval officer

[1] Ch. 22: 1 Stat. at Large, 677.

and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority to enter any ship or vessel in which they shall have reason to suspect any goods, wares or merchandise, subject to duty, are concealed, and therein to search for, seize and secure any such goods, wares or merchandise, and if they shall have cause to suspect a concealment thereof in any particular dwelling-house, store, building or other place, they, or either of them, shall, upon proper application or oath, to any justice of the peace, be entitled to a warrant to enter such house, store or other place (in the day-time only), and there to search for such goods; and, if any shall be found, to seize and secure the same for trial; and all such goods, wares and merchandise on which the duties shall not have been paid, or secured to have been paid, shall be forfeited."

The authority here given, it will be perceived, is limited, in terms, to collectors, naval officers, surveyors, and such other persons as may, by either of them, be specially appointed for this purpose. The subordinate officers of the customs, who are in general authorized to make seizures, seem, therefore, to be excluded.

So far, however, as ships and vessels are concerned, the specific power here conferred may be considered as fairly implied by the authority conferred and the duties enjoined on these officers in common with their superiors, by other enactments. *The United States* v. *Sears*, 1 Gallis., 215. By the phrase "or other person specially appointed by either of them for that purpose," I understand to be meant a special agent appointed to act in a particular case. The power to search dwelling-houses is one of great delicacy, and can be safely exercised only by a rigid

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By a temporary act, passed March 3, 1815, it was declared to be lawful for any collector, &c., in his own or in an adjoining district, to stop, search and examine any carriage or vehicle whatsoever, or to stop any person traveling on foot or beast of burden, on which he may suspect that there are goods, wares or merchandise which are subject to duty, or which shall have been introduced into the United States in any manner contrary to law, and if he find any such goods, &c., to seize the same.[1] This section was continued in force for the term of four years by the act of March 3, 1817, when it was suffered to expire, doubtless, on account of the great delicacy of the powers it conferred; but by the act of February 28, 1865 (ch. 67: 13 Stat. at Large, 441), the provisions of it, above recited, were "revived and re-enacted," and the carriage or other vehicle, and the beasts of burden employed, together with the teams or other motive power, as well as the goods, are made subject to seizure and forfeiture. It adopts also, with respect to the disposition of seizures made under it, the provisions of the 91st section of the collection act of 1799, and invests inspectors of the customs with the power given by the 68th section of that act, to collectors, naval officers and surveyors, to enter ships and other vessels, and, upon a warrant obtained on oath, to enter (in the day time), any dwelling-house, store, building or other place where he shall have reason to suspect any goods, subject to duty, are concealed. It repeals so much of the 91st section of the collection act of 1799, as withholds from any officer of the customs, necessarily sworn as a witness in any proceedings, to enforce a fine, penalty or forfeiture, the share therein to which

[1] Ch. 94, § 2: 3 Stat. at Large, 231.

he would otherwise be entitled. Finally, this act denounces forfeitures and severe pains and penalties for using any store, warehouse or other building, upon or near the boundary line between the United States and any foreign country, for the purpose of illicit trade.

4. *Of the protection afforded by law to the seizing officer.*

Fine for obstructing, &c.] For the greater security of the seizing officer against forcible resistance in the execution of his duties, it is provided by the collection act of March 2, 1799,[1] that "if any person shall forcibly resist, prevent, or impede any officer of the customs, or their deputies, or any person assisting them in the execution of their duty, such person so offending, shall, for every such offense, be fined in a sum not exceeding four hundred dollars. And if any master, or other person having the charge or command of any ship or vessel coming into or arriving at any port or place within the United States, shall obstruct or hinder, or shall be the cause or means of any obstruction or hindrance, with such an intent, to any officer of the customs or revenue, in going on board such ship or vessel, for the purpose of carrying into effect any of the revenue laws of the United States, he shall forfeit, for every such offense, a sum not exceeding five hundred dollars, nor less than fifty dollars." See act of February 18, 1793,[2] and of March 3, 1823.[3]

To enforce these fines an indictment lies. *The United States* v. *Sears*, 1 Gallis., 215. It was held also in this case that an inspector is an officer of the customs within the designation of the foregoing pro-

[1] Ch. 22, § 71: 1 Stat. at Large, 678.
[2] Ch. 7, § 31: 1 Stat. at Large, 316.
[3] Ch. 58, § 3: 3 id., 781.

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vision; that as such officer he had a right to go on board any vessel to discover infractions of the laws, and that, if obstructed in so doing, an indictment will lie. To show the official character of the inspector at the trial, his commission from the collector, reciting the approbation of the secretary of the treasury,[1] and also a copy from the treasury department, of the oath taken by him, were produced, and an actual execution by him of the duties of the office of inspector was shown. It was objected by the counsel for the defendant, that no proof had been adduced to show that the secretary of the treasury had approved the appointment of the inspector. But the court considered the evidence sufficient, and expressed strong doubts whether the express approbation of the secretary, of the *specific* officer, was necessary.

It was further objected, that the commission of the collector by whom the appointment had been made, ought to have been produced; but the court was of opinion that it was sufficient to have shown that he had for several years actually executed the duties of the office of collector. In the subsequent case of *The United States* v. *Batchelder* (2 Gallis., 15), the principles of this case were re-affirmed; and it was further held, that when an inspector has been appointed and commissioned by the collector, and is acting in the duties of his office, he is to be presumed not only to have been employed with the approbation of the secretary of the treasury, but also to have taken the requisite oaths.

[1] The words of the 21st section of the act under which inspectors are appointed, are, that the collector "shall, *with the approbation of the principal officer of the treasury department, employ* proper persons as weighers, gaugers, measurers and *inspectors* at the several ports within his district.

But the office of inspector ceases with that of the collector who appointed him. It is held at the pleasure of the collector, and is vacated by his death, removal or resignation. An indictment, therefore, will not lie for resisting an inspector after the resignation of the collector from whom he received his appointment. *The United States* v. *Wood*, 1 Gallis., 361.[1] An indictment for resisting the seizing officer will not lie, unless there was "probable cause" for the seizure.[2] *The United States* v. *Gay*, 2 Gallis., 359. In this case it was also held, that whether there was or was not reasonable cause, was a question of law on which it was the duty of the court to instruct the jury.

By the act of March 2, 1833, "to provide for the collection of duties on imports," new and important immunities and remedies are provided. It declares

[1] The 22d section of the collection act of 1799 provides that every collector, naval officer and surveyor, in cases of occasional and necessary absence, or of sickness, and not otherwise, may respectively exercise and perform their several functions, powers and duties, by deputy duly constituted under their hands and seals, respectively, and "that, *in case of the disability or death of a collector, the duties and authorities vested in him shall devolve on his deputy*, if any there be at the time of the disability or death of such collector." And, by the 7th section of the act of March 3, 1817 (vol. 6, 244), which section is re-enacted and made perpetual by the act of March 6, 1822, it is enacted "that every collector of the customs shall have authority, with the approbation of the secretary of the treasury, to appoint, within his district, such number of proper persons as deputy collectors of the customs as he shall judge necessary, who are hereby declared to be officers of the customs." Now, independently of the provision in the 22d section of the act of 1799, for the continuance of deputy collectors appointed in virtue of that section, it is very clear, that, according to the decision in the case of *The United States* v. *Wood*, the office of a deputy collector appointed under the act of 1817 would cease upon the death, removal or resignation of the collector who made the appointment. Whether this provision in the 22d section of the act of 1799, by which so very limited and qualified a power of appointment is conferred, is applicable to appointments made under the 7th section of the act of 1817 may well be doubted.

[2] See the next two particular heads.

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"that the jurisdiction of the circuit courts shall extend to all cases of law and equity arising under the revenue laws for which provision is not already made by law; and that, if any person shall receive any injury to his person or property for or on account of any act by him done under any law of the United States, for the protection of the revenue or the collection of duties or imports, he shall be entitled to maintain suit for damage therefor in the circuit courts of the United States in the district wherein the party doing the injury may reside, or shall be found." The act further provides, that "all property taken or detained by any officer or other person, under authority of any revenue law of the United States, shall be irrepleviable, and shall be deemed to be in the custody of the law, and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof." And further, that, "if any person shall dispossess or rescue, or attempt to dispossess or rescue, any property so taken or detained as aforesaid, or shall aid or assist therein," such person shall be liable to the punishment prescribed by the 22d section of the crimes act of April 30, 1790, for the willful obstruction or resistance of officers in the service of process.[1]

By the 3d and 4th sections of the same act, provision is made for the removal to the circuit court in and for which the defendant has been served with process, at the instance of the defendant, at any time before trial, of any suit instituted in a state court "against any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States, or under color thereof, or for or on account of any right, authority or title, set up or claimed by such officer or other person, under any law of the United States."

[1] Ch. 57, § 2: 4 Stat. at Large, 632.

General issue; double costs; onus probandi.] It is further enacted by the seventy-first section of the act of 1799, above referred to, "that if any officer, or other person, executing or aiding or assisting in the seizure of goods, shall be sued or molested for any thing done in virtue of the powers given by this act, or by virtue of a warrant granted by any judge or justice, pursuant to law, such officer or other person may plead the general issue, and give this act and the special matter in evidence; and, if in such suit the plaintiff is nonsuited, or judgment pass against him, the defendant shall recover double costs; and, in actions, suits or informations to be brought, where any seizure shall be made pursuant to this act,[1] if the property be claimed by any person, in every such case the *onus probandi* shall lie upon the claimant. But the *onus probandi* shall lie on the claimant only where probable cause is shown for such prosecution, to be judged of by the court before whom the prosecution is held."

In this enactment, two very distinct subjects, it will be perceived, are rather inaptly blended. The

[1] In order to perceive the just scope of the words "made in pursuance of this act," it is necessary to bear in mind the provision of the 70th section, whereby the "several officers of the customs" are enjoined "to make seizure of, and secure, any ship or vessel, goods, wares or merchandise, which shall be liable to seizure by virtue of this *or any other act of the United States*, respecting the revenue, which now is, or *may hereafter be, enacted*." The effect of this enactment appears to be to bring all municipal seizures for forfeitures incurred, under whatever act of congress, within the provision of the 71st section; and yet, in the case of *The United States* v. *An Open Boat*, 5 Mason's R., 232, 234, where the seizure was made for an asserted violation of the act of March 15, 1820, prohibiting commercial intercourse with the British colonies, Mr. Justice STORY held, that "every fact alleged in the libel, and necessary to maintain the asserted forfeiture, must be established by the government; for," he added, "the case does not fall within the 71st section of the revenue collection act of 1799." This observation, so far as I can discern, seems to infer that the learned judge had overlooked the provisions of the 70th section.

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sense in which they were supposed to be used in the act, are thus defined by Chief Justice MARSHALL:

"It is contended that probable cause means *prima facie* evidence, or, in other words, such evidence as, in the absence of exculpatory proof, would [upon general principles, he doubtless meant] justify condemnation. This argument has been very satisfactorily answered on the part of the United States by the observation that this would render the provision totally inoperative. It may be added that the term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation, and, in all cases of seizure, has a fixed and well known meaning.

"It imports a seizure made under circumstances which warrant suspicion. In this, its legal sense, the court must understand the term to have been used by congress."

When sufficient proof has been given on the part of the governnent to cast the *onus probandi* on the claimant, it is hardly necessary to add, that, if the claimant fails, by proof, to explain the difficulties of the case, condemnation must follow. *The Luminary*, 8 Wheat, 407.

Certificate of reasonable cause.] With a view to the further protection of the officers of the revenue in the reasonable and proper discharge of their responsible duties, it is declared by law that, in any prosecution founded on a seizure, made by any collector or other officer, under any act of congress authorizing such seizure, in which the judgment shall be for the claimant, if it shall appear to the court that there was "reasonable cause of seizure," the court shall so certify, and in such case the claimant or claimants shall not be entitled to costs, nor shall the person who made the seizure be liable to any suit, action or prosecution on account of such seizure.[1]

[1] Act of February 24, 1807, ch. 19: 2 Stat. at Large, 422.

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It will be observed that this act, for the better protection of the seizing officer, like the provisions of the act of 1799, designed to facilitate prosecutions *in rem* for the forfeiture of goods seized,[1] embraces all seizures under the laws of the United States. Properly to appreciate its importance it is necessary to remember that, without it, a decree in favor of the claimant would leave the officer absolutely defenseless in an action for damages, such a decree being conclusive evidence that the seizure was wrongful.

It may, it is believed, be safely asserted that, where the legality of the seizure depends on a question of *fact*, the phrase, "reasonable cause," in the acts last above referred to, ought to receive the same interpretation as the phrase "probable cause," and that where, in such a case, the facts proved on the trial are such as to call for exculpatory evidence from the claimant, but not otherwise, the court would be bound, in the event of a judgment for the claimant, to grant a certificate to exonerate the seizor from liability. But it is held that a doubt as to the true construction of the *law* is sufficient to entitle the seizor to a certificate. *The United States* v. *Riddle*, 5 Cranch, 311; *The Friendship*, 1 Gallis., 111. In this latter case a vessel was seized and libeled under an ambiguously expressed section of one of the embargo acts, which was reasonably, but, in the opinion of the court, erroneously, supposed by the collector to denounce a forfeiture, and it was decided that he was entitled to a certificate. It is hardly necessary to remark, however, that a doubt concerning the construction of the law can never constitute "probable cause," within the meaning of the seventy-first section of the duty act, because such an interpretation of the phrase would be equivalent

[1] See note, p. 499.

to declaring that a forfeiture may be incurred without violating the law.

It is important to bear in mind that a mere *intention* to infringe the law will not authorize a seizure. *The Julia*, 1 Gallis., 43; *The Friendship*, id., 45; *Le Tigre*, 3 Wash. C. C. Rep., 567, 572. And, therefore, no suspicion, however well founded, of such an intention, will entitle the seizing officer to a certificate.

Thus, in a case in the district court for the northern district of New York, where the seizure had been made for a supposed violation of the act of 2d March, 1821,[1] requiring the conductor or driver of any carriage or sleigh, coming from any foreign territory adjacent to the United States, with merchandise subject to duty, to deliver a manifest of such merchandise, immediately on his arrival within the United States, at the office of any collector or deputy collector nearest the boundary line, or nearest to the road by which such merchandise is brought, and declaring such merchandise, together with the vehicle forfeited, *if such conductor or driver shall neglect or refuse to deliver such manifest, or pass by, or avoid such office;* a certificate was refused by the court under the following circumstances appearing in proof at the trial; the court being of opinion that they evinced, at most, only an intention to violate the act, and did not afford any ground for reasonable suspicion of an actual violation. The merchandise, consisting of British fabrics, was brought in a wagon by a road leading from Canada into the village or hamlet in which a deputy collector of the Champlain district resided and kept his office, which, by its position, was that at which the conductor of the wagon was bound to deliver a manifest. He reached this place, where the owner of the goods, who was a

[1] Ch. 14: 3 Stat. at Large, 471.

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merchant, and was in the habit of importing goods from Canada, and paying the duties, also resided, at an early hour in the morning, before he had any reason to suppose the collector was out of bed, and before he had in fact arisen. Instead of driving directly to the office of the deputy collector, he turned off from the main road a few rods (without passing the collector's office, which was still a little further south), and drove into a yard. The goods, wagon and horse were immediately seized by an officer of the customs, who, having seen the wagon pass his house, which was at a short distance to the north of the yard, followed the wagon to the yard, and there at once made the seizure.[1]

5. *Ground of seizure.*

It is not compatible with the design of this work to enumerate the various offenses for which the penalty of forfeiture is denounced by the laws of the United States. These offenses are very numerous: to render their enumeration useful, it would be necessary to define them with perfect precision, and to specify all the statutory conditions, limitations and exceptions to which they are subject; and to do this would require too much space.

The acts under which forfeitures arise are those regulating the commerce, foreign and domestic, of the United States, including trade with the Indians; the collection of the customs; those for the suppression of the slave trade; those for the preservation of

[1] Several acts have from time to time been passed, containing provisions for aiding and protecting officers of the customs in the execution of their duties of a far more stringent character than those above enumerated; but these acts were temporary, and are not now in force. Such were the act of March 3, 1815 (ch. 94: 3 Stat. at Large, 231); and the expired sections of the act of March 3, 1833, ch. 57: 4 Stat. at Large, 632.

our international relations; and the internal revenue acts. CHAP. 1.

The most important of these acts are the following, viz.:

"An act concerning the registering and recording of ships and vessels," passed December 31, 1792.

"An act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same," passed February 18, 1793.

"An act regulating passenger ships and vessels," passed March 2, 1819.

"An act supplementary to the acts concerning the coasting trade," passed March 2, 1819.

"An act respecting the enrolling and licensing of steamboats," passed March 12, 1812.

"An act to authorize the register or enrollment and license to be issued in the name of the president or secretary of any incorporated company owning a steamboat or vessel," passed March 3, 1825.

"An act concerning vessels employed in the whale fishery," passed March 3, 1831.

"An act to regulate the foreign and coasting trade on the northern, northeastern and northwestern frontiers of the United States, and for other purposes," passed March 2, 1831.

"An act to regulate the collection of duties on imports and tonnage," passed March 2, 1799.

"An act to continue in force an act, entitled 'An act further to provide for the collection of duties on imports and tonnage, passed March 3, 1815,' and for other purposes," passed March 8, 1817.[1]

"An act further to regulate the entry of merchandise imported into the United States from any adjacent territory," passed March 2, 1821.

[1] All but the 3d, 4th, and 7th sections of this act are expired; and, with them, the act of 1815, referred to in the title. The three sections above mentioned, are made perpetual by the act of May 6, 1822, chap. 56.

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"An act to amend an act, entitled 'An act further to regulate the entry of merchandise imported into the United States from any adjacent territory,'" passed March 3, 1823.

"An act supplementary to, and to amend an act, entitled 'An act to regulate the collection of duties on imports and tonnage, passed March 2, 1799, and for other purposes,'" passed March 1, 1823.

"An act for the more effectual collection of duties," passed May 28, 1828.

"An act for the more effectual collection of impost duties," passed May 28, 1830.

"An act to alter and amend the several acts imposing duties on imports," passed July 14, 1832.

"An act to provide revenue from imports, and to change and modify existing laws imposing duties on imports, and for other purposes," passed August 30, 1842, and, "An act reducing the duty on imports, and for other purposes," passed July 30, 1846.

"An act to prevent smuggling, and for other purposes," passed June 27, 1864, ch. 164; 13 Stat. at Large, 197.

"An act to provide internal revenue to support the government, and pay interest on the public debt, and for other purposes," passed June 30, 1864, ch. 173; 13 Stat. at Large, 223.

"An act to reduce internal taxation, and amend an act entitled, &c. [the act last above mentioned] and the acts amendatory thereof," passed July 13, 1866, ch. 184; 14 Stat. at Large, 98.

Some of the above named acts, as will be perceived by their titles, relate chiefly to the inland trade between the United States, and the British dominions on this continent. As the legislative enactments relating *especially* to this subject, are few and short; as infractions of them are of frequent occurrence,

generally no doubt by design, but not unfrequently also from ignorance; and as their penalties are very severe, it will be useful to devote a brief space to their particular consideration.

One of the general regulations prescribed by the duty act of 1799, in relation to the importation from foreign countries, of goods subject to duty, prohibits such importation, except by sea, in vessels of not less than thirty tons burden, and into certain specified ports on the sea coast. But the inland collection districts bordering on the British dominions in Upper and Lower Canada are expressly excepted.[1]

And by the 105th section of the same act, it is moreover enacted that—

"It shall be lawful for citizens of the United States, and for all other persons, to import any goods or merchandise, of which the importation shall not be entirely prohibited, into the districts which are or may be established on the northern and northwestern boundaries of the United States, and on the rivers Ohio and Mississippi, in vessels or boats of any burden, and in rafts or carriages of any kind or nature whatsoever."[2]

From Canada, therefore, merchandise may be brought into the adjacent districts of the United States, in any description of water craft, or any description of land vehicles, and at any place along the boundary line.

By the next section it is enacted that—

"All vessels, boats, rafts and carriages, of whatever kind and nature soever, arriving in the districts aforesaid, containing goods, wares or merchandise, subject to duty on being imported into any port of the United States, shall be reported to the collector or other chief officer of the customs at the port of entry, in the district into which they shall be imported; and such goods shall be accompanied by the like

[1] Ch. 22, § 92: 1 Stat. at Large, 697.

[2] Ch. 22, § 92: 1 Stat. at Large, 702.

PART 3. manifests, and like entries shall be made by the person having charge of any vessels, boats, rafts and carriages aforesaid, and by the owners or consignees of the goods, wares and merchandise laden on board the same; and the powers and duties of the officers of the customs shall be exercised and discharged in the districts last mentioned, in like manner as is hereinbefore directed and prescribed, in respect to goods, wares and merchandise, imported into the United States in vessels from the sea; and generally all importations as aforesaid shall be subject to the like regulations, penalties and forfeitures as in other districts, except as hereinafter specially provided."[1]

But by subsequent legislation other regulations, supposed to be better adapted to the peculiar nature of this description of trade, have been substituted.

By one of the above entitled acts (passed March 3, 1817), it is enacted that when any goods, wares or merchandise shall hereafter be imported from the province of Lower Canada into the United States, in any steamboat on Lake Champlain, and such goods, &c., shall have been duly entered and the duties thereon paid, or secured, at the office of the collector of any district adjoining Lake Champlain, it shall be lawful to land such goods, &c., in the same or *any other district* adjoining said lake.[2]

By another of the above entitled acts (passed March 2, 1821), it is enacted:

[1] This exception appears to refer to the regulations prescribed by the three next sections, relative to the transportation of goods across portages.

[2] Ch. 109, § 4: 3 Stat. at Large, 396. By the third section it is also declared to be thereafter lawful for the master, or person having charge or command of any steamboat on Lake Champlain, when going from the United States into the province of Lower Canada, to deliver a manifest of the cargo on board, and take a clearance from the collector of the district through which any such boat shall last pass, without regard to the place from which any such boat shall have commenced her voyage, or where her cargo shall have been taken on board.

"That it shall be the duty of the master of any vessel, except registered vessels, and of every person having charge of any boat, canoe, or raft, and of the conductor or driver of any carriage or sleigh, and of every other person coming from any foreign territory adjacent to the United States into the United States, with merchandise subject to duty, to deliver, immediately on his or her arrival within the United States, a manifest of the cargo or loading of such vessel, boat, canoe, raft, carriage or sleigh, or of the merchandise so brought from such foreign territory, at the office of any collector or deputy which shall be nearest to the boundary line or nearest to the road or waters by which such merchandise is brought; and every such manifest shall be verified by the oath of such person delivering the same; which oath shall be taken before such collector or deputy collector; and such oath shall state that such manifest contains a full, just and true account of the kinds, quantities and values of all the merchandise so brought from such foreign territory; and, if the master or other person having charge of such vessel, boat, canoe or raft, or the conductor or driver of such carriage or sleigh, or other person bringing merchandise as aforesaid, shall neglect or refuse to deliver the manifest herein required, or pass by or avoid such office, the merchandise subject to duty, and so imported, shall be forfeited to the United States, together with the vessel, boat, canoe or raft, the tackle, apparel and furniture of the same, or the carriage or sleigh, and harness and cattle drawing the same, or the horses with their saddles and bridles as the case may be; and such master, conductor, or other importer shall be subject to pay a penalty of four hundred dollars."[1]

The second section of this act authorizes any deputy collector, stationed in any district of the customs contiguous to a foreign territory, to whom a manifest of merchandise, subject to duty, shall be delivered as aforesaid, to require of the importer of such merchandise the payment of the duties thereon, or good and ample security, either by bond, with one

[1] Ch. 14, § 1: 3 Stat. at Large, 616.

PART 3. or more sufficient sureties, for the payment thereof, or by the deposit of a portion of such merchandise, equal, at least, to double the amount of duties on the whole importation; which bond shall be canceled, or the merchandise so deposited shall be delivered to the owner, on producing to the deputy collector a certificate of the collector of the district that the duties have been duly paid.

The third and only remaining section of this act relates exclusively to the mode of enforcing, mitigating and remitting the forfeitures and penalties inflicted by this act, and, for that purpose, adopts the provisions of the duty act of 1799, and those of the act of March 3, 1797 (1 Stat. at Large, 506).

By an act to amend this act, passed March 3, 1833 (3 Stat. at Large, 781), four times the value of the goods imported is substituted for the specific penalty of four hundred dollars. The second section of this amendatory act contains an important provision applicable as well to importations by sea, as from an adjacent territory.

It declares that if any person or persons shall *receive*, *conceal* or *buy* any goods, &c., knowing them to have been illegally imported into the United States, and liable to seizure by virtue of any act in relation to the revenue, such person or persons shall, on conviction thereof, forfeit and pay a sum double the amount or value of the goods, &c., so received, concealed or purchased. It is proper to add, however, that the duty act of 1799 (sec. 69), contains a provision substantially the same with this, except that, in the former act, the word "receive" is omitted; the offense being defined by the terms "conceal and buy" alone. The 4th section of this amendatory act declares, that the provisions of the 46th section of the duty act of 1799 (which relates to "wearing apparel, and other personal baggage, and the tools

and implements of a mechanical trade"), shall be "extended to the case of goods, wares and merchandise, imported into the United States from an adjacent territory." Although the language of this provision is comprehensive enough to embrace every description of merchandise, it is clear that it was intended to apply only to the same descriptions of property as are provided for by the section of the collection act referred to, and which are exempted from duty. The motive to this enactment is doubtless to be found in the fact that the act of 1821 applies only to vessels, boats, &c., coming from an adjacent foreign territory into the United States, "with merchandise *subject to duty*."

To prevent the possibility of misconception, it is proper to remark, that it must by no means be understood to have been the intention of this act, with respect to the particular branch of foreign commerce to which it relates, to supersede entirely the regulations prescribed by the duty act of 1799, and that in the prosecution of this inland trade no forfeitures can be incurred, except by transgressing the injunctions of this act. On the contrary, the provisions of the former act are displaced or modified by the latter act only so far as they are inconsistent with it. Many of them, however, are of such a nature as not to be applicable at least to importations by land.

Thus, for example, the 50th section prohibits the *unlading or delivery* of goods, &c., from any ship or vessel without a *permit*, or, in the night-time, without a *special license*, on pain of forfeiture of the goods so unladen or delivered, and under the further pecuniary penalty of four hundred dollars against the master and every other person knowingly concerned; and, if the goods, &c., so unladen are of the value of four hundred dollars at the highest market price, the vessel is also subjected to forfeiture. Whether these

PART 3. provisions are still to be considered as operative with respect to importations from adjacent foreign territories, even by water, may be doubted. Their sole object in requiring a permit was to secure the payment of duties. The sole object of the act of 1821, in requiring the immediate delivery of a manifest, was the same. The object was intended to be attained by putting it into the power of the collector to exact the payment of duties before the goods should be removed beyond his control, and for this purpose the requirements of the act of 1821 are all sufficient, and may therefore not unreasonably be considered as superseding the requirement of the 50th section of the act of 1799. This construction is further recommended by the inconsistency which would result from the opposite one. The 50th section imposes a personal penalty of four hundred dollars. This penalty was adopted by the act of 1821; but it was abolished, and a penalty of four times the value of the goods substituted by the amendatory act of 1823. If, therefore, the 50th section is still in force with respect to importations from adjacent foreign territories, it follows, that, for substantially the same offense, either the one or the other of two very different penalties may be exacted at the option of the public prosecutor. It is proper to add, however, that, in the northern district of New York, the 50th section has generally been considered as unaffected by the act of 1821, and has been repeatedly enforced without resistance or complaint.

It is supposed, also, that the immediate delivery of a manifest verified by oath, and the payment forthwith of the duties of giving bond therefor, required by the act of 1821, was intended by Congress to be a full substitute for the reports by the master and the subsequent entry by the owner enjoined by the

act of 1799, so far at least as importations by land are concerned.

But there are other provisions in the act of 1799, which, though they do not admit of a literal application in all respects to importations by land, are nevertheless susceptible of being substantially applied, and must, therefore, it is presumed, be considered as in spirit applicable to such importations. Such are supposed to be the prohibition under penalty of forfeiture, contained in the 51st section, of the removal of such articles, brought in any *ship* or *vessel*, as require to be weighed, gauged or measured, in order to ascertain the duties thereon, or their proof or quality or quantity to be ascertained and marked thereon, without the consent of the proper officer; and the special regulations prescribed relative to importations of distilled spirits, wines, and teas, by the 35th, 37th, 38th, 39th, 41st, 42d, 43d, and 44th sections.[1]

The act of 1821, as we have seen, requires the manifest to be delivered by the master, &c., "*immediately on his or her arrival within the United States*," and makes the offense to consist in neglecting or refusing to do so, or in passing by or avoiding the proper office. A literal interpretation of the language of this enactment, it is obvious, would embrace every unregistered vessel, having any merchandise on board subject to duty, which, sailing from a Canadian port on the waters traversed by the boundary line between the United States and Great Britain, should pass that line. But there are many weighty objections to such an interpretation, particularly in regard to the commerce carried on upon the great lakes through which the boundary line between the two countries passes. It would effect

[1]These regulations are, however, in part repealed by the act of 14th July, 1832, § 5: 4 Stat. at Large, 591.

PART 3. British as well as American vessels; and as well vessels bound from one British port to another, as those bound from a British to an American port. But the right to navigate these lakes is common to the two nations, and this construction carried into practice would not only be highly vexatious to our own commerce, but would furnish good ground for complaint and resistance on the part of our neighbors. Indeed, the doctrine of the case of *The Appollon* (9 Wheat., 362), would forbid the attempt to extend this construction beyond our own citizens and vessels. The more reasonable conclusion would, therefore, seem to be, that, in regard to importations by water the legislature contemplated an arrival at the American shore.

The other requirements of the act of 1799, not inconsistent with the provisions of the act of 1821, are supposed to be operative with respect to importations from adjacent territories, so far as they are susceptible of application.

It will be observed, that "*registered vessels*," are excepted from the provisions of the act of 1821. Under the general navigation acts of the United States [the first two of the acts above enumerated under this head], vessels designed to be employed in foreign commerce are to be registered: and those to be used in the coasting trade or fisheries are to be enrolled and licensed, or, when under twenty tons burden, licensed only; and a vessel having been either registered or licensed, is restricted by these laws to the business for which she had thus become qualified, until her character is changed by the surrender of her papers, and the taking out of new ones. Until recently, these regulations extended as well to the navigation of our inland frontier waters, as to that carried on by sea. But in regard to the former, a new and different system has been intro-

duced. By one of the above enumerated acts, viz., that of March 2, 1831, it is enacted: CHAP. 1.

"That from and after the passage of this act, any boat, sloop, or other vessel of the United States, navigating the waters on our northern, northeastern and northwestern frontiers, otherwise than by sea, shall be enrolled and licensed in such form as may be prescribed by the secretary of the treasury; which enrollment and license shall authorize such boat, sloop or other vessel, to be employed either in the coasting or foreign trade; and no certificate of registry shall be required for vessels so employed on said frontiers: *Provided*, that such boat, sloop or vessel, shall be, in every other respect, liable to the rules, regulations and penalties now in force, relating to registered vessels on our northern, northeastern and northwestern frontiers."[1]

It is easy to perceive that questions of considerable importance and no little difficulty may arise out of the existing state of the law regulating this branch of our foreign and domestic commerce. The subject has always been attended with embarrassment. Prior to 1821, it was regulated by the collection act of 1799. But many of the regulations prescribed by that act were, from the nature of the case, partially or wholly inapplicable, especially in respect to importations by land. If the very rigorous act of 1821 introduced a greater degree of simplicity in some respects, it gave rise, also, to the embarrassing question—in what particulars, and to what extent it superseded or modified the act of 1799? By the act of 1831, much additional confusion and perplexity have been introduced, by the creation of a new and distinct description of American vessels, indued with peculiar privileges, but of so indefinite a character as to render it no easy task to determine to what regulations they are subject. The part of it to which I refer is the third section above recited. The main

[1] Ch. 98, § 3: 4 Stat. at Large, 487.

PART 3. design of this section, unquestionably, was to confer on vessels navigating our inland frontier waters, and which should be enrolled and licensed under it, the conjoint privileges *in regard to trade* of registered and licensed vessels; or, in other words, to authorize one and the same vessel to be employed simultaneously or alternately, both in foreign and domestic commerce, under the same set of papers. The provision includes "boats, sloops or other vessels;" and they are "to be enrolled and licensed in such forms as may be prescribed by the secretary of the treasury." The form which has, in fact, been prescribed, and which is now in actual use for this purpose, is understood to be in exact conformity with the requirements of the act of February 18, 1793, "for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same;"[1] except that the act of 1831, now in question, as well as that of 1793, are referred to in the certificates of enrollment and license.

What then is to be considered to be the true character and condition of this new description of vessels with respect to many of the restrictions and requirements enjoined by the general laws concerning registered and licensed vessels, and by the special act of 1821, having for their objects the protection of our navigation and the security of the revenue?

In name, at least, they are licensed vessels; and, looking at the question independently of the proviso in the act of 1831, there appear to be strong reasons for considering them subject, as such, to all the disabilities and penalties which would attach to them as vessels licensed under the original general act, except the ability conferred on them lawfully to engage in foreign as well as domestic trade. But the proviso

[1] Ch. 8: 1 Stat. at Large, 305.

declares, that "Such boat, sloop or vessel shall in every other respect [except not being required to have a certificate of registry] be liable to the rules, regulations and penalties now in force relating to registered vessels on our northern, northeastern, and northwestern frontiers." The difficulty of giving a satisfactory interpretation to this proviso is increased by the circumstance that there are no special laws to which the reference it contains to existing rules, &c., can apply, unless, indeed, it be the few provisions relative, not to registered vessels in particular, but, in general terms, to the branch of commerce in question.[1]

It is not to be disguised that acts of congress are occasionly met with which appear to have been passed under an erroneous or defective apprehension of the existing state of the law, and with little apparent regard to collateral consequences.

The proviso in question it strikes me is an instance of this sort. Perhaps the actual intention of congress would be best effectuated by considering the design of the proviso to have been merely to exclude the inference that, in conferring on licensed vessels the privileges pertaining to registered vessels, while at the same time the accustomed form and certificate were dispensed with, it was intended to relieve them from all the peculiar restrictions imposed on registered vessels. Such was the view entertained by it by the judge of the district court for the northern district of New York, in the case of *The Steamboat Black Hawk*. She was enrolled and licensed under the act of 1831. Among several other counts, the libel of information contained one founded on the 16th section of the registry act of 1792, requiring all sales and transfers of licensed vessels to be reported to the proper collector under penalty of forfeiture;

[1] See, *supra*, 507–509.

PART 3. and another count founded on the 32d section of the license act of 1793, absolutely prohibiting all such sales or transfers of licensed vessels, under a like penalty. The part of the opinion delivered in the case most pertinent to the present inquiry, is as follows:

"It is not important to the decision of the case to inquire whether or not the 16th section of the registry act is applicable to vessels enrolled and licensed, like the Black Hawk, in pursuance of the provisions of the act of 1831.

"It seems to me, however, very questionable, to say the least, notwithstanding the proviso of this latter act, whether the 16th section can be so applied. The design of the act of 1831 unquestionably was to confer upon vessels navigating our inland frontier waters, and which should be enrolled and licensed under it, the conjoint privileges, in regard to trade, of registered and licensed vessels; leaving them subject, however, in other respects, to all the restrictions imposed on vessels of either character, for the protection of our shipping and domestic trade. A registered vessel may lawfully be sold to a foreigner, and, if the sale be duly reported as required by law, she merely loses her American character. But congress has thought proper to prohibit the sale of *licensed* vessels to any other than resident American citizens. Can a vessel licensed for the foreign and coasting trade, under the act of 1831, be lawfully sold to a foreigner? I think not. She is not the less a licensed vessel, because she has become entitled to the privileges of a registered vessel. If this is so, then by the sale itself the violation of law would be complete, and the vessel be subject to forfeiture; and it would be seen to be inconsistent as well as useless to require the sale to be reported."

This view of the design of the act of 1831 was also acted on in the same court in the case of *The Steamboat Red Jacket.*

She had been enrolled and licensed under that act, and the information was founded on the act of 1821. A claim had been interposed, but no one appeared in

the court at the trial to contest the forfeiture. It was proved that, on two different occasions, foreign fabrics, to a small amount, had been brought in the Red Jacket, from Canada to the port of Buffalo, and that no manifest of them had been delivered. Upon this proof there was a verdict in favor of the United States and a judgment of condemnation, though certainly not without some degree of doubt of the applicability of the act of 1821 to the case. The circumstances of the case were calculated to awaken doubts. The vessel was of considerable value, and, though, in one of the two instances of illicit importation, the evidence showed that the master had been the offender, it furnished no ground for suspicion of connivance or knowledge on the part of the owners. It is understood that, in point of fact, all or nearly all of the vessels and boats of every description engaged in commerce on the waters in question are enrolled and licensed under the act of 1831. If, therefore, boats and vessels so enrolled and licensed are to be considered as exempt from the operation of the act of 1821, this act, so far as importations by water are concerned, is virtually repealed.

In concluding the foregoing summary reference to the ground of seizure under the laws of the United States, it is proper to notice the reported judicial decisions which determine, or tend directly or indirectly to elucidate, the true construction of some of these numerous enactments.

Effect of a bona fide sale.] The case of the *Schooner Mars, Hawes, claimant* (1 Gallis., 192), presented the important and interesting question, whether property which had become subject to forfeiture was protected by a subsequent sale made before seizure, for a valuable consideration, and without notice of the offense. Mr. Justice STORY, in a very elaborate and learned opinion, held that it was. A like decision was nearly

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simultaneously made in the circuit court for the district of Maryland. But these decisions were reversed by the supreme court of the United States, in the case of *The United States* v. *One thousand nine hundred and sixty Bags of Coffee*, Mr. Justice STORY and two of his brethren dissenting. 8 Cranch, 398; id., 417; id., 198. The principle appears to be, that the forfeiture attaches absolutely, so as to divest the property at the moment the offense is committed. *Gelson* v. *Hoyt*, 3 Wheat., 246, 311. Where, however, the act gives a forfeiture in the alternative, of the thing in respect to which the offense was committed, *or* of its *value*, no title vests in the United States until after they shall have made their election, by actual seizure, to proceed against the thing, instead of resorting to an action against the offender for the pecuniary penalty. *The United States* v. *Grundy and Thornburgh*, 3 Cranch, 337. And in such a case a sale to a *bona fide* purchaser, without notice before actual seizure, is valid and effectual. *The United States* v. *The Ship Anthony Maugin*, 2 Admiralty Decisions, 452. The doctrine of the cases above cited, from 8 Cranch and 3 Wheaton, will of course be understood as applying only to cases of forfeiture for some act or omission for which a forfeiture is denounced by law, and not to the mere *lien* of the government for duties, which attaches upon goods at the moment of importation, in cases where no forfeiture has been incurred. Thus, in the case of *The United States* v. *Three hundred and fifty Chests of Tea* (12 Wheat., 586), where the teas in question, after having been regularly imported and stored (bonds having been given for the payment of the duties thereon), were removed by the fraudulent connivance or culpable negligence of the inspector without the payment of duties, the court, after speaking of the lien of the government for

duties as one which could not be discharged by such illegal removal, add, "whether it could be enforced against a *bona fide* purchaser of goods, removed from the store by a permit from the proper officers, without notice that the duties were not paid or secured, is a question which does not arise in this case, and upon which no opinion, therefore, is intended to be given."[1] The lien above spoken of, as attaching at the moment of importation, is the right of possession secured to the United States by the laws regulating importations, on the arrival of the vessel in port, or within four leagues of the coast; and, of course, before the duties are paid or secured according to law — the object of it being to insure their payment. This lien transcends all adverse rights and authority. Thus, in the case of *Harris* v. *Dennie* (3 Peters, 392), where a cargo had been seized by a sheriff, in virtue of an attachment from a state court, on the arrival of a vessel in port, the attachment was held to be an interference with the lien, and consequent right of custody belonging to the United States, and therefore void.

Importation.] To constitute an importation it is necessary not only that there should be an arrival within the limits of the United States, and of a collection district, but also within the limits of a port of

[1] With regard to the form of action in which this lien is to be enforced, the language of the court in this case is not explicit. It was considered to be perfectly clear that it could not be done by seizure and a proceeding *in rem*. The court speaks of it as a lien "which might have been enforced by the ordinary remedies provided by law in similar cases." And, at the close of the opinion, it is said there is no doubt but that a suit at common law might be instituted in the district or circuit court, "in the name of the United States, founded on their legal right to recover the possession of goods upon which they have lien for duties, or damages for the illegal taking or detaining of the same." Probably the action of replevin, and the action of trespass *de bonis asportatis*, or trover, may be considered to have been the forms of remedy here referred to. It has been held that, *against the importer*, an action of assumpsit will lie for the recovery of duties.

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entry. *United States* v. *Vowel*, 5 Cranch, 368; *Arnold* v. *The United States*, 9 id., 104. The mere act of coming into port without breaking bulk is *prima facie* evidence of importation; but this presumption may be rebutted; and, if a vessel be driven in by distress, or to avoid capture, it is not importation. *The Boston*, 1 Gallis., 239; *The Mary*, id., 206.

The voluntary arrival of a vessel at her *port of destination*, with intent to unload her cargo, constitutes a complete importation, on which duties at once accrue. *The Boston*, 1 Gallis., 239; *Perot et al.* v. *The United States*, 1 Peters's C. C. Rep., 256; *The United States* v. *Lindsey*, 1 Gallis., 365; *The United States* v. *Lyman*, 1 Mason, 482.

Unavoidable acts or omissions.] It is only under circumstances which admit of an observance of the forms prescribed by law, that the penalty of forfeiture can be incurred by the omission of such forms. Thus, where, upon the discovery of a vessel adrift in Delaware bay without masts, anchors or rudder, and in danger of being carried out to sea, several persons, who had associated themselves together for the purpose, succeeded, by great efforts, in bringing the vessel to the nearest accessible part of the shore, and in saving the cargo, a part of which consisted of wines and brandy, and which, after being landed, was removed to a place of greater safety, it was held, that neither the 43d section of the act of 1799, declaring distilled spirits, wines and teas subject to forfeiture when found in the possession of any one unaccompanied by the mark and certificates required by the act,—nor the 51st section, subjecting articles of this description to forfeiture for being removed from the place of landing without the consent of the proper officer of the customs, was applicable to the case. The court were of opinion, that, in order to determine the just scope of these sections, it was

indispensably necessary to examine the preceding sections regulating the importation of spirits, &c., and the provisions of these sections being adapted to regular importations, and not to the case of goods saved from a wreck, the sections in question were held to require the like limitation. *Peisck et at.* v. *Ware et al.; The United States* v. *The cargo of the ship Favorite*, 4 Cranch, 347.

But the court placed its decision also on another ground; and, by doing so, established an important general principle. "The court is also of opinion," said Chief Justice MARSHALL, "that the removal for which the act punishes the owner with a forfeiture of the goods must be made *with his consent or connivance, or with that of some person employed or trusted by him.* If, by private theft, or open robbery, without any fault on his part, his property should be invaded, while in the custody of the officer of the revenue, the law cannot be understood to punish him with the forfeiture of that property. * * * * * * *

"The law is not understood to forfeit the property of owners or consignees, on account of the misconduct of mere strangers, over whom such owners or consignees could have no control."

Concealing.] In the case of *The United States* v. *Three hundred and fifty Chests of Tea* (12 Wheat., 486, 493), the term "concealed," in the 68th section of the act of 1799, was held to apply only to articles fraudulently withdrawn from public view, and intended to be secreted on account of their being subject to duties. Merely having possession of such goods is not, *per se*, a concealment. It is said, also, in this case, that in a prosecution under this section, "the owner of the goods is not put upon his trial to prove that the duties were paid or secured, until that fact is established."

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Marks and certificates.] To authorize a seizure of spirits, teas and wines under the 43d section, declaring these articles subject to forfeiture when found in the possession of any one, unaccompanied with the marks and certificates required by the 39th and 40th sections, it is necessary that the casks, chests or other vessels in which they are contained should be unaccompanied by both the required marks *and* certificates. The want of either of them alone is not sufficient. Id.

Unlading and delivering goods without a permit.] Under the 50th section of the collection act of 1799, subjecting vessels to forfeiture, from which goods brought from a foreign country, and which are of the value of four hundred dollars, are unladen or delivered within the United States, *without a permit*, it is not necessary that the goods should have been actually brought from such foreign country in such vessel; for, if it turns out that they had been transhipped into her on the homeward voyage, the forfeiture nevertheless attaches. *The Schooner Harmony*, 1 Gallis., 123. This section is understood to embrace every description of merchandise, whether chargeable with duties or free. This construction was assumed as unquestionable in the case of the *Schooner Elizabeth and Jane* (2 Mason, 407), and it was also held that *silver dollars* fell within the designation of "goods, wares and merchandise," and were subject to forfeiture for having been landed without a permit.

6. *Of the remedies of the owner for groundless seizure, &c.*

However essential it may be to the public welfare that the United States should possess, and, through their officers, exercise, the power of seizure, and however just and proper it may be that these officers

should be protected by law, so long as they act with honesty and discretion, it is no less indispensable to the security of the citizen that the law should afford the means of redress for any misuse of a power so summary and cogent, and so liable to abuse.

It is accordingly a settled principle of law that the seizing officer acts at his peril, and that unless he can show at least probable cause for any seizure he may make, he is responsible to the owner for all the damage he may sustain.

This principle was acted on and well defined in the cases of *Slocum* v. *Mayberry*, 2 Wheat., 1, and *Gelson et al.* v. *Hoyt*, 3 Wheat., 246. Both of these cases were brought before the supreme court by a writ of error from a state court.

The former was an action of replevin for the cargo of a vessel detained by a collector under an act of Congress authorizing the detention of any vessel ostensibly bound to some other port of the United States, on suspicion of an intention to violate or evade any of the provisions of the acts laying an embargo. The action was held to be maintainable on the ground that the authority conferred on the collector by the act did not in any manner extend to the cargo of the vessel, being limited in its terms and its object to the vessel alone, and therefore, although the detention of the vessel necessarily involved the present arrest of the cargo in its course to any other port, yet the collector had no right to seize it specifically nor to detain it against the will of the owner. The owner's legal right to it consequently remained unimpaired. He had a right therefore to demand it of the officer, and if withheld, he had a consequent right to resort to the law for redress. And as no act of Congress, either expressly or by implication, forbade the state courts to take cognizance of suits instituted for property in possession of

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an officer of the United States not detained under some law of the United States, the state court had jurisdiction.

But the circumstances of this case, it will be seen, were very peculiar; and Chief Justice MARSHALL, in pronouncing the decision of the court, was careful to distinguish it from the more ordinary case of a seizure for a supposed offense against some act of Congress inflicting the penalty of forfeiture for such offense, and authorizing such seizure. In such a case, any intervention of a state authority which, by taking the thing seized out of the possession of the officer of the United States, might obstruct the exercise of the *exclusive* jurisdiction over seizures conferred by the judiciary act on the federal courts, would unquestionably be a violation of that act; and the federal court, having cognizance of the seizure, might enforce a redelivery of the thing by attachment or other summary process against the parties who should divest such possession. The party supposing himself aggrieved by a seizure, cannot, because he considers such seizure tortious, replevy the property out of the custody of the seizing officer, or of the court having cognizance of the cause. If the officer has a right, under the laws of the United States, to seize for a supposed forfeiture, the question whether that forfeiture has been actually incurred belongs exclusively to the federal courts, and cannot be drawn to another forum. The party must, therefore, await the final decree of such courts upon the case. If the seizure shall be adjudged tortious and without probable cause, his right to the recovery of damages is conclusively established, and he may at once bring an action at common law in a state court, or a suit in admiralty in the district court. [1]

[1] This latter remedy is supposed to be limited to those cases in which the seizure was of admiralty jurisdiction; *i. e.*, a seizure made on the

Should the seizing officer refuse to institute proceedings pursuant to the seizure, it would be the duty of the district court, upon the application of the aggrieved party, to compel the officer to proceed to adjudication, or to abandon the seizure.

Since the decision of the case of *Slocum* v. *Mayberry*, of the doctrines of which the above is an abstract, an act has been passed by congress containing several highly important provisions relative to this subject, which it is proper to notice in this place. By one of these provisions it is declared, "that the jurisdiction of the circuit court of the United States shall extend to all cases in law and equity, arising under the revenue laws of the United States, for which other provisions are not already made by law." It is not known that this clause of the act has yet received any authoritative judicial construction.

The design of the act was to provide more effectually for the security of the revenue derivable from imposts, and for that of the officers employed in its collection; and all the other provisions of the act are directed to this object exclusively. But the terms of this clause are general, and as a suit against an officer of the customs for illegally seizing property on account of an alleged violation of "the revenue laws," would seem unquestionably to be a case "arising under" these laws, it is supposed that the circuit courts are by this clause invested with jurisdiction, concurrently with the state courts, of suits of this description, without regard to the citizenship of the parties.[1]

Another of the provisions of this act gives to any officer who may be sued in a state court for any act

high seas, or on waters navigable from the ocean, by vessels of at least ten tons burden.

[1] Act of March 2, 1833, ch. 57, § 2: 4 Stat. at Large, 632.

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done under the revenue laws, the right to remove the cause to the circuit court for the district in which the process was served. So that now, when a suit for an illegal seizure is instituted in a state court, the *defendant* may, if he thinks proper, have the cause tried and determined in the federal court. Id., §§ 3, 4.

The other provision above alluded to declares that, "all property taken or detained by any officer or other person under the authority of any revenue law of the United States, shall be irrepleviable, and deemed to be in custody of the law, and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof." Id., § 2. It is doubtful whether this clause in any manner affects the principles on which the case of *Slocum* v. *Mayberry* turned; or whether any thing beyond a direct legislative sanction and affirmance of these principles was intended by it. The next clause, providing for the *punishment* of those who shall interfere with property under seizure,[1] it is presumed embraces as well persons who may do so in obedience to the command of process from a state court, as others. But no sufficient reason is perceived for supposing that it was the intention of congress to substitute a criminal prosecution in the place of the coercive interposition of the court by "attachment or other summary process," to enforce a redelivery of the thing. In a proceeding *in rem*, the possession of the *res* is indispensable to the effectual exercise of jurisdiction. It is upon this ground alone that the courts are authorized, when unlawfully dispossessed, to compel a redelivery; and the exercise of this authority is not perceived to be incompatible with the further amenability of the party by whom the wrong has been committed, as a public offender.

[1] *Vide, supra.*

If this view of the provisions of the act of 1838 is correct, it follows that they do not, in any manner, conflict with the principles of the case of *Slocum* v. *Mayberry*.

In the other case above cited, that of *Gelston et al.* v. *Hoyt*, these principles were distinctly reasserted, and the legal consequences resulting from them were stated and applied with great precision and force. Among the points decided, those requiring notice in this place are the following:

In an action of trespass brought in a state court against the seizing officer while the suit for the supposed forfeiture is pending, the fact of such pendency may be pleaded in abatement, or as a temporary bar to the action. If the action be commenced after a decree of condemnation, or after an acquittal with a certificate or reasonable cause of seizure, then, in the former case the fact of such condemnation, and in the latter case the acquittal with such certificate, may be pleaded as a bar. If after an acquittal and a denial of such certificate, then the officer is without justification for the seizure, it being definitively settled to be a tortious act. A plea merely averring the fact of a forfeiture, without averring a *lis pendens* to enforce the forfeiture, or a condemnation, or an acquittal with a certificate of reasonable cause of seizure, is bad; because it attempts to put in issue the question of forfeiture in a state court, where it cannot be tried. When the charge in the declaration is for taking, detaining and *converting* property, it is sufficient to plead a justification of the taking and detention. If the plaintiff relies on the conversion, he should reply it by way of new assignment. A plea alleging a seizure for a forfeiture as a justification, should not only state the facts relied on to establish the forfeiture, but aver that thereby the property

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became and was actually forfeited, and was seized as forfeited.

In the case of *Slocum* v. *Mayberry*, it is said, as we have seen, that a party injured by an unlawful seizure of his property may, at his election, resort either to an action at common law in a state court, or to an admiralty suit in the district court, for the recovery of damages. It is presumed, however, that a suit in admiralty for this purpose would lie only when the seizure was made on the high seas, or on waters navigable from the sea by vessels of at least ten tons burden. When made on the high seas, jurisdiction would doubtless attach to the case as constituting a marine trespass; and, according to the case of *Burke* v. *Trevitt* (1 Mason, 96), jurisdiction may, in other cases as well as in this, be maintained, as an incident to the exclusive jurisdiction conferred on the district court over all such seizures. On this latter ground it might be supposed that, in the case of a seizure not of admiralty jurisdiction, a suit at common law for damages might be maintained in the district court. If the admiralty jurisdiction attaches as an incident to the general jurisdiction over the subject, why should not also the common law jurisdiction? In the case of *Slocum* v. *Mayberry*, however, the court seems to have been clearly of opinion that the state tribunals alone were competent to afford a remedy in this form. But, before recourse can be had to these tribunals, it is indispensable, as we have seen, that there should have been a decree of restoration and a refusal of a certificate of reasonable cause of seizure in the district court. But, when the seizure is of admiralty jurisdiction, the owner may, it is presumed, avoid this circuity of action by demanding his damages in the character of claimant in the suit instituted to enforce the forfeiture. In cases of prize, strictly *jure*

belli, and also of forcible arrest on the high seas, in the nature of captures *jure belli*, by the public ships of war of the United States, such is the established and familiar practice.[1] And no reason is perceived why it should not also prevail in cases of seizure by custom-house officers. The relation in which the captor in the one case, and the seizor in the other, stands to the government, the nature and limits of the responsibility assumed by each, and the form of proceeding for the purpose of condemnation, in both cases, are substantially the same.[2] Indeed, there is nothing to excite a doubt concerning the right of the claimant to seek redress in this form, instead of resorting to an original action for the purpose, except the absence (as far as I know) of any reported case in which it has been exerted. I understand the right, however, to be distinctly recognized in the case of the *Appollon*, 9 Wheat., 362. That was a case of municipal seizure by a collector of the customs, against whom the suit was instituted in the district court for the recovery of damages; and having been commenced before a final decree had been pronounced

[1] See, for example, the following cases: *Murray* v. *The Charming Betsey*, 2 Cranch, 64; *The Marianna Flora*, 11 Wheat., 1; *The Lively*, 1 Gallis., 315; *The Liverpool Packet*, id., 513.

[2] "In every case of a proceeding for condemnation upon captures by the public ships of war of the United States" (said the supreme court in *The Palmyra*, 12 Wheat., 1), "whether the same be cases of prize, strictly *jure belli*, or upon public acts in the nature of captures *jure belli*, the proceedings are in the name and authority of the United States, who prosecute for themselves as well as for the captors. The captors cannot, without the authority of the government, proceed to enforce condemnation. The suit is, in form and substance, a proceeding by and in the name of the United States for the benefit of all concerned."

These agents and officers are, indeed, in a certain sense, parties to the suit, as the seizing officer is in cases of mere municipal seizure.

In cases of capture, *probable cause* is a good defense against a claim for damages by the general law of prize; and, in cases of mere municipal seizure, it is, as we have seen, made so by statute. *The Appollon*, 9 Wheat., 362; *The Marianna Flora*, 11 id., 1; *The Palmyra*, 12 id., 1.

PART 3. in the suit for condemnation, it was objected that it ought not, on that account, to be entertained, because it was competent for the court to award damages in that suit, if the seizure was without probable cause; and the objection was adjudged by the supreme court to have been well founded. But, in a great majority of the reported cases, even of capture, in which damages were awarded, they were recovered in a suit instituted by the owner, sometimes after a decree of restoration and refusal of a certificate of probable cause, and sometimes before. In the latter case, the libel, alleging the capture to have been illegal, claims restoration and damages, or, if the prize has been lost in consequence of the capture, damages alone, and prays a monition to the captor to proceed forthwith to adjudication.

The captor may then, at his option, either institute proceedings for condemnation, or appear in the character of respondent, and contest the claim for damages.

With regard to the amount of damages recoverable, whether in cases of illegal capture or seizure, the general rule is, that it ought to be equal to the real injury sustained. *The Lively*, 1 Gallis., 315. Where the vessel and cargo have been entirely lost to the owner, the proper measure of damages is, the prime value, including all charges, premiums of insurance and counsel fees, with interest; and, in case of injury, the amount of the diminution in value, with interest. Where the voyage has been lost, or the cargo undelivered, the loss of freight is a proper item of damages. Supposed loss of profits on the voyage is in no case allowable. In case of gross and wanton outrage, vindictive damages may be rewarded. *Murray* v. *The Charming Betsey*, 2 Cranch, 64; *Maley* v. *Shattuck*, 3 id., 458; *The George*, 1 *Mason*, 24; *The Ulprino*, id., 91; *Hol-*

lingsworth v. *The Betsey*, 2 Adm. Decis., 330; *The Anna Maria*, 2 Wheat., 327; *The Amiable Nancy*, 3 id., 546; *S. C.*, Paine's C. C. Rep., 111; *La Amistad De Rues*, 5 Wheat., 385; *The Appollon*, 9 id., 362; *The Lively*, 1 Gallis., 315; *Canter* v. *The American Insurance Company et al.*, 3 Peters, 307.

If the captors wantonly injure the captured crew, damages will be awarded for personal ill-usage. *The Lively*, 1 Gallis., 315. The commander of a squadron is liable to individuals for the trespasses of those under his command, acting in pursuance of positive or permissive orders, and in case of actual presence and co-operation. *The Eleanor*, 2 Wheat., 345.

In the case of *Little et al.* v. *Bareme et al.* (2 Cranch, 170), the important principle was settled that the instructions of the president to a naval commander, when not strictly warranted by law, afford no protection to the officer against a claim for damages on account of a capture made by him in pursuance of such instructions. This case arose under the act of February 9, 1799, "further to suspend the commercial intercourse between the United States and France and the dependencies thereof." The first section forbade all vessels, owned or employed by persons resident within the United States, to proceed thence to any French port, or to be employed in any traffic or commerce with persons resident in France or any places under her jurisdiction. The fifth section authorized the president to give instructions to the commanders of public armed ships of the United States, to stop and examine any ship or vessel of the United States on the high seas, which there might be reason to suspect to be engaged in any traffic or commerce contrary to the true tenor of the act; and if, upon examination, it should appear that such ship or vessel *was bound or sailing to any port or place* within the territory of the

PART 3. French Republic, or her dependencies, contrary to the intent of the act, it shall be the duty of such commanders to seize and send into port such ship or vessel. The instructions given by the president to our naval commanders, under this act, directed the seizure of vessels bound *from* as well as *to* French ports. The vessel, on account of whose capture the suit was brought, was, when captured, returning with a cargo of coffee *from* a French West India port. The court were of opinion that the instructions, and, consequently, the capture, were not warranted by the act. Chief Justice MARSHALL, in delivering the opinion of the court, says:

"I confess the first bias of my mind was very strong in favor of the opinion that, though the instructions of the executive could not give a right, they might excuse from damages. I was much inclined to think that a distinction ought to be taken between acts of civil and those of military officers; and between proceedings within the body of the country and those on the high seas. The implicit obedience which military men usually pay to the orders of their superiors, which, indeed, is indispensably necessary to every military system, appeared to me strongly to imply the principle that these orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which, in general, requires that he should obey them. But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is, that the instructions cannot change the nature of the transaction, or legalize an act which, without these instructions, would have been a plain trespass. Captain Little then must be answerable in damages," &c.

What has thus far been said of the liability of the seizor relates to cases of seizure without reasonable cause; in which cases the liability attaches at the moment of the seizure; and if the property be sub-

sequently lost or injured while under seizure, it matters not how the loss or injury was occasioned. But as the authority of the owner over his property is suspended while it is under seizure, he has a right to have it safely kept, and in the event of its final acquittal, even though there was reasonable cause for seizure, to have it restored to him. The seizing officer while the property remains in his custody, and the marshal, after its arrest by him under the process of the court, are therefore responsible, in such a case, for any loss or injury resulting from want of ordinary care. *Burke* v. *Trevitt*, 1 Mason, 96.

CHAPTER II.

OF THE LIMITATION OF PROSECUTIONS FOUNDED ON SEIZURES.

All prosecutions and suits for penalties or forfeitures, pecuniary or otherwise, accruing under the laws of the United States, are required to be commenced within five years from the time when the penalty of forfeiture accrued ; provided the offender or the property liable to forfeiture, shall within that period be found within the United States, so that the proper process may be instituted and served against such person or property therefor. Act of Feb. 28, 1839.[1] It is presumed, from the terms of the act, that it is not sufficient that the seizure be made within the prescribed period, unless the judicial proceedings be also instituted within that period.

[1] Ch. 30, § 4: 5 Stat. at Large, 321. The same limitation for prosecutions to enforce fines and forfeitures incurred under the revenue laws was prescribed by the act of March 26, 1804, ch. 40, but without the proviso contained in the act of 1839. The limitation imposed by the 89th section of the collection act of 1799, ch. 22, was three years. Both these enactments are expressly repealed by the act of March 3, 1863, ch. 76, § 14, probably to relieve the act of 1839 from a possible doubt about their interference with it, though it seems very clear that they were superseded, and, by implication, repealed by that act.

CHAPTER III.

OF THE PROCEEDINGS FROM THE LIBEL OR INFORMATION (INCLUSIVE), TO THE HEARING OR TRIAL, INCLUDING CONDEMNATIONS BY DEFAULT.

SECTION I.

AS REGULATED BY STATUTE.

It has already been intimated that the proceedings of which we are now to treat, were, to a considerable extent, regulated by the act of March 2, 1799,[1] sometimes called the duty act and sometimes the collection act, and which still forms the basis of our revenue system.

The provisions alluded to are chiefly embodied in the 89th, 90th and 91st sections; and as it will be necessary in the sequel to make frequent and minute references to various clauses of these sections, it will be convenient and useful, long as they are, here to insert them. They are as follows:

"SEC. 89. *And be it further enacted*, that all penalties accruing by any breach of this act, shall be sued for and recovered with costs of suit, in the name of the United States of America, in any court competent to try the same; and the trial of any fact which may be put in issue, shall be within the judicial district in which any such penalty shall have accrued; and the collector within whose district the seizure shall be made, or forfeiture incurred, is hereby enjoined to cause suits for the same to be commenced without delay, and prosecuted to effect; and is, moreover, authorized to receive from the court within which such trial is had, or from the proper officer thereof, the sum or sums so recovered, after deducting all proper charges, to be allowed by the said court; and on the receipt thereof, the said collector shall pay and distribute the same without delay, according to law, and transmit, quarter yearly, to the treasury, an account of all moneys by him received for fines, penalties

[1] Chap. 22: 1 Stat. at Large, 627.

and forfeitures during such quarter. And all ships or vessels, goods, wares or merchandise, which shall become forfeited in virtue of this act, shall be seized, libeled and prosecuted as aforesaid, in the proper court, having cognizance thereof; which court shall cause fourteen days' notice to be given of such seizure and libel, by causing the substance of such libel, with the order of the court thereon, setting forth the time and place appointed for the trial, to be inserted in some newspaper published near the place of seizure, and also by posting up the same in the most public manner, for the space of fourteen days, at or near the place of trial; for which advertisement a sum not exceeding ten dollars shall be paid; and proclamation shall be made in such manner as the court shall direct; and, if no person shall appear and claim any such ship or vessel, goods wares or merchandise, and give bond to defend the prosecution thereof; and to respond to the cost in case he shall not support his claim, the court shall proceed to hear and determine the cause according to law; and, upon the prayer of any claimant to the court, that any ship or vessel, goods, wares or merchandise so seized and prosecuted, or any part thereof, should be delivered to such claimant, it shall be lawful for the court to appoint three proper persons to appraise such ship or vessel, goods, wares or merchandise, who shall be sworn in open court for the faithful discharge of their duty; and such appraisement shall be made at the expense of the party on whose prayer it is granted; and, on the return of such appraisement, if the claimant shall, with one or more sureties, to be approved of by the court, execute a bond in the usual form to the United States, for the payment of a sum equal to the sum at which the ship or vessel, goods, wares or merchandise, so prayed to be delivered, are appraised, and, moreover, produce a certificate from the collector of the district wherein such trial is had, and of the naval officer thereof, if any there be, that the duties on the goods, wares and merchandise, or tonnage duty on the ship or vessel so claimed, have been paid or secured, in like manner as if the goods, wares or merchandise, ship or vessel, had been legally entered, the court shall, by rule, order such ship or vessel,

PART 3. goods, wares or merchandise, to be delivered to the said claimant, and the said bond shall be lodged with the proper officer of the court, and, if judgment shall pass in favor of the claimant, the court shall cause the said bond to be canceled; but, if judgment shall pass against the claimant as to the whole, or any part of such ship or vessel, goods, wares or merchandise, and the claimant shall not, within twenty days thereafter, pay into the court, or to the proper officer thereof, the amount of the appraised value of such ship or vessel, goods, wares or merchandise, so condemned, with the costs, judgment shall and may be granted upon the bond on motion in open court without further delay. And, when any prosecution shall be commenced on account of the seizure of any ship or vessel, goods, wares or merchandise, and judgment shall be given for the claimant or claimants, if it shall appear to the court before whom such prosecution shall be tried that there was a reasonable cause of seizure, the said court shall cause a proper certificate or entry to be made thereof, and, in such case, the claimant or claimants shall not be entitled to costs, nor shall the person who made the seizure, or the prosecutor be liable to action, suit or judgment on account of such seizure and prosecution; *Provided*, that the ship or vessel, goods, wares or merchandise be, after judgment, forthwith returned to such claimant or claimants, his, her or their agent or agents; *And provided*, that no action or prosecution shall be maintained in any case under this act, unless the same shall have been commenced within three years next after the penalty of forfeiture was incurred.

"SEC. 90. *And be it further enacted*, that all ships or vessels, goods, wares, or merchandise, which shall be condemned by virtue of this act, and for which bond shall not have been given by the claimant or claimants, agreeably to the provisions for that purpose, in the foregoing section, shall be sold by the marshal or other proper officer of the court in which condemnation shall be had, to the highest bidder at public auction, by order of such court, and at such place as the court may appoint, giving at least fifteen days' notice (except in cases of perishable goods) in one or

more of the public newspapers of the place where such sale shall be; or, if no paper is published in such place, in one or more of the papers published in the nearest place thereto; for which advertising, a sum not exceeding five dollars shall be paid. And the amount of such sales, deducting all proper charges, shall be paid within ten days after such sale, by the person selling the same, to the clerk, or other proper officer of the court directing such sale, to be by him, after deducting the charges allowed by the court, paid to the collector of the district in which such seizure or forfeiture has taken place, as hereinbefore directed.

"SEC. 91. *And be it further enacted,* that all fines, penalties and forfeitures, recovered by virtue of this act (and not otherwise appropriated), shall, after deducting all proper costs and charges, be disposed of as follows: One moiety shall be for the use of the United States, and be paid into the treasury thereof, by the collector receiving the same; the other moiety shall be divided between, and paid in equal portions to the collector, and naval officer of the district, and surveyor of the port, wherein the same shall have been incurred, or to such of the said officers as there may be in the said district; and in districts where only one of the aforesaid officers shall have been established, the said moiety shall be given to such officer; *Provided, nevertheless,* That in all cases where such penalties, fines and forfeitures shall be recovered in pursuance of information given to such collector, by any person other than the naval officer or surveyor of the district, the one-half of such moiety shall be given to such informer, and the remainder thereof shall be disposed of between the collector, naval officer, and surveyor or surveyors in manner aforesaid; *Provided also,* That where any fines, forfeitures and penalties incurred by virtue of this act are recovered in consequence of any information given by any officer of a revenue cutter, they shall, after decucting all proper costs and charges, be disposed of as follows: One-fourth part shall be for the use of the United States, and paid into the treasury thereof, in manner as before directed; one-fourth part for the officers of the customs, to be distributed as hereinbefore set forth; and the

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remainder thereof to the officers of such cutter, to be divided among them agreeably to their pay: *And provided likewise*, That whenever a seizure, condemnation and sale of goods, wares or merchandise shall take place within the United States, and the value thereof shall be less than two hundred and fifty dollars, that part of the forfeiture which accrues to the United States, or so much thereof as may be necessary. shall be applied to the payment of the cost of prosecution: *And be it further provided*, That if any officer, or other person, entitled to a part or share of any of the fines, penalties or forfeitures incurred in virtue of this act shall be necessary as a witness on the trial for such fine, penalty or forfeiture, such officer or other person may be a witness upon the said trial; but in such case he shall not receive, nor be entitled to, any part or share of the said fine, penalty or forfeiture, and the part or share to which he otherwise would have been entitled shall revert to the United States."

As soon, then, as the seizure has been made, it is the duty of the seizing officer to cause proceedings to be instituted to enforce the supposed forfeiture; and for this purpose he is to give notice of the seizure, of the place where it was made, and of the particular grounds of it, to the United States attorney of the proper judicial district. If the seizure be made within the limits of a judicial district, the court for that district alone can take cognizance of it, wherever the offense may have been committed. See the judiciary act of 24th September, 1789, ch. 20, § 9: 1 Stat. at Large, 73; *Keen* v. *The United States*, 5 Cranch, 304; *The Marino*, 9 Wheat., 351. But, if the seizure be made on the high seas, it is properly cognizable in the district into which the thing seized is first brought. Id. *The Abby*, 1 Mason, 360.[1]

[1] In this case, Mr. Justice STORY considers the phrase "high seas," in the connection in which it is used in the text, as importing all waters on the sea coast below low-water mark, and at flood tide below high-water mark. He must, of course, be understood to refer, as indeed the

SECTION II.

OF THE INFORMATION AND THE LIBEL OF INFORMATION.

The district attorney, upon receiving due notice of the seizure, proceeds to institute a suit against the thing seized, by drawing up a written statement of the case setting forth the facts by reason of which a forfeiture is supposed to have been incurred. When the seizure has been made on land, or on water not navigable from the sea by vessels of ten or more tons burden, the case is of common law, or, as is sometimes said, of exchequer jurisdiction, and this pleading is denominated an *information:* when the seizure has been made on the high seas, or on waters which are so navigable, the case is of admiralty jurisdiction, and the pleading is called a *libel of information.*[1]

circumstances of the case imply, only to the main coast, and not to the shores of bays, harbors, inlets and the like, within the limits of a state. Each of the judicial districts of the United States consists of a state or part of a state, *eo nomine,* and is, of course, conterminous with it.

[1] See, *ante,* Part I, and *The Betsey and Charlotte,* 4 Cranch, 443; *Whalen* v. *The United States,* 7 id., 112. This distinction is well established, and the terms by which it is expressed, as, so far as I am informed, they seem to have been invariably understood by the courts, leave little room for doubt or difficulty in their application. But, in a case in the district court of the northern district of New York, it was strenuously contended by the counsel for the claimant that the practical construction which they had uniformly received in that court was founded in error. As the subject is of considerable importance, I shall make no apology for inserting the following extract from the judgment pronounced in the case by the judge of that court; merely premising, that the proceeding was on the admiralty side of the court, against the steamboat Black Hawk and her appurtenances, for various alleged infractions of the navigation laws of the United States; and that the seizure was made at the port of Ogdensburg, on the waters of the St. Lawrence: which waters were described in the libel, as being navigable from the sea by vessels of ten or more tons burden.

"A preliminary objection is taken that the waters of the St. Lawrence at the port of Ogdensburg are not so navigable; and that this proceeding is, therefore, improperly instituted on the admiralty side of the court. It is not denied that the river St. Lawrence, throughout its entire

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In the northern district of New York (where revenue seizures are of very frequent occurrence) it is the established practice to file the libel or information and issue the proper process at once, whether the court happens to be in session or not; and this I understand to be the practice in most of the other

course, is of sufficient depth to admit the passage of vessels of a burden far exceeding ten tons. But it is asserted, and, as a geographical fact, is notorious, that at several places below Ogdensburg, and at one, in particular, for several miles in extent, the velocity of the current is so great that it cannot be overcome by ascending boats without the aid of extraordinary means of propulsion or traction. That neither sails, nor oars, nor even steam, are sufficient for this purpose, but that it requires a resort to setting-poles or drag-ropes. The forcing of vessels through water by such means, it is argued, is not navigation; and the quality of navigableness cannot, therefore, be truly predicated of waters which can be traversed only by such unusual, tardy and laborious processes.

"There is unquestionably force and plausibility in the argument.

"Another ground of doubt, whether this is a case of admiralty jurisdiction, was also suggested. The constitution of the United States declares that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction. But congress has no power to enlarge this jurisdiction beyond what was understood and intended by it when the constitution was adopted; for this would be to deprive the citizen of the right of trial by jury, secured to him by the constitution, in suits at common law. It was upon this ground, that, in the case of *The Vengeance* (3 Dallas, 297), which arose not long after the adoption of the constitution, it was strenuously contended that congress had no authority to include seizures under the laws of impost, navigation and trade, wherever made, within the admiralty jurisdiction of the district courts; because, in England, such cases were cognizable not in the high court of admiralty, but in the court of exchequer. But it was admitted that the colonial vice-admiralty courts, both in this country and in the West Indies, had always exercised jurisdiction over seizures of this nature; and the objection was overruled. It was also objected in that case, that it was not in fact the intention of congress to embrace such seizures within the admiralty jurisdiction; an objection to which the somewhat ambiguous phraseology of the ninth section of the judiciary act afforded considerable plausibility. But this objection was also overruled; and, though the principles of this early case have several times since been called in question at the bar, it has been steadily adhered to by the supreme court.

districts. Indeed, except in the few districts in which all the terms of the district court are held in the same place, in which the judge and other officers of the court also reside, and where, therefore, the regular sessions of the court may be conveniently protracted by successive adjournments, or special ses- CHAP. 3.

"But the admiralty jurisdiction in England is limited to cases arising within the ebb and flow of tide; and that of the courts of the United States has been decided to be, in general, subject to the same limitation. Thus, for example, though the district courts, as instance courts of admiralty, possess an unquestionable jurisdiction of suits for the recovery of seamen's wages, and of suits by materialmen and shipwrights (except in the case of a domestic ship, where the local law gives no lien), this jurisdiction is held not to extend to cases where the wages are earned, the materials furnished or the services rendered, above the ebb and flow of tide; and so in regard to other maritime contracts, and in regard also to cases of marine trespass, false imprisonment and assault and battery, the admiralty jurisdiction is subject to a like limitation. *The Steamboat Jefferson*, 10 Wheat., 422; *The Steamboat Planter*, 7 Peters, 324.

"Without, therefore, questioning the general soundness of the decision in the case of *The Vengeance*, it might still be insisted that the admiralty jurisdiction of municipal forfeitures is limited to seizures made upon tide waters. An exception to this extent might, perhaps, not unreasonably be implied, as within the contemplation of the legislature; for it may well be doubted whether it was in fact intended to extend the admiralty jurisdiction thousands of miles into the interior of the country, to the waters, for example, of the Mississippi, Missouri, Ohio, and their tributaries, throughout their whole navigable extent; and even, if it was so intended, the constitutional power of congress to do it might reasonably be questioned.

"I have thought it right to notice the objection to the jurisdiction of the court in the present case, and thus briefly to advert to the grounds on which it rests. But, as applied to the waters in question, it is altogether novel. Hitherto, ever since my official connection with this court, and, as I understand, ever since its organization, all seizures made on lake Ontario and the river St. Lawrence have been considered and treated as of admiralty jurisdiction; and I am of opinion, that it would not become me, at this late day, to entertain the question whether this practice had not its origin in usurpation. If a jurisdiction which has been constantly exercised and acquiesced in without complaint for half a century, and which is in apparent accordance with the decisions of the supreme court, is to be renounced by this court, it can,

PART 3. sions may be conveniently held, the delays which would arise from postponing all suits on seizures made in vacation until the next succeeding term of the court would be intolerable. [Besides, by the 89th section of the collection act every collector, within whose district a seizure is made, or forfeiture incurred, is expressly "enjoined to cause suits for the same to be commenced *without delay*."

Rules regulating the structure of the Information and libel of Injormation.] These rules are enjoined by rule 22, of rules of practice prescribed by the supreme court, in causes of admiralty and maritime jurisdiction. It relates, it will be seen, exclusively to cases of seizure, and is as follows:

"All informations, and libels of information, upon seizures for any breach of the revenue or navigation or other laws of the United States, shall state the place of seizure, whether it be on the land or on the high seas, or on navigable waters within the admiralty and maritime jurisdiction of the United States; and the district within which the property is brought and where it then is. The information or libel of information shall also propound, in distinct articles, the matters relied on as grounds or causes of forfeiture, and aver the same to be contrary to the form of the statute or statutes of the United States in such case provided, as the case may require; and shall conclude with a prayer of due process to enforce the forfeiture, and to give notice to all persons concerned in interest to appear and show cause, at

in my judgment, be properly and decorously done only in obedience to the decision of an appellate tribunal."

The foregoing note is reprinted from a preceding edition of this work. But since the date of that edition, as already shown, the antecedent decisions of the supreme court, declaring the admiralty jurisdiction of the courts of the United States to be limited to cases arising on the high seas or tide waters, have been unequivocally overruled, and the distinction on which they turned repudiated, by that court. I have deemed it fit, nevertheless, to retain the note as a record of the past, pertaining to the judicial history of the United States, and, as such, not devoid of interest.

the return day of the process, why the forfeiture should not be decreed."[1] CHAP. 3.

As to the degree of strictness necessary to be observed in framing a libel or information, it may be said in general, that in regard to mere form no great nicety is required. It is proper to remark, however, that the reported decisions in our courts on this subject relate to proceedings in admiralty, in which, it has uniformly been said, less strictness is requisite than is exacted in proceedings, especially criminal proceedings, in courts of common law. Whether the same rule is applicable to proceedings by information on the common law side of the court, is a question to which the decisions thus far do not appear to afford a satisfactory answer. It is hardly to be supposed, however, that what would be sufficient as a libel of information, would be adjudged insufficient as a simple information. A distinction in this respect would seem to savor too much of arbitrary and senseless technicality; and such, I infer, was the impression of Mr. Justice STORY, in the case of *Cross* v. *The United States*, 1 Gallis., 31.

But with regard to matters of substance, the rule is, that every fact and circumstance material in law to the maintenance of the suit must be set forth with precision, clearness and all reasonable certainty. The owner of the property proceeded against is entitled to know exactly to what he is called upon to answer; and the case must be so presented as to enable the court to see, judicially, that the fact alleged to have been committed is an offense against the laws. This rule is extracted from the case of *The Schooner*

[1] A rule of the district court of the northern district of New York, made in 1869, permits the joinder of a suit *in rem* for a forfeiture and a suit *in personam* for a fine, penalty or debt, incurred by one and the same offense; and their consolidation when separately instituted. See *post*, Rules D. C., N. D. N. Y.

PART 3. *Hoppet and Cargo* v. *The United States*, 7 Cranch, 389. A rule, say the court, so essential to justice and fair proceedings as that which requires a substantial statement of the offense upon which the prosecution is founded, must be the rule of every court where justice is the object. The reasons of it apply to prosecutions in courts of admiralty with as much force as to prosecutions in other courts; and it is a maxim of the civil law that a decree must be *secundum allegata* as well as *secundum probata*—a maxim essential to justice in all courts. The libel of information against the vessel in that case charged in substance, that while the act entitled "An act to interdict commercial intercourse," &c., was in force, certain goods of the growth, produce, or manufacture of France, were imported into the United States, to wit, into the port of New Orleans, in the said vessel, from some foreign port or place, to wit, from St. Bartholomew, contrary to, and in violation of, the fourth, fifth and sixth sections of the act. By reason of which, and by force of the act of congress entitled An act, &c., the said vessel, her tackle, apparel and furniture had become forfeited to the United States. The only section of the act imposing a forfeiture on the vessel was the sixth; by which it was in substance enacted, that if any article, the importation of which is prohibited, shall be put on board of any ship, &c., with intention to import the same into the United States contrary to the true intent and meaning of the act, and with the knowledge of the owner or master of such ship, &c., such ship, &c., shall be forfeited. The crime for which alone the vessel could be subjected to forfeiture consisted in the prohibited articles *being put on board with the intention of importing them into the United States, and with the knowledge of the owner or master*. But upon both these points the libel was silent. It neither

alleged that the goods were put on board with intent to import them into the United States, nor with the knowledge of the owner or master. It did not therefore state a case showing that the law had been violated. Upon this ground it was held to be insufficient to warrant a sentence of condemnation, although it was shown *by the evidence* that in point of fact the vessel was liable to forfeiture. See, also, *The Caroline* v. *The United States*, 7 Cranch, 496; *The Anne* v. *The United States*, 7 id., 570. In accordance with the principle of this case a decree of condemnation was withheld upon a count in a libel of information in a case (*The Steamboat Black Hawk*) decided in the district court for the northern district of New York. The article in the libel was founded on the 4th section of the act of December 31, 1792, "concerning the registering and recording of ships and vessels, as partially modified by the act of March 3, 1831, relating to the inland frontier trade, and requiring, that, in order to the registry of any ship or vessel, an oath or affirmation shall be taken by the owner before the officer authorized to make such registry." The point of the decision will be sufficiently indicated by the following extract from the opinion of the court:

"The act designates the officer before whom the oath shall be taken, specifies the particulars which it is to embrace, and punishes the owner by the forfeiture of his vessel if he knowingly swears falsely in regard to any one of these particulars. A prosecution under this section, therefore, bears a close analogy to a prosecution for perjury; and, although it is well settled that less technical nicety is in general required in a libel than in an indictment, I am nevertheless of opinion that it is indispensable that the libel should contain a positive and direct allegation that the party charged with the false swearing was in fact sworn, that it should designate the officer before whom the oath was taken,

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that it should set forth so much of the matter sworn to as it is intended to falsify, and distinctly show in what the falsity is supposed to consist. In framing this article neither of these requisites has been complied with, unless it be the last—and even in regard to this, there is a want of conformity to the statute, and also to the terms of the oath which was proved on the trial to have been actually taken. The allegation is, that 'William Bacon, upon whose oath, &c., well knew, at the time he so made oath as aforesaid, that the said steamboat Black Hawk, &c., was not wholly and entirely owned by resident citizens of the United States.' But the act does not require, when the oath is made by a part owner, that he should state in terms, that the other owners are citizens, much less *resident* citizens of the United States. He is required to state his own residence, and to swear that no subject or citizen of any foreign prince or state is interested in the vessel; and such is the form of the oath produced in evidence. But, if this is the part of the oath on which reliance was placed, the assignment of false swearing should have been applied to this part, by a direct denial of its truth."

Another highly important rule which has been established is, that it is sufficient, on a libel or information on a seizure, to describe the offense in the words of the statute, provided it be so described, that, if the allegation be true, the case *must be* within the law. *The Samuel*, 1 Wheat., 9; *The Mary Ann*, 8 id., 381; *The Emily and The Caroline*, 9 id., 381; *The Merino et al.*, 9 id., 391.

It is in no case necessary to state any fact which constitutes matter of defense to the claimant; and, therefore, it is unnecessary to negative exceptions which come in by way of proviso to an act, or which are contained in subsequent statutes. But when the exception is in the enacting clause, there must, of course, be an averment that the case is not within it.

The Aurora, 7 Cranch, 382; *The United States* v. *Hayward*, 2 Gallison, 485, 487.[1]

Amendments.] Courts of admiralty are little trammeled by a regard to mere technicalities; substantial justice, without unnecessary delay or expense, being the great object which they keep steadily in view and constantly aim to accomplish. They accordingly acknowledge no limits to their right to allow amendments when conducive to this end. Such, at least, seems to be the just inference from the decisions of our own court; and it appears to be equally true of every stage of the proceedings from the institution of the suit of the district court to its final decision in the last court of appeal. We have already seen that mere formal defects are disregarded. What is here said relates therefore to substance.

When the ground of forfeiture is stated with insufficient certainty or fullness to justify a decree of condemnation founded on it, the court may, on application, allow it to be reformed, and may also permit new substantive charges to be introduced by

[1] The antecedent editions of this work contained some observations in this place, under the head of "*Interrogatories*," which, upon reconsideration, I conclude to omit. Adverting to the general rule in admiralty, allowing the libelant to propound interrogatories to the respondent, to be answered by the latter under oath, I stated that this right might be exercised by the district attorney in cases of seizure, cognizable on the admiralty side of the district court. I am now of opinion that this was an error. There are several very grave objections to such a practice; and, upon a careful examination of the rules of admiralty practice mentioned in the last preceding note, I also think there is strong reason to conclude that the practice is, in effect, forbidden. The 22d rule, it will be seen, is silent with respect to interrogatories. The next rule (the 23d) prescribes the form of "*all libels* in instance causes, civil and maritime;" and concludes as follows: "And the libelant may further require the defendant to answer, on oath, all interrogatories propounded by him, touching all and singular the allegations in the libel, at the close or conclusion thereof." Here, then, is a case to which that venerable maxim, *expressio unius exclusio est alterius*, appears to me to be applicable.

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additional articles or counts for that purpose. In the case of *The Edward* (1 Wheat., 261), and again in the case of *The Marianna Flora* (11 id., 1), the power of the circuit court to allow the introduction of new allegations was strongly contested by the counsel for the claimants, on the ground that the circuit court is authorized to exercise only an appellate jurisdiction in cases of this description, and that to permit a new and independent cause of forfeiture to be set up would be, in effect, to arrogate an original jurisdiction. But the court considered this power as no longer open to question in our courts, and vindicated its exercise as in strict accordance with the common usage and admitted doctrine of admiralty courts to permit the parties on appeal to introduce new allegations as well as new proofs—*non allegata allegare, et non probata probare.*

This rule is not to be understood, however, as authorizing the introduction before the appellate court of a new *res* or subject of controversy. Thus where the controversy in the court below was concerning seventy-two bales of cotton, and new pleadings having been filed on both sides in the appellate court, where the libelant set up a title to one hundred and seventy-two bales, and obtained a decree therefor, the supreme court reversed the decree as to the fifty additional bales. "The case carried up," say the court, "was the controversy about the seventy-two bales; * * * this was the *res* in controversy; and, in so far as the seventy-two bales were concerned, either party was authorized to make amendments, or to introduce new evidence, in order to support his title in the appellate court. But the libelant could not introduce a new subject of controversy; and the amendment which brought into the case the additional fifty bales was the introduction of a new *res*, which did not go up by the appeal;

and could not be originally instituted in an appellate court. We think this amendment is not justified by admiralty practice; although it is well known that the most liberal principles prevail in admiralty courts, in relation to amendments." *Houseman* v. *The Schooner North Carolina*, 15 Peters, 40, 50.

If, on appeal to the supreme court, the evidence appears to be sufficient to establish the forfeiture, but the libel is too defective to authorize a decree of condemnation, it is the practice of that court to remand the cause to the circuit court with directions to allow the requisite amendment. [*See the cases above cited;* and also *The Harrison*, 1 Wheat., 298.] And, in the case of the *Adeline* (9 Cranch, 244), the court, in deciding on the validity of an objection taken to the libel, say, "if, indeed, there were any thing in the objection, it cannot in any beneficial manner avail the claimants. The most that could result would be, that the cause would be remanded to the circuit court, with directions to allow an amendment of the libel. When merits clearly appear on the record, it is the settled practice, in admiralty proceedings, not to dismiss the libel, but to allow the party to assert his rights in a new allegation. This practice, so consonant with equity and sound principle, has been deliberately adopted by this court on former occasions." See, also, the case of *The Palmyra* (12 Wheat., 1), where the same language is again used. Finally, in the case of *The United States* v. *Four pieces of Woolen Cloth* (Paine's C. C. Rep., 435), in the circuit court for the southern district of New York, the district attorney was permitted so to amend a libel of information pending on the admiralty side of the court, as to change it to an information on the common law side of the court, for the purpose of adapting it to the place of seizure.

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The foregoing decisions relative to amendments were made in cases instituted on the admiralty side of the district court. Whether their doctrines are applicable, without qualification, to exchequer informations is a point that has not yet, as I am aware, been in terms decided. I may be permitted, however, to suggest a doubt whether there is any just foundation for a distinction in this respect between the cases.

It is true, that, in the cases above cited, the comprehensive power in question is generally claimed and vindicated by reference to the established usages of admiralty courts. But by the judiciary act of 1789, the courts of the United States are expressly empowered, at any time, to permit the parties "to amend any defect in the process or pleadings, upon such conditions as the said courts respectively shall, in their discretion, and by their rules, prescribe."[1] The authority conferred by this enactment is certainly very comprehensive, and such as would seem to leave little room to question the power of the court to establish uniformity where discrepancy would be strikingly incongruous. [See an *Anonymous case*, 1 Gallis., 22.] It must not be supposed, however, that all amendments that may be asked for are to be granted of course. The power in question is understood to be a discretionary power, to the exercise of which the court may annex such terms and conditions as justice appears to require or may decline to exert it at all in extraordinary cases, when its exercise would be productive of injustice. Thus, in the case of *The Harmony* (1 Gallis, 123), it was decided, that, although the fact that the statute of limitations would otherwise run against a cause of action *then before the court*, had been held to be a good reason for allowing an amendment *as to such cause of action*,

[1] Ch. 20, § 32 : 1 Stat. at Large, 73.

yet that the reverse of this rule ought to prevail with regard to an amendment introductive of a new substantive cause of action. And in several cases, in that, for example, of *The Hoppet* v. *The United States* (7 Cranch, 389), in which the decree of the circuit court was reversed on account of the insufficiency of the libel, the cause was *not* remanded with directions to allow an amendment. And although the adjudications above cited, and such others as I have met with relative to the subject, pertain exclusively to the libel of information, doubtless the liberality they inculcate in allowing amendments is to be extended in an equal degree to the pleadings on the part of the claimant.

SECTION III.

OF THE PROCESS, AND DUTY OF THE MARSHAL THEREON.

Upon the filing of the libel or information, the clerk issues a writ to the marshal, commanding him to attach the property seized, and to give notice to all persons claiming it, or knowing or having any thing to say why it should not be condemned pursuant to the prayer of the libel or information, to appear before the district court on a day and at a place therein named, and interpose their claim. It is, therefore, an attachment and citation or monition combined. It is usually and most properly denominated a warrant of arrest, but is also sometimes called a monition. The form of it is given in the Appendix. On receiving it, it is the duty of the marshal to arrest the property seized by taking it into his custody. He is henceforth chargeable with its safe keeping, and may remove it or not at his discretion, and either retain it in his own possession, or put it in charge of an agent or keeper appointed by him for the purpose.

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The next duty of the marshal is to give the required notice; a duty enjoined and regulated by the following clause in the 89th section of the collection act of 1790: "All ships or vessels, goods, wares or merchandise, which shall become forfeited in virtue of this act, shall be seized, libeled and prosecuted, as aforesaid, in the proper court having cognizance thereof; which court shall cause fourteen days' notice to be given of such seizure and libel, by causing the substance of such libel, with the order of the court thereon, setting forth the time and place appointed for trial, to be inserted in some newspaper published near the place of seizure, and also by posting up the same in the most public manner, for the space of fourteen days, at or near the place of trial; for which advertisement a sum not exceeding ten dollars shall be paid."[1] Unless there be some rule of the court prescribing a different practice, the warrant of arrest may be tested and made returnable on any day in term. But, in order to enable the marshal to comply with the requirement of the act, there must of course be at least fourteen days between the time of issuing the process and the return of it. The notice is drawn up by the clerk, and delivered or sent to the marshal along with the warrant. Its form, and the mode of serving it, or rather of giving it publicity, are sufficiently indicated in the provision of the act above cited.

The proper form of the return of the marshal, when the process has been executed, is given in the appendix.

[1] Ch. 22: 1 Stat. at Large, 695. By the act of February 26, 1853, ch. 80, the fees of printers in all judicial proceedings are fixed at forty cents per folio of a hundred words, for the first insertion, and twenty cents for each subsequent insertion. 10 Stat. at Large, 168. See appendix.

SECTION IV.

OF CONDEMNATION BY DEFAULT.

The 89th section of the act above referred to further provides that "proclamation shall be made in such manner as the court shall direct; and, if no person shall appear and claim any such ship or vessel, goods, wares or merchandise, and give bond to defend the prosecution thereof, and to respond the costs, in case he shall not support his claim, the court shall proceed to hear and determine the cause according to law."

The practice under this provision, in the district courts of New York, is this: On the return day of the warrant of arrest, if it is returned by the marshal executed, or on some subsequent day of the term, the district attorney reads the libel or information, or so much thereof as is necessary to show what property it is that he is proceeding against, by whom the seizure was made, and the grounds of the seizure. He thereupon moves that the usual proclamation be made; and the crier accordingly makes one proclamation to the purport, that, if any one can aught say why the property mentioned in the libel or information should not be condemned as forfeited to the United States, he may come forth and shall be heard. If no claimant appears, the district attorney moves for a decree of condemnation, and that the property be sold at a designated place; and it is so decreed by the court of course, without further inquiry.

SECTION V.

OF THE BOND REQUIRED BY LAW OF THE CLAIMANT, ON THE DELIVERY TO HIM OF THE PROPERTY SEIZED.

As a considerable period, more or less extended, generally elapses between the seizure and the final decision of the courts upon the case, as in some

PART 3. instances the property may be of a perishable nature, and in others it may be of importance to the owner to have the use and disposition of it in the mean time, and as the care and custody of it by the marshal occasions expense, congress has wisely provided for the delivery of it to the owner, *pendente lite*, if he chooses to make an application for this purpose, and offers sufficient security to pay the value of it in the event of its condemnation.

The clause in the 89th section of the collection act, by which alone, until recently, this proceeding was regulated, is as follows:

"Upon the prayer of any claimant to the court, that any ship or any part thereof should be delivered to such claimant, it shall be lawful for the court to appoint three proper persons to appraise such ship or vessel, goods, wares or merchandise, who shall be sworn in open court, for the faithful discharge of their duty; and such appraisement shall be made at the expense of the party on whose prayer it is granted; and, on the return of such appraisement, if the claimant shall, with one or more sureties, to be approved by the court, execute a bond[1] in the usual form, to the United States, for the payment of a sum equal to the sum at which the ship or vessel, goods, wares or merchandise, so

[1] In the case of the *Alligator* (1 Gallis., 148), and in several other cases, Mr. Justice STORY speaks of the right of the courts to exact, on the delivery of property, an admiralty *stipulation*, instead of a bond, in cases of municipal seizure, where the statute does not otherwise provide, and expresses a preference for the stipulation. But I am not aware that he has anywhere intimated an opinion that this latter form of security could properly be required in a case of seizure under the collection act of 1799. For all such cases, the 89th section of the act, as we have seen, expressly directs that a bond shall be taken. The term *bond* has a familiar and well-defined signification in law, and always imports an instrument under seal, which the stipulation is not.

But, independently of this statute designation, no one will suppose that an admiralty stipulation would be a proper form of security in cases of seizure prosecuted on the common law side of the court; and to exact different forms of security, according to the place of seizure, would only create unnecessary complexity and embarrassment.

prayed to be delivered, are appraised, and, moreover, produce a certificate from the collector of the district wherein such trial is had, and of the naval officer thereof, if any there be, that the duties on the goods, wares and merchandise, or tonnage duty on the ship or vessel, so claimed, have been paid or secured, in like manner as if the goods, wares or merchandise, ship or vessel, had been legally entered, the court shall, by rule, order such ship or vessel, goods, wares or merchandise, to be delivered to the said claimant; and the said bond shall be lodged with the proper officer of the court, and, if judgment shall pass in favor of the claimant the court shall cause the said bond to be canceled; but if judgment shall pass against the claimant as to the whole or any part of the said ship or vessel, goods, wares or merchandise, and the claimant shall not, within twenty days thereafter, pay into the court, or to the proper officer thereof, the amount of the appraised value of such ship or vessel, goods, wares or merchandise, so condemned, with costs, judgment shall and may be granted upon the bond, on motion in open court, without further delay."

It will be observed that nearly all the steps here prescribed are required to be taken in court. The application must be made to the court; the appraisers must be appointed by the court, and they must be sworn in court; the sureties in the bond are to be approved by the court, and, lastly, the order of delivery must be made by the court. It will be readily seen that the proceedings thus conducted, especially in large districts, comprising large and widely separated collection districts (like the northern district of New York, for example), must be so dilatory as in a great measure to defeat the design of the act. To remedy this evil the act of April 5, 1832, was passed. It is by this act enacted—

"That in any cause of admiralty jurisdiction, or other cause of seizure, depending in any court of the United States, any judge of the said court, in vacation, shall have the same

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power and authority to order any vessel or cargo, or other property, to be delivered to the claimants upon bail or bond, under the statute, as the case may be, or to be sold when necessary, as the said court now has, in term time, and to appoint appraisers, and to execute every other incidental power, necessary to the complete execution of the authority herein granted; and the said recognizance of bail or bond, under such order, may be executed before the clerk, upon the parties producing the certificate of the collector of the district of the sufficiency of the security offered; and the same proceedings shall be had in case of said order of delivery or sale as are now had in like cases when ordered in term time: *Provided*, that upon every such application, either for an order of delivery or of sale, the collector and attorney of the district shall have reasonable notice in cases of the United States, and the party or counsel in all other cases."[1]

It has been supposed, in the northern district of New York, that the clause above quoted from the collection act of 1799, considering its obvious policy and general design, was to be construed as mandatory upon the courts, so as to render it obligatory on them to order the delivery of property seized to the lawful claimant, upon his fully complying with the prescribed conditions. But I perceive that Mr. Justice STORY does not so understand it, but is of opinion that the courts may lawfully exercise a sound discretion in deciding whether they will appoint appraisers or not. *The Brig Struggle*, 1 Gallis., 476.

The directions prescribed by the legislative provisions above quoted, in relation to the delivery of property seized, are so full and exact as to leave little room for much substantial diversity of practice in the several districts in carrying them into effect; and it is presumed that no such diversity in fact exists. By the rules of the district court for the

[1] Ch. 66: 4 Stat. at Large, 503.

southern district of New York, it is provided that, in case of seizure of property in behalf of the United States, an appraisement, for the purpose of bonding the same, may be held by any party in interest, on giving one day's previous notice of motion before the court or the judge, in vacation, for the appointment of appraisers; and, if the parties and their proctors and the district attorney are present in court, such motion may be made *instanter* after seizure, without previous notice.

By another rule [the 66th] it is directed that appraisers, before executing their trust, shall be sworn or affirmed to its faithful discharge before the clerk or his deputy (who, the rule declares, are thereby appointed commissioners for the qualification of appraisers), and shall give one day's previous notice, &c. The 89th section of that act of 1799, however, directs that the appraisers shall be sworn "in open court," and the act of 1832 makes no other alteration in this respect, except to empower the *judge* to act *in vacation*. By the 67th rule the appraisers are allowed three dollars a day for each day necessarily employed in making the appraisement. In the district court for the northern district of New York, the forms to be observed in executing the provisions of the two enactments in question are prescribed, with considerable particularity, by rule, and I cannot better express my apprehension of what the practice ought to be under these provisions than by referring to the rule of that court on the subject, and to the practical forms in the appendix adapted to it.[1]

When the bond is entered into before the clerk, it is made indispensable by the act of 1832, that the certificate of the proper collector, as to the sufficiency of the security offered, should be produced; this being the evidence designated by the act. And when

[1] Appendix, Rule 86.

PART 3. this course is adopted, the application to the court or the judge for the order for delivery may be made (provided all the other requirements of the law have been complied with), either before the execution of the bond (in which case the order will be conditional, that the delivery be made on the execution of the bond before the clerk according to law); or the order may be deferred until after the execution of the bond; when, on the production of a certificate from the clerk of its due execution, an absolute order will be made.

It will be observed that the regulations prescribed by the 89th section of the collection act of 1799 are, by the terms of this section, restricted to "ships or vessels, goods, wares or merchandise, which shall become forfeited in virtue of this act." Most, if not all, of the subsequent acts creating forfeitures, however, contain provisions that the forfeitures which shall accrue under them may be enforced "in the manner" prescribed by the collection act. To what precise extent the directions contained in the 89th section are to be considered as adopted by this general form of reference, so as to render them compulsory in cases of seizure in virtue of the acts containing such reference, is a question which may admit of doubt. In the case of *The Struggle* (1 Gallis., 476), which arose under the non-importation acts of 1809 and 1811, and in which the vessel had been delivered on bond to the claimant, the court were of opinion that the bond was not to be considered as having been taken under the 89th section of the collection act. "I do not," said Mr. Justice STORY, "consider the present case as governed by any statute provision; I have never considered the 89th section of the act of the 2d of March, 1799, as reaching beyond cases within the purview of that act. Though the acts on which this information is founded refer

to that act as to the mode of prosecution, it does not follow that all the interlocutory proceedings of the court are to be governed by it." The bond was, however, held to be valid nevertheless, according to the doctrine of the case of *The Alligator* in the same court. 1 Gallis., 148. In that case, the vessel had been delivered on bond, and afterward condemned by the district court; and, on the affirmance of the decree of condemnation in the circuit court, the district attorney moved for judgment and execution on the bond.

The motion was opposed on the ground that, as the seizure was not made under the collection act of 1799, the provisions of the 89th section of that act were inapplicable to the case; that the taking of the bond and the delivery of the property were therefore without authority, and that the court had no power to grant the summary judgment prayed for. But the court held that it was immaterial whether there was any statute which authorized the delivery or not. The cause, it was observed, was a civil cause of admiralty and maritime jurisdiction, and nothing could be better settled than that the admiralty may take a *fidejussory* caution or stipulation in cases *in rem*, and may, in a summary manner, award judgment and execution thereon. The district court, possessing this jurisdiction, and being fully authorized to adopt the process and modes of proceeding of the admiralty, had an undoubted right to deliver the property on bail, and to enforce a conformity to the terms of the bailment. In what manner this security was taken, whether by a sealed instrument, or by a stipulation in the nature of a recognizance, could not affect the jurisdiction of the court. In all cases of this nature, the security, in whatever form, is taken by order of the court upon the voluntary application of the party, and therefore is *apud acta*.

PART 3. Having jurisdiction over the principal cause, the court must possess jurisdiction over all the incidents, and may, by monition, attachment or execution, enforce its decree against all parties to the proceedings. The motion of the district attorney was accordingly granted. In the case of *The United States* v. *Woolen Cloth* (Paine's C. C. Rep., 435); and in the case of *Neilson et al.* v. *The United States* (Peters's Circuit Court Rep., 235), this case was cited by the court with unqualified approbation, and its principles applied. The case in Peters was a prosecution on the admiralty side of the court, and was, therefore, a fit case for the application of these principles. But their applicability to the case in Paine seems to me less clear. That was a land seizure, cognizable on the exchequer or common law side of the court. It seems to have been assumed by the court, apparently without hesitation, that the case was not embraced by the 89th section of the collection act. The reason why it was supposed not to be within the provisions of this section is not explicitly stated, but, from the language of the court, I infer that these provisions were understood to be applicable only to seizures cognizable on the admiralty side of the court. But the section embraces, in express terms, *all* forfeitures accruing under that act.

It is true it directs that all vessels, &c., which shall become forfeited in virtue of that act, "shall be seized, *libeled* and prosecuted," &c. But, though the appellation "libel" does not properly belong to the information *in rem* on the exchequer side of the court, the use of the term in this section does not appear to me sufficient to exclude the otherwise irresistible conclusion that it was the intention of congress to prescribe rules for the prosecution of all seizures, made under the act, without regard to the

place of seizure. At the early day, when the act was passed, it is not improbable that the distinction, now so well understood, between land and water seizures, was overlooked.

Indeed, in that very case the proceeding had originally been instituted on the admiralty side of the court, under the supposition that no such distinction existed but that all seizures were of admiralty jurisdiction. If, as from the report I can see no reason to doubt, it was within the 89th section, then, by the express terms of this section, a judgment might have been summarily granted on the bond (after twenty days), and upon such judgment an *execution* might have been issued as upon other judgments. But, admitting the case not to have been within this section, although the bond might have been obligatory as an instrument voluntarily executed on good consideration and for a lawful purpose, and, as such, might have been enforced by an action of debt, yet, the case being one of common law jurisdiction, it does not appear to me that the admiralty powers of the court could properly be resorted to for a summary remedy unknown to the common law.

It would seem very clear, from the language of the 89th section of the collection act of 1799, that it was intended that no judgment should be granted on the bond for value, until after the lapse of twenty days after the decree or judgment of condemnation; and such was the impression of Mr. Justice STORY in the case of *McLellan* v. *The United States* (1 Gallis., 227, 229). But in the case of *Neilson* v. *The United States* (Peters's C. C. Rep., 240), Mr Justice WASHINGTON was clearly of opinion that it was only in the district court that the obligors could claim this delay, and he therefore granted a judgment *instanter*, on

PART 3. the affirmance of a decree of condemnation on appeal from the district court.

It will be observed, too, that the judgment is to "be granted on motion *in open court.*" Should the session of the court at which the condemnation takes place be terminated within less than twenty days thereafter it would seem to follow therefore, that no judgment could be granted on the bond until the next term. See, as to this point, the case of *McLellan* v. *The United States*, 1 Gallis., 227, 229.

It will be further observed that the bond is required to be "for the payment of a sum *equal to the sum at which the ship or vessel, &c., are appraised;*" while by a subsequent clause it is declared, that, if judgment shall pass against the claimant, and he "shall not, within twenty days thereafter, pay into court the appraised value of such ship or vessel, &c., *with costs*, judgment shall and may be granted," &c. While, therefore, the condition of the bond is not required to contain any stipulation for the payment of costs, the plaintiff is, nevertheless, required to pay costs, in addition to the appraised value, as the condition on which he and his sureties are to be exonerated. It is of some importance, therefore, to ascertain *what costs* are here intended. The claim of the United States against the offending property is in the nature of a lien upon it to the amount of its value; and the object of the proceeding is its confiscation. The legislative provisions by which forfeitures of this nature are imposed, declare a simple forfeiture. In some instances a pecuniary penalty, to be recovered of the offender, is superadded, but I am not aware of any instance in which a forfeiture *in rem*, *with costs* of prosecution is inflicted; and when no claimant appears, a simple decree, or judgment of condemnation, is pronounced against the *res*, and the costs are paid out of the proceeds of

the sale of it, before distribution, in accordance with the express provisions of the 91st section of the collection act of 1799. These views of the subject seem strongly to favor the inference that no other than the additional costs occasioned by the defense, including the delivery, were intended to be exacted; and to this extent only were the claimants held responsible by Mr. Justice STORY, in the case of *The Sally* (1 Gallis., 397, 414); which, though it did not arise under the collection act of 1799, is not, it is supposed, distinguishable from such a case in this respect.

By a rule of the district court of the southern district of New York, no vessels, goods, wares or merchandise in the custody of the marshal, shall be released from detention upon appraisement and security, until the costs and charges of the officers of the court, so far as the same shall have accrued, shall first be paid into court by the party at whose instance the appraisement shall take place, to abide the decision of the court in respect to such costs. This rule seems to imply an assumption that the court possesses a discretionary power to subject the claimant to costs when the decision is in his favor. In cases falling within the general inherent jurisdiction of the court as a court of admiralty, and when no statute interferes to prevent it, a discretionary power with respect to costs may unquestionably be exercised. But the admiralty jurisdiction of the district courts over revenue seizures is an extraordinary jurisdiction, conferred and regulated by statute. The statute requires, when the decision on the merits is in favor of the claimant, that his property shall forthwith be restored, and that the bond for the appraised value shall be canceled; and it then proceeds to declare that if the court shall certify that there was reasonable cause of seizure, the claimant

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shall not be entitled to costs. I am not aware of any principle, therefore, which warrants the application of the above mentioned rule to cases of this description. The statute, however, requires that the *appraisement* shall be made at the expense of the party on whose prayer it is granted.

In each of the districts of New York the practice was early adopted, and still prevails, of permitting the value of the property seized to be agreed on by the collector and district attorney, in behalf of the United States and the claimant, and of receiving a written certificate of such agreement, signed by them, instead of an actual appraisement.[1] It is a highly convenient and beneficial practice, and, though not expressly provided for in terms by the acts of congress on this subject, it is warranted nevertheless by their spirit.[2]

[1] See Appendix, Rule 86, D. C.

[2] For the purpose of guarding against possible misapprehensions it may not be amiss to advert to the act of March 3, 1847, (ch. 55, 9 Stat. at Large, 181), "An act for the reduction of costs and expenses of proceedings in admiralty against ships and vessels," and providing, "that, in any case brought in the courts of the United States exercising jurisdiction in admiralty, where a warrant of arrest or other process *in rem* shall be issued, it shall be the duty of the marshal to stay the execution of such process, or to discharge the property arrested, if the same has been levied, on receiving from the claimant of the same a bond or stipulation in double the amount claimed by the libelant, with sufficient surety, to be approved," &c. The language of this act, "in *any* case brought," &c., and especially the language of its title, is sufficiently general to comprise municipal seizures on navigable waters. But such seizures are made to enforce the total forfeiture of the property for the violation of penal laws—whereas a careful examination of this act will render it apparent that it extends only to private suits *in rem* to enforce the payment of personal demands against the owners of the property, as, for example, suits for seamen's wages.

SECTION VI.

OF THE SALE OF PERISHABLE PROPERTY, PENDENTE LITE.

One of the powers exercised by courts of admiralty in proceedings *in rem* is that of decreeing a sale, *pendente lite*, of the thing proceeded against when, from its nature or condition, it is likely to become worthless or of greatly diminished value if kept under arrest until the termination of the suit. As an incident to the admiralty jurisdiction conferred on the courts of the United States over seizures made on the high seas, or on water navigable from the sea, by vessels of ten or more tons burden, it may doubtless be exercised in these cases, independently of any specific legislative direction.[1] But in cases of seizure of the opposite description, which we have seen are of common law jurisdiction, it is not supposed that the admiralty powers of the courts can be rightfully invoked for this purpose.

This power is, however, understood to belong also to the English court of exchequer, and it is moreover expressly recognized, and its exercise is regulated by the act recited under the last preceding head of April 5th, 1832, not only in cases "of admiralty and maritime jurisdiction," but also in "*any other case of seizure.*"[1] It is believed, therefore, that it may safely be considered as pertaining alike to both descriptions of seizure, and it is apprehended that no distinction has hitherto been made between them by the courts in this respect.

There is one description of property which is not, strictly speaking, perishable; but to which, nevertheless, the reason for directing the sale of perishable property is strongly applicable. I refer to domestic

[1] See, also, Rule 10 of the rules of practice in admiralty, prescribed by the supreme court, expressly affirming this power. Appendix.

[1] Ch. 66: 4 Stat. at Large, 503.

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animals, which are frequently the subject of seizure on our inland frontier. It often happens, especially when the proceedings are protracted by the interposition of a claim, that the expense of keeping and feeding such animals until the final decision of the case nearly equals, and it sometimes exceeds, their full value.

Whether the power in question extends to this species of cases is a question upon which I am not aware that any judicial decision has yet been made. But it would seem difficult to distinguish them in principle from those in which the power is indisputable.

By the act last above cited, the application for an order of sale may be made, as we have seen, as well to the judge in vacation, as to the court in session. It may be made, therefore, at any time after the service of the warrant of arrest. The petition setting forth the facts on which the application is founded ought to be verified by oath, and a copy of it, with notice of the motion, served on the opposite party, his proctor or attorney. See Appendix, Rule 87, D. C., N. D. N. Y.

Upon the entry of the order of sale, a writ is issued by the clerk to the marshal, commanding him to sell the property, and pay the proceeds into court to abide the final decision of the cause. See Appendix, "Practical Forms."

A sale, *pendente lite*, being a proceeding adopted for the benefit of all parties, the costs of the proceeding, including the commissions of the marshal, ought, unless in very special cases, to be paid by the party to whom the property is ultimately awarded. In other words, they are to be paid out of the fund produced by the sale. *The Sally*, 1 Gallis., 401, 415.

Contrary to the doctrine laid down by the court in the early case of *Jennings* v. *Carson* (4 Cranch, 2),

it is now well settled that by an appeal from the sentence of a district court to the circuit court in a suit *in rem*, the property (or, if it has been sold, the proceeds of it) follows the cause into the circuit court. After appeal, therefore, the district court can no longer order a sale, but 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 judgment, but sends a special mandate to the circuit court to award execution thereon. *The Collector*, 5 Wheat., 194; *The Grotius*, 1 Gallis., 503.

SECTION VII.

OF THE CLAIM AND DEFENSE, AND THE BOND FOR COSTS.

1. *Of the Claim.*

In proceeding to the consideration of the several matters falling under this head, it will be useful for the reader to keep steadily in view the nature and objects of the proceeding of which we are treating. It is strictly a prosecution against a *thing*, which has been seized as forfeited to the United States on account of some imputed illegal act in regard to it. No inquiry is instituted on the part of the government concerning the ownership of the property, and no person is called upon coercively to answer for the supposed offense; and, if no one chooses voluntarily to interpose, the judgment which follows acts directy on the thing only.

But, in accordance with obvious principles of justice, the law, as we have seen, nevertheless, requires that public notice should be given of the prosecution, to the end that the owner, whoever he is, may be apprised of the peril in which his property has been

PART 3. placed, and have an opportunity of contesting the truth of the charge against it.

It is obvious then that the claimant is an actor, and that he is entitled to come before the court in that character, only in virtue of his proprietary interest in the thing in controversy. He is therefore required to establish his right to that character, as a preliminary to his admission as a party, *ad litem*, capable of sustaining the litigation. *The United States* v. *Four hundred and twenty-two Casks of Wine*, 1 Peters, 547.

What interest in the res is sufficient.] It is not necessary that the title of the claimant should be absolute or exclusive. It is sufficient that he has some definite interest, known and recognized in law. Thus, a pawnee or mortgagee of the property, or one having any specific lien upon it, would be entitled to appear as a claimant. The claim should, however, be co-extensive only with the interest of the claimant. It is irregular, therefore, for the owner or owners of a part of the property to interpose a general claim to the whole of it. *Stratton* v. *Jarvis and Brown*, 8 Peters, 4. The master of a vessel may appear as claimant in behalf of the owners of the vessel or cargo, at a place remote from that of their residence, but not in or near the place where they reside. *Spear, claimant, &c.* v. *Place*, 11 Howard, 522.

By whom the claim is to be made.] When the circumstances of the case admit of it, the claim should be preferred by the owner in person. *The Adelaide*, 9 Cranch, 214; *The Sally*, 1 Gallis., 401. When the principal is without the country, or resides at a great distance from the court, the claim may be made through the intervention of an agent. Id. Such are the rules laid down by the court in the cases here referred to, and there can be no doubt

of the solidity of the grounds on which they rest. But in truth, in both of them as well as in other reported cases, a claim by an agent was received and treated as regular, although the claimant resided at no remote distance from the court. The master of a vessel, which, or the cargo of which, has been seized, may claim in behalf of absent owners, though he has no personal interest in the property. And a consul, duly recognized as such by our government, has a right, in virtue of his official character, to interpose a claim in behalf of the absent citizens or subjects of the country whose commercial interests he represents. But without specific authority for that purpose, he will not be permitted to receive actual restitution of the property in case of its acquittal, but it will be retained to be delivered over to the owner when he applies for it. *The Bello Corrunes*, 6 Wheat., 152; *The London Packet*, 1 Mason, 14; *The Antelope*, 10 Wheat., 66.

How put in.] The first step to be taken by the owner of property seized, when he intends to contest the forfeiture, is to engage the services of a practitioner of the court in which the prosecution is pending, who will at once apply to the clerk of the court for a copy of the libel or information.[1]

It is not usual to file the claim before the return day of the process. But this is the time for preferring it which seems to be contemplated by the 89th section of the collection act of 1799; and as it is liable to preliminary objections, and the court may be called on to decide whether it is to be received, a good reason exists for deferring it till this time, admitting that it could regularly be made before. There is,

[1] At this stage of the proceeding the right accrues, as we have seen, to apply for a delivery of the property on bond; and it is a question for the decision of the claimant, under the advice of his proctor or attorney, whether he will exercise this right, and if so, at what time.

PART 3. however, a rule in the district court for the southern district of New York, expressly permitting a claim to be filed at any time after the service of the process, and, in the northern district, it is sometimes done in vacation before the return of the process by arrangement with the district attorney. The rule of the court of the southern district is, doubtless, designed for the beneficial purpose of enabling the claimant to obtain an earlier decision upon his rights, by placing the cause in a situation to be heard and determined at the next term after the seizure. Still, however, it would remain optional with the district attorney to bring the cause to trial at that term or not; and if, in any case, he should be willing to do so, an arrangement for this purpose might be made with him out of court, at the instance of the proctor or attorney for the claimant.

The claim, in itself, is nothing more than a direct assertion, verified by oath, of the proprietary interest of the claimant in the property under prosecution. The oath, when made by the claimant in person, ought to be direct and positive: when made by another acting in his behalf, it must at least affirm the belief of such agent in the verity of the claim. *The United States* v. *Four hundred and twenty-four Casks of Wine*, 1 Peters, 547.

Objections to the claim.] If the interest in the *res* set up by the claimant be insufficient to entitle him to assume that character; or if he refuse or omit to make the required affidavit in support of his claim, it is subject to preliminary objection and will be rejected on these grounds. *The United States* v. *Four hundred and twenty-four Casks of Wine*, 1 Peters, 547. So "if the claim be made through the intervention of an agent, if there is ground for suspicion, he may be required to produce and prove his authority, before he can be admitted to put in the

claim. If this is not done it furnishes matter of exception, and may be insisted upon by the adverse party, for the dismissal of the claim." Id. Objections of this nature may properly be made orally at the time of the presentation of the claim. "If the claim be admitted upon this preliminary proof, it is still open to contestation, and, by a suitable exceptive allegation in the admiralty, or, by a correspondent plea in the nature of a plea in abatement to the person of the claimant, in the exchequer, the facts of proprietary interest, sufficient to support the claim, may be put in contestation, and formally decided. It is in this stage of the proceedings, and in this only, that the question of the claimant's right is generally open for discussion. If the claim is admitted without objection, and allegations or pleadings to the merits are subsequently put in, it is a waiver of the preliminary inquiry, and an admission that the party is rightly in court, and capable of contesting the merits. If, indeed, it should afterward appear, upon the trial, even after the merits have been disposed of in favor of the claimant, that the claimant had, in reality, no title to the property, but that the same was the property of a third person, who was not represented by the claimant, or had an adverse interest, or whose rights had been defrauded, it might still be the duty of the court to retain the property in its own custody, until the true owner might have an opportunity to interpose a claim, and receive it from the court. But such cases can rarely occur; and are applications to the discretion of the court, for the furtherance of justice." Id. The above quotations are the language (obviously well considered) of Mr. Justice STORY. His professed object was to state with clearness and precision what he conceived to be the just rules of practice touching the points embraced by his remark.

2. *Of the defense.*[1]

In connection with the claim, usually, the claimant interposes a response of some sort to the libel or information. This response is frequently united continuously with the claim; though it would undoubtedly be more formal and congruous to keep the claim and answer separate; the object of the claim being to set up a right to defend the suit, and to offer an answer to the libel or information; and that of the answer being to set forth the grounds of defense, after the claim has been admitted.

Denial. General issue.] It is very rare, in the description of actions of which we are treating, that any other defense than that of a direct denial of the charges of illegal conduct set forth in the libel or information is interposed; the only question in general being whether the acts and omissions charged have in fact been committed. In all such cases the only pertinent answer or plea is a simple denial, equivalent to the general issue in personal actions. When the libel or information alleges several distinct offenses or causes of forfeiture, the more formal

[1] There is, as we have seen, a general rule prescribed by the supreme court regulating the structure of the libel, and of the libel of information, in cases of seizure. Respecting the form of the answer, there is no such rule, and it is accordingly governed by rules and practice of the several district courts. The 27th, as amended by the 49th, of the rules of practice in admiralty, dictates the form of the answer to the libel *in causes of civil and maritime jurisdiction*, whether *in rem* or *in personam*, when the sum in dispute exceeds fifty dollars. The answer is to be "on oath or solemn affirmation;" and "shall be full and explicit and distinct to each separate article and separate allegation in the libel, in the same order as numbered in the libel, and shall also answer in like manner each interrogatory propounded at the close of the libel." But it is clear that this rule is but the *correlative* of rule 23, prescribing the structure of "all libels in *instance causes, civil and maritime*," from which "informations and libels of information upon seizure" are, by the 22d rule, *carefully distinguished.*

and exact practice would be to traverse each one of them. But, by a rule of the district court of the southern district of New York, it is provided, that, instead of a traverse of each separate cause of forfeiture, the claimant may plead, as a general issue, "that the several goods, in the information mentioned, did not, nor did any part thereof, become forfeited in manner and form as in the information in that behalf alleged. This rule is of early date, and preceded the body of rules, prescribed by the supreme court, mentioned in the last note. But it is understood to be still adhered to in practice; and, in 1869, a rule was made by the district court of the northern district of New York (amendatory of rule 23 of the rules of that court regulating proceedings in civil causes *at common law*), to substantially the same effect, though even more comprehensive. See appendix, rule 23 of rules district court of the northern district of New York.

The rule in both districts, however, is merely *permissive*, and the form of answer prscribed by the 27th of the rules of the supreme court, in causes civil and maritime, is recommended by its superior precision and its conformity to the science of pleading. When the proceeding is on the exchequer side of the court, the plea in the above mentioned form, or other form of the like import, ought to conclude to the country; and, in that case, the issue is completed by adding the *similiter*.[1]

[1] It having been intimated to me in general terms that the judge of the district court of the United States for the eastern district of Missouri differed from me in the interpretation of rule 27 of the rules prescribed by the supreme court, regulating admiralty procedure, I carefully reconsidered the subject, and what I have said under this head, including the last preceding note, is the result of this reconsideration. I was not then aware that Judge Treat had pronounced any judicial opinion upon the subject, but a friend has since furnished me with No. 1 of vol. 3 of the *Western Jurist*, containing an elab-

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Demurrer.] The libel or information is always founded on some statute, and we have seen that it is in general sufficient to state the offense in the words of the statute; provided, however, the charge be so framed that if true the offense must necessarily have been committed. We have seen, also, that if the offense is insufficiently described, in a case on the admiralty side of the court, no decree of condemnation will be made, though the evidence is sufficient to show that a forfeiture has in fact been incurred; and upon the same principle, the court, in a proper case, would, doubtless, at the instance of the claimant, withhold a judgment of condemnation after verdict, in a case on the exchequer side of the court. But the claimant may also, if he thinks proper, insist on such sufficiency by demurrer.

orate opinion of his, in which he maintains that the 27th rule prescribing the form of the answer to "all *libels*, in causes *civil and maritime*," mentioned in rule 23, extends also to "*all informations and libels of information*" mentioned in rule 22. My answer is that already given in the last note. The scope of rule 27 is limited by its terms to that of the 23d rule, and consequently it does not comprehend the distinct class of cases designated in rule 22. That such must be the opinion also of the judges of New York districts I have already shown, for, according to Judge Treat's construction of rule 27 (the language of which he has omitted to give), they could not lawfully tolerate, much less introduce, the practice prevailing in their courts; nor need I add, that, according to the opposite interpretation, it would be equally unwarrantable in a judge to forbid this practice. His honor can see no reason for making a distinction in this respect between instance cases and cases of seizure. If in fact there were none, it would be a sufficient answer to say that the supreme court, in the exercise of a power expressly conferred by law, have seen fit to make this distinction. But, in truth, these two classes of cases differ so widely in character that their subjection to different forms of pleading infers no incongruity. It would be easy to show this, but I have already dwelt too long upon the subject. There are other criticisms, in the opinion of the learned judge, of the soundness of which he has failed to convince me, but they relate happily to matters of trivial importance, and I dismiss them with a disclaimer of all pretentions to infallibility.

Unless, however, the defect is such as really to leave him in doubt as to the ground on which the forfeiture is claimed, or one which cannot be supplied consistently with the facts likely to be proved, the great liberality exercised by the courts in allowing amendments, leaves the claimant, in general, little chance of being a gainer in the end by objecting at all.

Want of jurisdiction.] It is, as already explained, essential to the jurisdiction of the court that there should be a valid subsisting seizure at the time of the institution of the suit, and also that it should have been made either within the judicial district where the action is pending, or on the high seas and without the limits of any judicial district. In a case, therefore, in which either no effective seizure had in fact been made, or in which, after having been made, it had been abandoned, or where the seizure was made in a different district, it is in the power of the claimant to defeat the action on the ground of a want of jurisdiction in the court to hold cognizance of it. But care must be taken that the objection be not waived. The libel or information always alleges the seizure to have been made within the district or on the high seas for the purpose of making it appear that the case is within the jurisdiction of the court; but the fact or the place of seizure is not put in issue by a general denial of the alleged forfeiture. A claimant who wishes to avail himself of such an objection, must therefore put in an answer or plea, in terms denying the allegation of the fact or the place of seizure. *The Abby*, 1 Mason, 360. And if he intends to rely on a subsequent abandonment of the seizure, he ought, doubtless, to set up affirmatively the fact of such abandonment, because a seizure having once been made and followed up by a prosecution, the legal presumption would unques-

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tionably be, that it had not been abandoned. In the case of *The Abby*, above cited, Mr. Justice STORY also placed its decision upon the further ground, that a plea to the merits was an admission of the jurisdiction of the court; and he was also of opinion that applying for and receiving the property on bond, was such an acknowledgment of jurisdiction as the claimant was not at liberty to controvert. As a delivery on bond may now by a late statute be made out of court, before the return of the monition, it may be important, therefore, for the claimant to consider whether a delivery might not have the effect to deprive him of his right to contest the jurisdiction of the court.

Matter of justification or excuse.] Most of the forfeitures denounced by our laws are imposed for omitting to do some act enjoined by law. Rigorous and peremptory as they are, no forfeiture, as we have seen, can be incurred under them by *unavoidable omissions;* nor by illegal acts committed without the consent or connivance of the owner, or of some person employed or trusted by him.

But, as the proof required of the public prosecutor in the first instance is slight, cases of this nature may well arise, in which he might be able to make out a *prima facie* case of forfeiture, by proving just enough for this purpose, and omitting to give evidence of the exculpatory circumstances. In such cases it would be advisable for the claimant, in order to preclude all doubt of his right to prove his justification, to set it up by way of defense, affirmatively, in his answer or plea.

Replication.] One of the supplemental rules of the supreme court, regulating proceedings in admiralty (rule 52, 1854), directs that, "when the defendant in his answer alleges new facts, these shall be considered as denied by the libelant; and no replication,

general or special, shall be allowed. But, within such time as shall be fixed by the district court, * * * * the libelant may amend his libel so as to confess and avoid, or explain or add, to the new matter set forth in the answer; and * * * the defendant shall answer such amendments."

No care, it will be seen, was taken in framing this rule to discriminate between causes civil and maritime, and cases of seizure. It seems improbable, however, that it was intended to embrace the latter. But the 23d rule of the district court of the northern district of New York, as amended in 1869, expressly applies its provisions, with some variations, to cases of seizure. See Appendix.

Statute of limitations.][1] The rule in England appears to be that the limitations of a penal suit need not be pleaded, but may be given in evidence under the general issue. Buller's Nisi Prius, 195; Espinasse on Penal Statutes, 78. And so Mr. Justice STORY understood the law to be in the case of *Parsons* v. *Hunter*, 2 Sumner, 419, 426. Under these authorities this rule was applied in a case of seizure on the admiralty side of the court (*The United States* v. *The Black Hawk*) in the district court for the northern district of New York.

3. *Of the bond for costs.*

By the 89th section of the collection act, before the owner of property seized in virtue of that act is entitled to contest the forfeiture, he is required, as we have seen, to "give bond to defend the prosecution, and respond the costs in case he shall not support his claim." Under this provision it is understood to have been the practice of the courts of the United States to exact from the claimant a bond, with one

[1] See the commencement of this chapter.

PART 3. or more *sureties*, as the condition on which he is allowed to contest the alleged forfeiture of his property. This may not have been the case in all the districts, though I am not aware of any exception. But the act being silent as to sureties, I cannot but think it at least doubtful whether this practice is in accordance with the actual intention of the legislature. There are certainly strong reasons why no security for costs beyond the individual bond of the claimant should be required. The proceeding on the part of the United States is highly rigorous. The citizen is forcibly dispossessed of his property by a subordinate ministerial officer of the government, himself entitled to share in the forfeiture if condemnation shall follow, and, however groundless the seizure may in fact have been, if only a plausible pretext for making it can be shown, it is condemned of course, unless the owner can establish his innocence by proof on his part; and, even when he does so, he is without redress for all the loss, inconvenience and expense to which he has been subjected by the seizure and prosecution. In all this there may be nothing to complain of. But to deprive the owner of the right of being heard in his defense, and peremptorily to subject his property to confiscation without any inquiry into the validity of the grounds of seizure, unless he can furnish security for the payment of costs in the event of his failure to maintain his claim, seems to be discordant with the spirit of our civil institutions. The law lends its sanction to nothing analogous to this in controversies between private suitors, and the genius of our government is hostile to the exercise of prerogative rights. To be permitted to contest a charge of guilt and the reality of an alleged forfeiture, ought not to be regarded as a privilege, but as a right, and it is not easy to discern the justice of annexing to its exercise an oner-

ous and sometimes impossible condition. When no claimant appears, the forfeiture is treated as a mere lien on the thing, and the costs are paid out of its proceeds. The interposition of a claim no otherwise alters the case than by augmenting, in some degree, the expenses of the prosecution, and to compel the owner on this ground to bring in a third person as surety, who, aside from the promptings of his love of justice, or his benevolence, has no concern in the matter, appears to me, I confess, to savor of rapacity and oppression. Unless, therefore, congress, in assuming, as it has done, to regulate this part of the proceedings in cases of seizure, has unequivocally required the courts to exact the security in question, it ought not to be required. But the omission of any such requirements, in terms, is not the only evidence furnished by the act of the absence of any such intention.

The 89th section, after requiring the claimant to "give bond" to respond the costs, &c., immediately proceeds to prescribe the conditions on which property seized shall be delivered to the claimant, *pendente lite;* and, as we have seen, one of these conditions is, that he "shall, *with one or more sureties*, to be approved of by the court, execute a bond," &c. The act of 1799, containing these provisions, was a substitute for the collection act of 1790, the 67th section of which contains substantially the same provisions, and makes precisely the same distinction between the bond for costs and that for the appraised value. The propriety and necessity of requiring sureties in the latter case must be obvious to every one. There is, therefore, no want of sufficient reasons for this distinction, and the presumption is strong that it was intentional. There are also a multitude of other instances in which laws relating to judicial and other proceedings, expressly require

PART 3.

bonds with sureties to be given, insomuch that it it may safely be affirmed to be the uniform practice of congress, whenever it is intended to exact sureties, to declare such intention in terms.

The bond is usually offered and filed simultaneously with the claim, and it has been usual in the New York districts to require it to be in the penalty of two hundred and fifty dollars.[1]

[1] The following supplemental judgment pronounced by Mr. Justice STORY in the case of *The schooner Sally and cargo*, which had been captured during the last war by an American privateer for an alleged trading with the enemy, and condemned as lawful prize, cannot fail to be acceptable to the reader.

"The principal questions on the merits having now been disposed of, an application has been made to the court respecting the taxation of costs and expenses against the claimants. The bill presented to the courts is as follows, viz.:

Attorney's fee,	$25 00
Depositions.	
F. Slocumb,	6 00
[Here follow the names of four other witnesses.]	
Survey and Appraisement.	
Surveyor's fees,	24 00
Marshal's do	9 50
Clerk's do	4 00
Marshal's fees and charges,	75 94
Clerk's fees, entry, filing, recording, &c.,	25 00
Circuit Court, May, 1813.	
Copies,	35 00
Attorney's fee,	25 00
Filing, recording, &c.,	25 00
John Rice's bill,	82 67
	$350 11

The items objected to by the claimants are: 1. The Clerk's fees for recording the proceedings, and for the copy thereof transmitted to this court. 2. The marshal and clerk's fees on the sale under a perishable monition. And 3. Mr. Rice's bill for dockage and custody.

It is the unquestionable rule of the court, that the claimants shall not be liable for expenses, which would have been incurred independently of the interposition of their claim; but for all charges and

SECTION VIII.

EVIDENCE.

The usual mode of taking proofs in the British courts of admiralty is by deposition on interrogatories before a standing examiner, or a commissioner under a *dedimus potestatem;* but, by the judiciary act, it is provided, that "the mode of proof by oral testimony, and the examination of witnesses in open court, shall be the same in all the courts of the United States, as well in the trial of causes in equity

expenses, which grow out of their claim, they must be held responsible. On this ground the commissioners' fees for the deposition, taken under the standing interrogatories, though not objected to, must be deducted; but the expenses of the depositions of Slocumb, and others, which were admissible on the order for further proof, are properly chargeable. The survey and appraisement, having been made at the instance of the claimants, fall under the same consideration.

The objection to the clerk's fees for recording, &c., rests upon the ground that he is not obliged to record all the proceedings in the circuit court; and, at all events, is not obliged to record the evidence. But, however true the latter position may be under our practice, as to cases on the instance side of the admiralty (on which I give no opinion), I am well satisfied that the clerk is bound to record the whole proceedings in this court in prize causes, as the evidence is always in writing, and inseparable from the allegations of the parties. * * * *

As to the fees of the clerk for a copy of the proceedings, it is a mere question of fact whether the sum claimed by the clerk is to be allowed or not. The statute of 1st March, 1793, ch. 20, has prescribed the fees of the clerk for services of this nature, and the court is bound to apply the regulations. It will be easy for the counsel to ascertain the amount which will become thus due to the clerk, and that sum and no more must be allowed.

As to the marshal's and clerk's fees on the sales of the cargo by order of the court, I think, that, in general, it must be considered a charge on the property itself. It is a proceeding adopted for the benefit of all parties, and, unless in very special cases, should be paid by the party to whom the property is ultimately awarded. Nothing has been presented to the court to distinguish the present case from the general rule.

As to the dockage of the schooner, I think it must be allowed against the claimants, from the time of the interposition of their claim to the time of the delivery on bail. This expense was necessarily incurred for the preservation of the vessel during the litigation of their claim;

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and of admiralty jurisdiction as of actions at common law."[1] Having already, in a preceding chapter, treated of the subject of evidence, and, what is there stated, being in general applicable to the description of actions now under consideration, little remains requiring notice in this place. In cases of seizure, whether prosecuted on the admiralty or exchequer side of the court, witnesses are summoned by the like process, and are subject to the same penalties for non-attendance; the same description of documentary evidence are admissible, and the production of books and other writings may be required under the like conditions and with the like effect; depositions *de bene esse*, or under a commission, or in *perpetuam rei testimoniam*, may be taken and used in like manner as in ordinary actions at law.

The section of the judiciary act, above referred to, which authorizes and regulates the taking of depositions *de bene esse*, contains also the following provision, applicable especially to this description of suits, viz., that—

and they have not, in my judgment, entitled themselves to be relieved from the burden. Cases may occur in which it would be highly proper to make this charge on the property.

With respect to the charge of Mr. Rice for custody, the allowance of it depends altogether upon the facts. If a person was, in fact, employed to take care of the schooner during the whole time, a proper compensation for his services ought to be allowed. If no person was employed, I should not, as at present advised, incline to grant a compensation for ideal custody. There should be an actual superintendence over the property, to entitle the party to a beneficial recompense, and, even in cases of actual custody, if there be gross negligence or fraud, I should have no difficulty in refusing the party any compensation. Let the captors show by affidavit whether there has been any actual custody, and what would be a reasonable compensation. If actual custody, with competent diligence, be shown, I shall allow the item against the claimants, as this is not a case entitling them to a very favorable consideration in this court."

[1] Act of 24th Sept., 1789, ch. 20, § 30: 1 Stat. at Large, 73.

"In causes of admiralty and maritime jurisdiction, or other causes of seizure, when a libel shall be filed, in which an adverse party is not named, and depositions of persons circumstanced as aforesaid shall be taken before a claim be put in, the like notification as aforesaid shall be given to the person having the agency or possession of the property libeled, at the time of the capture or seizure of the same, if known to the libelant."

The language of this provision implies that depositions may be taken in behalf of the government, in these cases, before the cause is at issue. Indeed, according to the terms in which the right to take such depositions is conferred, authorizing them to be taken "in any civil cause *depending* in any court of the United States," it seems to have been intended generally to give to each party the right of taking them immediately upon the institution of the suit. But, inasmuch as there is no personal party defendant in suits *in rem* until after the claimant has appeared and been admitted in that character, it is presumed that this right cannot be exercised by the owner of property seized until after the actual interposition of his claim.

There is another mode of obtaining the testimony of witnesses resident in a foreign country, which is peculiar to admiralty courts; and that is by invoking the instrumentality, for this purpose, of the admiralty courts of the country within whose jurisdiction the witnesses are. This method is resorted to when it is foreseen or apprehended that an attempt to have the desired evidence taken under a commission will be rendered abortive by the jealous interference of the authorities of such foreign country. The request to the foreign court is made by what is denominated *letters rogatory*. This mode of obtaining proofs in admiralty cases is said to be recognized by all nations where courts of admiralty

PART 3.

are established; and as all are interested in maintaining it, great reliance may be placed upon its certainty and efficiency. Interrogatories accompany the letters rogatory. The depositions, when taken, are recorded in the registry of the foreign court, and authenticated copies of them are transmitted to the court whence the letters rogatory emanated; and these, according to the established usage of courts of admiralty, are admissible as evidence.[1]

When, in compliance with letters rogatory, addressed by a court of a foreign country to a circuit court of the United States, a commissioner is designated by the circuit court to take the required testimony, such commissioner is empowered "to compel the witnesses to appear and depose in the same manner as to appear and testify in court." Act of March 2, 1855, ch. 140: 10 Stat. at Large, 630.

With a view, it may be supposed, of securing evidence of frauds on the revenue, it is enjoined by law on the district judge of any district, whenever it shall be made satisfactory to appear, by affidavit, that any such fraud has been committed or attempted, forthwith to issue his warrant, directed to the collector of the port, where the merchandise in question has been entered, directing him or his duly appointed agents or assistants to enter any place or premises where invoices, books or papers relating to such merchandise or fraud are deposited, and to take and carry them away for the use of the United States, so long as the retention thereof may be necessary, subject to the control and direction of the solicitor of the treasury.[2]

[1] See Appendix, "Practical Forms."

[2] Act of March 3, 1863, ch. 76, § 7: 12 Stat. at Large, 740. Section 8th of this act makes it a misdemeanor severely punishable by fine and imprisonment, to conceal or destroy any such papers to prevent their use as evidence.

The officers of the customs and informers, as we have seen, are declared by the 91st section of the collection act of 1799, to be competent witnesses in cases of seizure—the distributive share to which they would otherwise be entitled being withheld from them, when they are sworn as such witnesses.

SECTION IX.

PROCEEDINGS FROM THE HEARING OR TRIAL, INCLUSIVE, TO THE TERMINATION OF THE SUIT.

1. *Of the hearing or trial.*

Little is required to be said in this place in addition to the directions already given under the corresponding head in an antecedent part of this treatise. When the proceeding is on the exchequer or common law side of the court, the trial is conducted in all respects in the same manner, and is subject to the same incidents as an ordinary personal action.

When the seizure is of admiralty jurisdiction, the case is heard and the questions of fact as well as of law are determined by the court, without the intervention of a jury, as in cases of equity.

The revenue laws are not, in a strict sense, penal acts, and they ought to be so construed as most effectually to accomplish the intention of the legislature in passing them, instead of being construed with great strictness in favor of the defendant. *Taylor, Blackburn & Co.* v. *The United States*, 3 How., 197.

By the thirtieth section of the judiciary act, it is provided, that, "in the trial of any cause of admiralty or maritime jurisdiction in a district court, the decree in which may be appealed from, if either party shall suggest to and satisfy the court that probably it will not be in his power to produce the witnesses, then testifying, before the circuit court, should an appeal be had, and shall move that their testimony

PART 3. be taken down in writing, it shall be done by the clerk of the court." [1]

2. Of the decree or judgment, and execution.

When the proceeding is on the common law side of the court, the judgment either of acquittal or condemnation follows the verdict of course as in other suits at law.

When the case is of admiralty jurisdiction, the decree or sentence is either pronounced immediately, or time is taken by the judge for deliberation, and if he thinks proper, to reduce his opinion to writing. The sentence must, however, be entered in court; and as several months intervene between the stated terms of the district courts, with one or two exceptions, it may sometimes be the duty of the judge, when the decision is to be deferred, to prolong the term by adjourning the court to some day only sufficiently distant to afford the necessary time for advisement. But when the property has been delivered on bond, no very serious inconvenience can in general arise from postponing the entry of the decree till the next ensuing term.

When the judgment or decree is in favor of the claimant, it is the duty of the court to consider whether there was reasonable cause for seizure; and if so, to certify accordingly.

It will be remembered that in all suits in the district court involving an amount exceeding fifty dollars, a writ of error or appeal lies to the circuit court; and that on judgments subject to review by *writ of error*, no execution can be issued until after the expiration of ten days from the rendition of the judgment—that period being allowed to the party to deliberate on the propriety of bringing a writ of error and to sue out the same in proper form.

[1] Ch. 20: 1 Stat. at Large, 73.

It follows, therefore, that upon a judgment in cases of seizure on the common law side of the court, when the property in controversy exceeds fifty dollars in value, no execution can issue until after ten days. In regard to *appeals*, however, there is no such legislative provision. And, therefore, in cases on the admiralty side of the court, unless a stay of execution is provided for by the rules of the court, the decree may be executed without delay.

In case of acquittal, a warrant of restitution issues to the marshal, commanding him to restore the property to the claimant.[1] Upon a sentence or judgment of condemnation, a writ of *venditioni exponas* issues (unless the property has been delivered on bond), commanding the marshal to sell the property and pay over the proceeds in pursuance of the sentence.[2] If the costs occasioned by the interposition of the claim are not paid on demand, after taxation, an action on the bond for costs may be instituted to enforce their payment.

When the property condemned has been delivered on bond, the fruits of the decree or judgment are, as we have seen, to be obtained by requiring the claimant to pay into court the appraised or agreed value of the property, together with the costs. If he fail to do this within twenty days, a judgment will be granted, summarily, on the bond against him and his sureties, and enforced by execution in the usual form.

Costs.] An act of congress passed July 22, 1813, contains the following salutary provisions, viz. :

"That whenever proceedings shall be had on several libels against any vessel and cargo which might legally be joined in one libel, before a court of the United States, or the terri-

[1] *Vide, supra,* as to the power of the court to award damages to the claimant.

[2] *Vide, supra,* and Appendix, "Practical forms."

PART 3.

tories thereof, there shall not be allowed thereon more costs than on one libel, unless special cause for libeling the vessel and cargo, severally, shall be satisfactorily shown as aforesaid [viz.: on motion in open court]. And in proceedings on several libels or informations against any cargo, or parts of cargo or merchandise, seized as forfeited for the same cause, there shall not be allowed by the court more costs than would be lawful on one libel or information, whatever may be the number of owners or consignees therein concerned; but allowance may be made on one libel or information for the costs incidental to several claims: *Provided*, that in case of a claim of any vessel or other property seized on behalf of the United States, and libeled or informed against as forfeited under any of the laws thereof, if judgment shall pass in favor of the claimant, he shall be entitled to the same on paying only his own costs."

The third section of the same act contains also the following provision:

"And if any attorney, proctor, or other person, admitted to manage and conduct causes in a court of the United States, or the territories thereof, shall appear to have multiplied the proceedings in any cause before the court, so as to increase costs unreasonably and vexatiously, such person may be required, by order of court, to satisfy any excess of costs so incurred."[1]

This is a remedial statute, and it very clearly reveals the nature of the abuses to be remedied or prevented by that part of the second section which precedes the proviso, and by the third section. But the precise nature of the mischief at which the proviso is aimed is not so obvious. Its design doubtless was to secure each of the several claimants against being held responsible for the costs occasioned by the claims interposed by the other claimants. But the language of it seems to imply that the property of a claimant who has been successful in defending

[1] Ch. 14, § 2: 2 Stat. at Large, 19.

it from condemnation, may nevertheless be adjudged to pay costs. Costs, in courts of admiralty, are said to be purely discretionary; but I am not aware that the payment of costs has ever been exacted as a condition precedent to be complied with before, in the language of the act of 1813, the claimant "shall be entitled to" his property. The 89th section of the collection act of 1799, already so often referred to, requires the claimant, in all cases, to give a bond, "to respond the costs *in case he shall not support his claim;*" and, as one of the conditions on which he is entitled to have the property delivered to him *pendente lite*, he is required to give another bond with sureties for the appraised value of the property.

The act does not, in terms, require the condition of this latter bond to contain any express stipulation for the payment of costs; but it directs a summary judgment to be entered on it in case of condemnation, unless the claimant, within twenty days, pays the appraised value, with the costs; and it expressly enjoins the court, "if judgment shall pass in favor of the claimant," to "*cause the said bond to be canceled.*" It provides, moreover, that, when a certificate of reasonable cause of seizure shall be given, "*the claimant, or claimants, shall not be entitled to costs.*" These provisions seem to me clearly to imply an absolute mandatory direction to the courts to award restitution unconditionally, in cases of acquittal, and to leave them no discretionary power to exact costs of the claimant in such a case.[1]

[1] Such seems to have been the view of the circuit court for the Massachusetts district, in the case of *The Louisetta* (2 Gallis., 307), in which the vessel, after seizure, had been sold on an interlocutory order, and finally decreed to be restored. Under the circumstances of the case, which were supposed by the marshal to be peculiar, he considered the custody fees not properly chargeable against the United States. But the court said "the expenses must be borne by the United States, there having been probable cause, which excused the collector."

PART 3. It is to be borne in mind, also, that a large proportion of seizures are of common law jurisdiction; and that these statutory regulations are intended to embrace these as well as the opposite description of seizures. But it would be contrary to all analogy to adjudge costs against a successful defendant in an action at common law. It is worthy of remark, too, that in England all revenue seizures are cognizable exclusively in the court of exchequer, and that such of them as are cognizable on the admiralty side of the district courts of the United States are made so only by force of a legislative act. The effect of this statute, with regard to the description of seizures embraced by it, is to withdraw them from the consideration of a jury, "according to the course of the civil law." But, with respect to the essential rights and responsibilities of the claimant, it would seem to be both natural and proper to look for guidance to the English court of exchequer, rather than to foreign courts of admiralty exercising no similar jurisdiction. In truth, however, there seems to be good reason to suppose that congress intended, peremptorily, to prescribe the course of proceeding in cases of seizure, in all its most essential particulars, so as to leave but little discretionary power to the courts in regard to it. There was abundant cause for doing this. The subject was one of great importance, deeply affecting the revenue and commerce of the country, and the rights of the citizen. The practice of the state courts, by which this branch of jurisdiction had previously been exercised, was unquestionably ill-digested, fluctuating and multiform. This was a great evil, not at all likely to be cured by the mere substitution of national for state tribunals. There were cogent reasons, therefore, for devising and establishing by law a uniform course of procedure, adapted to the exigencies of the case:

one which, while it should studiously and sufficiently guard the revenue, should not, on the other hand, unreasonably trench upon the security of private rights. This I should unhesitatingly suppose to have been done, but for the great respect I entertain for the opinions of those who seem to have entertained different views of the subject, and I venture, with all suitable humility, to suggest that it would be far safer to yield implicit obedience to these legislative directions than to incur the hazard of introducing incongruity, perplexity and confusion by attempting to follow the feeble and flickering lights transmitted to us through the medium of books across the Atlantic.

It may not be amiss to add, that it is by no means intended to question the power of the court to impose costs on the claimant by interlocutory orders, as the condition upon which any favor or relief, of which he may stand in need, shall be accorded to him.

The fees which may be lawfully exacted in cases of seizure for official and professional services are prescribed by the act of February 26, 1853, ch. 80.[1]

SECTION X.

SETTING ASIDE CONDEMNATION BY DEFAULT — REHEARING — NEW TRIAL.

It sometimes happens that the owner of property seized, who intends to interpose a claim, is prevented by accident or misapprehension from doing so, until after condemnation on proclamation. In such cases, it is the practice in the northern district of New York, and, it is presumed, also in the other districts, on sufficient cause shown, to vacate the sentence of condemnation and receive the claim, at any time during the term at which the condemnation took place; and in an extraordinary case in the above named

[1] See Appendix.

PART 3.

district, an order to stay proceedings until the next term was granted in vacation, to enable the owner of a vessel, which had been condemned on proclamation, to move the court for relief.

When a party is dissatisfied with the decree in a cause on the admiralty side of the court, he has a right, provided the value of the thing in controversy exceeds fifty dollars, to appeal to the next circuit court, and there to have his cause heard anew. But he may also apply during the same term for a rehearing in the district court. The application for this purpose is to the equitable discretion of the court; and the principles which govern courts of equity in similar cases furnish the surest guide in the exercise of this discretion.

In suits on the common law side of the court, the unsuccessful party is entitled, under the like limitation as to amount, to a writ of error for the correction of any error of law. But he may also, as in other cases at common law, apply for a new trial.

Applications for the above mentioned or other special purposes are brought before the court by petition or affidavit and notice to the opposite party, according to the rules or established practice of the court.

PART IV.

PRACTICE OF THE COURTS OF THE UNITED STATES IN CRIMINAL CASES.

The nature and general limits of the criminal jurisdiction of the national courts have already been sufficiently stated and defined in the first part of this work.

We have seen that these courts derive no criminal jurisdiction from the common law, and that it is therefore only after the national legislature, acting within the limits of its constitutional authority, has declared an act to be punishable, that the judicial tribunals can take cognizance of such act as a public offense. But we have seen, also, that while no resort can be had to the common law as a *source* of criminal jurisdiction, it nevertheless furnishes the proper and, as the state laws are here inoperative, the only guide, in the absence of constitutional or statutory regulations, as to the principles and rules of procedure in the exercise of this branch of jurisdiction.

My design now is to point out the few constitutional and statutory provisions pertaining to the subject, and to offer such brief explanatory observations as may suffice to relieve it from embarrassment.

PART 4.

CHAPTER I.

LIMITATION OF CRIMINAL PROSECUTIONS.

By the 32d section of the crimes act of 1790, it is enacted—

"That no person or persons shall be prosecuted, tried or punished for treason or other capital offense aforesaid,[1] willful murder or forgery excepted, unless the indictment for the same shall be found by a grand jury within three years next after the treason, or capital offense aforesaid, shall be done or committed; nor shall any person be prosecuted, tried or punished, for any offense not capital, unless the indictment for the same shall be found within two years from the time of committing the offense aforesaid; *Provided*, that nothing herein contained shall extend to any person or persons fleeing from justice."[2]

By the act of March 26, 1804, the period of limitation for the prosecution of "any crime arising under the revenue laws of the United States," is extended to *five* years.[3]

[1] The term "aforesaid," must, it is presumed, be considered here as referring to the capital offenses defined in the same act. If so, it would seem at least to be very doubtful whether the prescribed limitation would apply to a capital offense of a different description defined by a different act. There are several such cases, see, for example, the act of March 26, 1804, and the post-office act of March 3, 1825. The second branch of the section, relative to offenses not capital, it will be be seen, has no such qualification.

Since the foregoing part of this note was written a limitation of five years has, by the act of July 26, 1868, ch. 236 (15 Stat. at Large, 183), been prescribed for the prosecution of offenders against the act of March 26, 1804, ch. 40 (2 Stat. at Large, 290), denouncing the penalty of death for the malicious destruction of vessels on the high seas. The latter part of the 2d section of this act, as printed, beginning with the words "or if," is not *intelligible*. It should be read with the omission of this "if" and of the word "of" in the next line.

[2] Ch. 9: 1 Stat. at Large, 119.

[3] Ch. 40, § 3: 2 id., 290. As to other cases, *vide supra*.

CHAPTER II.

OF THE ARREST.

On what grounds and in what manner to be made.] By article fourth of the amendments to the constitution of the United States, it is declared, that "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

The design of this amendment was not to introduce new principles, but more effectually to guard against the infringement of private rights already recognized by the common law. See 1 Hale's P. C., 580; 4 Bla. Com., 291, 292; 1 Chit. Cr. Law, 41. Its introduction is supposed to have been occasioned by the sensibility which was aroused in England and in this country, shortly before the commencement of the American revolution, on the subject of general warrants. 3 Story's Com., 748. It appears to have been aimed chiefly against unreasonable searches. But it has been understood to extend also to the arrest of persons on warrants for that purpose alone; and it was accordingly held by the supreme court of the United States in the case *Ex parte Burford* (3 Cranch, 447) to be necessary that the warrant and the complaint on which it is founded should specify not only the name[1] of the person to be arrested, but also, with reasonable certainty, the time, place and nature of the offense. To justify an arrest there must be *probable cause*, supported by *oath* or *affir-*

[1] When the name of the party is unknown, a description of his person would doubtless be sufficient, as at common law.

PART 4. *mation.* Probable cause, in this sense, is understood to mean such probable cause as might induce a discreet, impartial man to suspect the party to be guilty. 1 Chit. Cr. Law, 34. But the fact that the crime imputed to him has been actually committed by some one should first be established with reasonable certainty. Id., 33.

As will be seen in the sequel (*vide, post*, Chap. III), it has been determined by the supreme court of the United States that one magistrate may, except under suspicious circumstances, commit on a duly authenticated affidavit taken before another magistrate. It follows, therefore, *a fortiori*, that such evidence is sufficient to warrant an arrest in the first instance.

In England, a Quaker's affirmation is said to be inadmissible in criminal proceedings, to criminate or accuse another, though it may be read to exculpate himself; and that no warrant ought therefore to be granted on such affirmation. 1 Chit. Cr. Law, 34. It is otherwise here.

By the common law, a magistrate may commit upon view of the offense without oath. It is not supposed to have been the intention of the article of the constitution above cited to forbid the exercise of such power under the laws of the United States; but I am not aware that the question has been judicially decided.

By whom the warrant may be issued.] By the 33d section of the judicial act it is enacted—

"That for any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any *justice of the peace or other magistrate of any of the United States*, where he may be found, agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before

such court of the United States as by this act has cognizance of the offense."[1]

And by the act passed July 16, 1798, it is further enacted—

"That the judges of the supreme court, and of the several district courts of the United States, and *all the judges and justices of the courts of the several states*, having authority, by the laws of the United States, to take cognizance of offenses against the constitution and laws thereof, shall, respectively, have the like power and authority to hold to security of the peace and good behavior, in cases arising under the constitution and laws of the United States, as may or can be lawfully exercised by any judge or justice of the peace of the respective states in cases cognizable before them."[2]

Whether congress could constitutionally confer the authority specified in these enactments upon state magistrates, is a question which has repeatedly been agitated, and which has been variously decided by the state courts and judges. It has been supposed to depend upon the question whether the power intended to be conferred is to be considered a ministerial or judicial power; the *judicial* power of the United States being, by the constitution, vested in a supreme court, and in such inferior courts as congress may from time to time ordain and establish; and it being, moreover, a settled principle of jurisprudence that the criminal laws of a country can be enforced only in its own courts. The power to order the arrest of a citizen, and then of deciding on the propriety of discharging, committing or bailing him, seems to savor strongly of judicial authority, and to stand in striking contrast to that exercised by the ministerial officer who merely obeys such order. It appears to be agreed

[1] Ch. 20: 1 Stat at Large, 73.

[2] Ch. 83: 1 Stat. at Large, 609.

PART 4. on all hands that state magistrates are not *obliged* to exercise this power. The question is, whether, if they voluntarily do so, their acts are to be held valid. This is a question of considerable importance. The judges of the United States being so few in number, in proportion to the extent of the Union, the occasional interposition of the local magistrates for the arrest of offenders against the United States would tend to promote public justice and the security of the citizen, by rendering the escape of offenders less easy and frequent. The right of these magistrates to exercise this power is believed to be in accordance with the general apprehension of the law throughout the Union. In the northern district of New York it has often been exercised, and has never, to my knowledge, been disputed or complained of. I do not, however, intend to be understood as intimating any opinion of my own relative to the validity of the act in question.

The commissioners, to take affidavits, acknowledgments of bail, &c., are also, as we have seen, invested with plenary powers to arrest and commit or bail offenders against the laws of the United States.

It may seem superfluous to add that the warrant, by whomsoever issued, under the laws of the United States, ought, unless it be in the name of the judge or other magistrate issuing it, to be in the name of the president of the United States; though I have understood that, probably through inadvertence or the influence of habit, such warrants have sometimes been made in the name of the people of the State of New York.

To whom directed.] When the warrant is issued by a judge of the supreme court of the United States, it may doubtless be directed to the marshal of any one of the districts composing the circuit to which he is allotted; or, generally, it is presumed,

to any marshal of such circuit; but not, it is supposed, to the marshal of any district beyond the limits of such circuit; because the original criminal jurisdiction of a judge of the supreme court belongs to him only as a judge of the circuit court. When issued by a district judge, it must be directed to the marshal of the district for which such judge is appointed.

When the warrant is issued by a state magistrate (assuming the right of these officers to act), the question to whom the warrant may lawfully be directed seems to be less simple, and any answer which may be given to it less satisfactory.

The marshals of the United States and their deputies are the only officers ordained by the laws of the United States to execute precepts issued under the authority of these laws. From this it would seem to follow that these officers alone are competent to perform this service, and consequently that warrants issued by state magistrates, as well as those issued by the judges of the United States ought to be directed to them and to them only. But at common law a warrant may be directed to any indifferent person by name who is not an officer. 1 Salk., 347; 1 Hale's P. C., 581; 2 id., 110; 4 Bla. Com., 29; 1 Chit. Cr. Law, 38.

In most of the states, if not in all, where this rule has not been displaced by legislation, it would probably be recognized as operative. It is worthy of remark, too, that the section of the judicial act above cited, conferring the power in question on state magistrates, provides that it may be exercised "agreeably to the usual mode of process against offenders in such state."

There is reason for the conclusion, therefore, that these magistrates may, lawfully (as it is believed they generally do), direct their warrants to a consta-

PART 4. ble; or, if the local law permits it in other cases, to any indifferent person by name. It is, however, by no means intended to recommend this course. It is certainly regular to direct process, by whomsoever issued, for the arrest of offenders against the United States, to the marshal; and this is unquestionably the safer and most proper course.

Summary trial.] Before proceeding farther, it is necessary to advert to an act of congress, authorizing forms of procedure in certain specified cases, so widely different from those treated of in the sequel as to require separate notices. The act alluded to is entitled, "*An act to provide for the summary trial of minor offenses against the laws of the United States,*" passed June 11, 1864 (ch. 121: 13 Stat. at Large, 125). After empowering the judge of any district court to hold a special session of it at any time, whether in term or vacation, for the trial of minor offenses against the United States, as hereinafter provided, it enacts —

"That whenever a complaint shall be made against any master, officer or mariner of any ship belonging, in whole or in part, to any citizen or citizens of the United States, of the commission of any offense, not capital or otherwise infamous, against any law of the United States, made for the protection of persons or property engaged in commerce or navigation, it shall be the duty of the district attorney to investigate the same and the general nature thereof, and if, in his opinion, the case is such as should be summarily tried under the provisions of this act, he shall report the same to the district judge, and the judge shall fortwith, or as soon as the ordinary business of the court will permit, proceed to try the same, and, for that purpose, may, if necessary, hold a special session of the court. That at such trial it shall not be necessary that the accused shall have been previously indicted, but a statement or complaint, verified by oath, in writing, shall be presented to the court, setting out the offense in such a manner as clearly to apprise

the accused of the character of the offense complained of, and to enable him to answer such complaint. And the said complaint or statement shall be read to the accused, who may plead to or answer the same, or make a counter-statement. That the said trial shall thereupon be proceeded with in a summary manner, and the case may be decided by the court, unless, at the time for pleading or answering, the accused shall demand a jury, in which case the trial shall be upon the complaint and plea of not guilty."

The act limits the sentence, on conviction, to imprisonment in jail for one year, or to a fine not exceeding five hundred dollars, or both, at the discretion of the court, in those cases where the laws of the United States authorize such imprisonment and fine. The court may allow the district attorney to amend his statement or complaint at any stage of the proceedings before verdict, when such amendment will work no injustice to the accused; and may adjourn the cause to some future day, if it shall appear that the accused is unprepared to meet the charge as amended, and that an adjournment will promote the ends of justice. The seventh and last section enacts —

"That at such trial, if by jury, the United States and the accused shall each be entitled to three peremptory challenges. Challenges for cause, in such cases, shall be tried by the court, without the aid of triers."

PART 4.

CHAPTER III.

OF THE EXAMINATION — BAIL — COMMITMENT — AND HABEAS CORPUS.

An affidavit made before one magistrate may warrant commitment by another.

Examination.] In the case *Ex parte Boleman and Ex parte Swartwout* (4 Cranch, 75), the important question arose, whether one magistrate could lawfully commit on an affidavit made before another magistrate. The question was decided in the affirmative, "on the principle that before the accused is put on his trial all the proceedings are *ex parte*." This decision was applied by Chief Justice MARSHALL in the case of *The United States* v. *Burr* (Burr's Trial, vol. 1, pp. 14, 97). But he was of opinion that such affidavits ought to be received and acted on with much caution. The following are his remarks upon this point:

But should be cautiously admitted.

"That the magistrate may commit upon affidavits has been decided in the supreme court of the United States, though not without hesitation. The presence of the witness, to be examined by the committing justice, confronted with the accused, is certainly to be desired, and ought to be obtained, unless considerable inconvenience and difficulty exist in procuring his attendance. An *ex parte* affidavit, shaped, perhaps, by the person pressing the prosecution, will always be viewed with some suspicion, and acted upon with some caution; but the court thought it would be going too far to reject it altogether. If it was obvious that the attendence of the witness was easily attainable, but that he was intentionally kept out of the way, the question might be otherwise decided."

And he added, that before a paper purporting to be an affidavit could properly be received and acted on as such, its verity must appear to be established beyond a doubt. Its authentication must not rest on probability, but must be as complete as the nature of the case admits of. On this ground the chief justice

And its authentication complete.

refused to admit an affidavit purporting to have been "taken on the fifteenth April, before B. Cenas, a justice of the peace," to which was appended a certificate of the governor of the territory of Louisiana, dated "at New Orleans the sixteenth of April, 1807," stating that "B. Cenas was a justice of the peace for the county of New Orleans;" first, because there was no designation of the place where the affidavit was taken, and the oath might therefore have been administered out of the county of New Orleans, and so beyond the jurisdiction of the justice; and, secondly, because the certificate of the governor did not state that the person who took the affidavit was a magistrate; but only that a person of that name was a magistrate.

Accused entitled to witnesses on his examination at the expense of the United States.

An act, passed at the second session of the first congress, gives to persons "*accused* or indicted," the right to offer evidence in their defense. This act and a later one amplifying its provisions, will be more particularly noticed in the sequel. It is adverted to here for the purpose of stating, that, according to the liberal interpretation which, as I understand, has been practically given to it, a person arrested on a criminal charge is entitled to have witnesses summoned in his behalf to testify *on his examination*, at the expense of the United States; but that this privilege has been restricted by a subsequent act, forbidding the taxation against the United States of the fees of more than four witnesses on the examination of criminal cases before a commissioner, unless their materiality and importance shall be certified to by the district attorney.[1]

This enactment was designed to correct the prevalent abuse of unnecessarily summoning a multitude of witnesses in behalf of the United States. But it doubtless embraces the witnesses on both sides. This

[1] Act of August 16, 1856, ch. 124, § 3: 11 Stat. at Large, 49.

PART 4.

act (§ 8) also forbids the allowance of witnesses' fees to any officer of the United States courts, including bailiffs, guards, or deputies of marshals, testifying before a court or commissioner.

Accused to be bailed or committed for trial, &c.

The accused (unless discharged) must, as already stated, be "imprisoned or bailed, as the case may be, for trial before such court of the United States *as by this act has cognizance of the offense.*" And the act proceeds to require that "copies of the process shall be returned as speedily as may be into the clerk's office of *such court*, together with the recognizances of the witnesses for their appearance to testify in the case; which recognizances, the magistrate before whom the examination shall be, may require on pain of imprisonment."[1] The means resorted to in the first instance to procure the attendance of a witness is a summons. If this be disregarded, a warrant may be issued to bring the witness compulsorily. If the witness refuses to testify, he may be committed until he shall consent to do it, or shall be otherwise discharged by due course of law. He may be required to enter into a recognizance for his future appearance at the proper court, and be committed if he refuse to do so. Married women and children, not being able to bind themselves must procure others to be bound for them. 1 Chit. Cr. Law, 76, 77; 90, 91. The Revised Statutes of the State of New York, contain a provision authorizing the magistrate, when he shall be satisfied, by due proof, that there is good reason to believe that the witness will not fulfill the condition of his recognizance, to require sure-

Attendance of witnesses, how secured.

[1] It will be observed, that the recognizance for the appearance of the offender is not specifically mentioned as one of the papers to be transmitted to the clerk's office of the district to which the prisoner is to be sent. It can hardly be doubted, however, that this is the proper disposition of it, for it is only in the court of that district that the recognizance can be enforced or the penalty remitted. The omission was doubtless from inadvertance.

ties. This provision is believed to be in accordance at least with the spirit of the common law. It infers the power and duty of commitment for want of sureties, and such must have been the apprehension of congress, for, by an act, passed May 20, 1826, the marshals of the several districts and territories of the United States are "authorized to pay such persons as shall be imprisoned on account of inability to give security in a recognizance for their attendance as witness on behalf of the United States, the same sum for each day's imprisonment as is provided by law for witnesses actually attending court under process;" the allowance to be fixed and certified by the judge, as in other cases.[1]

Power to commit expressly given by statute.

It has been deemed expedient, nevertheless, by subsequent acts, expressly to confer the power of commitment. By the act of August 23, 1842, when the offense is charged to have been committed on the high seas, or elsewhere within the admiralty and maritime jurisdiction of the United States, the judge, justice or commissioner is empowered, on the hearing before him, in his discretion, to require any witness produced in behalf of the accused, as well as in behalf of the United States, to enter into a recognizance with such surety or sureties as he may deem necessary for his appearance as such witness at the trial, provided his testimony appears to be important for the purpose of justice, and is otherwise in danger of being unattainable.[2] And, by the act of August 8, 1846, it is provided that any person whose testimony, on an application by the district attorney to any judge of the United States, is shown by satisfactory proof to be admissible and necessary on "the trial of any criminal cause or proceeding in which the United States shall be a party or interested,"

[1] Ch. 75: 4 Stat. at Large, 174.

[2] Ch. 188, § 2: 5 Stat. at Large, 516.

PART 4. may be compelled to enter into a recognizance with or without sureties for his due appearance as a witness, and, on his refusal or neglect to give such recognizance, may be committed to prison, there to remain until he shall be brought before the court to testify, or shall give such recognizance.[1] Persons so committed are entitled to one dollar a day while in confinement, in addition to subsistence.[2]

The act of 1842 was obviously framed with reference to witnesses brought before the examining magistrate, and is, besides, limited, it will be seen, to prosecutions for maritime offenses; whereas the act of 1846 was doubtless more especially designed to embrace witnesses subsequently discovered at any time before trial; and extends, moreover, to prosecutions for any offense against the United States. The rate of compensation fixed by the act of 1853, it is presumed, was designed to supersede that prescribed by the act of 1826.

Bail.] The 8th article of the amendments to the constitution ordains, that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

By the judicial act, the "justices of the peace or other magistrates" of the several states are in general terms empowered to bail persons brought before them for examination on arrest.[3] But, by a subsequent clause of the same section, it is further provided, that, "upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which case it shall not be admitted but by the supreme or circuit court, or by a justice of the supreme court, or a judge of the district court, who shall exercise their discretion therein, regarding

[1] Ch. 98, § 7: 9 Stat. at Large, 72.

[2] Act of February 26, 1853, ch. 80, § 3. See Appendix.

[3] Act of 24th Setepmber, 1789, ch. 20, § 33: 1 Stat. at Large, 91.

the nature and circumstances of the offense, and of the evidence and the usages of law. And if a person, committed by a justice of the supreme court, or a judge of a district court, for an offense not punishable with death, shall afterwards procure bail, and there be no judge of the United States in the district to take the same, it may be taken by any judge of the supreme or superior court of law of such state." This last clause, it will be perceived, relates to the case of persons already committed by a judge of the United States for want of sureties; but, by the subsequent act of March 2, 1793, it is, in general terms, provided, "that bail for appearance in any court of the United States, in any criminal cause in which bail is by law allowed, may be taken by any judge of the United States, any chancellor, judge of a supreme or superior court, or chief or first judge of a court of common pleas, of any state, or mayor of a city," and also by "any person having authority from a circuit court to take bail; which authority, revocable at the discretion of such court, any circuit court may give to one or more discreet persons, learned in the law, in any district for which such court is holden, where, from the extent of the district, and remoteness of its parts from the usual residence of any of the before mentioned officers, such provision shall, in the opinion of the court, be necessary. *Provided*, that nothing herein shall be construed to extend to taking bail in any case where the punishment for the offense may be death; nor to abridge any power heretofore given by the laws of the United States, to any description of persons to take bail."[1] This proviso, it will readily be seen, refers to the authority given to the judges of the United States by the 33d section above cited of the judicial act, at their discretion, to admit to bail even

[1] Ch. 22, § 4: 1 Stat. at Large, 333.

PART 4. in capital cases, and to that given to state magistrates to bail persons brought before them on arrest, in cases not capital.[1]

Offenders may be required to give better security.] Any judge of the United States, or other magistrate, having authority to commit offenders against the laws of the United States, upon satisfactory proof that a person previously admitted to bail as such offender is about to abscond, and that his bail is insufficient, is empowered to require such person to give better security, or, for default thereof, to cause him to be committed to prison; and, to that end, an order for his arrest may be indorsed on the original warrant or order of commitment, or a new warrant therefor may be issued by such judge or magistrate, setting forth the cause of such proceeding.[2]

May be surrendered. Bail have the privilege in vacation to surrender their principal, and, for that purpose, to arrest him and deliver him to the marshal or his deputy, to be carried before any judge or other officer having power to commit, who, at the request of the bail, shall recommit the principal to the custody of the marshal, and indorse on the recognizance, or a cer-

[1] The power, conferred by this act on the circuit courts, to appoint persons "learned in the law," to take bail in criminal cases, has long since been superseded by the authority subsequently vested in these courts, to appoint the officers, now familiarly known as commissioners, and by another act (of 23d August, 1842: 5 Stat. at Large, 516), expressly empowering them to exercise all the powers conferred by the 33d section of the judiciary act, on justices of the peace or other magistrates of the several states, in respect to arresting, imprisoning or bailing offenders against the laws of the United States. *Vide supra*, commissioners to take bail, &c.

[2] Act of August 8th, 1846, ch. 98, § 6: 9 Stat. at Large, 73. In conferring this power on "any judge of the United States, or other magistrate, having authority," &c., it is hardly to be imagined that congress designed to exclude commissioners; but, if not, it would have been far better to name them. It may reasonably be presumed, however, that the term "magistrate" was supposed to embrace them.

tified copy of it, the discharge or exoneratur of the bail; and the principal is to stand committed until discharged by due course of law.[1]

By the act of February 28th, 1839, it is provided—

Bail may be exonerated, when.

"That in all cases of recognizances in criminal cause [causes] taken for or in, or returnable to, the courts of the United States, which shall be forfeited by a breach of the condition thereof, the said court for or in which the same shall be taken, or to which the same shall be returnable, shall have authority, in their discretion, to remit the whole or a part of the penalty whenever it shall appear to the court that there has been no willful default of the parties, and that a trial can, notwithstanding, be had in the cause, and that public justice does not otherwise require the same penalty to be exacted or enforced."[2]

Commitment.] To warrant a commitment of the accused, the evidence must be such as to afford a strong presumption of his guilt. It sometimes happens that a person indicted in one district makes his escape before arrest into another district. In such cases the exhibition of a copy of the indictment, authenticated by the certificate of the clerk under the seal of the court, would, it is supposed, be the proper evidence. Perhaps, also, an affidavit, or the certificate of the clerk alone, that an indictment had been found, would be sufficient, as in England. See 1 Chit. Cr. Law, 342. But where the application is founded on the fact of indictment found alone, there ought, on the arrest of the supposed party, to be evidence of his identity to warrant a commitment.

Removal of prisoner to another district.] By the thirty-third section of the judicial act, already so frequently referred to, the following provision is made for the removal of persons committed under

[1] Ibid., § 4.

[2] Ch. 36, § 6: 5 Stat. at Large, 322.

PART 4. the laws of the United States, and also of the witnesses against them, from one district to another:

"And if such commitment of the offender, or the witnesses, shall be in a district other than that in which the offense is to be tried, it shall be the duty of the judge of that district, where the delinquent is imprisoned, seasonably to issue, and of the marshal of the same district to execute, a warrant for the removal of the offender, and the witnesses, or either of them, as the case may be, to the district in which the trial is to be had."

The generality of this provision leaves the *mode* of removal to be devised by the judges who are to perform the duty it enjoins. It is probable that some diversity of form in this particular has prevailed in the different districts. But congress at length saw fit to regulate the practice in accordance with that described in an antecedent edition of this work, as having been adopted in the northern district of New York, except that, by the new act, a "copy" of the warrant "may be delivered to the sheriff or jailer, from whose custody he may be taken, and another copy thereof to the sheriff or jailer to whose custody he may be committed," instead of a separate warrant. The act directs that the original writ, with the marshal's return thereon, shall be returned to the clerk of the district to which he [the prisoner] may be removed.[1]

The authority to direct the removal of the prisoner, it will be seen, is confined to the district judge. It contemplates a previous commitment of the offender to prison—the act generally of a commissioner, and sometimes of a state magistrate—to await the action of the judge on receiving information of the commitment. But it occasionally happens that the original

[1] Act of February 26, 1853, ch. 80: 10 Stat. at Large, 161. This is the act to regulate fees and costs, and will be found in the Appendix.

complaint is made before the judge in person, and that the accused is brought before him in the first instance on his own warrant; and, in such cases, if the offense appears to have been committed in another district, although the act speaks only of persons under "commitment," it may doubtless be construed to warrant a removal without the formality of a previous commitment to prison, the form of the warrant being varied accordingly.

CHAPTER IV.

OF THE INDICTMENT—ARRAIGNMENT—AND THEIR INCIDENTS.

Where the indictment is to be preferred.] The 6th amendment to the constitution, adopted soon after the passage of the judiciary act, among other things ordains that "in all criminal prosecutions the accused shall enjoy the right to a speedy public trial by an impartial jury of the *state* or *district wherein* the crime shall have been committed." Congress had, however, already seen fit, at its first session, to provide "That in cases *punishable with death*, the trial shall be had in the *county* where the offense was committed; or where that cannot be done without great inconvenience, twelve petit jurors at last shall be summoned thence."[1] This statutable provision, not being inconsistent with the amendment, is not repealed by it, and so it was considered by the circuit court of the district of Virginia on the trial of Burr for treason. The crime was alleged to have been committed in Wood county, one of the frontier counties of Virginia. The trial was at the city of Richmond, in that state, on account, it is presumed, of the inconvenience of holding the court in Wood

[1] Act of Sept. 24, 1789, ch. 20, § 29: 1 Stat. at Large, 88.

PART 4. county. But twelve of the petit jurors were directed to be drawn from that county, the court being of opinion that the act requiring this to be done was still obligatory, certainly so unless its observance was waived as well by the United States as by the accused.[1] But by a recent act this provision of the act of '89 is repealed.[2] So much of it, however, as requires the trial in capital cases to be held in the county where the offense was committed, where this can be done "without great inconvenience," is yet in force. But to render the enactment effective, it was necessary to confer the power of appointing special sessions of the circuit courts; and this authority was accordingly given by an additional act passed March 2d, 1793, which was made to embrace criminal offenses of whatever grade. It empowers the supreme court if in session, or if not, any justice thereof together with the district judge, to order special sessions of the circuit court "for the trial of criminal causes at any convenient place within the district nearer to the place where the offense may be said to be committed, than the place or places appointed by law for the ordinary sessions.[3]

[1] Burr's Trial, vol. 1, 353.

[2] Act of July 16, 1862, ch. 99, § 2: 12 Stat. at Large, 589.

[3] Ch. 22, § 3: 1 Stat. at Large, 334. The section proceeds to direct, that, upon the appointment of any such special session, "the clerk of such circuit court shall, at least thirty days before the commencement of such special session, cause the time and place of holding the same to be notified for at least three weeks successively, in one or more of the newspapers published nearest to the place where the session is to be holden. That all process, suits and recognizances of every kind, whether respecting jurors, witnesses, bail or otherwise, which relate to the cases to be tried at the said special sessions, shall be considered as belonging to such sessions, in the same manner as if they had been issued or taken in reference thereto. That any special session may be adjourned to any time or times previous to the next stated meeting of the circuit court. That all business depending for trial at any special court shall at the close thereof be considered as of course removed to the next stated term of the circuit court."

The foregoing regulations respecting the place of trial all relate to offenses committed within the United States. But the jurisdiction of the national courts is not limited to such offenses; and by a later act it is ordained that the trial of all offenses which shall have been committed on the high seas, or elsewhere out of the limits of any state or district, shall be in the district where the offender is apprehended, or into which he may be first brought.[1]

Jurisdiction of circuit and district courts concurrent, except, &c.

Indictments for all offenses against the United States may be found indifferently either in the district or circuit court, and may, at the instance of the district attorney, by order of the court having possession of them, to be entered on its minutes, be transmitted from the one court to the other for trial, except that all indictments for capital offenses, found in either court, are triable only in the circuit court, whither it is made the duty of the district court to send all such indictments found therein.[2]

Joinder of counts.

"Whenever there are several charges against the same person or persons for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments shall be found in such cases, the court may order them consolidated." Act of 16th Feb., 1853; see Appendix.

Indictment necessary in all cases.] The 5th article of the amendment to the constitution declares that "no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or actual danger."

[1] Act of March 3, 1825, ch. 65, § 1: 4 Stat. at Large, 115.

[2] Act of August 8, 1846, ch. 98, §§ 2, 3: 9 Stat. at Large, 72.

PART 4.

This provision being in terms confined to capital or otherwise infamous crimes, it leaves to congress a discretionary power to provide some more simple mode of bringing minor offenders to justice, as, for example, the legislature of the state of New York has done, although the state constitution contains a similar inhibition. But this power is limited by a further restriction imposed by the second section of the 3d article of the constitution, which ordains that "The trial of all crimes, except in cases of impeachment, shall be by jury," and congress has not seen fit to exercise it. Consequently no punishment can be inflicted by the civil judicial tribunals of the United States (unless the limited authority possessed by the courts to imprison for contempt is to be considered an exception), except through the intervention of a grand jury.

State laws adopted.

The Grand Jury.] The mode of designating and summoning grand and petit jurors, their qualifications, &c., have already been treated of in one of the earlier parts of this work, to which the reader is referred. In those states where, as in New York, grand jurors are designated by lot to serve in the state courts, the same mode of designation must be resorted to in the national courts. Upon this point he act of 1840 is explicit, and it expressly empowerst the court "to make all necessary rules and regulations for conforming the designation and impanneling of juries to the laws and usages now in force" in the several states.

Grand jurors not to be summoned without special order.

The rarity of criminal prosecutions in the courts of the United States, where it often happened that the attendance of a grand jury was but an idle ceremony, owing to the limited criminal jurisdiction of these courts, a well guarded act of congress was at length passed, by which it was enacted —

"That no grand jury shall hereafter be summoned to attend any circuit or district court of the United States, unless the judge of such district court, or one of the judges of such circuit court, shall, in his own discretion, or upon the notification of the district attorney that such jury will be needed, order a *venire* to be issued thereon: *Provided*, that nothing herein shall prevent either of the said courts in turn from directing a grand jury to be summoned and impaneled, whenever, in its judgment, it may be proper to do so, and at such time as it may direct: And, *provided further*, that nothing herein shall operate to extend beyond what the law now permits, the imprisonment before indictment found of an individual accused of a crime or offense, or the time during which an individual thus accused may be held under recognizance before indictment formed."[1]

The right of challenge.

It was held by the circuit court, for the district of Virginia, that a person, under accusation, whose case is to be submitted to a grand jury, has the same right to challenge *for cause*, before the jurors are sworn, as he would have if about to be put upon his trial by a petit jury; and it appearing that the marshal, after completing his panel of twenty-four jurors, and summoning them, upon ascertaining that two of the number would be unable to attend, summoned two other persons in their stead, he was held to have acted without legal authority. Having once chosen and summoned the full number, he became *pro hac vice*, *functus officio*. The two supernumeraries were accordingly set aside, and the deficiency was supplied from the bystanders.[2] In that case the persons to compose the jury had been selected *ad libitum* by the marshal. Had they been designated by lot, the objection would have been more forcible still.

[1] Act of August 8, 1846, ch. 98: 9 Stat. at Large, 72.

[2] Burr's Trial, vol. 1, 31.

PART 4. In the state of New York the grounds of challenge (or objection, as it is denominated in the statute) are specified and fixed by law; and they are very limited, being, 1, that the juror objected to is the prosecutor, or complainant, upon any charge against the accused; 2, that he is a witness on the part of the prosecution, and has been subpœnaed or been bound in a recognizance as such. Whether the act of July 20th, 1840, requiring that "jurors to serve in the courts of the United States, in each state respectively, shall have the like qualifications," &c., "as jurors of the highest court of law of such state," is to be considered as embracing this limitation, has not, to my knowledge, been decided. Doubtless congress had reference mainly to qualifications of a more general nature, relating to citizenship, property, age, &c. But, considering the spirit and policy of the act, there is strong ground for holding the state law operative. Be this as it may, however, although the New York statute expressly forbids the allowance "of any other challenge to the array of grand jurors, or to any person summoned to serve as a grand juror," than those above specified, it can hardly be supposed that it was intended to exclude irregularities in the drawing and summoning of the persons composing the array.

Special causes of challenge, new oath.

It is necessary now to bring into view the several acts of congress; the first of which prescribes other causes of challenge and an additional oath. This act was the offspring of extraordinary circumstances existing at the date of its passage; but will doubtless remain to meet the possible exigencies of the future. It is too important to be omitted, and does not admit of analytical abbreviation. It is as follows:

"*An act defining additional causes of challenge, and prescribing an additional oath for grand and petit jurors in the United States courts.*

Be it enacted, ——— That, in addition to the existing causes of disqualification and challenge of grand and petit jurors in the courts of the United States, the following are hereby declared and established, namely: without duress and coercion, to have taken up arms, or to have joined any insurrection and rebellion, against the United States; to have adhered to any rebellion, giving it aid and comfort; to have given, directly or indirectly, any assistance in money, arms, horses, clothes, or any thing whatever, to or for the use or benefit of any person or persons, whom the person giving such assistance knew to have joined, or to be about to join, any insurrection or rebellion; or to have resisted, or to be about to resist, with force of arms, the execution of the laws of the United States, or whom he had good ground to believe had joined, or was about to join, any insurrection or rebellion; or had resisted, or was about to resist, with force of arms, the execution of the laws of the United States; or to have counseled or advised any person or persons to join any insurrection or rebellion; or to resist, with force of arms, the laws of the United States.

"SEC. 2. *And be it further enacted,* That at each and every term of any court of the United States the district attorney, or other person acting for or on behalf of the United States in said court, may move, and the court, in their discretion, may require, the clerk to tender to each and every person who may be summoned to serve as a grand or petit juror, or venireman or talesman, in said court, the following oath or affirmation, viz.: 'You do solemnly swear (or affirm, as the case may be) that you will support the constitution of the United States of America; that you have not, without duress and constraint, taken up arms or joined any insurrection or rebellion against the United States; that you have not adhered to any insurrection or rebellion, giving it aid or comfort; that you have not directly or indirectly given any assistance in money, or any other thing, to any

PART 4. person or persons whom you knew, or had good ground to believe, had joined, or was about to join, said insurrection and rebellion, or had resisted, or was about to resist, with force of arms, the execution of the laws of the United States; and that you have not counseled or advised any person or persons to join any rebellion against, or to resist, with force of arms, the laws of the United States.' Any person or persons declining to take such oath shall be discharged by the court from serving on the grand or petit jury, or venire, to which he may have been summoned.

"SEC. 3. *And be it further enacted,* That each and every person who shall take the oath herein prescribed, and who shall swear falsely as to any matter of fact embraced by it, shall be held to have committed the crime of perjury, and shall be subject to the pains and penalties declared against that crime."[1]

The first section of the act, it will be seen, merely superadds the specified causes of challenge to those already recognized by law, to be insisted on and proved, as in other cases, at the option of persons having the requisite personal interest to entitle them to object.

The purpose of the second section, investing the district attorney with discretionary authority to exact the specified oath, is apparently twofold: first, to secure impartiality on the part of the jurors in proceedings civil and criminal to which the United States are parties; and, secondly, to enable this officer, as the official representative of the United States, on grounds of public policy, peremptorily to exclude from the national courts, as jurors, the specified classes of persons.

The other act, above alluded to, is entitled "*An act regulating proceedings in criminal cases, and for other purposes.*" The provisions of it requiring recital in this place are contained in the first section,

[1] Act of June 17, 1862, ch. 103: 12 Stat. at Large, 430.

and are also too multifarious and compact to admit of advantageous abridgment. They are as follows:

"*Be it enacted, &c.* That every grand jury impaneled before any district or circuit court of the United States to inquire into, and presentment make of public offenses against the United States, committed or triable within the district for which the court is holden, shall consist of not less than sixteen and not exceeding twenty-three persons. If, of the persons summoned, less than sixteen attend, they shall be placed on the grand jury, and the court shall order the marshal to summon, either immediately or for a day fixed, from the body of the district, and not from the bystanders, a sufficient number of persons to complete the grand jury. And whenever a challenge to an individual grand juror is allowed, and there are not other grand jurors in attendance sufficient to complete the grand jury, the court shall make a like order to the marshal to summon a sufficient number of persons for that purpose. No indictment shall be found, nor shall any presentment be made, without the concurrence of at least twelve grand jurors. From the persons summoned and accepted as grand jurors, the court shall appoint the foreman, who shall have power to administer oaths and affirmations to witnesses appearing before the grand jury."[1]

Touching the maximum and minimum number of jurors to be impaneled, and the minimum number whose concurrence is requisite, the act is only declaratory of the common law. By an early statute of New York the foreman of a grand jury was empowered to administer oaths and affirmations to witnesses. He had no such power at common law, and consequently, until the passage of the above mentioned act, it was necessary in the courts of the United States, as in England, that witnesses summoned to testify before a grand jury should be sworn in open court.

Evidence.] Though it was formerly held that the grand jury ought to find a bill if *probable* evidence were adduced in support of it, because it is only an

[1] Act of March 3, 1863, ch. 86.

PART 4. accusation, against which the accused will afterward have an opportunity to defend himself, the just and true rule unquestionably is, that to warrant a grand jury in finding a bill, the evidence must be such as to convince them of the guilt of the accused. 1 Chit. Cr. Law, 318.

With respect to the *kind* of evidence which a grand jury may receive, it is to be remarked that it should in general be such only as is usually denominated *legal* evidence. It must in its nature be the best of which the case admits, and must be given on oath. A grand jury cannot, therefore, for example, receive in evidence the written examination of a witness in lieu of his parol testimony. A mere office copy of a written document cannot be received instead of the original. And evidence of what third persons have said is inadmissible. Id. In the case of *The United States* v. *Coolridge* (2 Gallis., 364), a witness who professed to have conscientious scruples against taking an oath, but who was not a Quaker, was allowed by the grand jury to give his testimony as a witness, without being sworn, and the indictment was quashed on this ground.[1]

Right of the accused to process to compel the attendance of witnesses in his behalf.] By the act of April 30, 1790, it is enacted that —

"Every person or persons, accused or indicted of the crimes aforesaid, shall be allowed or admitted, in his defense, to make any proof that he or they can produce, by lawful witness or witnesses, and shall have the like process of the court where he or they shall be tried, to compel his, her or their witnesses to appear at his or their trial, as is usually granted to compel witnesses to appear on the prosecution against them."[2]

[1] The motion to quash was founded on the affidavit of the witness himself to the fact of his not having been sworn; but the court required also the affidavit of the defendant of his belief of the fact.

[2] Ch. 9, § 29 : 1 Stat. at Large, 118.

In the case of *The United States* v. *Aaron Burr*, the question arose whether Burr, being then under recognizance to appear and answer to an indictment to be preferred against him for a misdemeanor, was entitled to the process of subpœna to summon witnesses, *before indictment found*, to testify in his behalf on the trial. The court decided that he was so entitled; being of opinion that this right was secured in express terms, by the above cited section, to persons accused of capital offenses, and, upon general principles, the same rule should be applied to other cases. The following is the conclusion of the opinion of the court delivered by Chief Justice MARSHALL upon this point:

"Upon immemorial usage, then, and upon what is deemed a sound construction of the constitution and law of the land, the court is of the opinion, that any person charged with a crime in the courts of the United States has a right before, as well as after indictment, to the process of the court to compel the attendance of his witnesses. Much delay and much inconvenience may be avoided by this construction; no mischief which is perceived can be produced by it. The process would only issue when, according to the ordinary course of proceeding, the indictment would be tried at the term to which the subpœna is made returnable; so that it becomes incumbent on the accused to be ready for his trial at that term." Burr's Trial, vol. 1, pp. 177–180.[1]

[1] The precise question before the court was, whether Colonel Burr was entitled to a subpœna *duces tecum*, directed to the president of the United States. It was objected by the attorney for the United States, first, that no subpœna could be issued in behalf of the accused before indictment found, and, secondly, that no subpœna could properly be issued to the president at any time. The decision of the court upon the first objection is stated in the text; and the second objection was also held to be groundless. But in Virginia the subpœna *duces tecum* issues, not absolutely of course, but, with the leave of the court. This rule of practice the court thought proper to adopt in the case of Colonel Burr, especially as it was proposed to issue this process to the president, and therefore entertained the question of the materiality of the evidence sought.

PART 4.

Process for the arrest of the defendant.] Unless the party indicted is already in custody, or voluntarily appears in pursuance of a recognizance previously taken, process must issue for the purpose of bringing him into court, in order to defend himself against the charge.[1] There are no special regulations prescribed by congress on this subject, but it will be useful, nevertheless, briefly to dwell upon it.

The authority of the courts of the United States to issue process to bring a defendant into court upon an indictment may well be considered as a power incidental to their criminal jurisdiction; or it may be considered as expressly conferred by the fourteenth section of the judicial act of 1789, giving to these courts authority to issue writs necessary for the exercise of their jurisdiction.

At common law the usual process for this purpose is a writ of *capias*, or a bench warrant; and either mode may doubtless be properly used by the courts of the United States.[2] The capias issues under the seal of the court, in the name of the president of the United States; is tested when issued by a circuit court, in the name of the chief justice of the United States; and is signed by the district attorney. It can be executed only within the district. If the defendant is elsewhere, he can be brought within the jurisdiction of the court only by the means already pointed out[3] for the removal of prisoners from one district to another. The usual practice in England

[1] "For though (says Mr. Chitty) a bill may be preferred and found against a person in his absence, this being an *ex parte* proceeding to which, if present, he could make no opposition, yet in general no indictment can be tried unless he personally appear; a provision founded on a principle of equity in all cases, and the express enactment of the statute 28 Edw. III, c. 3, in capital ones that no man shall e condemned without being brought to answer by due process of law.'

[2] In the cases growing out of Burr's expedition, the capias was considered to be the proper process. Burr's Trial, vol. 1, 354.

[3] See, *ante*, 613.

seems to be to make the process, whether capias or bench warrant, returnable generally, at the *next session* of the court, without specifying the time. 4 Chit. Cr. Law, 198. And such a return is understood to mean the next session after the *arrest*, and not after the teste or date of the process; and, therefore, the officer may justify an arrest after the next ensuing session; though it is the practice to renew the process at every session, if not executed before. 1 Chit. Cr. Law, 342, 343. The more correct practice here undoubtedly is to make the process returnable on a day certain, either in the same or the next session.

In England, when the party indicted is already under recognizance, no process can be had against him during the session of the court, "because it is looked upon in law as one day, and the defendant has the whole to make his appearance," 1 Chit. Cr. Law, 342. "In such cases, however," adds Mr. Chitty, "the prosecutor may, if the defendant has not appeared, bespeak a bench warrant during the assizes or sessions, which will be issued at the close thereof. If the assizes or sessions are over, and no bench warrant has been previously applied for, then a warrant from a single judge or justice of the peace may be obtained; and in order to make the application effectual, it must be grounded upon the *certificate* of the clerk of assize or the clerk of the peace, that the indictment has been found against the defendant, upon which the warrant will be granted, or under the before mentioned statutes may either be an affidavit or a certificate." Id. This distinction seems to savor more of technical nicety than of good sense. The sole object of the recognizance is to insure the presence of the accused to answer to the indictment in the event of one being found against him, and such is the condition of the recognizance. The finding of

PART 4. the bill of indictment furnishes a new and powerful motive for escape; and it appears to be unwarrantable, as well as inconsistent, upon a mere fiction of law, thus to jeopard the claims of public justice, and the safety of the bail. The same principle, for aught that is perceived, would forbid the trial, commitment for want of sureties, or even the arraignment of a person under recognizance, against whom an indictment should be found, though he should be present in court, unless he should voluntarily offer himself for the purpose. No such fiction, it is believed, is recognized, in this respect, in the courts of the United States. In each of the New York districts there is an express rule of court authorizing the district attorney, "on an indictment found by a grand jury, forthwith to sue out a *capias*, under the seal of the court, for the arrest of the person indicted."

Nolle prosequi.] The law of England, relative to the power to enter a *nolle prosequi*, is thus stated by Mr. Chitty [vol. 1, 478]:

"During these various stages of the proceedings [*i. e.*, at any time antecedent to the trial], a *nolle prosequi* may be entered by the attorney-general. The usual occasion of granting the stay of prosecution is, either, when in case of misdemeanor, a civil action is depending for the same cause, or any improper and vexatious attempts are made to oppress and injure the defendant, as by repeatedly preferring defective indictments for the same supposed offense; or, if it be clear that the indictment for a misdemeanor is not sustainable against the defendant, as if a surgeon be indicted for refusing to be a constable."

It is supposed that the several district attorneys of the United States possess this power. Probably, before exercising it, they would, in general, consider it advisable to state the circumstances of the case informally to the court, for the purpose of

obtaining its assent, tacit or express, to the propriety of the step.

Arraignment.] By the 4th section of the act of March 3d, 1835, "in amendment of the acts for the punishment of offenses against the United States," it is enacted—

"That, whenever any person is indicted for any offense against the United States, whether capital or otherwise, shall, upon his arraignment, stand mute, or will not plead or answer thereto, it shall be the duty of the court to enter the plea of not guilty on his behalf, in the same manner as if he had pleaded not guilty thereto. And, when the party shall plead not guilty, or such plea shall be entered as aforesaid, the cause shall be deemed at issue, and shall, without further form or ceremony, be tried by jury. And, in all trials in capital cases, if the party indicted shall peremptorily challenge above the number of jurors allowed by law, such excess of challenges shall be disallowed by the court, and the cause shall proceed for trial in the same manner as if challenges had not been made."[1]

Prisoner to be brought into court and remanded by *order*.

To remedy an expensive abuse, it has been enacted that "no writ shall be necessary to bring into court any prisoner or person in custody, or for remanding him from the court into custody; but the same shall be done on the order of the court or district attorney, for which no fee shall be charged by the clerk or marshal."[2]

[1] Ch. 40: 4 Stat. at Large, 775. This section supersedes the provisions of the 30th section of the Crimes act of 1790, and those of the 14th section of the act of March 3d, 1825.

[2] Act of February 16th, 1853, § 3: Appendix.

CHAPTER V.

TRIAL.

Rights guaranteed to the accused.

The sixth article of the amendments to the constitution, as already stated, secures to the accused "a right to a speedy and public trial." It entitles him also "to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The judiciary act of September 24, 1789 (ch. 19, sec. 29: 1 Stat. at Large, 88), directs—

"That in cases punishable with death, the trial shall be had in the county where the offense was committed, or, where that cannot be done without great inconvenience, twelve petit jurors at least shall be summoned from thence. And jurors in all cases, to serve in the courts of the United States, shall be designated by lot or otherwise, in each state respectively, according to the mode of forming juries therein now practiced, so far as the laws of the same shall render such designation practicable by the courts or marshals of the United States; and the jurors shall have the same qualifications as are requisite for jurors by the laws of the state of which they are citizens, to serve in the highest courts of law in such state, and shall be returned, as there shall be occasion for them, from such parts of the district, from time to time, as the court shall direct, so as shall be more favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly to burden the citizens of any part of the district with such services."[1]

But by the act of July 17, 1862 (ch. 189: 12 Stat. at Large, 589), so much of the foregoing section as,

[1] See, to the like effect, as to the qualifications and designation of jurors, the act of July 20, 1840, *supra*, p. 433.

in cases punishable with death, requires twelve petit jurors to be summoned from the county where the offense was committed, is repealed.

Speedy trial.] The spirit of this guaranty is easily discerned, and it was designed for practical effect. It enjoins upon the public prosecutor the duty of diligent preparation for the trial, and upon the courts the obligation to require the strict performance of this duty. A failure to fulfill it entitles the accused to his discharge from further imprisonment, either absolutely or upon his own recognizance, or, if he has been admitted to bail, it entitles his sureties to a discharge from further responsibility. It is to be borne in mind, moreover, that this provision was intended for the benefit of the accused, and that it affords no warrant for compelling him to be brought to trial without an opportunity for due preparation.[1]

Copy of the indictment, &c.] A person indicted for treason must have a copy of the indictment, and a list of the panel of petit jurors summoned, and of the witnesses to be produced on the trial to prove the indictment, stating their names and places of abode, delivered to him at least three entire days before the trial; and, if indicted for any other capital offenses, must have delivered to him such copy of the indictment and list of jurors, two entire days before the trial.[2]

[1] It is said to be the settled practice of the English courts, in cases of felony, to try the accused at the same session, and generally on the same day when the indictment is found against him and he is arraigned; while in misdemeanors the practice is otherwise; and when the defendant is not in actual custody, it is said the court has no power to compel him to take his trial at the same session at which he pleaded to the indictment. 1 Chit. Cr. Law, 483, 484. No such distinction, it is believed, has ever been made in the courts of this country.

[2] Crimes act of April 30, 1790, ch. 9, § 29 : 1 Stat. at Large, 118. In England the right to have a copy of the indictment is limited to indictment for treason, but the time of its delivery, before trial, is longer. The statute (7 W. III, c. 3) gives five days, and the act was interpreted

PART 4. *Right of defense—Process for witnesses—Assignment of counsel.*] The sixth article of the amendment to the constitution further ordains, that the accused in *all* criminal prosecutions shall "have compulsory process for obtaining witnesses in his favor and the assistance of counsel for his defense." The crimes act of 1790, just above cited, contains like provisions in a more amplified form. It was passed, as we have seen, before the full ratification of the amendment, but not being inconsistent with it, the act was not repealed by it. The 29th section of this act, in addition to the provisions already cited, directs —

"That every person so accused and indicted for any of the crimes aforesaid shall also be allowed and admitted to make his full defense by counsel learned in the law; and the court before whom such person shall be tried, or some judge thereof, shall, and they are hereby authorized and required immediately upon his request, to assign to such person such counsel, not exceeding two, as such person shall desire, to whom such counsel shall have free access at all reasonable hours; and every such person or persons, accused or indicted of the crime aforesaid, shall be allowed and admitted in his said defense to make any proof that he or they can produce, by lawful witnesses, and shall have the like process of the court where he or they shall be tried, to compel his or their witnesses to appear at his or their trial,

to mean five days before the *arraignment* of the prisoner, for then is the time for him to take exception to it by way of a plea or a demurrer. 4 Bla. Com. 351. It was held, also, that the copy ought to include the caption of the indictment. The statute (7 Anne, c. 24) extends the time to ten days, and requires also a list of jurors and witnesses to be delivered. Id., 352, *note*. There seems to be good sense, and no more than justice, in the liberal interpretation of the English acts by which the specified number of days is computed from the arraignment; and the number of days prescribed in the American act seems insufficient, especially if, according to the decision of the late Judge STORY, the word "trial" in this act is to receive a strict interpretation, limiting its meaning to a trial by jury. 4 Mason's Rep., 232.

as is usually granted to compel witnesses to appear on the prosecution against them." CHAP. 5.

This enactment, designed to secure important privileges to the accused, which are denied by the common law, it will be noticed, applies only to persons indicted for offenses comprised by the words "any of the crimes aforesaid." The section of which it forms a part names only treason and other capital offenses. But the other sections of the act define all the offenses for the punishment of which it was then thought necessary to provide, and it may reasonably be presumed that the enactment was designed to embrace all the offenses defined and declared punishable by the act. But the catalogue of offenses against the United States has, by subsequent laws, been considerably enlarged, and to these new offenses the provision in question is supposed not to extend. I am not aware, however, that any distinction has been made in any of the courts of the United States with respect to any of the rights conferred on the accused by the act of 1790, between the offenses enumerated in the act and those subsequently defined. And by a later act, the right to compulsory process for witnesses has been extended in favor of indigent persons. The provision is in the following words:

"*And be it further enacted*, That whenever any indictment shall be pending in any court of the United States, and any defendant thereto shall make an affidavit, setting forth that there are witnesses whose evidence is material to his defense, and that he cannot safely go to trial without them, what he expects to prove by each of them, that they are within the district in which the court is held, or within one hundred miles of the place of trial, and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the court in term, or any judge thereof in vacation, may, if it appear proper to do so, order that such witnesses be subpœnaed, if found within the limits

PART 4. aforesaid; and, in such case, the costs incurred by such process, and the fees of such witnesses, shall be paid in the same manner that similar costs and fees are paid in case of witnesses subpœnaed in behalf of the United States."[1]

In requiring the payment by the United States of the fees of the witnesses, the act unquestionably extends to fees for attendance as well as for travel.

Another early act directs, that "subpœnas for witnesses who may be required to attend a court of the United States in any district thereof may run into any other district, *provided*, that in civil causes, the witnesses living out of the district in which the court is holden do not live at a greater distance than one hundred miles from the place of holding the court."[2] The limitation imposed by this proviso, with respect to civil cases, the reader will have noticed, is adopted by the act of 1846, above recited, respecting witnesses subpœnaed in behalf of the defendant in virtue of that act. But, with this exception, the process of subpœna in criminal cases runs throughout the United States.

The petit jury—Rights of challenge.] Touching the qualifications of jurors, and the mode of designating and summoning them, *vide supra*, 433.[3]

Until the passage of the act of March 3, 1865, ch. 86 (13 Stat. at Large, 500), the right of peremptory *challenge* in the courts of the United States remained insufficiently defined, as such of my readers as have had occasion to resort for information on the subject to antecedent editions of this work cannot have failed to observe. This act limits and defines the right as follows:

[1] Act of August 8, 1846, ch. 98, § 11: 9 Stat. at Large, 74.

[2] Act of March 2, 1792, ch. 23, § 6: 1 Stat. at Large, 335.

[3] The act of June 17, 1862, ch. 103, prescribing new causes of challenge and requiring an additional oath, recited *supra*, 619, it will be seen, embraces petit as well as grand jurors.

"Sec. 2. *And be it further enacted,* That, when the offense charged be treason or a capital offense, the defendant shall be entitled to twenty and the United States to five peremptory challenges. On a trial for any other offense in which the right of peremptory challenge now exists the defendant shall be entitled to ten and the United States to two peremptory challenges. All challenges whether to the array or panel or to the individual juror for cause or favor shall be tried by the court without the aid of triers."

With respect, then, to the right of peremptory challenge on a trial for treason or for any crime which, by the laws of the United States, the offender is subject, on conviction, to capital punishment, there is no longer room for doubt. But what are those "other" offenses on arraignment for which "the right of peremptory challenge now exists?" To what law is recourse to be had to ascertain those other offenses, if any such there are? Certainly not to the laws of the state where the court is held. It must be then to the laws of England. The inquirer will accordingly be naturally led to search the commentaries of Sir William Blackstone. He will there find (book 4, pp. 253, 254) what will probably appear to him satisfactory evidence that the right is and has always been limited to cases of *felony:* and on turning to ch. VII, p. 94, of the same book, for a definition of felony, he will find an elaborate and, with all the characteristic perspicacity and precision of the author, somewhat perplexing disquisition on the subject, and the result I have little difficulty in predicting will be a conviction that the right of peremptory challege in the courts of the United States is limited to treason and capital offenses, and that the enactment in question is accordingly nugatory. The abolition of *triers* is undoubtedly an improvement.

Challenge for cause.] Challenges, *for cause*, are either to the *array* or to the *polls;* and challenges

PART 4. of both descriptions are either *principal* or *to the favor*. The act of June 17th, 1862, ch. 103. (12 Stat. at Large, 430), prescribing additional principal causes of challenge, has already been re-cited, *supra*, p. 619; and it is not compatible with my design to enter at large into an examination of the various grounds of challenge depending on the common law. Relative to one of the causes of principal challenge, and that of more frequent occurrence than any other, a diversity of opinion has prevailed in the American courts. I refer to a pre-conceived opinion supposed to have been formed by the juror relative to the merits of the case to be tried, adverse to the challenging party.

On the trial of Col. Burr, in the progress of which every inch of ground admitting of debate was very earnestly and ably contested, Chief Justice MARSHALL declared the rule to be "that a man must not only have formed, but *declared* an opinion, in order to exclude him from serving on the jury." Burr's Trial, vol. 1, p. 44, and *passim*. But it has been held by the supreme court of the State of New York, that the formation of an opinion alone is a disqualification, and a principal cause of challenge.

On a challenge to the favor, the challenged juror may be examined as to the matter of the challenge, provided it do not tend to his dishonor or discredit. 1 Archb. Pr., 185; 1 Cowen's Rep., 432.

Separate trial.] In the case of *The United States* v. *Marchant and Colson* (12 Wheat., 480), which came before the supreme court on a certificate of division from the circuit court for the district of Massachusetts, it was decided that when two or more persons are charged in the same indictment in a court of the United States with a capital offense, they have not, by law, a *right* to be tried separately, the United States, by their attorney, object-

ing thereto; but that the court has a discretionary power to direct separate trials, not only at the request of the prisoners, but against their wishes. "It is," says the court, "a matter of sound discretion, to be exercised by the court, with all due regard and tenderness to prisoners, according to the known humanity of our jurisprudence."

Where several are tried jointly, on the same indictment, each individual has a right to the full number of his challenges. But, in England, if they refuse to join in their challenges, the practice is, on this ground alone, for the court to direct them to be tried separately, in order to prevent the delay which might arise from the whole panel being exhausted. See 1 Chit. Cr. Law, 535, and the authorities cited by him. This practice is commented on and explained by the court in the case of *Marchant and Colson*, above cited, but I do not perceive, in the opinion of the court, any distinct recognition of it as applicable to proceedings in the courts of the United States.

Bill of exceptions.] It is well settled, in England, that no bill of exceptions lies in capital cases, and, though the authorities are not all agreed upon this point in cases of misdemeanor, the better opinion seems to be that this remedy does not exist in any criminal case. There is no statute of the United States giving a writ of error to revise the judgments of the district and circuit courts in criminal cases, and, consequently, no bill of exceptions can lawfully be allowed. It is only by means of a certificate of disagreement in opinion upon a question of law between the judges of a circuit court, that a criminal case can be brought under the cognizance of supreme court. Neither a writ of error, nor a writ of prohibition, nor a certiorari will lie. *Ex parte Gordon*, 1 Black, 503.

PART 4. *Province and power of the jury.*] There is a familiar saying, that, in criminal cases, *the jury are the judges of the law as well as of the fact.* Its frequent repetition by lawyers, as well as by others, of itself furnishes evidence of its truth in some sense, while the fact that it has become the subject of earnest disputation in our courts, and that judges have expressed conflicting opinions respecting its true signification, proves that it has been misunderstood.

In the case of *The United States* v. *Wilson and Porter*, which was an indictment for robbing a mail carrier and putting his life in jeopardy, tried before the circuit court of the United States for the eastern district of Pennsylvania in 1832 (1 Baldw. Rep., 78), the court, in charging the jury, after stating at length the opinions entertained by the court on the various points of law involved in the case, proceeded as follows:

"We have thus stated to you the law of this case, under the solemn duties and obligations imposed on us, under the clear conviction, that, in doing so, we have presented to you the true test by which you will apply the evidence to the case; but you will distinctly understand that you are the judges both of the law and fact in a criminal case, and are not bound by the opinion of the court; you may judge for yourselves, and, if you should feel it your duty to differ from us, you must find your verdict accordingly."

The court, however, thought proper, nevertheless, strongly to inculcate upon the jury the propriety of "taking the law as given by the court," instead of "making a rule of their own," and solemnly to admonish them, at any rate, not willfully to disregard the law, "because obedience to the law is as much the duty of a citizen in the jury box as out of it." The opinion of the court upon the law was unfavorable to the prisoner, and the opinion of the

jury being, it seems, in accordance with that of the court, they returned a verdict of guilty against Wilson, who was tried first, under an order of the court directing separate trials. Upon the trial of Porter, the other prisoner, whose case depended on the same questions of law, his counsel, as appears by the report, availing themselves of the liberal doctrines laid down by the court relative to the right of juries, appealed from the court to the jury upon these questions of law, and the court, when it came to charge the jury, speaking of the course adopted by the counsel in this respect, distinctly admitted its propriety. "The court," said the learned judge by whom the charge was delivered, "cannot but admire the efforts of intellect and eloquence made by the counsel for the prisoner. In going to the verge of their rights, in appealing from the court to the jury, they have acted in the strict line of their duty, from which they are under no obligation to depart." The court, however, thought it prudent not only to repeat and reinforce its cautions to the jury, not lightly to disregard the decisions of the court upon the law, but to enter into an argument to convince them of the soundness of these decisions.

In 1832 an indictment came on for trial before the same court in the case of *The United States* v. *Shine* (1 Baldwin's Rep., 510), for passing a counterfeit note of the bank of the United States, in which one of the grounds of defense relied on by the counsel for the defendant, in his argument to the *jury* was the alleged unconstitutionality of the charter of the bank. The court, in its charge to the jury, without, however, repudiating the doctrine which it had laid down in the former case, told them very distinctly that the constitutionality of an act of congress which had been decided to be constitutional

PART 4. by the supreme court of the United States, was not a proper subject for their consideration, and labored with great earnestness to dissuade them from exercising the appellate power, which they had been urged by the defendant's counsel to assume. Upon this case I will only remark, that, after an attentive perusal of the argument of the court, I am obliged to confess my inability to discover any difference in principle between these two cases, with respect to the right of juries to judge of the law as well as the fact. The constitution itself is but a law, and the judgment of the supreme court of the United States but the opinion of judges.

In the case of *The United States* v. *Battiste* (2 Sumner, 240), which was an indictment for a capital offense tried in 1835, Mr. Justice STORY, in summing up the case to the jury, took occasion to comment on the maxim in question, and to declare his opinion of it in the following terms:

"Before I proceed to the merits of this case, I wish to say a few words upon a point suggested by the argument of the learned counsel for the prisoner, upon which I have had a decided opinion during my whole professional life; it is, that in criminal cases, and especially in capital cases, the jury are the judges of the law as well as of the fact. My opinion is, that the jury are no more judges of the law in a capital or other criminal case, upon a plea of not guilty, than they are in every civil case tried upon the general issue. In each of these cases their verdict, when general, is necessarily compounded of law and fact, and includes both. In each they must necessarily decide the law as well as the fact. In each they have the physical power to disregard the law as laid down to them by the court, but I deny that, in any case, civil or criminal, they have the moral right to decide the law according to their own notions or pleasure. On the contrary, I hold it the most sacred constitutional right of every party accused of a crime that the jury should respond as to the facts, and the court as to the law. It is

the duty of the court to instruct the jury as to the law, and it is the duty of the jury to follow the law as laid down by the court. This is the right of every citizen, and it is his only protection. If the jury were at liberty to settle the law for themselves, the effect would be, not only that the law itself would be the most uncertain, from the different views which different juries might take of it, but in case of error there would be no remedy or redress by the injured party, for the court would not have any right to review the law, as it had been settled by the jury. Every person accused as a criminal has a right to be tried according to the law of the land, and not by the law as a jury may understand it, or choose, from wantonness or ignorance or accidental mistake, to interpret it. If I thought that the jury were the proper judges of the law in criminal cases, I should hold it my duty to abstain from the responsibility of stating the law to them upon any such trial; but believing, as I do, that every citizen has the right to be tried by the law, and according to the law; that it is his privilege and truest shield against oppression and wrong, I feel it my duty to state my views fully and openly on the present occasion."

These views of the subject are at once so obvious and so forcible, as in reality to leave little room for doubt as to their soundness. The consequences depicted by the learned judge as likely to result from the actual assumption by juries of the power of deciding the law independently of the court did not escape the acute minded judges of the circuit court of the United States for the eastern district of Pennsylvania, before whom the above cited case of *The United States* v. *Wilson and Potter* was tried, and they strongly pressed them upon the attention of the jury, for the purpose of dissuading them from the exercise of their acknowledged right to overrule the court.

Is it not a little remarkable that while thus employed the judges did not themselves become

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convinced of the legal fallacy, as as well as the absurdity of the dogma they were laboring to counteract?

The much abused maxim in question is, nevertheless, true in its proper sense. The jurors *are* the sole judges of the *applicability of the law* under which the accused is arraigned, as laid down to them by the court, to the *facts*, as they appear from the evidence in the case. It is the duty of the court to inform the jury in what the offense in question consists; and of the jury to determine whether it has been proved. In the faithful performance of this important, responsible and often difficult office, the whole duty of jurors consists, and no enlightened and honest juror will desire to transcend it. To pronounce what the law is, with all its pertinent limitations, qualifications and exceptions, is the exclusive province of the court.

There is no difficulty in accounting at once for the origin and popular perversion of this rule. It is a corollary from a human axiom of the common law, invented to mitigate the horrors of a bloody code, by which, among the variety of actions which men are daily liable to commit, no less than one hundred and sixty were declared to be worthy of instant death.[1] Under such a code, it is no wonder that juries sometimes yielded to the claims of humanity rather than the demands of the law, and that judges were little disposed to interfere with their decisions. Hence the adoption of the maxim that *no man shall be twice put in jeopardy of life or limb for the same offense;* or, in other words, that a verdict of acquittal, after a regular trial on a good indictment, should be deemed final and conclusive in favor of the accused, whatever might in reality be the law or the facts of the case; and hence arose the adage, in

[1] See 4 Bla. Com., 18.

its popular and perverted sense, that the jury are the judges of the law as well as of the fact. Along with the great principle from which it was deduced, it was brought by our ancestors as a part of the common law to this country, and has been adhered to as, in its just sense, it is to be hoped it always will be, under our milder codes. But it never was true in England in the sense ascribed to it in the case of *Wilson and Porter*, and it is essential alike to the security of the innocent against unjust condemnation, and of the community against the escape of the guilty, that the interpretation there given to it should be repudiated as false and mischievous.[1]

CHAPTER VI.

NEW TRIAL.

In the case of *The United States* v. *Gilbert and others* (2 Sumner, 19), which was an indictment for piracy, the question arose, and was very elaborately discussed both at the bar and by the court, whether, in a *capital case*, *after a regular conviction*, upon a sufficient indictment, a court of the United States has authority to grant a new trial.

The question was supposed to depend on the true interpretation of that provision of the constitution of the United States (which is but a constitutional recognition of an old and well established maxim of the common law), that no person shall be subject for the same offense to be twice put in jeopardy of life or limb.

No doubt was entertained, that, had there been a verdict of *acquittal*, this constitutional inhibition

[1] The doctrine held by Mr. Justice STORY, in the case of *The United States* v. *Battiste*, has since been emphatically reasserted in a well considered and very able opinion by Mr. Justice CURTIS. It is known to the author moreover, that the same opinion was entertained also, with undoubting confidence, by Mr. Justice THOMPSON.

PART 4.

would have afforded a complete protection to the prisoners against a new trial. The question considered and decided was, whether it extended also to cases of conviction. Mr. Justice STORY maintained that it did, and the motion was denied. His honor, Judge DAVIS, was of the opposite opinion. The argument of Mr. Justice STORY evinces great learning and deep research, and seems fully to sustain his conclusion that the power in question is never exercised, and is understood not to exist in the English courts. The settled law of England appears to be, as stated by Mr. Chitty (1 Chit. Cr. Law, 654), that in cases of felony or treason no new trial can in any case be granted; the only remedy which remains to the defendant in case of his conviction being, that, if the conviction appear to the judge to be improper, he may respite the execution to enable the convict to apply for a pardon. The decisions of the American courts seem to have generally been adverse to this doctrine. With regard to the decisions of the supreme court of New York, I doubt whether they warrant the impression of Mr. Justice STORY that they support the doctrine he maintains. The case of *Comstock* (8 Wend., 549) was an application *in behalf of the people* for a new trial, for the alleged misdirection of the judge, after a verdict of *acquittal* on an indictment for grand larceny, and was in truth too clear for argument. The court, in delivering their opinion, content themselves with briefly quoting the English doctrine above mentioned, as summarily stated by Mr. Chitty, and deny the motion. But in the case of *The People* v. *Stone* (5 Wend., 39), the court, after quoting the English rule that a new trial can never be granted in cases of felony or treason, proceed to denounce it in very strong terms as tyrannical and unjust; and then add that this rule "has never been countenanced by our courts,

and would never be tolerated by our people." Perhaps it is to the habit of considering the subject independently of the constitutional inhibition, that is to be ascribed in some degree the general prevalence in this country of an impression in favor of the existence of the power in question. The common law maxim which this inhibition embodies, like other humane maxims of the common law, doubtless had its origin, as already observed, in the more humane spirit awakened by advancing civilization, and shocked by the terrible severity of the ancient penal code of England. It has generally been regarded, therefore, as having reference exclusively to the security of the accused; and viewing it under this aspect, the mind does not easily reconcile itself to the notion that its spirit would be violated by granting to a man already convicted, and at his request, another chance for his life.

The question whether, when, in a capital case, the jury have been *discharged* by the court from necessity, before verdict, the accused can be again put upon his trial, has been differently decided by the courts of the several states.[1] But the question may be considered as put at rest in the courts of the United States by the decision of the supreme court in the case of *The United States* v. *Perez* (9 Wheat., 579), in which it was decided that courts have a discretionary power, even in capital cases (to be exercised, however, with great caution and reserve), to discharge the jury from giving a verdict, and that the prisoner may be tried again for the same offense after the exercise of the power.

[1] See the case of *The United States* v. *Gilbert et al.* (2 Sumner's Rep., 19), where the cases on this point are collected and commented by Mr. Justice STORY.

CHAPTER VII.

JUDGMENT AND EXECUTION.

Attainder.] By section 3 of article 3 of the constitution of the United States, it is declared that "the congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted."

By the crimes act of April 30, 1790, it is declared, "that no conviction or judgment for any of the offenses aforesaid [one of which is treason] shall work corruption of blood, or any forfeiture of estate."[1]

Benefit of clergy.] By the thirtieth section of the same act it is enacted "that the benefit of clergy shall not be used or allowed, upon conviction of any crime, for which, by any statute of the United States, the punishment is or shall be declared to be death."

Punishment of death, how inflicted, &c.] By section thirty-second of the same act it is provided, "that the manner of inflicting the punishment of death, shall be by hanging the person convicted by the neck until dead."

The fourth section of the same act provides—

"That the court before whom any person shall be convicted of the crime of murder, for which he or she shall be sentenced to suffer death, may, at their discretion, add to the judgment, that the body of such offender shall be delivered to a surgeon, for dissection; and the marshal, who is to cause such sentence to be executed, shall accordingly deliver the body of such offender, after execution done, to such surgeon as the court shall direct, for the purpose aforesaid; *Provided*, That such surgeon, or some other person by him appointed for the purpose, shall attend to receive and

[1] Ch. 9, § 24: 1 Stat. at Large, 112.

take away the dead body at the time of the execution of such offender." CHAP. 7.

The next section inflicts a fine of one hundred dollars and imprisonment for a term not exceeding twelve months, for rescuing or attempting to rescue the body during its conveyance to the place of dissection, or from the house of the surgeon.

An act passed March 3, 1869, ch. 142 (15 Stat. at Large, 338), prescribes the requisite proceedings to insure the delay of execution of a judgment of condemnation in a capital case carried for review to the supreme court of the United States.

Whipping — Pillory.] By the act of February 28, 1839, it is enacted, "that the punishment of whipping and the punishment of standing in the pillory, so far as they now are provided for by the laws of the United States, be and the same are hereby abolished."[1]

Place of imprisonment.] By the act of March 3, 1825, it is enacted —

"That in every case where any criminal convicted of any offense against the United States shall be sentenced to imprisonment and confined to hard labor, it shall be lawful for the court by which the sentence is passed, to order the same to be executed in any state prison, or penitentiary, within the district where such court is holden; the use of which prison or penitentiary may be allowed or granted by the legislature of such state for such purposes; and the expenses attendant upon the execution of such sentence, shall be paid by the United States."[2]

And by the act of March 3d, 1835, it is provided —

"That whenever any person shall be convicted of any offense against the United States which is punishable by fine and imprisonment, or by either, it shall be lawful for the

[1] Ch. 36, § 5: 5 Stat. at Large, 321.

[2] Ch. 65, § 15: 4 Stat. at Large, 115.

PART 4. court by which the sentence is passed, to order the sentence to be executed in any house of correction, or house of reformation for juvenile delinquents, within the state or district where such court is holden, the use of which shall be allowed and authorized by the legislature of the state for such purpose. And the expense attendant on the execution of such sentence shall be paid by the United States."[1] *Vide, supra*, p. 201, "Jails."

Imprisoned convicts how to be treated.] By the act of June 30, 1834, it is enacted—

"That whenever any criminal convicted of any offense against the United States shall be imprisoned in pursuance of such conviction, and of the sentence thereupon, in the prison or penitentiary of any state or territory, such criminal shall in all respects be subject to the same discipline and treatment as convicts sentenced by the courts of the state or territory in which such prison or penitentiary is situated; and while confined therein shall be also exclusively under the control of the officers having charge of the same, under the laws of said state or territory."[2]

[1] Ch. 40, § 5: id., 775.

[2] Ch. 163: 4 Stat. at Large, 739.

PART V.

PRACTICE OF THE SUPREME AND CIRCUIT COURTS OF THE UNITED STATES IN THE EXERCISE OF THEIR APPELLATE JURISDICTION BY WRIT OF ERROR; AND OF THE SUPREME COURT UPON CERTIFICATE OF DISAGREEMENT OF OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURTS.

CHAPTER I.

OF THE REMEDY BY WRIT OF ERROR GENERALLY, AND FOR WHAT ERRORS IT WILL LIE.

Much that would otherwise properly find a place here, has already been said in defining the limits of the appellate jurisdiction of the supreme court and of the circuit courts of the United States. We have seen that the supreme court is empowered, by writ of error in suits at law, and by appeal in suits in equity and in admiralty, to revise the final judgments and decrees of the circuit courts, and of the supreme courts of the territories; and by writ of error, the decisions of the highest courts of the several states, in suits both at law and in equity, in certain cases of rare occurrence, specified in the 25th section of the judicial act of 1789; and that the circuit courts are invested with appellate jurisdiction over the final judgments of the district courts, by writ of error in suits at law, and by appeal in causes of admiralty jurisdiction. We have seen,

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also, what judgments are to be deemed *final*, these alone being subject to revisions by writ of error; when the amount in controversy may be said to exceed $2,000, so as to bring the case within the appellate jurisdiction of the supreme court,—and $50, so as to fall within that of the circuit court, and how this must be made to appear in cases demanding it; to what cases this jurisdiction extends, independently of the sum in dispute; what is a *suit* within the purview of the 25th section of the judiciary act; what shall be held to be one of those cases arising under the constitution, laws or treaties of the United States, described in that section, of which the supreme court, in virtue of it, may take cognizance, and by what evidence the required condition must be shown; in short, whatever concerns the nature and general scope of the appellate jurisdiction, as defined by statute, has already been shown in the first part of this work, and chiefly in the 2d chapter.

There are, however, some restrictions to which this jurisdiction is, by the judiciary act, subjected, not yet mentioned, and which it is therefore proper here to notice. The 22d section forbids the reversal of any judgment for error in ruling any plea in abatement, other than to the jurisdiction of the court; or for error in fact.[1] And the 32d section of the same

Plea in abatement.

[1] Neither does a writ of error lie to the exchequer chamber or house of lords in England, for error in fact. 1 Archb. Pr., 212. But for an error of this description, as where the party, being under age, appears by attorney, or was a married woman at the commencement of the suit, a writ of error lies in the same court. Its use is not to correct errors of judgment, but to enable the court to rectify errors which preceded the judgment. In *Picket's heirs* v. *Legerwood* (7 Peters, 144), it is said to be resorted to for this purpose in some of the states, and in that case it had been adopted by the circuit court of the United States, and resulted in the allowance of an amendment of the declaration, of vital importance, in an action of ejectment. The court held that a writ of error would not lie for the re-examination of such a judgment. This form

act forbids the reversal of any judgment "for any defect or want of form, but the courts shall proceed to give judgment according as the right of the case and matter of law shall appear to them, except in these cases only in which advantage shall be taken of such defect and want of form by special demurrer."[1]

No reversal for defect of form.

It may then in general be said that a writ of error can be maintained in the courts of the United States only for some error *in law in matter of substance.* These errors are either apparent upon the face of the record, or verified by *certiorari*, upon an allegation of diminution; or, as most frequently happens, are presented by a bill of exceptions accompanying the record. But a writ of error lies also upon a judgment of a circuit court, rendered upon a statement of facts agreed upon for that purpose without a jury, and incorporated in the record returned to the supreme court. *The United States* v. *Eliason*, 16 Peters, 291; *Stimpson* v. *The Balt. & Susq. R. R. Co.*, 10 Howard, 329, 345. The propriety of this practice was carefully reconsidered and discussed in the latter case, and was unanimously reaffirmed. In the previous case of *Keene* v. *Whittaker* (13 Peters, 459), a writ of error upon such a judgment was dismissed; but the report is very brief, and does not clearly show the ground of the decision. No reason is perceived why this practice should not be held to be admissible on error from the district to the circuit courts.

Error lies on judgment on facts agreed.

A writ of error also lies to re-examine a judgment on a special verdict; but not for the re-examination of questions not otherwise presented than by a statement signed by one of the judges of the circuit court, purporting to contain a history of the

And on special verdict.

of remedy, it was said, has long been superseded in England, and, it is supposed, in most of the states of the Union, by summary application to the court on motion.

[1] Act of Sept. 24, ch. 20: 1 Stat. at Large, 73.

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trial; but being neither a bill of exceptions nor a special verdict. *Suydam* v. *Williamson et al.* 20 Howard, 427. The statement in this case contained a recital of the evidence given on both sides, and of further evidence offered by the plaintiffs, which was objected to by the defendant, and overruled by the court; to which decision, it was stated, the plaintiffs' counsel excepted. The paper concluded as follows: "A verdict was then, by direction of the court, taken for the plaintiffs for the premises claimed, subject to the opinion of the court, upon the question of law, with liberty to either party to turn the case into a special verdict or bill of exceptions." The action was ejectment. After advisement, the circuit court gave judgment for the plaintiffs in conformity with the verdict. No error appearing independently of the statement, the supreme court affirmed the judgment. Mr. Justice CLIFFORD, in pronouncing the judgment of the court, gives an elaborate and instructive exposition of the principles and rules pertinent to the case, regulating the practice of the court.

In the application of the general rule above stated, as to what constitutes error for which a writ of error will lie, numerous decisions have been made by the supreme court. But, with the exception of such as relate to the amount in controversy, most of which have already been noticed in the first part of this work, generally speaking, they are, or at least were intended to be, in conformity with the rules and principles of the common law; there being little in the acts of congress rendering these rules and principles inapplicable.

The following enumeration of points decided by the supreme court will, nevertheless, be found useful.

No one but a party to the record of the judgment is entitled to sue out a writ of error for its revision.

Payne v. *Niles* (20 Howard, 219), and all the joint parties in the court below must join in a writ of error. *Wilson's Heirs* v. *The N. Y. Life and Fire Ins. Co.*, 12 Peters, 140.

When a writ of error will lie.

A writ of error will lie upon the ground of want of jurisdiction in the court below, and that, even at the suit of the plaintiff below. *Capron* v. *Van Noorden*, 2 Cranch, 126. When the question upon the writ of error arises upon an exception to the decision of the court below upon the admissibility of testimony, the party excepting will, it seems, be confined to the specific ground of objection urged at the trial; and where the purpose for which the evidence is offered is specifically avowed, the court will not look at it in any other point of view, or inquire whether it might not be proper for some other purpose. *Hind's Lessee* v. *Longworth*, 11 Wheat., 199, 209.

Error will not lie to review the decision of a circuit court allowing a new count to be filed in an action of ejectment, alleging a new demise by a lessor not named in the original counts, nor its refusal to allow costs on leave to amend. *Wright* v. *Hollingsworth's Lessee*, 1 Peters, 165. The court will not decide questions not raised by the record, though both parties desire it. *Bradstreet* v. *Potter*, 16 Peters, 317. On a writ of error the whole record is to be inspected; and if there is a demurrer to evidence, not this merely, but the declaration must be examined. *Bank of the United States* v. *Smith*, 11 Wheat., 171. The decision of the circuit court overruling a motion to quash an attachment cannot be re-examined on writ of error. *Toland* v. *Sprague*, 12 Peters, 300. The question whether there was any evidence to be submitted to a jury cannot be entertained on a writ of error, unless a decision thereon was prayed for in the court below, and an exception regularly taken. *Garrard* v. *Reynolds' Lessee*, 4 Howard, 123. The

PART 5. court, on a writ of error, can revise evidence only to ascertain its competency in point of law, as tending to prove the fact it was offered to establish. Whether or not the jury drew a correct inference from it, cannot be considered. *Hepburn* v. *Dubois*, 12 Peters, 345. If, in the progress of the trial of a suit in Louisiana, a party has, in fact, had the full benefit of a peremptory exception, its disallowance, when first offered, is not a ground of reversal. *Phillips* v. *Preston*, 5 Howard, 278. An exception which, in the course of the trial, became wholly immaterial, cannot be assigned for error. *Philadelphia, Wilmington and Baltimore Railroad Company* v. *Howard*, 13 Howard, 307. The departure of the jury from the instructions of the court cannot be corrected on a writ of error. *Chesapeake and Ohio Canal Company* v. *Knapp*, 9 Peters, 541. The provision contained in the 17th section of the patent act of July 4, 1836 (5 Stat. at Large, 124), for the allowance of writs of error and appeals "in all other cases in which the court shall deem it reasonable to allow the same," does not include a suit in equity to set aside an assignment of a patent right. *Wilson* v. *Sanford*, 10 Howard, 99. Final process is not a fit subject for a writ of error. *Amis* v. *Smith*, 16 Peters, 303. For the correction of an erroneous proceeding under a mandate from the supreme court, a writ of error is the proper remedy. *Martin* v. *Hunter's Lessee*, 1 Wheat., 304.

A writ of error will not, in general, lie for an alleged error in deciding upon an application addressed to the discretion of the court; and therefore the grant or denial of a new trial is not a ground for a writ of error. *Hardenon* v. *Moore*, 7 Cranch, 11; *Barr* v. *Grantz's Heirs*, 4 Wheat., 213; *Blunt's Lessee* v. *Smith*, 7 Wheat., 248. Nor a refusal to reinstate a cause on motion after dismissal. *Welch* v. *Mandeville*, 7

Cranch, 152. Nor the denial of a motion to compel a party to join in a demurrer to evidence. *Young et al.* v. *Black*, 7 Cranch, 565. Nor to reverse a decision upon an application to amend. *Walden* v. *Creig*, 9 Wheat., 576; *Chiroc* v. *Reiniher*, 11 Wheat., 280; 6 Cranch, 206; 1 Mason, 153. Nor for an alleged error in continuing or refusing to continue a cause. *Marine Insurance Company of Alexandria* v. *Hodgson*, 6 Cranch, 206; *Barrow* v. *Hill*, 13 Howard, 54.[1] Nor on a judgment of nonsuit voluntarily submitted to by the plaintiff; but upon a peremptory judgment of nonsuit, granted at the instance of the defendant, and against the will of the plaintiff, a writ of error lies; the courts of the United States having no authority to order such a nonsuit. *Evans* v. *Phillips*, 4 Wheat., 73; *supra*, p. 449. And so, upon a judgment awarding a peremptory mandamus. *Columbian Insurance Company* v. *Wheelwright*, 7 Wheat., 534. The issue of *nul tiel record* being an issue of fact, though triable by the court, no writ of error lies to a judgment thereon. 2 Mason, 22. Nor will a writ of error lie merely to review a question of costs. *Sizer* v. *Many*, 16 Howard, 98.

After a case has been decided by the supreme court on a writ of error and a mandate issued to the court below, if a second writ of error be sued out, it brings up for review nothing but the proceedings subsequent to the mandate. *Roberts* v. *Cooper*, 20 Howard, 367.

The act of May 31, 1844, ch. 31 (5 Stat. at Large, 658), authorizing a writ of error in revenue cases without regard to the amount in controvesy, does not include a suit brought against a collector to recover duties paid under protest; and accordingly, where the judgment was for a sum not exceeding $2,000,

[1] In this latter case ten per cent damages was awarded on the ground that the writ of error was sued out merely for the purpose of delay.

PART 5. the writ of error was dismissed for want of jurisdiction. *Mason* v. *Gamble*, 21 Howard, 390.

When on appeal or writ of error the cause appears to have been brought before the court by collusion between the parties, in order to obtain a decision for extraneous purposes, it will be dismissed with costs upon the application of third persons whose interests would be affected by the decision. Such proceedings are regarded by the court as contemptuous and highly reprehensible. *Lord* v. *Veazie*, 8 Howard, 254; *Cleveland* v. *Chamberlain*, 1 Black, 419. A motion for a new trial is not a waiver of the right to bring a writ of error. In some of the circuits there is a rule giving to it this effect, but a compliance with it can be enforced only by requiring the party to waive his right on the record, as the condition on which his motion for a new trial shall be heard. *United States* v. *Hodge*, 6 Howard, 279.

Want of jurisdiction and irregularity of the writ are the only grounds for dismissal. The court will not entertain a motion to dismiss or quash the writ on the ground that no error appears on the face of the record. That is a question to be determined on the regular final hearing. *Hecker* v. *Fowler*, 1 Black, 95. And after a cause has been dismissed on motion for want of jurisdiction, because it did not appear that the value of the property in question exceeded two thousand dollars, a motion to reinstate the cause on affidavits of value cannot be entertained. *Richmond* v. *The city of Milwaukee et al.*, 21 Howard, 391.

When a writ of error in a suit at common law has been dismissed because it appeared by the transcript that there was no final judgment in the court below, a motion *at the next term*, to reinstate the cause, founded on an amended transcript and the certificate of the clerk of the court below, showing that the judgment was final, cannot be entertained. The

writ of error becomes *functus officio*, and the decision of the court final at the close of the first term. *Rice* v. *The Minnesota and N. W. R. R. Co.*, 21 Howard, 82. If more than the requisite sum is claimed in the *quod damnum*, and there is a general verdict for the defendant, the plaintiff may have a writ of error, though the bill of exceptions relates to items of less amount than such requisite sum. *The United States* v. *M'Daniel*, 6 Peters, 634.[1]

[1] A large portion of the questions decided in the cases cited in the text seem too plain for doubt, and yet many of them, at a large expense to the parties, have had to be decided over and over again, some of them in additional cases not cited. The multiplication of reported decisions seems not to diminish the evil. I would fain hope, that, by bringing so large a number of adjudications together within a space so limited, I may contribute somewhat to guard my professional brethren against the bewildering illusions that seem so easily to beset them, as soon as they leave the familiar precincts of the state tribunals, and tread the *terra incognita* of the national courts.

The foregoing part of this note was contained in the fourth edition. While the present edition is passing through the press, my attention has been called to a new work on the jurisdiction and practice of the courts of the United States. The first volume, of more than six hundred pages, being completed, I have been furnished with a copy of it. The preface thus begins: "The great majority of legal practitioners throughout the United States make the commencement of their professional employment in the state courts. They study attentively * * * * * * * . But, to many, the peculiar sphere of the United States courts remains for years a *terra incognita*, and when they are called upon at length, in special cases, to advise upon or prosecute causes in which a resort to the national tribunals is desirable, they feel an uncertainty and undefiniteness in their knowledge of this new field."

It seems due to the authors of this new work to assure the learned reader that, so far as I have discovered, in turning over many of the leaves of this first volume, it contains no direct evidence that the authors ever saw this treatise, and that the above quoted passage ought, accordingly, to be regarded as one of those remarkable coincidences which sometimes surprise us in our journey through life. It is worthy of transcription, moreover, as an "elegant extract;" though it hardly rises to the dignity of one of the "curiosities of literature."

PART 5.

CHAPTER II.

OF THE FORM OF THE WRIT, WITHIN WHAT TIME IT MUST BE BROUGHT, AND ITS OPERATION AS A SUPERSEDEAS.

Style of the writ.

Whence it issues.

The writ of error, like all other writs from the courts of the United States, runs in the name of the President. It issues from the appellate court, whether the supreme court or a circuit court. But, in order to avoid the inconvenience of obliging suitors throughout the union to apply to the clerk of the supreme court for the writ, this officer was, by an early act, which will be more particularly noticed in the sequel, directed to transmit to the clerks of the several circuit courts, the form of a writ of error from the supreme court, and these clerks were empowered to seal, sign and issue this writ for use within their respective districts. From them, therefore, the writ is generally if not uniformly obtained.

Need not be allowed.

As the supreme court has been called upon to decide the question whether an *allowance* of a writ of error is necessary, it is not amiss to say that this formality is not required. It is sufficient to issue it and file it in the office of the clerk of the court to which it is directed. *Davidson* v. *Lanier*, 4 Wallace, 447.

To what court directed.

The reader will not require to be told that the writ should ordinarily be directed to the court whose judgment is to be reviewed. But although the appellate jurisdiction of the supreme court over the final judgments and decrees of a state court is limited to those of the highest court in which a decision could be had, yet, if the record has been remitted by such court to another court, the writ may be directed to the latter, and the record be brought thence. *Gelston et al.* v. *Hoyt*, 3 Wheat., 246.

Test and return.

The writ, whether issuing from the supreme court or from a circuit court, and to whatever court directed, must be tested in the name of the chief justice, or (if that office be vacant) in the name of the justice next in precedence; but with respect to the test and return days there is no statutable regulation; nor, as to the test day, is there, to my knowledge, any judicial decision establishing any rule more definite than this: that it must be some day in term. When issued in vacation it may, I presume, be tested of any day in the last preceding term; but, as the first day is fixed by law, and known, it is best to test it on that day; and when issued in term, it ought doubtless to be tested on the first day of that term.

Test day.

In vacation.

In term.

Return day.

With respect, however, to the return day, the supreme court has at length laid down a definite rule to be observed in all cases. It is not in conflict with any express prior decisions of the court, but in the later decisions to which allusion is here made it is for the first time declared to be absolute and universal. The rule is this: that on whatever day the writ is issued, it shall be made returnable on the *first day* of the *next ensuing term*. *The Insurance Company of the Valley of Virginia* v. *Mordecai*, 21 Howard, 195; *Porter* v. *Foley*, id., 393. In the first of these cases the writ was issued on the 18th of October, 1858, and was made returnable on the second Monday of January, instead of the first Monday of December, then next; and the day specified in the citation for the appearance of the defendant in error was the same. On motion in behalf of the defendant in error to dismiss the cause for this reason, the court held the writ void, and dismissed it for want of jurisdiction; founding its decision upon the process act of May 8, 1792 (1 Stat. at Large, 278), by the 9th section of which the clerk of the supreme

In all cases the first day of the next term.

Reason of the rule.

PART 5. court was required to transmit to the clerks of the several circuit courts, for use in their respective districts, the form of a writ of error to be approved by two of the judges of that court, which was accordingly done, and the first day of the term (next ensuing) was made the return day of the writ. The legal return day was held to have been thus fixed under the authority of the act. The reason assigned for the decision, it will be seen, admits of no exceptions to the rule. When the judgment happens to be rendered so shortly before the first day of the term as to render it difficult or impossible to sue out the writ and serve the citation before the return day, it would doubtless be convenient to the party deeming himself aggrieved to be permitted to make his writ returnable on a later day of the term.[1] But on the other hand, to say nothing of the legal difficulty supposed to be in the way of such a modification of the rule, there are grave objections to it. It would introduce a new element of controversy. *How short* a time before the term must the judgment be rendered to warrant this departure from the general rule? In strict justice this ought to depend on the particular circumstances attending each case, and the court would be called upon to weigh these circumstances and to conform its decision to them. The duration of the term, moreover, is uncertain, and the return day selected might happen to be after its termination, and the writ be thus rendered nugatory. In the second of the above cited cases, the writ of error (to revise the judgment of a state court) was issued on

[1] This would be in accordance with the direction given by Judge CURTIS, in his summary directions for suing out writs of error in the appendix to his Digest, and according also to my own prepossessions. The attention of the court was distinctly called to these directions by Mr. Robinson, in opposition to the motion to dismiss the cause; but, as already stated, such an exception would have been inconsistent with the ground on which the decision was placed.

the 27th of December, and made returnable on the 3d Monday of January next ensuing. It was dismissed on motion; the court merely referring, briefly, to its decision in the above mentioned case of *The Insurance Company of the Valley of Virginia* v. *Mordecai*, as settling the law upon the subject, and conclusive with respect to the case before the court. In this case, it will be seen, the writ was issued during the term, and made returnable about three weeks later in the same term. It serves, therefore, further to demonstrate the inflexibility of the rule, by removing all doubt with respect to the only class of cases concerning which any doubt could otherwise have possibly been entertained. The writ should have been made returnable, not on a later day in the same term, but on the *first* day of the *next* term. The court, in conclusion, said, that, if the plaintiff desired it, he might, in order to save expense, withdraw the transcript, leaving a receipt therefor with the clerk, and use it in connection with a new writ of error.

The foregoing observations touching the return day of the writ of error were written for the fourth edition of this work. Since its publication a judicious rule has been made by the supreme court (notwithstanding the ground it felt it to be its duty to assume in the case of *The Insurance Company of the Valley of Virginia* v. *Mordecai*, above cited), which to a great extent relieves the subject from the uncertainty which attended it. The above exposition will serve to show the actual predicament of the case when the new rule was made, and for that reason I conclude not to expunge it.

The rule prescribes, that, when the final judgment in the court below has been rendered more than thirty days before the first day of the next term of the supreme court, the writ of error and citation, if taken before that day, must be made returnable on

PART 5. that day, and served before; when the judgment was rendered less than thirty days before the first day of the term, the writ of error and citation may be made returnable on the third Monday of the next term and served before that day. See Appendix, rule 37, Rules S. C.[1]

The test and return days in the several circuit courts are regulated by local usage and rules of court. The rules applicable to *all* process in the national courts in New York may be seen, *supra*, *p.* 338 *et seq.*

Statute regulations.

Before proceeding to the consideration of the remaining subjects of this chapter, it is necessary to bring under review the brief legislative enactments, which, in conferring the appellate jurisdiction, also prescribe in outline the manner in which it is to be exercised. They have been referred to in the first part of this work, for the purpose of defining the scope of this jurisdiction but in order clearly to understand the regulations they enjoin it is important to recite them verbatim.

The 22d section of the judicial act of 24th September, 1789, enacts—

"That final decrees and judgments in civil actions in a district court, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, may be re-examined and reversed, or affirmed, in a circuit court holden in the same district upon a writ of error, *whereto shall be annexed and returned therewith, at the day and place therein mentioned, an authenticated transcript and assignment of errors and prayer for reversal, with a citation to the adverse party, signed by the judge of such district court or a justice of the supreme court, the adverse party having at least twenty days' notice. And upon a like process* may final judgments and decrees in civil actions, and

[1] But suppose that the judgment was rendered *just* thirty days before the first day of the next term?

suits in equity, in a circuit court, brought there by original process, or removed there from the courts of the several states, or removed there by appeal from a district court, where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs, be re-examined and reversed or affirmed, in the supreme court, *the citation being in such case signed by a judge of such circuit court, or justice of the supreme court,* and the adverse party having at least *thirty* days' notice. But there shall be no reversal in either court, on such writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or to such plea to a petition or bill in equity, as is in the nature of a demurrer, or for any error in fact. *And writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of,* or in case the person entitled to such writ of error be an infant, *feme covert, non compos mentis,* or imprisoned, then within five years as aforesaid, exclusive of such disability. And every justice or judge, signing a citation, or any writ of error as aforesaid, *shall take good and sufficient security that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs, if he fails to make his plea good.*"[1]

The 23d section of the same act provides —

"That a writ of error as aforesaid shall be a *supersedeas* and stay of execution, in cases only where the writ of error is *served by a copy thereof being lodged for the adverse party in the clerk's office where the record remains, within ten days, Sundays exclusive, after rendering the judgment or passing the decree complained of.* Until the expiration of which term of ten days, executions shall not issue in any case where a writ of error may be a *supersedeas;*[2] and

[1] Ch. 20: 1 Stat. at Large, 84. But in causes of whatever nature, carried for revision to the supreme court by the United States or by direction of any department of the government, no bond or security is required; but all costs taxable against the United States are to be paid out of the contingent fund of the proper department. Act of Feb. 21, 1863, ch. 50: 12 Stat at Large, 657.

[2] Vide *supra,* p. 558, note 3.

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where, upon such writ of error, the supreme or circuit court shall affirm a judgment or decree, they shall adjudge or decree to the respondent in error *just damages* for his delay, and *single or double costs*, at their discretion."

The 25th section of the same act, which gives the writ of error to the state courts, provides that a final judgment or decree in such courts, in the cases therein specified, "may be re-examined and reversed or affirmed in the supreme courts of the United States, upon a writ of error, *the citation being signed by the chief justice, or judge or chancellor of the court, rendering or passing the judgment or decree complained of, or by a justice of the supreme court of the United States, in the same manner, and under the same regulations, and the writ of error shall have the same effect as if the judgment or decree complained of had been rendered or passed in a circuit court.*" [1]

The only remaining legislative provision which requires to be noticed in this place is the act of 12th December, 1764 (ch. 3, 1 Stat. at Large, 404), relative to the amount of the *security* required by the 22d section of the judicial act. After a recital of the provisions of this section, relative to such security, and of the fact that doubts had arisen as to the extent of the security to be required in certain cases, it enacts "that the *security* to be required and taken on the signing of a citation on any writ of error which shall *not be a supersedeas* and stay of execution, shall be

[1] The reader has already seen that by the act of March 3, 1803, ch. 11 (2 Stat. at Large, 244), the 22d and 23d sections of the judiciary act have been modified by the substitution of an appeal; subject, however, to the same regulations, in lieu of a writ of error, in cases of equity, and of admiralty and maritime jurisdiction. This modification comprehends all cases arising in the district and circuit courts of the United States. A writ of error still continues to be the only process by which the judgments or decrees of a state court can be reviewed by the supreme court of the United States."

only to *such an amount* as, in the opinion of the justice or judge taking the same, *shall be sufficient to answer all such costs* as, upon an affirmance of their judgment or decree, may be judged or decreed to the respondent in error."[1]

Writs of error to be brought within five years.

In proceeding to notice those parts of the foregoing enactments now requiring attention, I propose, in the first place, to consider that which limits the right to bring a writ of error to five years "*after rendering* or *passing* the *judgment* or *decree* complained of." It is important to determine from what date the period of limitation is to be computed; and, to do this, it becomes necessary to ascertain when, in the sense of the statute, a judgment may be said to have been *rendered*. No answer appears to have been given to this question by any decision of the supreme court, nor am I aware that it has been decided in any of the circuit courts. But, in the case of *Fleet* v. *Young*, in the court of errors of the state of New York (11 Wendell, 522), the question was whether or no the writ of error was barred by the state statute, the words of which ("after the *rendering* of the judgment") were essentially the same as those of the act of congress; and, in order to determine this question, it became necessary for the court to decide

When the statute begins to run.

Decisions of the courts of New York.

[1] There is a statutable provision of considerable importance relative to writs of error in criminal cases, prosecuted under the 25th section, which ought not to be passed over in silence, and which is noticed here for the want of a more fit place.

The act of July 13, 1866 (ch. 184, sec. 69, 14 Stat. at Large, 172), directs that whenever a writ of error shall be issued for the revision of any judgment or decree in any criminal proceeding where is drawn in question any statute of the United States, in a court of any state, as is provided in the 25th section of the judiciary act of 1789, the defendant, if charged with an offense bailable by the laws of such state, shall not be released from custody until a final judgment upon such writ, or until a bond, with sufficient sureties in a reasonable sum, as ordered and approved by the State court, shall be given; and if the offense is not so bailable, until final judgment upon the writ of error.

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whether the statute began to run when the judgment was given, or when the record of judgment was subsequently filed. The decision, in accordance with an elaborate opinion pronounced by Chancellor KENT, was, that the day on which the judgment was *given* was the day contemplated by the statute. The same question, under different circumstances, arose in a subsequent case before the supreme court of New York. There had been a motion to set aside the report of a referee, which was denied at the July term, 1840; and the judgment record was not filed until several months afterward. The court decided that the denial of the motion to set aside the referee's report was the rendering of the judgment in the sense of the statute, and consequently that the period of limitation then began to run; Mr. Justice BRONSON, with characteristic perspicacity, observing, that "the record was not the judgment, but only a written memorial of the judgment, which had previously been rendered." *Lee* v. *Tillotson*, 4 Hill, 27.

It may, I think, with considerable confidence, be presumed, that the supreme court of the United States would arrive at the same conclusion as the New York courts have done.

Judgments absolute and nisi.

But there remains another question which may happen to be one of vital importance. A writ of error will lie for the revision only of final judgments; and the period of limitation cannot therefore commence at the date of an *interlocutory* judgment. But a final judgment may be either absolute at the time it is given, as a judgment for the defendant, on a demurrer, or for the plaintiff on a plea in abatement, to the declaration; or it may be a judgment *nisi*, not to become absolute until a future day, the *quarto die post*, or on the last day of the term, as a judgment upon the verdict of a jury, or by default; and from what day, in the case of a judgment of the

latter kind, does the statute begin to run?[1] It is to be considered, that, until the judgment becomes absolute, it remains uncertain, in contemplation of law, and perhaps in fact, whether it will ever become so, and, consequently, whether a writ of error will become necessary. The more reasonable conclusion seems, therefore, to be, that the day on which a judgment becomes absolute is that whence the limitation is to be computed.

Writ of error not brought until filed.

A writ of error is not to be deemed "brought," until it is filed in the court to which it is directed; and therefore, though the writ bear test within five years, if it be not filed within that period, it is barred. *Brooks* v. *Norris*, 11 Howard, 204. This is an important case, and it determines another question of practice of considerable interest. The judgment of the court was pronounced by the chief justice, and I shall need no apology for inserting the following extract from it:

"The writ of error is not brought in the legal meaning of the term, until it is filed in the court which rendered the judgment. It is the filing of the writ that removes the record from the inferior to the appellate court, and the period of limitation prescribed by the act of congress, must

[1] It will be recollected that in the courts of the United States, all trials are *at bar*. Under the *nisi prius* system and common law practice, no order can be entered for judgment on a verdict until the next term of the court in bank, on the return of the postea; and then the order is *nisi*, for the purpose of affording the unsuccessful party by motion in arrest, or for judgment *non obstante veredicto*, or for a new trial, to show cause why the order should not be allowed to become absolute. And a like opportunity is in like manner afforded to the defendant in judgments by default. They are entered *nisi* on the return of the writ of inquiry, or the report of the clerk. The same reason exists for a like practice, in both cases, in the courts of the United States, and such, doubtless, is their practice in all the districts. In the New York districts it is regulated by rule. See Appendix, Rules 30 and 32, of the district court of the northern district, and Rule 6 of the circuit court.

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be calculated accordingly. The day on which the writ may be issued by the clerk, or the day on which it is tested, is not material in deciding the question. In this case, therefore, five years had elapsed before the writ of error was brought, and the limitation of time in the act of congress was a bar to the suit."

The statute bar may be taken advantage of on motion.

"According to the English practice, the defendant in error must avail himself of this defense by plea. He cannot take advantage of it by motion; nor can the court take judicial notice of it, as the limitation of time is not an objection to the jurisdiction of the court. It is a defense which the defendant in error may, or may not, rely upon, as he himself thinks proper. But, according to the established practice of this court, he need not plead it, but may take advantage of it by motion. The forms of proceeding in the English courts of error have not been adopted or followed in this court. * * * In this case the bar arising from the lapse of time is apparent on the face of the record, and the defendant may take advantage of it by motion to quash or dismiss the writ."

Writ of error, when a *supersedeas*.

We are, in the next place, to consider that part of the statute which prescribes the conditions on which a writ of error shall operate as a *supersedeas*. It must, for this purpose, as we have seen, be sued out, and served by lodging a copy of it in the clerk's office for the adverse party "within ten days, Sundays exclusive, after *rendering* the judgment complained of."

This regulation is virtually a statute of limitation, and it will be observed that the time from which the limitation is to be recorded, is designated by the same words that are used to fix the time at which the five years limitation is to commence. It would seem to follow, therefore, that the interpretation to be given to these words, ought to be the same in both cases, and I can discern no reason to the contrary. The just conclusion, then, seems to be that in this case as

in the other, the time of limitation begins to run when the judgment is given, and has become absolute.

To be served within ten days after judgment absolute.

There is, moreover, a decision of the supreme court relative to the proper time for bringing an appeal, which seems to favor this conclusion. The phrase of the statute with respect to appeals is, "after *passing* the decree complained of;" and the word "passing" thus applied to appeals, seems to be, and doubtless was designed to be, equivalent to the term "rendering" as applied to judgments. In the case of *Silsby et al.* v. *Foot* (20 Howard, 290), above alluded to, a "final decision" is stated to have been made in the circuit court, on the coming in of the master's report on the 28th of August, 1854, and an appeal was taken within less than ten days thereafter; but the decree was special, and "was not settled or signed by the judge till the 11th of December, 1856;" and, on that day, a second appeal was taken. At the December term of the supreme court, 1857, a motion was made in behalf of the appellee to dismiss the second appeal, on the ground that a prior appeal had already been taken, and the question was, whether or not the first appeal had been taken prematurely, and thereby rendered ineffectual. The court held that it had not; the decision made in August, 1854, being "the passing of the decree" according to the true interpretation of the act; the court accordingly dismissed the second appeal as superfluous.[1]

[1] The force of this decision is weakened, however, by the terms in which it is expressed; or, rather, by the declarations which accompany its annunciation. After stating its decision in the case before it, that an appeal may be regularly taken at any time after the decision is pronounced and entered on the minutes by the clerk, and that, if taken within ten days, it will stay execution, the court adds: "and we are also of opinion, that, if taken within ten days after the decree is settled and signed by the judge, and filed with the clerk, that it is in time to stay the proceedings." It is no great fault of the reporter, there-

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Supersedeas granted, when.

When a writ of error has been regularly sued out within ten days after the judgment was given in the court below, and an execution has nevertheless been issued, a supersedeas may be granted by the supreme court, or by the court below. *Stockton et al.* v. *Bishop*, 2 Howard, 74. But where a writ of error, though seasonably issued, has been dismissed, and a second writ of error has been sued out, the court has no power to grant a supersedeas unless the second writ also was issued within ten days from the date of the judgment. Nevertheless, when a cause is reinstated after dismissal from a writ of error which was a supersedeas, the appellate court may, in its discretion, grant a supersedeas on having the cause again brought before it on a second writ of error, because, when reinstated, it would stand upon the first writ of error. This is the true interpretation of the case of *Haldeman et al.* v. *Anderson*, 4 Howard, 640. In the order granted in this case it is erroneously stated to have been made in virtue of the 14th section of the judiciary act of 1789, empowering the courts of the United States to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary, &c., and agreeable, &c. *Hogan et al.* v. *Ross*, 11 Howard, 294. So where

fore, that his syllabus is in the following words: "Where an appeal is taken within ten days from the rendition of the decree, it is in time to operate as a supersedeas; and so, also, if taken within ten days after the decree is settled and signed."

With a slight amendment, by the substitution of the words *it is regular and will operate*, &c, in lieu of the words "it is in time to operate," it is a faithful abstract of the language of the court. So that both of the two appeals, that had been taken in the case before the court, were held to be regular, and each of them a supersedeas, although there was an interval of more than two years between them. It seems to follow, that, with respect to appeals, a like latitude is to be allowed as to the five years' limitation.

an appeal was taken in a suit at common law within ten days after judgment, and an execution was nevertheless issued, the appeal being a nullity, it was error in the circuit court to supersede the execution, on the ground that the party appealing, on discovering his mistake, sued out a writ of error after the expiration of ten days. *Saltmarsh* v. *Tuthill*, 12 Howard, 387.

CHAPTER III.

OF THE PROCEEDINGS FROM THEIR COMMENCEMENT TO THE RETURN INCLUSIVE.

Plaintiff in error to find sureties.

When a party deeming himself aggrieved by a judgment against him, which he is entitled to have reviewed by writ of error, desires to resort to that remedy, the first thing it behooves him to do is to find one or more responsible persons who are willing to become his sureties in the "security" which the statute requires.[1] The statute is silent as to the form of the security. In England, where the plaintiff in error is also required to give security, it is in the form of a recognizance, and is called bail in error; but the engagement is held to be absolute, the bail not being permitted to exonerate themselves by the surrender of the principal. The established form, in the courts of the United States, is a bond with one or more sureties, and in a penalty sufficient, when the writ is sued out in season to render it a supersedeas, to secure the amount recovered in

To give a bond.

The penalty.

[1] But, by the act of February 21, 1863, ch. 50 (12 Stat. at Large, 657), the United States are exonerated from giving security upon writ of error, or appeal to *the supreme court*, prosecuted by them, or on their account, in any case. The act, however, directs the payment in the event of an adverse decision of the costs taxable against the United States; and, by the act of July 27, 1868, ch. 255 (15 Stat. at Large, 226), the provisions of that act are extended to writs of error and appeals to *the circuit courts* of the United States.

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the court below, whether debt or damages and costs, or costs only, together with such costs and damages as may be adjudged against him, should he fail in the appellate court. When not sued out within ten days, a penalty sufficient to cover all such *costs* as, upon affirmance, may be adjudged against him, is all that is required. This security is indispensable; and, therefore, where the bond was in a small sum to respond the damages and costs which might be adjudged *in the supreme court*, it was upon motion ordered that the cause stand dismissed unless the plaintiff in error should file sufficient security within thirty days after the rising of the court. *Cartlet* v. *Brodie*, 9 Wheat., 553. The form of the bond, in order to render it a supersedeas, is prescribed with great minuteness by rule 35. See appendix, rules S. C. But the objection to the sufficiency of the security ought to be taken by way of preliminary motion to dismiss the writ of error for irregularity; and it is too late to object at the argument upon the merits. *Mandeville et al.* v. *Riggs*, 2 Peters, 482.

Writ dismissed for want of.

Objection, when taken.

The citation, what it is.

The "citation" required by the statute is a summons to the adverse party, admonishing him to appear and show cause, if any there be, why the judgment should not be reversed. The service of it is the "notice" enjoined by the statute. Its proper date is the day on which it is signed; and the day designated for the appearance of the adverse party, or return day, as it is often called, is the same as that of the writ. It is tested in the name of the judge by whom it is granted, and must be signed by him. If signed by the clerk instead of the judge, it is bad, and the cause will be dismissed. *The United States* v. *Hodge*, 3 Howard, 534. When the writ is brought for the revision of a judgment of a district court in a circuit court, the citation must be signed by "the judge of such district court, or a

Its date and return day.

Tested in the name of the judge and signed by him.

By *what* judge.

justice of the supreme court;" and, when brought to review the judgment of a circuit court in the supreme court, the citation must be signed by "a judge at such circuit court or a justice of the supreme court;" the signature of the district judge in the latter case having been adjudged not to be in accordance with a just construction of the act, and accordingly ineffectual. *Palmer* v. *Downer*, 7 Wallace, 541.

Forms for the bond, the writ of error, and the citation, are given in the appendix.

Bond to be executed, &c.

The steps to be next taken are, to draw up and execute the bond in due form;[1] to obtain a writ of error from the clerk of the circuit court; to prepare the required "citation;" and, if the writ of error is to be brought in virtue of the 25th section of the judicial act to reverse the decision of a state court, to prepare a petition addressed to the judge to whom the application is to be made, setting forth distinctly the facts which are supposed to bring the case within that section, and praying the allowance of the writ and a citation;[2] and then, thus armed, to apply to the proper judge designated in the 22d and 23d sec-

Application to the judge.

[1] But, unless the pecuniary ability of the sureties is already well known to the judge, they should appear before him in person, to the end that he may interrogate them upon this point. And he would have a right, I suppose, to insist on their answering under oath. Indeed the act seems to contemplate their personal attendance. It requires the judge "to *take* good and sufficient security;" though this language was probably suggested by the English practice of taking a recognizance, and in the expectation of the adoption of that practice here.

[2] Such a petition is stated to be usual by Judge CURTIS, in the summary directions for suing out writs of errors and appeals, which he has laid the profession under obligation by appending to his digest; and the very special nature of the jurisdiction conferred by the 25th section may be a good reason for this distinction. In all other respects the proceedings are the same as when the writ of error is directed to a court of the United States.

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tions of the act above recited, to approve the bond, allow the writ, and sign the citation. If the judge is convinced of the sufficiency of the bond, he will indorse upon it his certificate to that effect, and perform the other acts required of him.

Bond, writ and copy to be filed, where.

The bond must be delivered to the clerk of the court, where the record remains, and this should be done without unnecessary delay.[1] So, also, must the writ of error, and a copy of it for the adverse party, at some time before the return day, and in season for transmission, along with the transcript of the record, to the appellate court; and, if it is intended to make the writ of error a supersedeas, the copy of the writ must be lodged with the clerk within ten days, Sundays exclusive, after judgment. It is highly proper, though perhaps not necessary, that this copy should have a descriptive indorsement, showing it to have been so lodged, pursuant to law, for the defendant in error. For any other purpose, except to stay the execution, it has been held to be sufficient, if lodged at any time before the return day. *Wood* v. *Lide*, 4 Cranch, 180; but it is unwise so to defer it.[2]

[1] But, where the omission to file a bond seemed traceable to misapprehension on the part of the attorney, it was allowed to be filed *nunc pro tunc*. *Brobst* v. *Brobst*, 2 Wallace, 96.

[2] The lodging of a copy of the writ in the clerk's office, for the defendant in error, is peculiar to our national courts. The 22d section of the judicial act, which gives the writ of error, and also prescribes the formalities to be observed in suing it out, makes no mention of the copies. It is, by the 23d section, that the copy is required, and, as the sole purpose of that part of the section appears to me to have been to regulate the operation of the writ of error as a supersedeas, I cannot but doubt whether it was intended to require this formality, except as the condition on which the writ of error should become a supersedeas. It seems to have been assumed, however, from the outset, that it was requisite in all cases.

Judge CURTIS, in the appendix of his digest, mentioned in the last preceding note, advises the deposit in the clerk's office of an additional copy of the writ, and of the citation, as well as of a copy of the bond.

Citation to be served, how.

The next thing requiring attention is the proper *service* of the citation, without which the writ of error becomes a nullity. The service is to be made by delivering a true copy to the party, his attorney or counsel; and there must be an affidavit appended to, or indorsed upon the original, showing due service, and the day on which it was made, which, with the writ, must be filed with the clerk of the court below.

A service on the executrix of the deceased attorney of record, and also on a member of the bar, who was the former law partner of the deceased attorney, was held to be nugatory, and the writ of error was accordingly dismissed. *Bacon* v. *Hart*, 1 Black, 38. But, when a female is a party to the suit in the court below, and marries after judgment therein, a service on the husband is good. 5 Cranch, 21, *note*. Service on the attorney of record is good, unless his name as such has been withdrawn *by leave of the court*. *The United States* v. *Curry*, 6 Howard, 106. When the writ of error is brought upon a judgment in favor of the United States, the

I presume he does not intend to be understood as asserting that the delivery of these copies to the clerk is necessary to the regularity of the proceedings, because there is no statute, nor any decision, or general rule of the court, nor is there any thing in the practice of the English court of king's bench requiring it; nor does he assign any reason for recommending it. For these reasons I have not felt at liberty to enumerate it among the requirements of the law. He states also that the copies of the writ and citation remain in the clerk's office. It must, I presume, be for this purpose, therefore, that he enjoins the deposit of them; and, as a precaution against the possible loss of the original writ and citation in their transmission to the clerk of the appellate court along with the transcript of the record; it may be worth while to deposit copies of them. This, I imagine, is the view of the subject taken by Judge CURTIS. His laudable purpose was to point out what it is *best* to do, whether the law peremptorily exacts it or not; it is my business, *also*, to show what is, and what is not, absolutely indispensable.

PART 5. service must be upon the district attorney of the United States.

The return. We come now to the answer or return to be made to the writ of error. The writ is addressed to the judge or judges of the court whose judgment is to be reviewed, and its mandate is to send to the appellate court, under his or their seal, the record and proceedings, with all things concerning the

How made. same; but this may be done through the clerk by the transmission, under the seal of the court, to the clerk of the appellate court, of a transcript of the record,[1] with whatever else is requisite to enable that court to understand correctly, and properly to decide, the questions in controversy; and the transcript must be filed before the expiration of the term at which it was returnable, otherwise the writ or appeal is no longer valid. *Edmonson* v. *Bloomshire*, 7 Wallace, 306. If there be a bill of exceptions,

What it must contain. that must of course be included. But the return must also contain within itself sufficient evidence, direct or presumptive (except with respect to the amount in controversy where that is material), to show that the appellate court has jurisdiction, and that the statute has been complied with in suing out the writ.

Copy of the bond. The return should, therefore, contain a copy of the bond to show that the required security has been given. This, however, has been held not to be indispensable; and, in the same case, it was also said that if no bond had, in fact, been given, the omission would not vitiate the writ, this part of the

[1] But where a blank was left instead of the names of the jurors, the omission was held to be immaterial. 9 Cranch. 180.

The transcript *must* be under the seal of the *court*, else the appellate court has no jurisdiction. *Blitz* v. *Brown*, 7 Wallace, 693.

The original writ of error, not a copy of it, must always accompany the transcript. *Mussina* v. *Cavazos*, 6 Wallace, 355.

statute being only directory. *Martin* v. *Hunter's Lessee*, 1 Wheat., 304, 361. But the reverse of this has been held, or, at least, assumed as unquestionable in later cases. Thus, in *Anson et al.* v. *The Blue Ridge Railroad Co.* (23 Howard, 1), no bond having been given, the court granted leave to supply the deficiency, citing former decisions to the like effect.

The citation.

The return of the citation, as we have seen, is required by the express terms of the statute, and in several early cases it was accordingly held to be indispensable. But, in *Itineray* v. *Byre* (5 Howard, 295), the reverse was decided, the court observing that the presumption was that a citation had been issued, and it might be proved *aliunde*. This decision, in conflict with several prior decisions, does not appear to have been followed, and, being also in conflict with the statute, we may, with some confidence, predict that it will not be. A citation, regularly served, is indispensable to the validity of the writ, and, unquestionably, it is incumbent on the plaintiff in error, or appellant, to show affirmatively that this condition has been complied with. Nor can it be doubted that the citation itself, with the evidence of its service accompanying the return, is the proper mode of showing such compliance. See *Bacon et al.* v. *Hart*, 1 Black, 38.[1]

[1] There is, probably, among the several courts of the United States, a want of uniformity in the formal part of the return. The English form, recommended by its neatness and strict propriety, is as follows: "The answer of (naming the chief justice) to the foregoing writ.

The record and process, whereof mention is therein made, follow in these words, to wit:"

Then follows a copy of the record, commencing with the placita. See Sellon's Practice.

The customary form in New York is (or was) less graceful. See Burril's Forms.

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Within what time the return must be made.

With respect to the *time* allowed in the supreme court for making the return, it is now definitively settled, in accordance with all analogous usage, that it must, in all cases, be made before or *during* the next term, or if not, that the cause will be dismissed on motion of the defendant in error or appellee, for that reason alone. *The Steamer Virginia* v. *West*, 19 Howard, 102; *Bacon et al.* v. *Hart*, 1 Black, 36; *Mesa* v. *The United States*, 2 Black, 721. The limitation exists independently of the 9th general rule of the supreme court, which, as we shall see in the next chapter, requires the return to be filed, and the cause placed upon the docket (calendar), either by the *sixth* or the *thirteenth* day of the term, according to circumstances, on pain of dismissal.

In cross appeals one transcript sufficient.

It has been declared by law, that in all cases of appeal duly taken by both parties from the judgment or decree of any district or circuit court to the supreme court, a transcript of the record filed in the supreme court by either party, on his appeal, may be used on both appeals, and both appeals may be heard as if records had been filed by the appellants in both cases.[1]

Translations.

When the record contains any document, paper, testimony or other proceedings, in a foreign language, it must contain also a translation of such document, &c.[2]

Record to be printed.

The clerk is required, in all cases, to have fifteen copies of the record printed, at the expense of the United States.[3]

[1] Act of August 6, 1861, ch. 61, § 1: 12 Stat, at Large, 319.

[2] Appendix, Rule 11, Rules S. C.

[3] Rule 10. For further particulars, see these rules. Appendix.

CHAPTER IV.

PROCEEDINGS SUBSEQUENT TO THE RETURN.

Appearance to be entered.

On the filing of the transcript, the appearance of the counsel for the plaintiff in error or appellant is to be entered, and no motion for dismission, except by special leave of the court, will be heard without previous notice to the adverse party, his attorney or counsel. Appendix, Rule 35, S. C.

Notice of motion to dismiss.

Diminution.

The cause being now in the appellate court, it behooves the parties to ascertain whether the return is complete, and if not, to pray a certiorari to the court below to supply the deficiency. Either party may allege, or, as it is usually termed in the reports, *suggest* diminution; and formerly it appears to have been the practice to make the suggestion orally. But by one of the general rules of the court the motion for a certiorari must be in writing; and the facts on which it is founded, if not admitted by the adverse party, must be verified by affidavit. The rule also requires the motion to be made at the first term.[1]

Return to certiorari may be made by the clerk.

In the case of *Fenemore* v. *The United States* (3 Dallas, 360, *note*), it became a question whether the rule authorizing a return to a writ of error to be made by the transmission, by the clerk of the court to which the writ of error was directed, of a transcript under his hand and the seal of his office, was to be construed as extending to a *certiorari* issued upon an

[1] Appendix, Rule 14, S. C. Rules. The practice of the supreme court in this respect is much more simple, and at the same time more effective, than that of the English courts upon writs of error directed to one of the superior courts, where the right to allege diminution appears to be confined to the plaintiff, and where the allegation is to be made in the form of an assignment of error. The practice of the supreme court nearly resembles the English practice said to be applied to cases brought for review from an inferior court, in which the plaintiff in error is not allowed to assign diminution for error, but the court directs a certiorari to issue *ad informandum conscientiam.*

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allegation of diminution, so as to authorize a return thereto in the same manner; and it was the opinion of a majority of the court that such ought to be its construction; and in *Stewart* v. *Ingle et al.* (9 Wheat., 526), this practice was sanctioned and confirmed.

Special writ, when necessary.

In the case of *Barton* v. *Petit et al.* (7 Cranch, 288), a writ of error was brought to reverse a judgment on a bond given to the marshal with condition to have certain goods forthcoming at the day of sale appointed by the marshal; being goods which he had seized under a *fi. fa.* issued upon a former judgment recovered by the defendants in error against the plaintiffs in error, which judgment was reversed at the last preceding term of the supreme court of the United States. The ground upon which it was contended that the judgment upon the bond ought to be reversed, was the reversal of the original judgment. Under these circumstances it became a question in what manner the fact should be verified, that the execution, upon the levy under which the bond had been taken, was issued upon the identical judgment which had been reversed. Upon this question the court was of opinion that a *certiorari*, upon suggestion of diminution, was not the appropriate remedy; and, moreover, that it would not be regular to receive the certificate of the clerk of the court below, of the dependency of the latter, upon the former judgment. The court therefore ordered a special writ to be framed, applicable to such cases, directed to the clerk of the court below, requiring him to certify, under the seal of the court, the execution recited in the bond on which the second judgment was rendered. The case being novel, the court would not permit the plaintiff in error to suffer in consequence of his delay in moving, but remarked that "in future the party must take the consequences

of his neglect if he should fail to have the execution certified in time."

The appellate jurisdiction of the supreme court from the judgment of the inferior courts of the United States being, as we have seen, limited to cases in which the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs, it must always appear upon the return of the writ of error that the cause involves that amount; and, unless the fact is sufficiently established by the record, it is incumbent upon the plaintiff in error to prove it to the satisfaction of the court.[1] The supreme court have deemed it necessary, therefore, to adopt the practice of permitting the plaintiff in error to show, *by affidavit*, to the satisfaction of the court, that the matter in dispute amounts to the requisite sum or value.[2] So the appellate jurisdiction of the circuit courts from the judgments of the district courts being restricted to cases in which the matter in dispute, exclusive of costs, exceeds fifty dollars, the same necessity for proof *aliunde* as to the amount in controversy, exists in these courts, and the rule of the supreme court being founded in necessity is, it is presumed, followed in all the circuit courts.

Amount in controversy.

May be shown by affidavit.

In the case of *The United States* v. *The Brig Union*, 4 Cranch, 116 (which, though an appeal, was subject in this respect to the same rules as a writ of error), a witness was introduced and sworn *viva voce* in open court as to the value, and upon the evidence thus taken, and such further evidence as the record

[1] It has already been shown (*supra*, p. 50, *et seq.*) under what circumstances the record is to be considered as furnishing this evidence, and, when it is necessary, to resort to proof *aliunde*.

[2] There was formerly a general rule of the court, or rather an early decision of the court, printed among the rules, as rule 13, to this effect, which required notice to the opposite party and entitled him to produce counter affidavits. But this rule is omitted in the revised rules of 1858, as will be seen by referring to the appendix.

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was supposed to afford, the cause was dismissed for want of jurisdiction, the court not being satisfied that the amount in controversy was sufficient. On the next day the attorney-general, in behalf of the plaintiffs, moved for a continuance of the cause, and for leave to take affidavits respecting the value in controversy, so as to sustain the jurisdiction of the court, but the motion was denied upon the ground that the parties had once put themselves on trial upon the evidence already adduced, and a decision had been made. The reporter adds, that *no objection was made* to the *viva voce* examination of the witness upon the question of value.

Amendments.

Writs of error not amendable.

It is necessary, in the next place, to inquire to what extent the parties are entitled to relief by amendments granted in the appellate court. No amendment of a writ of error could be allowed at common law, it being a maxim that all amendments are granted for the support of judgments; but the design of writs of error is to reverse them. Ld. Raym., 71. Nor was there in England any statute of jeofails embracing writs of error until the passage of a special act with respect to them in the reign of George I. They are not named in the 32d section of the judicial act of 24th September, 1789, and by the late decisions of the supreme court it has become a settled doctrine of that court that a writ of error is not amendable. It is only in virtue of the writ that the court can take cognizance of the cause at all, and if the writ is defective, the court has no power to amend it, even by consent of parties. *Hodge et al* v. *Williams*, 22 Howard, 87.[1]

[1] There are reported cases of very early date in which defects in a writ of error were allowed to be amended or disregarded; and these cases ought not to be left unnoticed, although the comprehensive and decided language of the court in the case cited in the text seems scarcely to warrant an expectation that they will be followed. In *Mossman* v.

This principle comprehends all amendments requisite to the maintenance of jurisdiction, and, therefore, where the amount in dispute, as shown to the record, was insufficient, the court refused to allow insertion of a claim for interest, which would have increased the amount to the requisite sum. *Udall* v. *The Steamship Ohio*, 17 Howard, 17; *Olney* v. *The Steamship Falcon*, id., 19. And so, if the requisite allegations of citizenship are wanting, the supreme court will not allow them to be inserted. This can be done only in the court below after the cause has been remanded on dismission. *Jackson* v. *Ashton*, 10 Peters, 180. But it is otherwise with matters not affecting the jurisdiction of the court. Thus where it was shown by the certificate of the clerk that there was a clerical error in the transcript of the record sent to be filed in the supreme court, that court allowed the error to be corrected without the formality of a *certiorari*. *Woodward* v. *Brown*, 13 Peters, 1. And, in a celebrated early case, the supreme court having reversed the judgment of the court below on a demurrer to a plea, the pleadings were amended in accordance with the decision of the court by consent of the parties, and the cause was heard on the amended pleading. *Fletcher* v. *Peck*, 6 Cranch, 87. And where, in a suit brought to recover the amount

No amendment of the record allowed to support jurisdiction.

Other errors amendable.

Higgins (4 Dallas, 12) a blank was left in the writ for the return day. But the writ was regularly tested, and was indorsed by the clerk, "Returnable to February term, 1799." By other indorsements it appeared when it was returned into the office of the clerk of the court below, and, when in the supreme court, a motion was made in behalf of the plaintiff in error to amend by filling the blank on the ground that "there was enough to amend by;" and the court answered, "Let the amendment be made." In *Course* v. *Stead* (4 Dallas, 22), the writ being tested in vacation, was held to be amenable. And in *Blakewell* v. *Patten et al.* (7 Cranch, 277), the writ, issued in September and made returnable at the next February term, was tested of the preceding February term, instead of the [now obselete] August term; and a motion to dismiss or quash the writ on account of this defect was denied.

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of a great number of promissory notes, the judgment of the court below had been given for too large a sum, in consequence of the accidental omission of the plaintiff to describe one of the notes in this declaration, the supreme court allowed a remittitur to be entered for the excess of damages. *Bank of Kentucky* v. *Ashley et al.*, 2 Peters, 327.

Defect or want of citation cured by appearance.

The reports show it to have happened, in many instances, that the transcript was accompanied either by a defective citation, or by none at all; and this we have seen to be a fatal irregularity, if the objection be seasonably made, by motion to dismiss the cause. But it has been held that the objection is to be deemed waived by the voluntary appearance and implied acquiescence of the defendant in error. The cases by which the rule thus generally expressed has been established, are variant in their circumstances; and instead of a particular reference to them, for the purpose of more exactly defining the rule, I shall better accomplish this purpose by availing myself of the language of Mr. Chief Justice TANEY in one of the latest of these cases, where the rule, with its just qualifications, is laid down, and the reasons on which it rests are stated, with characteristic precision and clearness. The writ was sued out in October, 1856, returnable at the December term next following; but the citation was signed by the clerk of the circuit court instead of a judge. The record was filed with the clerk of the supreme court, and the cause was placed upon the docket on the 24th of November; and on the 4th of December, 1856, the defendant appeared in that court by counsel. At the next term, December, 1857, (the cause, it is presumed, not having been reached on the docket during the first term), a motion was made to dismiss it on account of the insufficiency of the citation. The chief justice, in disposing of the motion, said:

Scope and reasons of the rule.

"The citation is, undoubtedly, irregular in this respect, and the defendant in error was not bound to appear under it, and if a motion had been made at the last term, within a reasonable time, to dismiss the cause on this ground, it would have been dismissed. But the appearance of the party in this court, without making a motion to dismiss during the first term, is a waiver of any irregularity in the citation, and is an admission that he had received notice to appear to the writ of error. This point was decided in the cases of *McDonogh* v. *Millandon*, 3 Howard, 693; *The United States* v. *Yulee*, 6 id., 605; and *Buckingham et al.* v. *McLean et al.*, 13 id., 150. And these cases have been recognized and affirmed in the case of *Carroll et al.* v. *Dorsey et al.*, decided at the present term.

"Indeed, any other rule would be unjust to the plaintiff in error, and is not required for the protection of the defendant. The latter is not bound to appear unless he is legally cited, except for the purpose of moving to dismiss. He knows, or must be presumed to know, whether the notice which the law requires has been served on him or not. And if the objection is made at the first term, the plaintiff, by a new writ and proper citation, might bring up the case to the succeeding term. But if the defendant does not, by motion at the first term, apprise him of the irregularity of his proceeding in this respect, and of his intention to take advantage of it, the plaintiff is put off his guard by the defendant's appearance; and if the motion is permitted at the second term, he will be delayed an entire year in the prosecution of his suit, whenever it is the interest of the defendant in error to delay and harass his adversary.

"An affidavit has been filed by one of the counsel for the defendant in error, stating that he is the junior counsel in the case, and that he did not make the motion at the last term because the senior counsel was absent in Europe, and the deponent did not wish to decide on the expediency of the motion to dismiss without consulting him; that he expected him to return before the term ended, but the court adjourned sooner than he anticipated, and the senior counsel did not return until the court had finally adjourned

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to the next term. The facts stated in the affidavit cannot influence the decision of the motion. The absence of one, or of all the counsel employed by one party in the pursuit of other business, furnishes no ground for delaying a case in this court without the consent of the adverse party. The motion comes too late, and is, therefore, overruled." *Chaffee* v. *Hayward*, 20 Howard, 208.

The observations, near the beginning of this quotation, that, "if the motion had been made at the last term *within a reasonable time*, &c., should, at least, serve as a caution against deferring the motion to dismiss, especially after appearance, even during the first term, and on the other hand it seems pertinent to suggest that before allowing the plaintiff in error to proceed *ex parte* in the absence of the defendant in error, to argue the cause, the court doubtless holds itself bound to see that it is regularly before the court, and that, unless it should appear from the return that a proper citation had been duly served, it may be presumed the cause would be dismissed. It is proper to add, however, that I have met with no reported decision to this effect.

Waiver by appearance limited to want of citation.

The appearance of the defendant in error is no impediment to a motion to dismiss the cause for want of jurisdiction, or for any irregularity other than the want of a citation. *The United States* v. *Yates et al.*, 6 Howard, 605.

Motions. To be made on Friday.

By one of the rules of the supreme court Friday of each week is appointed for the hearing of such motions, not required to be put on the docket, as shall be made before the court shall have entered upon the hearing of a cause upon the docket,[1] and

To be in writing.

by another rule, all motions are required to be in writing, stating the facts of the case and the object of the motion.[2]

[1] Appendix, Rule 27, Rules S. C.

[2] Appendix, Rule 6, Rules S. C.

The rules are silent with respect to notice of motions of the adverse party. They are, on Friday, publicly announced, by the counsel offering them, and delivered to the clerk; if, as is usually the case, the opposite counsel is present, no further notice is required, and the motion may be called up, either at a later hour on the same day, if the counsel for the adverse party consents, or on the next motion day. If counsel has appeared, but is not present, the court expects him to have timely notice, and will, if necessary, give the proper directions for that purpose. If, which rarely happens, the motion is founded on some paper dehors the record, a copy of it is to be furnished to the opposite counsel.

Motions to dismiss, when admissible.

The reader has already been made aware, that, in the practice of the supreme court, the word *dismiss* is generally used instead of the common law term *quash*, to signify the summary disposition of a writ of error or appeal in that court, without inquiring into the merits of the controversy; and it is well to understand clearly for what causes a motion for this purpose will be granted. In the case of *Brooks* v. *Norris* (11 Howard, 204), it was decided that the defendant in error might, in this form, avail himself of the five years' limitation of the right to bring a writ of error.

It has been uniformly held, that a writ of error will be dismissed on motion for want of appellate jurisdiction of the case; as where the amount is insufficient, or the judgment or decree of the court below is not final, or the case is not embraced by the 25th section of the judiciary act when the writ of error is to a state court. And in the case of *The Steamer Brigadier-General R. H. Stokes* (22 Howard, 48), a motion was made to dismiss the cause on the ground of a want of jurisdiction in the court below. But the motion was denied; the chief justice

When not.

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observing, that the question of jurisdiction in that court was a proper one for appeal to the supreme court, and for argument when the case should be reached. In *Hecker* v. *Fowler* (1 Black, 95), a like motion was made, on the ground that no error appeared on the face of the record. The court denied the motion, saying, that, where a judgment appears to have been rendered which the party is entitled to have revised in this court, and it is brought here for revision upon proper process duly issued, the case must await the final hearing.[1] It was incidentally said, in this case, also, that "want of jurisdiction and irregularity of the writ are the only grounds for dismissal." We have just seen, however, that the lapse of five years before bringing the writ had been adjudged a ground for dismissal, and it is not to be supposed that the court designed to exclude that case. The omission, in direct terms, to include it must either have been inadvertent, or else it must have been intended to include it as an irregularity. The general rules of the supreme court, as we shall see in the sequel, moreover, entitle the defendant in error to a dismissal of the cause upon the failure of the plaintiff or appellee, or, in case of his death, of his representatives, to appear and prosecute the writ or appeal.

The result.

The result then is, that want of jurisdiction in the appellate court, the statute bar, irregularity in the process and non-appearance, are the only grounds on which a writ of error or appeal will be dismissed on motion.

Cause dismissed cannot be restored at subsequent term.

After a cause has been dismissed for irregularity, it cannot be reinstated at a subsequent term. The writ of error is then *functus officio*, and cannot be revived. *Rice* v. *The Minnesota and N. W. R. R. Co.*, 21 Howard, 82.

[1] See, also, *Taylor* v. *Morton*, 2 Black, 481.

Assignment of error and joinder.

We have seen that the statute expressly requires an assignment of errors and prayer for reversal to be *annexed* to the writ of error and returned with it, along with the transcript of the record; and it is evident that this requirement can be complied with only by filing the assignment with the clerk of the court below, before the transmission of the transcript to the appellate court. At the outset, this clause of the statute appears by the reported cases to have been considered obligatory according to its literal meaning. The assignment of errors was filed with the clerk of the court below, and the joinder in the appellate court; nor is it to be doubted that this may with strict legal propriety still be done. But I learn from the best authority, that the more usual practice in the supreme court now is, to defer the assignment until after the return has been made. Indeed, there is an early rule of the supreme court requiring the defendant in error to assign errors at the commencement of the term of that court, or as soon thereafter as the record shall be filed with the clerk, "*if errors shall not have been assigned in the court below.*" This rule is omitted in the revised rules of 1858, and of course has ceased to operate. It shows, however, that, even at this early date, the statute was not always complied with,—a fault perhaps attributable to the anomaly of requiring errors to be assigned in a cause before it has reached the appellate court. How this anomaly found its way into a statute drawn up with so much ability, and marked by so much skill and learning; or under what views of the subject the supreme court felt itself warranted in permitting the law to become a dead letter, it would be impertinent to inquire.

To be filed in the appellate court.

How entitled.

The assignment is entitled in the appellate court, and of the term at which the writ of error is returnable. And so of the joinder in error. As none

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but questions of law are subject to revision in the national courts by writ of error, and as these questions must always appear upon the record, there can rarely, if ever, be occasion for any other than a general assignment of errors or joinder; forms for which are given in the appendix.

Causes, when to be docketed. Rule 9.

At the close of the last chapter mention was made of the 9th rule of the supreme court, requiring the plaintiff in error or appellant, when the judgment or decree to be brought up for review was given *thirty* days before the term of the supreme court, to see that the record is filed, and the case docketed within the first *six* days of the term; and when given *less* than thirty days before the term, within the first *thirty* days of the term, on pain of having the cause docketed at the instance of the defendant in error or appellee, and on his motion dismissed, upon the production of the certificate of the clerk of the court below, "stating the cause, and certifying that a writ of error or appeal had been sued out and allowed" therein. The rule also declares (rather unnecessarily, I should think), that after such dismissal the plaintiff in error or appellant shall not be entitled to have the record filed, and the cause docketed, unless by order of the court.

But, inasmuch as the party defendant may prefer to have the cause heard and decided at once, rather than run the risk of a second writ of error or appeal, the rule further provides that he may, at his option, file a copy of the record, and docket the cause, and it shall then stand for argument at the same term, as it also shall, when docketed by the plaintiff in compliance with the rule.

With respect to writs of error and appeals from California, Nevada, Washington, New Mexico and Utah, the rule, as amended by rule 32, substitutes

sixty days in lieu of the thirty days, mentioned in the rule. CHAP. 4.

This rule was designed to prevent delay arising from negligence, or a desire to protract the proceedings, on the part of the plaintiff in error or appellant. But it seems, on its face, hardly consistent with the express requirement of the statute, that the adverse party shall have thirty days' notice, especially as the later decisions of the court peremptorily require the writ of error and citation to be made returnable, in all cases, on the first day of the next term. For whatever may be the date of the judgment or decree, the writ of error or appeal may not be brought until within a few days before the term; and yet the rule requires the record to be filed, and the cause placed upon the docket, within the first six days of the term, in all cases where the judgment or decree was given thirty days before its commencement, and directs that the cause shall stand for argument at the same term. The earlier decisions, in order to secure a compliance with the statute, left it optional with the defendant, when the citation was served less than thirty days before the term, whether the cause should be brought to argument at that term or continued to the next term; and there was a general rule to this effect; and in one case it was said that the citation must in all cases be served thirty days before the return day of the writ. It may be presumed, however, that the court will hold itself bound, notwithstanding the rule, to allow the defendant or appellee, when he desires it, the full period of thirty days after service of the citation, to prepare for the argument. Besides, the court always continues in session long after the expiration of that period; and the causes being arranged upon the docket, according to the dates of the issues, no writ of error or appeal brought

Apparent inconsistency of the rule with the statute.

How reconciled with the statute.

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shortly before a term is likely, moreover, to be reached until very late, if at all, during that term.

That part of the 9th rule which gives to the defendant in error, or appellee, the right to have the cause docketed and dismissed, has given rise to several decisions, most of them relating to the certificate of the clerk of the court below, on which the motion to dismiss is to be founded. Touching this subject the following points have been decided: The certificate must be produced, although the transcript of the record has been lodged by the plaintiff in error, or appellant, with the clerk. *Macomb* v. *Armstead*, 10 Peters, 407; *West* v. *Brasier*, 12 id., 101. But the production of the original writ of error and citation supersedes the necessity of a certificate. *Amis* v. *Pearle*, 15 Peters, 211.

Clerk's certificate necessary.

But not if the original writ and citation be produced.

The certificate must name all the parties to the record in full. "A B and others" is insufficient. The "others" must be named. *Smith* v. *Clark*, 12 How., 21; *Holliday* v. *Batson*, 4 id., 645. Although the plaintiff in error or appellant has failed to comply strictly with the rule, by having the record filed and cause docketed within the times prescribed by the rule, yet, if the record be filed afterward, before the motion to dismiss, the motion will be denied. *Pickett's Heirs* v. *Legerwood*, 7 Peters, 144. And where a motion on the part of the defendant to dismiss the cause was deferred to the next term after the return term, and then was made simultaneously with a motion by the plaintiff in error to docket the cause, the latter motion was granted. *Owens* v. *Tierman's Lessee*, 10 Peters, 24. Under the amended rule and the latter decisions, this case, I imagine, is not likely to be followed. A judgment of dismissal under the rule is *nisi* only *during the term*, and, when it can be done without substantial injustice to

Must contain the names of the parties *in full*.

Motion to dismiss to be seasonably made.

Order of dismissal, *nisi* during the term.

the defendant, the court may reinstate the cause. *Gwin* v. *Breedlove*, 15 Peters, 284.[1]

Certificate to be *certain* as to *time*.

To bring a case within that part of the rule which relates to cases in which the writ of error or appeal was brought thirty days before the return term, the certificate must show with certainty when the judgment or decree was rendered; and, therefore, where the statement was that a final judgment was rendered in April term, 1850, of the circuit court, it was held insufficient, because, *non constat*, that the term was not continued by adjournment until within thirty days of the commencement of the term of the supreme court, when the motion was made. The certificate should have specified the *day* on which the judgment was given. *Rhodes* v. *The Steamship Galveston*, 10 Howard, 144.

Security for clerk's fees.

But there is another rule to which it is necessary now to advert. It is the 10th of the revised rules, by which the clerk of the supreme court is required, in all cases, to "take of the party a bond, with competent security, to secure his fees, in a penalty of two hundred dollars, or a deposit of that amount, to be placed in bank, subject to his draft." And accordingly in a case where the clerk, upon the request of the plaintiff in error to docket the cause, declined to do so for want of such bond, the court refused to allow it to be done; but gave time to the plaintiff to comply with the rule; in default whereof, the cause was to be docketed and dismissed on motion of the defendant. *Owings* v. *Tierman's Lessee*, 10 Peters, 447. The same rule also directs, that, upon service and non-payment of the clerk's bill of fees,

[1] This case was decided before the rule assumed its present form, but would, I presume, still be adhered to, as would probably, also, another decision in harmony with it, that the clerk cannot properly certify the dismissal, until the close of the term. *The Bank of the United States* v. *Swan*, 3 Peters, 68.

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an attachment shall issue against the party, or his sureties, to compel the payment. The party is subject to an attachment independently of the rule, and need not therefore join in the bond. The rule applies to the plaintiff in error or appellant only; not to the adverse party.

"Party," in the rule, means the actor, the plaintiff in error or appellee, who comes into the appellate court voluntarily, not the party defendant.

Death of a party.

Upon the death of either party to a writ of error or appeal, during its pendency in the supreme court, the representatives of the real or personal estate of the deceased party, according to the nature of the case, are entitled to be admitted as parties to the suit. The rule prescribes in detail the consequences of their omission to avail themselves of this privilege.[1]

Call of the docket.

On the second day of the term the court commences calling the causes in their order on the docket. If either of the parties is ready for the argument, he will be heard. If neither is ready, the cause shall go down to the foot of the docket, unless good cause to the contrary be shown. No more than ten causes will be called on the same day, including the one, if any, under argument, continued from the preceding day.

No cause shall be taken up out of its order on the docket, or set down for any particular day, except under special and peculiar circumstances, to be shown to the court. Causes called in their order and put at the foot of the docket, if not again reached during the same term, are continued to the next term.[2]

Criminal cases to have preference, unless &c.

To this rule, however, an important exception has been made by statute. The act of July 13, 1866, ch.

[1] Appendix, Rule 15, Rules S. C.

[2] Appendix, Rule 26, Rules S. C.

184, § 69 (14 Stat. at Large, 172), directs that "writs of error in criminal cases shall have precedence upon the docket of the supreme court of all cases to which the government of the United States is not a party, excepting only such cases as the court, at their discretion, may decide to be of public importance."

And so of revenue causes, &c.

A rule has been made in accordance with this enactment, and comprising also revenue cases and others of public concern.

Two or more causes may be argued as one.

The same rule also permits, with the leave of the court, two or more causes, depending on the same questions, to be argued together as one cause. See Appendix, Rule 34.

Non-appearance at second term.

When a cause has been called at two successive terms, and, on being called at the second term, neither party is prepared to argue it, it shall be dismissed at the cost of the plaintiff, unless good cause be shown for further postponement.[1]

Plaintiff to open and close.

The plaintiff in error, or appellant, is entitled to open and conclude the argument.

Cross appeals.

Cross appeals are to be argued together, and the argument is to be opened and closed by the plaintiff in the court below.[2]

Non-appearance of plaintiff.

If, when a cause is called for argument, there is no appearance for the plaintiff in error, the defendant may have him called, and the writ dismissed, or may open the record and pray an affirmance.[3]

Non-appearance of defendant in error.

If there be no appearance for the defendant in error, the court may proceed to hear an argument on the part of the plaintiff, and give judgment according to the right of the case.[4]

[1] Appendix, Rule 19, Rules S. C.

[2] Appendix, Rule 22, Rules S. C.

[3] Appendix, Rule 16, Rules S. C. This rule, and the next, apparently from inadvertence, is silent as to the non-appearance of an appellant.

[4] Appendix, Rule 17, Rules S. C.

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Printed arguments.

In all cases brought before the supreme court by writ of error, appeal, or otherwise, the parties have a right, by mutual agreement, within the first thirty days of the term, to submit their cause to the decision of the court, upon printed instead of oral arguments, signed by an attorney or counselor of the court, and filed within the time above specified, without regard to the number of the cause on the docket. Twenty copies of the arguments, signed in like manner, are to be filed with the clerk, to be distributed as directed by rule 33.

When this has not been done until the cause is called for argument, the cause may, nevertheless, be so submitted by either or both of the parties, provided, that, when a printed argument is offered only on one side, it must be filed before the commencement of the oral argument on the other side, otherwise the cause will be heard and decided *ex parte*.[1]

Printed briefs to be furnished.

Printed abstracts, points and authorities in the case, signed by an attorney or counselor of the court, must be filed before the argument will be heard; and twenty copies thereof are required to be filed with the clerk by the plaintiff in error or appellant six days, and by the defendant in error or appellee three days, before the case is called for argument. If furnished by the counsel on one side and not on the other, the former will be heard *ex parte*.[2] But the case of *Wright et al.* v. *Sill* (2 Black, 544) is stated by the reporter to have been "submitted to the court upon the record, without any argument, written or oral." Possibly, however, briefs containing the points and the authorities relied on may have been submitted.

Number of counsel and time limited.

The same rule directs that no more than two counsel shall be heard for each party; and no coun-

[1] Appendix, Rules 20 and 33, Rules S. C.

[2] Appendix, Rules 21 and 31, Rules S. C.

sel shall speak more than two hours without special leave granted before the argument is commenced. And the circumstance that the cause involves many points makes no difference with respect to the number of counsel. 7 Cranch, 1. But in the case of *McCulloch* v. *The State of Maryland* (4 Wheaton, 322, note *a*), which involved a constitutional question of great importance, and in which the government had directed the attorney-general to appear for the plaintiff in error, the rule was dispensed with.

These rules contain other regulations relative to the argument of causes, for which I refer the reader to the rules themselves.

Interest.

On affirmance, interest is to be computed on the judgment of the inferior court from its date, at the rate allowed in the state whence it was brought for review. The same rule is applied to decrees in equity, unless otherwise specially ordered.

Damages on affirmance.

The 23d section of the judiciary act directs that upon the affirmance of a judgment or decree, either in the supreme or a circuit court, "just damages for his delay, and single or double costs, at their discretion," shall be adjudged to the defendant in error. The language of the act would seem to render it obligatory on the courts, in all cases of affirmance, to adjudge damages, and to give them a discretionary power with respect only to costs. But such has not been its practical effect in the supreme court; for, according to the 23d rule of that court, it is only when a writ of error, operating as a *supersedeas*, appears to have been sued out merely for delay, that damages are to be awarded. The rule fixes the amount at ten *per centum per annum* on the amount of the judgment.[1]

Costs.

The right to recover costs on error or appeal to the supreme court, on dismissal, on affirmance, and on reversal, is regulated by rules 24 and 30.[1]

[1] Appendix.

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On dismissal.

On dismissal, except for want of jurisdiction, costs are allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

On affirmance.

On affirmance, costs are allowed to the defendant in error or appellee, unless otherwise specially ordered.

On reversal.

On reversal, costs are allowed in like manner to the plaintiff in error or appellant.

When the United States are a party.

In suits to which the United States are a party no costs are allowed for or against them.

Mandate on dismissal.

The same rule requires the clerk, on the dismissal of a cause, to issue a mandate, or other proper process, in the nature of a *procedendo*, to the court below, for the purpose of informing it of the decision, so that the requisite further proceedings may be had; and if costs are adjudged, the amount is to be inserted, and a taxed bill of items annexed.

Costs to be inserted.

No argument heard on Saturday.

The court will not hear arguments on Saturday (unless for special cause it shall order the contrary), but will devote that day of each week to the other business of the court.[1]

Adjournments, &c.

The day fixed upon for adjournment will be announced ten days before; and no cause will be taken up for argument or allowed to be submitted during the last three days.[2]

Dismissal in vacation.

It may happen to be the mutual desire of the parties to a writ of error or appeal, to have it dismissed in vacation; and this they are entitled to have done, on filing with the clerk an agreement to that effect, stating the terms agreed on as to costs, and paying his fees, who will thereupon enter a dismissal.[3]

The agreement may by signed by the *parties*, without the concurrence of their attorneys or counsel, and the cause will not be re-instated at the

[1] Appendix, Rule 27, Rules S. C.

[2] Rule 28.

[3] Rule 29.

instance of the latter, on a representation that their lien for costs would otherwise be lost. *Platt* v. *Jerome*, 19 Howard, 384.

In the case of *Hudson et al.* v. *Guestier* (7 Cranch, 1), a rule having been obtained on the first day of term, to show cause why the case (which had been decided ten years before) should not be reheard, the rule was on a subsequent day discharged—the court remarking that "the case could not be reheard after the term in which it had been decided." See, also, 7 Wheat., 58. And in a subsequent case it was said that "no re-argument will be granted in any case, unless a member of the court who concurred in the judgment desires it; and when that is the case it will be ordered without waiting for the application of counsel," *Brown et al.* v. *Aspden et al.*, 14 Howard, 25. In this case the judgment had been affirmed by an equally divided court, eight judges only being present, and this circumstance was held to make no difference in the applicability of the above mentioned rule.

Rehearing.

By the 24th section of the judicial act it is enacted—

"That when a judgment or decree shall be *reversed*, in a circuit court, such court shall proceed to render such judgment, or pass such decree, as the district court should have rendered or passed; and the supreme court shall do the same on reversals therein, except where the reversal is in favor of the plaintiff or petitioner in the original suit, and the damages to be assessed, or the matter to be decreed, are uncertain, in which case they shall remand the cause for a final decision. And the supreme court shall not issue execution in causes that are removed before them by writ of error, but shall send a special mandate to the circuit court to award execution thereupon."[1]

Judgment and execution.

[1] Act of 24th September, 1789, ch. 20: 1 Stat. at Large, 73.

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And the 25th section of the same act, providing for the prosecution of writs of error in certain cases from the state courts to the supreme court, directs that such writs of error "shall have the same effect as if the judgment or decree complained of had been rendered or passed in a circuit court, and the proceeding upon the reversal shall also be the same, except that the supreme court, instead of remanding the cause for final decision, as before provided, may, at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution."

In the case of *The United States* v. *Sawyer* (1 Gallis., 86), the question was discussed whether the exception contained in the second clause of the 24th section of the judicial act, above recited, is applicable as well to reversals in the circuit courts as in the supreme court, so as to make it the duty of the former courts, as well as of the latter, upon reversals therein, when further proceedings are necessary, to "remand the cause for a final decision" to the court below. The exception was held not to extend to the circuit courts; and that a *venire facias de novo* might be awarded returnable in the appellate court, to enable it to "render such judgment," &c., "as the district court should have rendered." No reasonable doubt can be entertained of the soundness of this decision; but, on the contrary, it will probably occur to the reader, inasmuch as the language of the section relative to reversals in the circuit courts is imperative, that "such court *shall* proceed to render," &c., that it must, therefore, be *obligatory* upon the circuit courts, in all cases where, upon reversal, resort to a jury is necessary, to award a venire returnable before themselves. But from the reports of subsequent cases in the circuit court for the first circuit (in which the above mentioned decision was made),

and, also, in the circuit court for the second circuit, it appears that it is the practice of those courts to direct a *venire facias de novo*, returnable in the district or circuit court indifferently, at discretion.

After reversals in favor of the plaintiff in the supreme court in error from the *circuit court*, when the instrumentality of a jury is requisite to settle the rights of the parties, the cause is always to be remanded to the circuit court for a final decision; and so, also, where the writ of error is from a *state court*, *except*, as we have seen, that when the case has been already once remanded, the court may, in its discretion, proceed to a final decision and award execution. Should a case arise in which it should be necessary for the supreme court to exert this discretionary power, the judgment in such case would of course be entered up, and the record thereof remain in the supreme court.[1] And so in a circuit

[1] The design of congress in vesting the supreme court with the authority conferred in this exception, doubtless was to provide against the possible occurrence of a refusal by a state court to execute a mandate of the supreme court. And experience has shown that the apprehension of such an occurrence was not wholly groundless.

In the case of *Fairfax's Devisee* v. *Hunter's Lessee* (7 Cranch, 603), the court of appeals of Virginia declined to obey the mandate of the supreme court, issued upon the reversal of a judgment of the court of appeals, reversing the judgment of an inferior state court, upon the ground that so much of the twenty-fifth section of the judicial act as extends the appellate jurisdiction of the supreme court to state courts was, in their opinion, unconstitutional and void. To this decision a new writ of error was brought. 1 Wheat., 304. This, therefore, was a case (and so the supreme court pronounced it) falling within the exception, and from the reporter's abstract of the points decided, prefixed to the report of the case, it would seem that the supreme court did proceed to final judgment and award of execution. But from the report itself it does not distinctly appear what course was adopted. The court expressly waived a decision upon the question whether it had authority to issue a mandamus to the court of appeals, to enforce the former judgment; and for aught that appears in the report, the mandate may have been sent to the inferior state court, whose judgment was affirmed, as was done in the case of *Clark* v. *Harwood*, 3 Dallas, 342.

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court, where, upon a reversal therein, a *venire facias de novo* is awarded, and a trial had in that court; the judgment is in like manner perfected in the same court, and execution issued therefrom.

But in all other cases of reversal in either court, there is a *remittitur* to the court below, as from the house of lords in England to the king's bench, accompanied by a mandate to enter such judgment, as, according to the decision of the appellate court, the court below ought to have rendered; or, if further proceedings are necessary to bring the cause to a final determination, to institute such proceedings. Thus, when the judgment below was upon a special verdict, or case agreed in lieu of a special verdict, the appellate court proceed to give judgment, and merely direct the court below to enter such judgment. *Hudson et al.* v. *Smith*, 6 Cranch, 285, *note*.

But, when a judgment upon a verdict for the plaintiff is reversed upon a writ of error, founded upon a bill of exceptions to the opinion of the court below, the direction to such court is to award a *venire de novo*. Id. And where a judgment upon a special verdict is reversed upon the ground that such special verdict is too defective to enable the court to give judgment upon the merits, the cause is remanded, with directions to award a *venire de novo*. *The Chesapeake Insurance Co.* v. *Stark*, 6 Cranch, 268; *Livingston et al* v. *The Maryland Insurance Co.*, id., 274. Where a judgment in favor of the defendant upon demurrer, drawing into question the validity of a plea to the plaintiff's declaration was reversed, the appellate court holding the plea to be bad, the cause was remanded, with directions to the court below to permit the defendant to plead anew to the action, if he should think proper to do so. *McKnight* v. *Craig's Administrator*, 6 Cranch, 183. In like manner, when the judgment of the court below upon

demurrer to the defendant's plea was in favor of the plaintiff, and such judgment was reversed, the judgment was, that the plaintiff take nothing by his writ. *Thorndike* v. *The United States*, 2 Mason, 1. In the case of *Slacum* v *Pomery* (6 Cranch 221), the error relied upon was a defect in the plaintiff's declaration; and the defect being considered fatal by the supreme court, the judgment of that court was, that the judgment should be arrested, and that the cause should be remanded to the circuit court, with a direction to that effect. In the case of *Lanusse* v. *Barker* (3 Wheat., 101), the judgment below was in favor of the defendant upon a general verdict, and the writ of error was founded upon a bill of exceptions taken at the trial. The counsel in the court below had entered into an agreement, which appeared upon the transcript of the record, that, if the judgment should be reversed, judgment should be rendered by the supreme court for some one of several specified sums, according as that court might be of opinion that the plaintiff below was entitled to recover the one or the other of such sums. The judgment was reversed, but the court refused to give effect to the agreement, or to direct the circuit court to enter judgment for a specified amount. They considered the agreement as forming no part of the record, and were of opinion, moreover, that to act upon it would be to exercise a power too nearly approaching the province of a jury, and, therefore, merely directed that a *venire de novo* should be issued.

Where, on a writ of error, it appears that the jurisdiction exercised by the circuit court was unauthorized, the judgment is reversed, and the cause remanded with a mandate to dismiss it. *Cullen* v. *Rea*, 7 Howard, 729. When the judgment of the circuit court was a rightful judgment of dismissal for want of jurisdiction, the judgment is affirmed.

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When the *appellate* jurisdiction does not extend to the case, the writ of error, as we have seen, is simply *dismissed.* But, when the appellate jurisdiction is abrogated or ceases to exist during the pendency of the writ of error, the judgment is that it be *abated*, and, in such case, no mandate is to be sent to the court below, but only a certified copy of the judgment. *McNulty* v. *Batty et al.*, 10 Howard, 72; *S. C.*, id., 646.

CHAPTER V.

OF THE PROCEEDINGS UPON CERTIFICATE OF DISAGREEMENT IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURTS.

This mode of bringing into action the advisory power of the supreme court is provided for by the "act to amend the judicial system of the United States," passed April 29, 1802.[1] This provision has already been recited in the first part of this work, in treating of the jurisdiction of the supreme court. Several judicial decisions, affecting the *jurisdiction* of the supreme court under it, have also been stated. It embraces criminal as well as civil proceedings; and extends to all causes in the circuit courts, whether originally commenced therein, or removed thereto from a state court, except that it is inapplicable to cases removed by writ of error or appeal from the district court; because in such case the district judge is precluded from expressing any opinion. It extends also to every question of *law*, the determination of which is necessary to the decision of a cause, however it may arise, whether, for example, upon the trial, upon motion in arrest of judgment, upon special verdict, or verdict taken subject to the

[1] Ch. 31, § 6: 2 Stat. at Large, 156.

opinion of the court. But not to questions of fact; and, therefore, where one of the questions certified, was whether the evidence was sufficient to prove an averment in the pleadings, it was held to be inadmissible. *Silliman* v. *The Hudson River Bridge Company*, 1 Black, 582. Nor to questions of practice subject to the discretion of the court; the true rule being that the question must be one, a decision upon which, in the circuit court, would be subject to review on writ of error or appeal. *Wiggins et al.* v. *Gray et al.*, 24 Howard, 303; and see, also, *Davis* v. *Braden*, 10 Peters, 288; and *Parker* v. *Nixon*, id., 410.

A recurrence to the state of the law before the passage of this act, and a glance at the important changes introduced by it in the organization of the circuit courts, will render the design and necessity of the provision in question sufficiently manifest. Previous to that time, the circuit courts were composed of two judges of the supreme court and the district judge of the district where the court was held, and the judges of the supreme court changed their circuits. If all the three judges were present, no division of opinion could take place. If only one judge of the supreme court attended, and a division occurred, the cause was continued until 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 circuit courts to consist of one judge of the supreme court and the district judge, and confined the several judges of the supreme court to their respective circuits, so that the same judge constantly attends the same circuit. This great improvement of the pre-existing system, was

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attended with this difficulty. The court being always composed of the same two judges, any division of opinion would remain, and the question would continue unsettled; and it was to remedy this inconvenience that this mode of proceeding was introduced. See the case of *The United States* v. *Daniel*, 6 Wheat., 542.

It is proper to remark, however, that, in practice, this convenient method of obtaining an authoritative decision upon questions of difficulty and importance is sometimes resorted to, without the actual expression or even formation of hostile opinions between the judges of the circuit court. But it has been justly observed by Mr. Chief Justice TANEY that no party has a right to ask such a certificate, nor can it be made consistently with the duty of the court, if the judges are agreed and do not think there is sufficient ground for doubt to justify them in submitting the question to the judgment of the supreme court.

The act provides that nothing therein contained shall prevent the case from proceeding, if, in the opinion of the court, further proceedings can be had without prejudice to the merits. And, generally, when the question arises upon the trial, the cause may nevertheless proceed. As, for example, when the question respects the admissibility of evidence, the evidence may be received, reserving the question of its admissibility to be decided, if necessary, upon a certificate of disagreement of opinion.

The general rule, with respect to the form and contents of the statement to be certified to the supreme court, is, that it must contain so much of the pleadings and evidence as is necessary, in order fully to present the point or points upon which the judges disagree, and that these points must be stated with precision. Thus, in the case of *Perkins* v. *Hart* (11 Wheat., 237), the statement was held to be defective, because the

points, as stated, involved questions of fact, which ought to have been settled by the jury, as well as questions of law.

So, in the case of *Barnes* v. *Williams* (11 Wheat., 415), the difference of opinion occurred upon a special verdict; and the statement was held defective in that the special verdict stated the *evidence of the fact* instead of the *fact* itself. In the case of *Wolf* v. *Usher* (3 Peters, 269), and of *Saunders* v. *Gould*, (4 id., 292), the particular point upon which the judges differed was not stated; but the whole record was sent up, and it was certified merely that the court had differed in opinion, without stating what that difference was; and on this account the statements were held to be defective.

In such cases the supreme court refuse to take jurisdiction of the cause, but merely certify the insufficiency of the statement, and remand the cause to the circuit court for further proceedings, according to law. Such, at least, appears to have been the disposition of all the cases with which I have met except one. And, indeed, in the case of *Perkins* v. *Hart* (11 Wheat., 237), Judge WASHINGTON, who delivered the opinion of the court, after pointing out at length the defects in the statements sent up, concluded with the following observations: "Were this cause before the court upon a writ of error, the imperfections in the points reserved, which have been noticed, would render it proper to reverse the judgment, and to direct a *venire de novo* to be awarded. Being an adjourned cause, it would be improper for this court to give any such direction to the court below." But in the case above cited of *Barnes* v. *Williams* (forming the exception above alluded to), Chief Justice MARSHALL, in delivering the opinion of the court, is stated by the reporter to have concluded by saying, that "the case was, therefore, too

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imperfectly stated to enable the court to decide the questions upon which the opinions of the judges of the circuit court were opposed," and the cause was remanded to that court, *with directions to award a venire de novo.*

The point upon which the disagreement happens is, "during the same term," to be "stated under the direction of the judges, and certified under the seal of the court, to the supreme court, at their next session to be held thereafter; and shall, by the said court, be finally decided. And the decision of the supreme court and their order in the premises shall be remitted to the circuit court, and be there entered on record, and shall have effect according to the nature of said judgment and order."

With respect to the proceedings upon these statements, after they are sent to the supreme court, it is sufficient to say that they are the same with those in cases carried up for revision by writ of error.

The parties, as plaintiff and defendant, respectively, are to be placed on the docket in the same manner in which they stand in the circuit court.[1]

No other points than those upon which the judges of the circuit court differed are to be argued or decided. *Ogle* v. *Lee*, 2 Cranch, 33, and many subsequent cases.

A resort to this proceeding does not preclude the parties from afterward bringing a writ of error upon the judgment of the circuit court. Id.

When, upon a certificate of disagreement, the judges of the supreme court are also equally divided, the cause is to be sent back to the circuit court, and thence dismissed. *Silliman* v. *The Hudson River Bridge Co.*, 1 Black, 582.

[1] There was a rule of the supreme court to this effect (No. 57), but it seems not to have been included among the rules of that court, as "revised and corrected" in December Term, 1858. See Appendix.

A form for the certificate is given in the appendix. The manner in which the certificate is to be drawn up and settled in the northern district of New York, is prescribed by rule 7 of the circuit court. See Appendix.

PART VI.

OF CERTAIN ANOMALOUS SUBJECTS.

CHAPTER I.

PRIORITY OF THE UNITED STATES.

This is an important subject, which has led to much forensic discussion, and many judicial decisions; but which it is believed is in general but little understood.

By the act of 3d March, 1797, "to provide more effectually for the settlement of accounts between the United States and the receivers of public money,"[1] it is enacted —

"That where any revenue officer or other person, hereafter becoming indebted to the United States by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied; and the priority hereby established shall be deemed to extend, as well to cases in which a debtor not having sufficient to pay his debts, shall make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor, shall be attached by process of law, as to cases in which an act of legal bankruptcy shall be committed."

[1] Ch. 20, § 5: 1 Stat. at Large, 112.

PART 6. By the collection act of March 2, 1799, it is enacted—

"That where any bond for the payment of duties shall not be satisfied on the day it may become due, the collector shall, without delay, cause a prosecution to be commenced for the recovery of the money thereon, by action or suit at law, in the proper court having cognizance thereof; and in all cases of insolvency, or where any estate in the hands of executors, administrators or assignees shall be insufficient to pay all the debts due from the deceased, the debt or debts due to the United States, on any such bond or bonds, shall be first satisfied; and any executor, administrator or assignees, or other person who shall pay any debt due by the person or estate from whom, or for which they are acting, previous to the debt or debts due to the United States from such person or estate being first duly satisfied and paid, shall become answerable in their own person or estate for the debt or debts so due to the United States, or so much thereof as may remain due and unpaid; and actions or suits at law may be commenced against them for the recovery of the said debt or debts, or so much thereof as may remain due and unpaid, in the proper court having cognizance thereof; *Provided*, That if the principal in any bond which shall be given to the United States for duties on goods, wares or merchandise imported, or other penalty, either by himself or his factor, agent or other person for him, shall be insolvent, or if such principal being deceased, his or her estate and effects, which shall come to the hands of his or her executors, administrators or assignees, shall be insufficient for the payment of his or her debts; and if, in either of the said cases, any surety on the said bond or bonds, or the executors, administrators or assignees, of such surety, shall pay to the United States the money due upon such bond or bonds, such surety, his or her executors, administrators or assignees, shall have and enjoy the like advantage, priority or preference, for the recovery and receipt of the said moneys, out of the estate and effects of such insolvent or deceased principal, as are reserved and secured to the United States; and shall and may bring and maintain a suit or suits on

the said bond or bonds, in law or equity, in his, her or their own name or names, for the moneys paid thereon. And the cases of insolvency mentioned in this section shall be deemed to extend as well to cases in which a debtor not having sufficient property to pay all his or her debts, shall make a voluntary assignment thereof for the benefit of his or her creditors, or in which the estate and effects of an absconding, concealed, or absent debtor, shall have been attached by process of law, as to cases in which an act of legal bankruptcy shall have been committed."[1]

The following are the principles which appear to have been established by the judicial constructions which have been given to these enactments, in the numerous cases to which they have given rise.

1. Congress had the constitutional power to enact these regulations, in virtue of their authority to make all laws which shall be necessary and proper to carry into execution the powers vested by the constitution in the government of the United States, or in any department or officer thereof. In construing this clause of the constitution, it would be incorrect, and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power.

Where various systems might be adopted for that purpose, it might be said, with respect to each, that it was not necessary, because the end might be obtained by other means. *Congress must possess the choice of means*, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution. *The United States* v. *Fisher*, 2 Cranch, 358.

2. The fifth section, above recited, of the act of 1797, extends to debtors of the United States of every description, and not merely to delinquent

[1] Ch. 22, § 65: 1 Stat. at Large, 676.

PART 6. revenue officers and persons accountable for public moneys, to which the preceding sections are limited; while the 65th section of the act of 1799 applies only to persons bound for the payment of those duties on imports and tonnage, which are the subject of the act. Id., and *Beaston* v. *The Bank of the United States*, 12 Peters, 102. The act of 1797 was, therefore, held to embrace the case of an indorser of a foreign bill of exchange of which the United States were holders. *The United States* v. *Fisher*, cited above.

3. These acts create *no lien* in favor of the United States, but only a priority in payment, limited to the particular cases or states of things specified in the acts, while the debtor is living; but taking effect generally if he is dead. No transfer of property, in the ordinary course of business, which would otherwise be valid, is therefore affected by them. *The United States* v. *Fisher*, 2 Cranch, 358; *The United States* v. *Hooe et al.*, 3 id., 73; *Conrad* v. *The Atlantic Insurance Company*, 1 Peters, 386; *Beaston* v. *Bank of the United States*, 12 id., 102. The priority of the United States, therefore, does not divest a *specific lien*, whether accompanied by possession or not; and *a fortiori*, it does not supersede the rights of a mortgagee. Thus, in the case of *Conrad* v. *The Atlantic Insurance Company*, above cited, it was held that an assignment of a bill of lading of an outward bound ship, "and of the specie, goods, &c., to be procured thereon and thereby, and any return cargo to be obtained, &c., by the proceeds thereof," as collateral security for money loaned on a *respondentia* bond, was valid and effectual in favor of the assignee against the right of priority of the United States, as to a debt due to them from the assignor. Such a transfer gives to the assignee a right to take and

hold the proceeds of the outward bound cargo against any person but the consignee of the cargo, or a purchaser from the consignee without notice.[1] See, also, to the same point, the cases of *Harris* v. *D' Wolf*, 4 Peters, 147; *Conrad* v. *Nicoll*, 4 id., 291; *Conrad* v. *The Pacific Insurance Company*, 6 id., 262; and *The United States* v. *The Canal Bank*, 3 Story's R., 79. The importance of the case of *Conrad* v. *The Atlantic Insurance Company* is enhanced by the elaborate review and explanation it contains of the case of *Thelluson et al.* v. *Smith*, 2 Wheat., 396. According to the report of that case, it decides that the general lien of a judgment creditor upon the lands of his debtor is overreached and displaced by the priority of the United States; and that to render it valid as against such priority with respect to any portion of the property of the debtor, it is necessary to take out an execution and make a levy on such property. The controversy in that case was concerning the proceeds of a part of the lands of the debtor called the "Sedgely estate," which had been sold on a junior judgment in favor of the United States, after he had brought himself within the purview of the acts giving priority to the United States, by an assignment of all his property. "The real ground of the decision," say the court, "was, that the judgment creditor had never perfected his title, by any execution and levy on the Sedgely estate; that he had acquired no title to the proceeds as his property; and that if the proceeds were to be deemed general funds of the debtor, the priority of the United States to payment had attached against all other creditors; and that a mere potential lien on land did not carry

[1] The case of *Conrad* v. *The Atlantic Insurance Company*, is a highly instructive one. It involved several questions of great interest, which were discussed with extraordinary learning and ability, as well at the bar as by Mr. Justice STORY in pronouncing the opinion of the court.

PART 6. a legal title to the proceeds of a sale made under an adverse execution. "This," it is added, "is the manner in which this case has been understood by the judges who concurred in the decision; and it is obvious that it established no such proposition, as that a specific and perfected lien can be displaced by the mere priority of the United States; since that priority is not of itself equivalent to a lien."

This explanation was sufficient in the view of a majority of the court, to relieve the case then before them from any embarrassment arising from the case of *Thelluson* v. *Smith;* but I do not understand it, whatever inferences the court might have been willing should be drawn from it, as distinctly implying any repudiation of the doctrine of that case, as laid down in the reported opinion. On the contrary, the care which the court take to distinguish between specific and general liens, in which latter category they place judgments before an actual levy, would seem to imply an assent to that doctrine. Mr. Justice JOHNSON, however, who gave a separate opinion, considered the decision of the court in the case before them as overturning the case, or, rather to use his own language, the report of the case of *Thelluson* v. *Smith*, and expressed his satisfaction that it did so. And he clearly showed that the special verdict in that case, rightly understood, involved no question of priority at all; the judgment in favor of the United States not having been obtained until after the assignment of all the debtor's property, and the sale from which the proceeds in question accrued having been a mere nullity, and being, of course, no impediment to the enforcement of the prior judgment. The case of *Thelluson* v. *Smith* did not, therefore, require any decision upon a question of preference between the United States claiming a priority of payment under the act in question, and a judg-

ment creditor; and however doubtful this question may have been left by the commentary of the court upon that case in *Conrad* v. *The Atlantic Insurance Company*, a decision of it unfavorable to the judgment creditor would seem to be little in accordance with the judicial construction in reference to other kindred questions which these acts have uniformly received. In the first reported case which arose under them, it was unequivocally declared that they created *no lien* in favor of the United States; and this declaration has often been repeated and acted upon since. But a judgment creditor surely has a lien in regard to the debtor's lands, general though it be until rendered specific by an actual levy; and how can it be displaced by rights falling short of a lien? It is proper to add, however, that in the more recent case of *Brent* v. *The Bank of Washington* (10 Peters, 596), the court appear to have considered this question still an open one; for, speaking of the priority of the United States, they say "*it has never been decided* that it affects any lien, *general* or specific, existing when the event took place which gave the United States a claim of priority."

In the case of *Brent* v. *The Bank of Washington*, it was held, that where the charter of a bank gave to the bank a lien on the stock held by a debtor for the payment of debts due to it, this lien would prevail against the priority of the United States.

The report of the case of *The United States* v. *Mott et al.* (1 Paine's C. C. Rep., 188), is not sufficiently exact with respect to dates and some other particulars to render it perfectly intelligible. But, judging from the report, it would seem not to have occurred, either to the counsel or the court, that the fact of the defendants having a prior judgment, was a circumstance of any importance at all. The reporter, it appears, considered the case as turning upon a ques-

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tion of fraud in the assignment, though I do not perceive in the report any ground for such a conclusion.

4. Congress intended to define the *insolvency* which should bring the debtor within the law; and, as this term is used in these acts, it imports such a general divestment of property as would in fact be equivalent to insolvency in its technical sense.

It supposes that all the debtor's property has passed from him. A mere inability of a living debtor to pay his debts is not sufficient; but it must be manifested in one of the three modes pointed out in the explanatory clauses of the acts; and no evidence can be received of the insolvency of the debtor until he has been divested of his property in one of these modes; for, while he continues to be the owner and in possession of the property, the priority does not attach, though he may in fact be unable to pay his debts.

And the "voluntary assignment" of the debtor's "property" mentioned in these acts, means *all* his property. Had the legislature contemplated a partial assignment, the words, or part thereof, or others of similar import, would have been added. 3 Cranch, 73; *Prince* v. *Bartlett*, 8 id., 431; *Thelluson et al.* v. *Smith*, 2 Wheat., 296; 1 Peters, 386; 12 id., 102; *The United States* v. *Clark*, 1 Paine's C. C. Rep., 629.

When the debtor is divested of his property in one of the modes specified in the acts, the person who becomes vested with the title is thereby made a trustee for the United States, and is bound to pay the debt first out of the proceeds of the debtor's property, saving, however, the rights of mortgagors and other prior incumbrancers. See, also, as to the duties and liabilities of the assignees of the debtor, *Field et al.* v. *The United States*, 9 Peters, 182.

5. Corporations are to be considered persons within the provisions of the fifth section of the act of 1797. *Beaston* v. *Bank of the United States*, 12 Peters, 102.

6. The priority of the United States confers no right to take the property of a partner from partnership effects to pay a separate debt due by such partner to the United States when the partnership effects are not sufficient to satisfy the creditors of the partnership; it being a well settled rule that the interest of each partner in the partnership property is his share of the surplus after the partnership debts are paid; and that surplus only is liable to the separate debts of such partner.

7. The priority of the United States attaches as well with respect to debts owing but not yet payable, as with respect to those already payable when the insolvency or death of the debtor occurs. *The United States* v. *The Bank of North Carolina*, 6 Peters, 29.

8. In the case of *The United States* v. *Clark* (1 Paine's C. C. Rep., 629) it was held, that an action of assumpsit for money had and received, founded on the right of priority, might be maintained by the United States against the assignee of the debtor, to recover the proceeds of the debtor's property; and that it was not necessary that the debt should first be ascertained by a judgment against the debtor. Such an action would, however, of course, require the same proof of indebtedness, and be open to the same defense as a suit against the debtor.

The suit in that case was against the assignee of a surety in the paymaster's bond; and it was held that the debt of the paymaster to the United States was created by the advances made to him, and was to be considered as having accrued so as to constitute the surety a debtor of the United States, as soon as the principal failed to account for the public moneys advanced to him, as required by the condition of his bond, without regard to the time of striking the balance of his account on the treasury books, or to the time of commencing the suit.

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It was also further held, that an assignee is not liable until after notice to him of the debt due to the United States; but that such notice need not be given by the United States, and need only be such as would be sufficient to put a prudent man on inquiry.

It may not be amiss to add, that whatever ground for doubt there may have been heretofore, while all contracts made in pursuance of the laws regulating the post-office establishment were made with the postmaster-general, whether debtors under such contracts came within the operation of these acts, there can be none now, since, by the act of July 2, 1836, all contracts of this description are required, thenceforth, to be made "to and with the United States."[1]

CHAPTER II.

IMPRISONED DEBTORS.

While the acts of congress, collectively, provide for the liberation of *all* insolvent debtors imprisoned *on executions* issuing from any court in the United States, they divide such debtors into three distinct classes, and prescribe for each a different form of relief. It is proposed to state the provisions now in force, relative to each of these classes.

1. By the act of June 6, 1798, entitled "An act providing for the relief of persons imprisoned for debts due to the United States," it is provided (sec. 1)—

"That any person imprisoned upon execution issuing from any court of the United States, for a debt due to the United States, which he shall be unable to pay, may at any time after commitment, make application in writing to the secretary of the treasury, stating the circumstances of his case, and his inability to discharge the debt; and it shall there-

[1] Ch. 270, § 13: 5 Stat. at Large, 80.

upon be lawful for the said secretary to make, or require to be made, an examination and inquiry into the circumstances of the debtor, either by the oath or affirmation of the debtor (which the said secretary, or any other person by him specially appointed, are [is] hereby authorized to administer), or otherwise, as the said secretary shall deem necessary and expedient, to ascertain the truth; and upon proof being made, to his satisfaction, that such debtor is unable to pay the debt for which he is imprisoned, and that he hath not concealed, or made any conveyance of his estate, in trust for himself, or with an intent to defraud the United States, or deprive them of their legal priority, the said secretary is hereby authorized to receive from such debtor, any deed, assignment or conveyance, of the real or personal estate of such debtor, if any he hath, or any collateral security, to the use of the United States; and upon a compliance by the debtor, with such terms and conditions as the said secretary may judge reasonable and proper, under all the circumstances of the case, it shall be lawful for the said secretary to issue his order, under his hand, to the keeper of the prison, directing him to discharge such debtor from his imprisonment under such execution, and he shall be accordingly discharged, and shall not be liable to be imprisoned again for the same debt; but the judgment shall remain good and sufficient in law, and may be satisfied out of any estate which may then, or at any time afterward, belong to the debtor."[1]

The second section declares false swearing under the act to be perjury, and by reference to an expired act of earlier date superadds the further penalty that "the court, upon the motion of the creditor, shall recommit the debtor to the prison, from whence he was liberated, there to be detained for the said debt, in the same manner as if the said oath or affirmaton had not been taken."

The third and last section provides "that the benefit of this act shall not be extended to any persón

[1] Ch. 49, § 1: 1 Stat. at Large, 561.

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imprisoned for any fine, forfeiture, or penalty, incurred by a breach of any law of the United States or for moneys had and received by any officer, agent, or other person, for their use."

By this section, it will be perceived, a very large proportion of those likely to be imprisoned on execution at the suit of the United States, is excluded.

2. For the purpose of providing for the case of persons thus excluded, viz., those who should be imprisoned in execution of judgments for *fines*, *forfeitures* or *penalties*, or for the embezzlement or non-payment, according to law, of *money belonging to the United States*, the supplementary act of March 3, 1817, was passed.

By this act it is enacted —

"That any person imprisoned upon execution for a debt due to the United States, which he shall be unable to pay, *if his case shall be such as does not authorize his discharge by the secretary of the treasury*, under the powers given him by the act, entitled 'An act providing for the relief of persons imprisoned for debts due to the United States,' may make application to the President of the United States, and upon proof being made to his satisfaction, that such debtor is unable to pay the debt, and upon a compliance, by the debtor, with such terms and conditions as the president shall deem proper, he may order the discharge of such debtor from his imprisonment, and he shall be accordingly discharged, and shall not be liable to be imprisoned again for the same debt; but the judgment shall remain good and sufficient in law, and may be satisfied out of any estate which may then, or at any time afterward, belong to the debtor."[1]

The terms of these two acts are unquestionably comprehensive enough to embrace judgment debtors of the United States of every description.

But by the act of March 3, 1825, to establish and regulate the post-office department, it is provided,

[1] Ch. 114: 3 Stat. at Large, 399.

that "the postmaster-general shall be authorized to discharge from imprisonment any person confined in jail, on any judgment in a civil cause, obtained in behalf of the department: *Provided*, it be made to appear that the defendant has no property of any description: *And provided*, that such release shall not bar a subsequent execution against the property of the defendant."[1]

Under this act, and until recently, all contracts relative to the concerns of the post-office department were required to be made with the postmaster-general, and all suits growing out of such contracts were prosecuted in his name. The provision above quoted may, therefore, have been inserted from abundant caution, under the supposition that the description of imprisoned insolvent debtors therein mentioned might not be embraced within the general act giving a like authority to the president and secretary of the treasury. Or, under the system which then prevailed, it may have been deemed expedient to withdraw this particular class of debtors from the power of these functionaries, and to place them under that of the postmaster-general.

But by the act "to change the organization of the post-office department," &c., passed July 2, 1836, "all bonds and contracts of postmasters, mail contractors and other agents of the post-office department," are required thereafter to "be made to and with the United States of America."[2]

And by the eighth section of this act, provision is made for the appointment by the president and senate, of an "auditor of the treasury for the post-office department, whose duty it shall be to receive all accounts arising in the said department, or relative thereto, to audit and settle the same," &c.

[1] Ch. 64, § 38: 4 Stat. at Large, 113.

[2] Ch. 270, § 13: 5 Stat. at Large, 82.

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Under this state of the law, therefore, it may well be questioned whether the provision above cited from the act of 1825, is not superseded.

3. The remaining description of insolvent debtors to be here noticed, consists of those who are imprisoned on execution not at the suit of the United States.

These are provided for by the "act for the relief of persons imprisoned for debt," passed January 6, 1800.[1]

The first section of this act secures to all persons imprisoned on process issuing from the courts of the United States, the like privileges of the yards or limits of the jails in each state, as persons confined in like cases on process from the state courts.

The second section enacts:

"That any person imprisoned on process of execution issuing from any court of the United States, in civil actions, except at the suit of the United States, may have the oath or affirmation, hereinafter expressed, administered to him by the judge of the district court of the United States, within whose jurisdiction the debtor may be confined; and, in case there shall be no district judge residing within twenty miles of the jail wherein such debtor may be confined, such oath or affirmation may be administered by any two persons who may be commissioned for that purpose by the district judge; the creditor, his agent or attorney, if either live within one hundred miles of the place of imprisonment, or within the district in which the judgment was rendered, having had at least thirty days' previous notice, by a citation served on him, issued by the district judge, to appear at the time and place therein mentioned, if he see fit, to show cause why the said oath or affirmation should not be so administered: at which time and place, if no sufficient cause, in the opinion of the judge (or the commissioners appointed as aforesaid) be shown, or doth, from examination, appear to the contrary, he or they may, at the request of the debtor,

[1] Ch. 4: 2 Stat. at Large, 4.

proceed to administer to him the following oath or affirmation, as the case may be, viz.: '*You* ——— *solemnly* (*swear* or *affirm*) *that you have no estate, real or personal, in possession, reversion or remainder, to the amount or value of thirty dollars, other than necessary wearing apparel; and that you have not, directly or indirectly, given, sold, leased, or otherwise conveyed to, or intrusted, any person or persons, with all, or any part of the estate, real or personal, whereof you have been the lawful owner or possessor, with any intent to secure the same, or to receive, or expect, any profit or advantage therefrom, or to defraud your creditors, or have caused or suffered to be done, any thing else whatsoever, whereby any of your creditors may be defrauded.*' Which oath or affirmation being administered, the judge or commissioners shall certify the same, under his or their hands, to the prison keeper, and the debtor shall be discharged from his imprisonment on such judgment, and shall not be liable to be imprisoned again for the said debt; but the judgment shall remain good and sufficient in law, and may be satisfied out of any estate which may then, or at any time afterward, belong to the debtor. And the judge or commissioners, in addition to the certificate by them made and delivered to the prison keeper, shall make return of their doings to the district court, with the commission, in cases where a commission hath been issued, to be kept upon the files and record of the same court. And the said judge, or commissioners, may send for books and papers, and have the same authority as a court of record, to compel the appearance of witnesses, and administer to them as well as to the debtor the oaths or affirmations necessary for the inquiry into, and discovery of the true state of the debtor's property, transactions and affairs."

Section third provides —

"That when the examination and proceedings aforesaid, in the opinion of the said judge or commissioners, cannot be had with safety or convenience in the prison wherein the debtor is confined, it shall be lawful for him or them, by warrant, under his or their hand and seals, to order the marshal or

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prison keeper to remove the debtor to such other place, convenient and near to the prison, as he or they may see fit; and to remand the debtor to the same prison, if, upon examination or cause shown by the creditor, it shall appear that the debtor ought not to be admitted to take the above recited oath or affirmation, or that he is holden for any other cause."

The fourth section denounces the pains and penalties of perjury for false swearing under the act, and directs that —

"In case any false oath or affirmation be so taken by the debtor, the court, upon motion of the creditor, shall recommit the debtor to the prison from whence he was liberated, there to be detained for the said debt, in the same manner as if such oath or affirmation had not been taken."[1]

The fifth and last section of this act contains the important provision —

"That any person imprisoned upon process issuing from any court of the United States, except at the suit of the United States, in any civil action, against whom judgment has been or shall be recovered, shall be entitled to the privileges and relief provided by this act, after the expiration of thirty days from the time such judgment has been, or shall be recovered, though the creditor should not, within that time, sue out his execution, and charge the debtor therewith."

This section, it will be seen, is intended to provide for the case of imprisonment of the debtor, on

[1] This latter clause, and the corresponding one in the act of 1798, seem not to have been well considered. During what period after the debtor is "liberated," is he to continue liable, "on motion of the creditor," to be recommitted? Would not such a recommitment be equivalent to a conviction for perjury—and that without a jury?

It could hardly have been intended to authorize a recommitment except upon evidence which would warrant a conviction on an indictment for perjury. Why then direct the debtor to be committed and "detained for the said debt," when provision is made for his punishment by imprisonment, as a criminal?

mesne process, or on surrender by bail, and the omission by the plaintiff to charge him in execution.

By the supplementary acts of January 7, 1824,[1] and of April 22, 1824,[2] it is provided that the oath prescribed by the act of 1800 may be administered, either by any judge of the supreme court of the United States or by the district judge for the district in which the debtor may be, or by any person commissioned by either of such judges, for that purpose; and that the person or persons so commissioned shall have full power and authority to issue a citation, directed to the creditor, his agent or attorney, if either live within one hundred miles of the place of imprisonment, requiring him to appear at the time and place therein mentioned, if he see fit, to show cause why the said oath or affirmation should not be administered; and further, that, if the creditor or his agent or attorney lives within fifty miles of the place of imprisonment, only fifteen days' notice shall be required.

[1] Ch. 3: 4 Stat. at Large, 1.

[2] Ch. 39: 4 Stat. at Large, 19.

CHAPTER III.

OF PROCEEDINGS FOR THE MITIGATION OR REMISSION OF FINES, PENALTIES, FORFEITURES AND DISABILITIES.

The laws of the United States regulating commerce and navigation, like those of all commercial nations, are necessarily rigorous in their exactions, and highly penal. They require the performance of certain acts, and prohibit certain others; and inflict forfeitures and penalties for the non-observance of their injunctions, without regard in general to the *motives* of the offender.

But however necessary such a code of legislation may be, in this particular instance, to regulate the conduct of the subordinate ministerial officers of the government, and even the decisions of judicial tribunals, its inflexible enforcement without the right of appeal to some dispensing power, would sometimes lead to intolerable injustice. Congress accordingly, by a series of temporary acts, passed soon after the organization of the government, provided a mode of relief, in such cases, by authorizing the secretary of the treasury, upon a proper application to him for that purpose, to mitigate or altogether to remit the penalties of these laws, when, from the facts of the case first judicially ascertained, he shall be of opinion that such penalties "*have been incurred without willful negligence or any intention of fraud.*"

The last of these acts, is that of March 3, 1797.[1] It was limited to two years, but was declared perpetual by the act of Feb. 11, 1800.[2] It is entitled "An act to provide for mitigating or remitting the forfeitures, penalties and disabilities, accruing in

[1] Ch. 13: 1 Stat. at Large, 506.
[2] Ch. 6: 2 Stat. at Large, 7.

certain cases therein mentioned;" and it is still valid and operative with respect to all cases embraced by its terms, except those in which the fine, penalty, or forfeiture does not exceed fifty dollars in amount or value; for these cases a simpler course of proceeding has been prescribed by a later act, which will be more particularly mentioned in the sequel.

The first section of the act of 1797 is as follows:

"That whenever any person or persons shall have incurred any fine, penalty, forfeiture or disability,[1] or shall have been interested in any vessel, goods, wares or merchandise, which shall have been subject to any seizure, forfeiture or disability, by force of any present or future law of the United States, for the laying, levying, or collecting any duties or taxes, or by force of any present or future act, concerning the registering and recording of ships or vessels, or any act concerning the enrolling and licensing ships or vessels employed in the coasting trade or fisheries, and for regulating the same, shall prefer his petition to the judge of the district, in which such fine, penalty, forfeiture, or disability shall have accrued, truly and particularly setting forth the circumstances of his case, and shall pray that the same may be mitigated or remitted, the said judge shall inquire in a summary manner into the circumstances of the case; first causing reasonable notice to be given to the person or persons claiming such fine, penalty or forfeiture, and to the attorney of the United States, for such district, that each may have an opportunity of showing cause against the mitigation or remission thereof; and shall cause the facts which shall appear upon such inquiry, to be stated and annexed to the petition, and direct their transmission to the secretary of the treasury of the United States, who shall thereupon have power to mitigate or remit such fine, forfeiture or penalty, or remove such disability, or any part thereof, *if, in his opinion, the same shall*

[1] Such, for example, as the incapacity to hold any office under the United States for the period of seven years, inflicted by the fiftieth section of the collection act of March 2, 1799 (Ch. 22: 1 Stat. at Large, 665), for a violation of its provisions.

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This act, it will be seen, extends to liabilities incurred by force of all *future*, as well as existing, laws of the description therein mentioned.

With regard to the *persons* who have a right to petition, and the *time* at which such right accrues, the act is sufficiently explicit.

It will readily be seen, also, that in all cases in which, by the act, the secretary of the treasury is authorized to grant relief, he is invested with unlimited discretion as to the *extent* of the relief, and as to the terms and conditions upon which prosecutions, where they have been instituted, shall be stayed or discontinued. He has authority, therefore, to remit as well the share of the fine, penalty or forfeiture to which the officers of the customs or of informers are by law entitled, as that which belongs to the United States.

The act contains no limitation in point of time, of the right of petitioning or of power of remission; but, from the nature of the case, some such limitation must exist. This is a point which has led to very earnest discussion; but, so far at least as the interests of the officers of the customs or of informers are concerned, may now be considered as definitely settled by the case of *The United States* v. *Morris* (10 Wheat., 246); which, though it relates immediately to a *forfeiture*, is doubtless equally applicable to pecuniary fines and penalties. The question in

[1] The second section of this act invests the state court with all the powers conferred by the first section, on the district judges of the United States.

that case was, whether by *a judgment or decree of condemnation* against property seized for a violation of the non-intercourse laws of the United States, the rights of the officers of the customs to a moiety of the value of such property had become absolute and fixed, so as no longer to be subject to the power of revision by the secretary of the treasury. After a very able argument at the bar, and an elaborate and luminous examination of the question by the court, it was decided that the power of remission continued until *the actual receipt of the money arising from the forfeiture by the collector for distribution.*

It will be perceived, however, that this decision, in fixing the limits *beyond* which the power of remission can no longer be exerted, applies in terms only to the shares of the officers of the customs, and *not to the interest of the United States.* The question may therefore, perhaps, still be considered as open for discussion, whether so far as this interest in concerned, the secretary of the treasury may not remit at a *still later* stage of the transaction.

It will doubtless occur to the reader that the rule established by this case authorizes a remission after as well as before *a sale*, by the marshal of the petitioner's property, provided the proceeds have not been paid over for distribution to the collector. It is presumed, however, that the supreme court did not contemplate any interference with the *title* acquired by the purchaser at such sale; but intended, in case of such subsequent remission, not that the property of the petitioner should be restored, but that the proceeds of it, or such portion thereof as might be remitted, should be paid over to him.

In a case highly favorable to the petitioner, and in which there would be danger that the period of grace would elapse before a decision by the secretary of the treasury could be obtained, probably the

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district judge would consider it his duty to grant an order for a temporary stay of proceedings in the suit against the property or person of the petitioner.

Of the petition and notice thereof.] Although the application for relief is to the secretary of the treasury, the *petition* is, by the terms of the act, to be presented, and may with propriety be, as in practice it usually is, *addressed* to the judge by whom the summary inquiry is to be made. It must truly and particularly set forth the circumstances of the petitioner's cases; that is, it must state truly and with precision how his liability was incurred, and the circumstances upon which he relies for relief — as his ignorance or misapprehension of the requirements of the law, mistake, accident, misconduct of agents, or the like; and that he had been guilty of no "willful negligence, or any intention of fraud." It does not require all the formal precision usually observed in a bill in equity; but is very analogous in its nature to such a bill for relief, for example, against a judgment at law, and should be framed accordingly. The secretary of the treasury being authorized to direct any prosecution which may be pending to "cease and be discontinued *upon such terms and conditions* as he may deem reasonable and just," it is essential that the petitioner should state *whether any and what legal proceedings have been had in the case;* and it is accordingly expressly required, by a rule of each of the district courts in New York, that he shall do so.[1]

It is not required by the act, nor by the rules of either of these courts, that the petition shall be verified by the *oath* of the petitioner.

It is, however, usual in practice to append to it an affidavit of its truth; and, when this is done, care should be taken, as in all other cases, that the affi-

[1] Appendix, Rule 96, D. C. N. D.

davit be made either before the judge, or one of the commissioners appointed to take affidavits and acknowledgments of bail, in the district in which the petition is preferred.

The act requires the judge, before proceeding to the summary inquiry into the circumstances of the case, to cause "reasonable notice to be given to the person or persons claiming the fine, penalty or forfeiture, and to the attorney of the United States for such district." This language would rather seem to imply the previous presentation of the petition, and an order thereupon, in each case, that such as may be deemed reasonable, be given. This, however, is but matter of form; and, according to a rule in each of the district courts in New York, the petitioner may give notice, in the first instance, of his intention to present the petition, and then the necessary inquiry takes place at the time of its presentation. This is merely doing by general rule, what it would otherwise be necessary to do by special order in each particular case. In the southern district this notice must be served *four* days, and, in the northern district, *ten* days before presenting the petition. As it regards the form of the notice, these rules require the service of "a *copy of the petition*, with a notice of the time and place of presenting the same."[1]

The service must in *all* cases be made upon the *district attorney;* but, in order to ascertain upon what other persons it must also be made, it is necessary to refer to the 91st section of the act of March 2, 1799, "to regulate the collection of duties on imports and tonnage,"[2] prescribing the manner in which fines, penalties and forfeitures are to be distributed. It is true this direction in terms applies

[1] Appendix, Rule 88, D. C. N. D.

[2] Ch. 22: 1 Stat. at Large, 607.

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only to such penalties and forfeitures as may be incurred under that particular act; and that there are other acts of the description enumerated in the remission act, by which penalties and forfeitures are also inflicted; but in every instance, as far as I have observed, the provisions of this act relative to the enforcement and distribution of such penalties and forfeitures are referred to and expressly adopted.

But before adverting to the provisions in question of the 91st section of the collection act, it will conduce to perspicuity in relation to this whole subject, to notice some of the provisions of the two next preceding sections.

The eighty-ninth section, among other things, directs that all penalties, accruing by any breach of the said act, shall be sued for and recovered, with costs of suit, in the name of the United States of America. It makes it the duty of the collector, within whose district[1] any seizure is made or forfeiture incurred, to cause suits for the same to be commenced without delay, and prosecuted to effect; authorizes him to receive from the court, or from the proper officer thereof, the sum or sums so recovered, after deducting all proper charges, to be allowed by the said court, and directs him, on receipt thereof, to pay and distribute the same without delay according to law.

The ninetieth section directs all vessels and goods condemned in virtue of the said act (and for which bond shall not have been given), to be sold by the marshal after fifteen days' notice, and directs the marshal, within ten days after such sale, to pay over the amount of such sales (deducting all proper charges allowed by the court) to the clerk, or other proper officer of the court, to be by him paid to the collector of the district.

[1] By *district* it will of course be understood is meant *collection* district.

Then comes the ninety-first section, directing the mode of distribution, as follows:

"That all fines, penalties and forfeitures, recovered by virtue of this act (and not otherwise appropriated), shall, after deducting all proper costs and charges, be disposed of as follows: One moiety shall be for the use of the United States, and be paid into the treasury thereof by the collector receiving the same; the other moiety shall be divided between and paid in equal proportions to the collector and naval officer of the district, and surveyor of the port, wherein the same shall have been incurred, to such of the said officers as there may be in the said districts; and in districts where one only of the said officers shall have been established, the said moiety shall be given to such officer: *Provided,* Nevertheless, that in all cases where such penalties, fines and forfeitures shall be recovered, in pursuance of information given to such collector, by any person other than the naval officer or surveyor of the district, the one-half of such moiety shall be given to such informer; and the remainder thereof shall be disposed of between the collector, naval officer and surveyor or surveyors in manner aforesaid: *Provided, also,* That where any fines, forfeitures and penalties, incurred by virtue of this act, are recovered in consequence of any information given by any officer of a revenue cutter, they shall, after deducting all proper costs and charges, be disposed of as follows: One-fourth part shall be for the use of the United States, and paid into the treasury thereof in manner as before directed; one-fourth part for the officers of the customs, to be distributed as hereinbefore set forth; and the remainder thereof to the officers of such cutter, to be divided among them agreeably to their pay."[1]

[1] The residue of this section is as follows: "*And provided, likewise,* That whenever a seizure, condemnation and sale of goods, wares or merchandise, shall take place within the United States, and the value thereof shall be less than two hundred and fifty dollars, that part of the forfeiture which accrues to the United States, or so much thereof as may be necessary, shall be applied to the payment of the costs of the prosecution: *And be it further provided,* That if any officer or other person, entitled to a part or share of any of the fines, penalties

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It follows, therefore, that notice is, in *every* case, to be given to the *collector;* and, according to the strict letter of the law, when the fine, penalty or forfeiture has been incurred in a collection district in which there is a surveyor or naval officer, or both, notice ought to be given to him or them also.

It is understood, however, that it has not heretofore been the practice of the judge for the southern district of New York, in cases of forfeiture or penalties incurred in the collection district of the city of New York, in which there are both a surveyor and a naval officer, to require the service of notice upon these latter officers, but only on the collector. Perhaps, as the collector is made by law the immediate agent in the collection, receipt and distribution of the moneys arising from penalties and forfeitures, and is himself always entitled to a distributive share, it has been considered a sufficient compliance with the spirit of the act to cause him alone to be notified, as the representative as well of the interests of his associates as of his own. According to the terms of the printed rule of that court, one copy of the petition and notice are to be served on the district attorney, "and *another* copy and notice on *the persons* claiming the fine," &c. It is clear, also, that, when the fine, penalty or forfeiture, is recovered in pursuance of information given by an informer or an officer of a revenue cutter, as mentioned in the section last cited, a literal interpretation of the remission act would require such informer or officer to be notified. The name of the informer or officer should in such cases (when known) be stated in the petition.

or forfeitures, incurred in virtue of this act, shall be necessary as a witness on the trial for such fine, penalty or forfeiture, such officer or other person may be a witness upon the said trial; but in such case he shall not receive, nor be entitled to, any part or share of the said fine, penalty or forfeiture; and the part or share to which he otherwise would have been entitled, shall revert to the United States."

In many cases, however, in which information had thus been given, the petitioner might be wholly ignorant of the fact. It is proper, therefore, when a seizure has been made, or a suit for a penalty commenced, that he should state in his petition, if the fact is so, that he has no knowledge or good reason to believe that such seizure was made or suit instituted in pursuance of information given to the collector by any person entitled as informer to a share of such penalty or forfeiture.

The due service of the notice must of course be proved by affidavit made before the judge or a commissioner.

But by far the most difficult and embarrassing part of the proceeding remains to be considered. The judge is required "to inquire, in a summary manner, into the circumstances of the case," and to "cause *the facts* which shall *appear* upon such inquiry to be stated and annexed to the petition, and direct their transmission to the secretary of the treasury." It is the duty of the judge, therefore, to decide, from the evidence adduced, what are the facts of the case; and from the facts thus ascertained, the secretary is to form his opinion whether the petitioner is guilty of "willful negligence or any intention of fraud." But, with respect to the nature of the evidence to be adduced, and the mode by which it is to be obtained, the act is wholly silent. Generally, a judicial inquiry implies a resort to what in law is considered *competent and credible* testimony as the only means of ascertaining the truth; and, in the case of *The Margaretta* (2 Gall., 415), (the only reported case to be met with relative to the duty of the judge under this act), it was held, that such was the necessary import of the provision in question; and that the oath of the petitioner was, therefore, in its nature incompetent evidence. But it certainly was not intended to

PART 6. require of the judge, or of the petitioner, to work impossibilities; nor could it have been intended so to fetter the benign spirit of this important and necessary remedy as to render it illusory or ineffectual. And, to say nothing of the omission of the legislature to provide the means of compelling the attendance of witnesses, it is to be remembered that in many, perhaps a majority, of cases, the facts upon which the petitioner relies for exculpation are such as, from their very nature, either cannot be, or cannot fairly be presumed to be, known to any one but himself. In such instances, what can the party do more than to give a full explanation of the circumstances, and verify his statement by his own oath? And if there is nothing suspicious upon the face of his statement, and the district attorney representing the United States, and the officers of the customs having a personal interest in the proceedings, are unable to disprove, or in any manner invalidate it, why should it not be adjudged to be true, and, as such, transmitted to the secretary of the treasury? Unquestionably such statements ought to be scanned with a critical and distrustful eye. If there is good reason to believe that others are acquainted with the facts, the petitioner should be required, if possible, to obtain, their testimony; and, if the explanation is in any degree unsatisfactory, and it can be done without unreasonable delay or hardship, and especially if the district attorney or collector desire it, the petitioner should be required to submit himself to a rigid oral examination under oath. But an inflexible adherence, under all circumstances, to the rule laid down in the case of *The Margaretta*, it is, with great deference, apprehended, would impose an unreasonable and unjust restriction upon the remedy provided by this act.

It is worthy of remark, too, that if the oath of the petitioner ought to be excluded as evidence, upon the ground that his interest disqualifies him as a witness, the oaths of the officers of the customs ought also to be excluded for the same reason; and thus the means of arriving at the truth would be greatly abridged. Nor does the course here insisted upon, in fact involve such a departure from established judicial principles and usage, as at first view it may appear to do. It only treats the oath of the petitioner as *prima facie* evidence of the truth. But it is the familiar practice of courts of equity to grant injunctions upon bills of complaint unsupported by any other evidence than the oath of the complainant, and to continue them until the positive denial or disproof of the bill on oath. And, indeed, the principle of adjudging that to be true which is alleged, even without oath, upon the one side, and not denied upon the other, runs throughout the science of pleading, and is uniformly acted upon both in equity and at law. Every decree upon a bill taken *pro confesso*, and every judgment by default, is founded upon a judicial ascertainment, without proof, of the fact alleged by the party in whose favor such decree or judgment is pronounced; and so, when the right of recovery is contested, every essential fact averred by the plaintiff, and not expressly denied by the defendant, is in like manner adjudged to be true.

In each of the judicial districts in New York, the practice has been, and, unless it has recently been changed in the southern district, still is, in conformity with these views.

The statement of facts.] By the rules of each of the district courts in New York, it is made the duty of the clerk to transmit the facts appearing on the inquiry, together with the petition, to the secretary of the treasury; his fees are to be paid by the peti-

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tioner before transmission; and when several petitioners or distinct claimants, not being partners, or several cases or importations are embraced in one petition, the clerk, by the rules of these courts, is entitled to the same fees as if a distinct petition had been presented in each case.[1]

The formalities observed relative to the drawing up and transmission of the statement of facts, probably vary considerably in the several districts. In the northern district of New York an order is made and entered, *reciting* the fact of the presentation of the petition; that it satisfactorily appears that reasonable notice has been given to the district attorney, and to the collector by whom the seizure was made (or within whose district the fine, penalty or forfeiture was incurred, &c., as the case may be), that the district attorney, or collector (or both of them, as the case may be), appeared (or did not appear, as the fact may be), that the judge thereupon proceeded summarily to inquire into the circumstances of the case; and *directing* that the clerk annex to the petition[2] a statement of the facts appearing upon such inquiry, and transmit the same to the secretary of the treasury.

The clerk, under the direction of the judge, then draws up a statement of the facts, annexes it, together with a transcript of the rule tested (after the manner of process), in the name of the judge, and having the seal of the court affixed to it, to the

[1] Appendix, Rules 88–91, D. C. N. D.

[2] The act in *terms* requires the statement of facts to be annexed to the *petition*, and transmitted, &c. Perhaps its *spirit* would warrant the transmission of a *copy* of the petition instead of the original, and if so, it would be in more strict conformity with legal usage to retain the original in the clerk's office. The literal construction of the act, however, seems to be the safer one. But it is proper that the clerk should at least retain and deposit in his office a copy of the petition, and of the statement of facts.

petition, and transmits the whole to the secretary of the treasury.

Warrants of remission.] When the decision of the secretary is in favor of the petitioner, a warrant of remission, under the seal of the department, is sent to the clerk of the court whence the statement of facts was received. An exemplification of this warrant, under the seal of the court, is then furnished by the clerk to the petitioner; and, *provided the case is one to which the authority of the secretary extends, but not otherwise*, it constitutes a valid defense against a legal prosecution for the fine, penalty, forfeiture or disability remitted.

When the decision is adverse to the petitioner, such decision is also, in like manner, transmitted to the clerk.

The amendatory act, alluded to at the beginning of this chapter, is that of July 14, 1832.[1] It is brief, and is as follows:

"That, in all cases of fine, penalty, or forfeiture, mentioned and embraced in the act entitled 'An act to provide for mitigating or remitting the forfeitures, penalties and disabilities, accruing in certain cases therein mentioned,' or in any act in addition to or amendatory of the said act, and not exceeding fifty dollars in amount or value, the secretary of the treasury be, and he hereby is authorized, if, in his opinion, the said fine, penalty or forfeiture was incurred without willful negligence or intention, or fraud, to prescribe such rules and mode of proceeding, to ascertain the facts, as, in his opinion, may be convenient and proper, without regard to the provisions of the act above referred to; and upon said facts, so to be ascertained as aforesaid, the said secretary may exercise all the power conferred upon him, in and by the said act, as fully as he might have done had said facts been ascertained under and according to the provisions of the said act."

[1] Ch. 233: 4 Stat. at Large, 597.

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The sole design of this act, it will be obseved, is to dispense in the cases therein specified, with the judicial inquiry prescribed by the original act. Whether the secretary of the treasury has seen fit to prescribe and promulgate prospectively any "rules and modes of proceeding to ascertain the facts;" or whether in each case, on being applied to for information, he indicates what will be required of the petitioner in the particular case; or, lastly, whether the petitioner is left to follow the dictates of his own judgment in the first instance, relying on his own oath alone, or supported by the oaths of others, for the verification of his petition, until the secretary shall either adjudge the evidence sufficient, or pronounce it unsatisfactory, and, in his discretion, either deny the petition absolutely, or indicate the deficiency, and afford to the petitioner an opportunity to supply it, I am not appraised.

CHAPTER IV.

OF NATURALIZATION.

No state can pass naturalization laws.

Among the powers confided by the constitution to congress is that establishing a uniform rule of naturalization throughout the United States. This power is now well understood to be in its nature exclusive; and considered in all its bearings, is certainly one of great importance. In pursuance of it an act was passed at the second session of the first congress. Since that period the subject has repeatedly occupied the attention of the national legislature, until at length a long series of conflicting legislation has involved it in considerable apparent perplexity. This is the more to be regretted on account of the great disadvantage, as it respects the means of obtaining correct information, under which the class of persons labor whose rights it is

the object of these laws to regulate; and on account of the frequency with which the courts of record of every grade throughout the union are called upon to act upon the subject. So far, however, as it concerns merely the conditions of admission to the rights of citizenship, and the proceedings requisite for that purpose (a clear explanation of which is all that will here be attempted), the law as it previously stood, has been much simplified by the last act upon the subject, of May 24, 1828.[1]

The following exposition of the existing law relative to this subject is believed to be accurate, and it is hoped may prove intelligible and useful.

Provision is made for the naturalization only of "free white persons."[2]

To what courts application may be made.

Application for this purpose may be made to any circuit or district or territorial court of the United States, or to any court of record having a common law jurisdiction, and a seal and clerk or prothonotary of any individual state. Act of April 14, 1802.[3]

Previous residence in all cases required.

The applicant must have resided within the limits and under the jurisdiction of the United States for at least *five years* immediately preceding the time of his application; and must also have resided *one year*, at least, in the state or territory in which the court to which his application is addressed is sitting.[4]

How proved.

In proof of such previous residence, the courts are expressly prohibited from receiving the *oath of the applicant*, but are directed to require "the oath or

[1] Ch. 116: 4 Stat. at Large, 310.

[2] As to the description of persons who are to be considered as falling within this designation, see 2 Kent's Commentaries, 8th ed., 36.

[3] Ch. 28, §§ 1, 3: 2 Stat. at Large, 155.

[4] Id. The act does not, in terms, require such residence to have been during the *last* preceding year. But from the obvious policy of this provision, there is much reason to conclude that such was the intention of congress, and such it is apprehended is its true construction.

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affirmation of *citizens* of the United States;" that is, it is presumed, of at least *two* citizens; and the names of these citizens as witnesses of the fact of such residence, and also the place or places, of the applicant's residence for the last five years, are to be stated in the record to be made of the proceeding by the clerk of the court.[1]

It is proper now to notice and explain a distinction made by the existing laws between the case of those who arrived in the United States before, and those arriving after the 18th of June, 1812.

Declaration of intention to be made *two* years before admission.

The first condition of admission imposed by the act of April 14, 1802, above cited, is as follows, viz.: that the applicant shall have declared on oath or affirmation, before one of the courts above mentioned, three years at least before his application for admission, that it was *bona fide* his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty whatever, and partic-

[1] I have stated the latter requirements, of obtaining the testimony of *citizens* to the fact of residence, and of inserting the names, &c., in the record, *as applicable to all cases*, upon the authority of the second section of the act of May 24th, 1828 (ch. 106), as upon the whole the safer construction of it; though it is certainly questionable whether it embraces by far the most numerous class of applicants, viz., those who have come to reside in the United States since the 18th day of June, 1812; and of whom, as we shall presently see, a condition is required, which is not exacted of those who came at an earlier date. In effect, however, the question is not very important; because, by the act of 1802, which governs the rights in this respect, of those who arrive subsequently to 1812, the oath of the applicant cannot be received to prove his residence, but the court is bound to require *satisfactory proof*, by other evidence. This, it is true, would leave the court at liberty to receive the testimony of aliens, and, if it thought proper, to rely upon the evidence of only one witness. But in regard to a fact in its nature of so much notoriety as the residence of an individual, there would in general be no hardship in requiring the evidence of two citizens to prove it; and, indeed, to do so, would be but a reasonale exercise of discretion, under the act of 1802, requiring, in general terms, only satisfactory proof.

ularly by name, the prince, potentate, state or sovereignty whereof he may at the time be a citizen or subject. But by the act of May 26, 1824, this declaration may be made before the *clerk* of one of those courts, as well as before the court itself; and may be made only *two* years, instead of three, before the time of admission.[1]

May be made before court or *clerk*.

As thus modified, the condition is still obligatory upon those aliens who did not arrive in this country before the the 18th of June, 1812.[2]

A compliance with it must therefore be proved at the time of the application. The *mode* of proof is not prescribed by any law now in force. Where the declaration was made before the court, or the clerk of the court, to which the application for admission is made, doubtless the exhibition of the original record of it would be sufficient. If it was made before a court, or a clerk of a court, other than that to which the application is made, an exemplification of the record of it, under the hand and seal of the clerk of such court, would be competent, and probably the only competent evidence.

How proved.

But by the act of May 24, 1828, those aliens who arrived in the United States before the 18th of June, 1812, are exonerated from the performance of this

From aliens who came before 1812, no previous declaration required: Provided, &c.

[1] Ch. 186, §§ 3, 4: 4 Stat. at Large, 69.

[2] The act of 1802, § 2, also requires that aliens who should arrive in the United States subsequent to the date of its passage, should, if of the age of twenty-one years, report to the clerk of one of the above mentioned courts, his or her name, birthplace, age, nation, allegiance, the country whence he or she emigrated, and the place of his or her intended settlement; all which was to be recorded by such clerk; who was to furnish a certificate of such report, which the alien was required to produce to the court at the time of his application. Those who were under the age of twenty-one or were held in service, were in like manner to be reported by their parents, &c. This provision, after undergoing a modification by the act of March 22, 1816, was, together with the enactment by which it was modified, wholly *repealed* by the act of May 24, 1828.

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condition: *Provided*, That the applicant, when he presents himself for admission, shall (in addition to what is above stated as required in all cases), prove, to the satisfaction of the court, that he was residing within the limits and under the jurisdiction of the United States, before the said 18th day of June, 1812, and has continued so to reside.[1] We have already seen that the last five years of such residence must be proved by the oaths or affirmations of at least two citizens of the United States. But this requirement does not extend to the antecedent portion of such residence. That is only required in general terms, to be proved "to the satisfaction of the court." This continued residence (as it is understood, *for the whole period* commencing prior to the 18th of June, 1812,) is required to be stated and set forth in the record, together (as above explained), with the place or places of the applicant's residence for the last preceding five years. By the act of March 13, 1813, it was declared, that no person who should have arrived in the United States, from and after the termination of the war in which the United States were then engaged with England, should "be admitted a citizen of the United States, who shall not for the continued term of five years next preceding his admission as aforesaid, have resided within the United States, *without being at any time during the said five years out of the territory of the United States.*" This enactment has since been repealed by the act of June 26, 1848 (ch. 72: 9 Stat. at Large, 240).

Time of arrival and residence, how proved.

To be set forth in record of admission.

Before resuming the consideration of what is common with regard to all applicants, it is proper also to notice another distinction made by the laws upon this subject.

[1] Ch. 114: 4 Stat. at Large, 310.

No previous declaration required of *minors*.

This distinction is one in favor of *minors*, and is made by the first section of the act of May 26, 1824, already cited. It enacts —

"That any alien, being a free white person, and a minor, under the age of twenty-one years, who shall have resided in the United States three years next preceding his arrival at the age of twenty-one years, and who shall have continued to reside therein to the time he may make application to be admitted a citizen thereof, may, after he arrives at the age of twenty-one years, and after he shall have resided five years within the United States, including the three years of his minority, be admitted a citizen of the United States, without having made the declaration required in the first condition of the first section of the act to which this is in addition, three years,[1] previous to his admission: *Provided*, Such alien shall make the declaration required therein, *at the time of his or her admission;* and shall further declare on oath, and prove, to the satisfaction of the court, that, for three years next preceding, it has been the *bona fide* intention of such alien to become a citizen of the United States; and shall, in all other respects, comply with the laws in regard to naturalization."

According to this act, therefore, all aliens, who, at the time of their arrival in this country, are not more than eighteen years old, although they may have come *since* the 18th day of June, 1812, are, after the expiration of five years, provided they are then of the age of twenty-one years, and if not, then as soon as they shall have attained the age, entitled to admission, upon the terms prescribed in the proviso of the act, without having, two years previously, made a declaration of intention, as required of adults who arrive after that date. What ought to be deemed satisfactory proof of a *bona fide* intention, during the last preceding three years, to become a citizen,

[1] Altered by a subsequent section of this same act, as we have seen, to *two* years.

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is a question to be decided by the respective courts. It would seem, however, from the nature of the fact to be proved, that the oath of the applicant ought, under ordinary circumstances, to be held sufficient.

It remains now to state what is further required of *all* aliens upon their application for admission to the rights of citizenship.

Proof of good character, &c., required in all cases.

The applicant must prove, to *the satisfaction of the court*, that during the period of five years next preceding his application, "he has behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the happiness and good order of the same." Act of April 14, 1802.[1]

He must declare on oath or affirmation, before the court, "that he will support the constitution of the United States, and that he doth entirely renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatever, and particularly by name, the prince, potentate, state or sovereignty, whereof he was before a subject."[1] This oath must be recorded by the clerk of the court.

In case the applicant "shall have borne any hereditary title, or been of any of the orders of nobility in the kingdom or state from which he came," he is further required to "make an express renunciation of his title or order of nobility."[1] This renunciation is also to be recorded.

Proofs, &c., how taken.

The foregoing summary contains all that is required by the laws of the United States to enable an alien to become naturalized. The proofs, oaths and declarations should be made, upon oral examination, according to the ordinary form of proceeding

[1] Ch. 28 : 2 Stat. at Large, 153.

in courts of law. But the usual mode is to bring them before the court in the form of affidavits prepared beforehand.[1]

[1] In the earlier editions of this work this form of proof was incautiously mentioned, not only as the "usual," but also as "the more convenient mode." But subsequent observation and reflection have more than sufficed to convince me that it is highly objectionable and ought not to be tolerated. The admission of an alien to the rights and privileges of American citizenship, is among the gravest and most responsible functions of our courts. That it was so regarded by the early congresses, in legislating upon the subject, is evident from the studious care taken to guard against the admission of unworthy persons. Had it been foreseen or apprehended that the act of 1802, as framed, would lead to a practice so little in accordance with its policy, and by which one of its most important provisions is rendered virtually nugatory, it cannot be doubted that additional safe-guards would have been interposed for the purpose of preventing a result so much to be deplored. The act requires proof in addition to that of residence, satisfactory to the court, that during the period of five years last past the applicant has demeaned himself as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the happiness and good order of society. The practice of the state courts, in this state at least, is to produce an affidavit subscribed and sworn to by two persons, averring the residence, and describing the character and conduct of the applicant in the words of the act. The affidavit being, as it usually is (except the necessary blanks), in print, is presumed to be in due form, and, if I am correctly informed, is not even read to the court. It is simply filed, and the applicant is at once, and, as a matter of course, permitted to take the final oath, and thereupon receives his certificate. Of the character of the witnesses; of their competency to verify the facts to which they have sworn, the court is, in general, wholly uninformed. They may, themselves, be persons of bad moral character and conduct, having little or no respect for the sanctity of an oath; they may know nothing of the principles of the constitution; and they may be utterly regardless of the happiness and good order of the community. They may therefore be grossly incompetent to judge correctly of the facts to which they attest, or too unscrupulous to be worthy of reliance. With such evidence no court has a right to be *satisfied*, and to receive and act upon it, is not to execute, but to evade the statute. Beyond a question, the witnesses should be sworn to speak the truth, and subjected to a thorough and searching examination; and, unless their evidence be such as, upon a careful scrutiny, to warrant the verdict of a jury affirming the truth of all the facts to be established, the application should unhesitatingly be denied. This, without doubt, is what the legislature intended, and the practice

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The judgment conclusive.

The judgment of the court admitting the applicant a citizen of the United States is to be entered as such on record, and, if it is in legal form, is, like every other judgment, conclusive. It is complete evidence of its own validity, and no subsequent inquiry can be made into the sufficiency of the evidence upon which it was pronounced. *Spratt* v. *Spratt*, 4 Peters, 393.

None of the acts upon this subject now in force provide any compensation to the clerks of courts for the services above specified; and from the language of some of the provisions, since repealed, allowing a small compensation, to be paid by the applicant, it seems to be inferable that these officers were not

which has been substituted for it is a miserable sham. Let us see if it is not so. During the last year the city of New York and human nature have been disgraced by a ferocious mob rioting, through many terrible hours, in bloodshed and havoc. It consisted mainly of foreigners. Among them were doubtless many who had already been naturalized, upon evidence *satisfactory to the court*, of their morality, loyalty and love of good order. And as to the rest, whose probationary term of five years was probably not yet expired, it may reasonably be presumed that they will, in due time, also become applicants for naturalization. And are they likely to lack witnesses of their qualifications to be received into the American family? By no means. They may find them in abundance among their companions in guilt! No one will deny the importance of the subject, and no true patriot who reflects upon it can fail to desire a radical reform. But the evil has become too inveterate for extirpation, except by means of additional legislation. It is not, and congress has no power to render it, obligatory on the state courts to administer the naturalization laws. Their agency is at most but optional; and whether it ought any longer to be invoked, is a question well worthy of consideration. No unnecessary obstacles should be interposed to the free admission of the hosts of worthy foreigners who seek a home upon our soil; but the ruffians and vagabonds who find their way to our shores ought to be sternly rejected. A judicious modification of the laws for this purpose could not fail to be productive of incalculable benefit, not only to the community, but to the immigrants themselves, by the incentive it would give them to good conduct, and the salutary restraint it would impose, during the whole period of their probation.

considered as having any right to exact fees without a special authority by law. But for such official services as he is not expressly required to perform, such as furnishing to the alien an authenticated certificate of a previous declaration of intention, to be used in another court, or a like certificate of his naturalization, a clerk might, doubtless, with propriety, exact such fees as would be allowed for similar services by the laws of the state; or, in the absence of any local law applicable to the case, such compensation as the court should consider reasonable.

It may be useful, in conclusion, to state, that, by the act of March 26, 1804,[1] it is provided, that when any alien, who shall have complied with the first condition specified in the first section of the act of 1802, and pursued the directions contained in the second section of the same act, shall die, before he is actually naturalized, his *widow and children* shall be considered as citizens of the United States, and entitled to all rights and privileges as such, *upon taking the oath prescribed by law.*

Widows and children when to be deemed citizens.

The second section here mentioned, was, as we have said, repealed by the act of 1828; and, considering the comparatively onerous nature of its provisions, and the small probability there is that they will be complied with in order to secure this contingent advantage to widows and children, it is very obvious that the above enactment, in their favor, has become exceedingly defective.

By the fourth section of the act of 1802, above cited, it is enacted — "That the children of persons duly naturalized under any of the laws of the United States, * * * being under the age of twenty-one years, at the time of their parents being so naturalized, * * * shall, if dwelling in the United States, be considered as citizens of the United States."

Minor children of persons naturalized to be deemed citizens.

[1] Ch. 47, § 2: 2 Stat. at Large, 292.

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This enactment has been supposed, by Chancellor KENT,[1] to give rise to two questions of considerable interest and importance, viz.:

1. Whether it is *prospective* in its scope, so as to embrace as well the minor children of persons who should be naturalized after the passage of the act, as of persons who had then already been naturalized; and,

2. Whether it was intended to apply only to cases in which *both* parents had been naturalized, or whether the naturalization of the father alone would be sufficient.

It is not my design to enter into a full examination of these questions. But, for the phrase "under *any of* the laws," &c., I should have entertained little doubt that the provision in question was intended to be prospective. Such a construction would be in accordance with the liberal spirit of the act, compared with the preceding act of 1798, which required fourteen years' previous residence; and no good reason is perceived for making a distinction in this respect between the children of those who had already been, and those who should afterward be naturalized. The act of 1804, moreover, as we have seen, confers the right of citizenship upon the widows and children of persons, who, having taken the preliminary steps to entitle them to naturalization, should die before they were naturalized; and there would seem to be an inconsistency in giving to an inchoate act, on the part of the father, an efficacy which was not understood to result from its actual consummation by him. But, on the other hand, the phrase "under any of the laws," &c., would certainly seem to refer to the various acts which, from time to time, had previously been passed upon the subject, and which were repealed by this act of

[1] 2 Kent's Commentaries, 8th ed., 51.

1802; thus limiting the operation of the enactment in question to the children of persons naturalized under those acts.

If such be the true construction of this provision, the lapse of almost forty years has greatly diminished the importance of the other question, viz., whether the act contemplates the naturalization of both parents as necessary to confer the rights of citizenship on minor children. There seems, however, to be strong grounds for the conclusion that it was the intention of the legislature to declare the naturalization of the father alone sufficient; and such I understand to have been the impression of the learned commentator above named.

APPENDIX.

I. Act to Regulate Fees and Costs, &c.

II. Rules of the Supreme Courts.

III. Rules of Practice in Equity.

IV. Rules of Practice of the Court of Claims and of the Supreme Court, Regulating Appeals therefrom.

V. Rules of the Circuit Court of the Northern District of New York.

VI. Rules of the District Court of the Northern District of New York.

VII. Practical Forms:

- I. In Suits at Common Law.
- II. Of Proceedings by Writ of Error.
- III. Of Proceedings to Take Testimony de bene esse.
- IV. In Cases of Municipal Seizure.
- V. Certificate of Division in Opinion.
- VI. Letters Rogatory.

VIII. Review of the Case of Nevins v. Johnson.

I.

An Act to Regulate the Fees and Costs to be allowed Clerks, Marshals and Attorneys of the Circuit and District Courts of the United States, and for other Purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in lieu of the compensation now allowed by law to attorneys, solicitors and proctors in the United States courts, to United States district attorneys, clerks of the district and circuit courts, marshals, witnesses, jurors, commissioners and printers, in the several states, the following and no other compensation shall be taxed and allowed. But this act shall not be construed to prohibit attorneys, solicitors and proctors from charging to and receiving from their clients, other than the government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective states, or may be agreed upon between the parties.

Fees of Attorney, Solicitors and Proctors.] In a trial before a jury, in civil and criminal causes, or before referees, or on a final hearing in equity or admiralty, a docket fee of twenty dollars: *Provided,* That in cases in admiralty and maritime jurisdiction, where the libelant shall recover less than fifty dollars, the docket fee of his proctor shall be but ten dollars.

In cases at law, where judgment is rendered without a jury, ten dollars, and five dollars where a cause is discontinued.

For *scire facias* and other proceedings on recognizances, five dollars.

For each deposition taken and admitted as evidence in the cause, two dollars and fifty cents.

A compensation of five dollars shall be allowed for the services rendered in cases removed from a district to a circuit court by writ of error or appeal.

For examination by a district attorney, before a judge or commissioner, of a person or persons charged with crime, five dollars per day for the time necessarily employed.

For each day of his necessary attendance in a court of the United States, on business of the United States, when the same shall be held at the place of his abode, five dollars, and the like sum for his attendance for each day of the term when the said court shall be held elsewhere.

For traveling from the place of his abode to the place of holding any court of the United States in his district, and to the place of any examination before a judge or commissioner, of a person or persons charged with crime, ten cents per mile for going and ten cents for returning.

When an indictment for crime shall be tried before a jury, and a conviction is had, in addition to the attorney's fees allowed by this act, the district attorney may be allowed a counsel fee in proportion to the importance and difficulty of the cause, not exceeding thirty dollars.

In every case where a district attorney has, during the last six years, prosecuted or defended a suit in which the United States was concerned, in a district where the law allows no taxable attorney's fees, and for which he has received no compensation, except his per diem and annual salary, he shall be paid for his services according to the provisions of this act.

For the services of counsel, rendered at the request of the head of a department, such sum as may be stipulated or agreed on.

Whenever there are or shall be several charges against any person or persons for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments shall be found in such cases, the court may order them consolidated.

Whenever two or more things belonging to the same person or persons are or shall be seized for an alleged violation of the revenue laws, the whole shall be included in one suit; and if not so included, and separate actions are prosecuted, the court may consolidate them.

Whenever two or more indictments, suits or proceedings, are or shall be prosecuted, which should be joined, the district attorney prosecuting them shall be paid but one bill of costs for all of them;

and if any attorney, proctor or other person admitted to manage or conduct causes in any court of the United States, or of the territories thereof, shall appear to have multiplied the proceedings in any cause before such court, so as to increase costs unreasonably and vexatiously, such person may be required, by order of the court, to satisfy any excess of costs so increased.

Whenever two or more charges are or shall be made, or two or more indictments shall be found against a person, only one writ or warrant shall be necessary to arrest and commit him for trial; and it shall be sufficient to state in the writ the name or general character of the offenses, or to refer to them only in very general terms. Only one writ or warrant shall be necessary to remove a prisoner from one district to another; a copy of which may be delivered to the sheriff or jailer from whose custody the prisoner may be taken and another copy thereof to the sheriff or jailer to whose custody he may be committed, and the original writ, with the marshal's return thereon, shall be returned to the clerk of the district to which he may be removed. Whenever a prisoner is committed to a sheriff or jailer by virtue of a writ, warrant or mittimus, a copy thereof shall be delivered to the sheriff or jailer as his authority to hold the prisoner, and the original writ, warrant, or mittimus, shall be returned to the proper court or officer with the officer's return thereon.

Clerk's fees.] For issuing and entering every process, commission, summons, capias, execution, warrant, attachment, or other writ, except a writ of venire, summons, or subpœna for a witness, one dollar.

For filing and entering every declaration, plea, or other paper, ten cents.

For administering every oath or affirmation to a witness, or other person, except a juror, ten cents.

For entering any return, rule, order, continuance, judgment, decree or recognizance, drawing any bond, or making any record, certificate, return or report, for each folio, fifteen cents; and for a copy of any such entry or record, or of any paper on file, not exceeding one folio, ten cents; and for each additional folio, ten cents.

For making dockets and indexes, and for all other services on the trial or argument of a cause, where issue is joined and testimony given, including venire and taxing costs, three dollars.

For making dockets and indexes, and for all other services in a cause where issue is joined and no testimony given, including taxing costs, two dollars.

For making dockets and indexes, and for taxing costs and other services, in a cause which is dismissed, discontinued, or a judgment or decree is made or rendered therein without issue, one dollar.

In equity and admiralty causes only, the process, pleadings and decree, and such orders and memorandums as may be necessary to show the jurisdiction of the court and regularity of the proceedings, shall be entered upon the final record; and, in case of an appeal, copies of the proofs, and of such entries and papers on file as may be necessary on hearing of the appeal, may be certified up to the appellate court.

For affixing a seal of the court to any instrument, when required, twenty cents. For issuing a writ of subpœua, twenty-five cents. For every search for any particular mortgage, judgment or other lien, fifteen cents. For traveling from the office of the clerk, where he is required by law to reside, to the place of holding any court required to be held by law, five cents per mile for going and five for returning, and five dollars per day for his attendance on any such court or courts while actually in session.

For searching the records of the court for judgments, decrees and other instruments constituting a general lien upon real estate, and certifying the result of such search, fifteen cents for each person against whom such search is required to be made.

For receiving, keeping and paying out money, in pursuance of the requirements of any statute or order of court, one per cent on the amount so received, kept and paid.

In cases removed by writ of error or appeal, the clerk's fees for making dockets and taxing costs, shall be but one dollar, and the clerks of the district and circuit courts respectively, *ex officio*, shall be, and hereby are, authorized and empowered to administer oaths, take acknowledgements, take and certify affidavits and depositions, in the same manner as commissioners, and shall be entitled to the same fees and compensation therefor.

Marshal's fees.] For service of any warrant, attachment, summons, capias, or other writ (except execution, venire, or a summons or subpœna for a witness), two dollars for each person on whom such service may be made: *Provided*, That on petition, setting forth the facts on

oath, the court may allow such fair compensation for the keeping of personal property attached and held on mesne process, as shall, on examination, be found to be reasonable.

For serving a writ of subpœna on a witness, fifty cents; and no further compensation shall be allowed for any copy, summons, or notice for witness.

For travel, in going only, to serve any process, warrant, attachment, or other writ, including writs of subpœna in civil and criminal cases, six cents per mile, to be computed from the place of service to the court or place where the writ of process is returned; and if more than one person is served therewith, the travel shall be computed from the court to the place of service which shall be the most remote, adding thereto the extra travel which shall be unnecessary to serve it on the other: *Provided*, That when more than two writs of any kind in behalf of the same party or parties, to be served on the same person or persons, or part of the same persons, are or might be served at the same time, the marshal shall be entitled to compensation for travel on only two of such writs; and, to save unnecessary expense, it shall be the duty of the clerk to insert the names of as many witnesses in a cause, in such subpœna, as convenience in serving the same will permit. And, in all cases where mileage is allowed to the marshal by this act, it shall be at his option to receive the same, or his actual traveling expenses, to be proved on his oath to the satisfaction of the court.

For each bail bond, fifty cents.

For summoning appraisers, each fifty cents.

For every commitment or discharge of a prisoner, fifty cents.

For every proclamation in admiralty, thirty cents.

For sales of vessels or other property, under process in admiralty, or under the order of a court of admiralty, and for receiving and paying the money, for any sum under five hundred dollars, two and one-half per centum; for any larger sum, one and one-quarter per centum, upon the excess.

For serving an attachment *in rem* or a libel in admiralty, two dollars; and the necessary expenses of keeping boats, vessels or other property attached or libeled in admiralty, not exceeding two dollars and fifty cents per day; and, in case the debt or claim shall be settled by the parties, without a sale of the property, the marshal shall be entitled to a commission of one per cent on the first five hundred dollars of the claim or decree, and one-half of one per cent on the excess

over five hundred dollars: *Provided,* That in case the value of the property shall be less than the claim, then, and in such case, such commission shall be allowed only on the appraised value thereof.

For serving a writ of possession, partition, execution, or any final process, the same mileage as is herein allowed for the service of any other writ; and for making the service, seizing or levying on property, advertising and disposing of the same by sale, set-off or otherwise, according to law, receiving and paying over the money, the same fees and poundage as are or shall be allowed for similar services to the sheriffs of the several states, respectively, in which the service may be rendered.

For serving venires and summoning every twelve men as grand or petit jurors, four dollars, or thirty-three and one-third cents each; and in those states where jurors, by the laws of the state, are drawn by constables, or other officers of corporate towns or places, by lot, the marshal shall receive for the use of the officers employed in drawing and summoning the jurors and returning each venire, two dollars, and for his own trouble in distributing the venires, two dollars for each jury: *Provided,* That in no case shall the fees for distributing and serving venires, and drawing and summoning jurors by township officers, including mileage chargeable by the marshal for such service, at any court, exceed fifty dollars.

For traveling from his residence to the place of holding court, to attend a term thereof, ten cents per mile for going only, and five dollars per day for attending the circuit and district courts when they are both in session, or for attending either of said courts when but one is in session, and for bringing in and committing prisoners and witnesses during the term.

For executing a deed prepared by a party or his attorney, one dollar.

For drawing and executing a deed, five dollars.

For transporting criminals, ten cents per mile for himself, each necessary guard, and each prisoner.

For copies of writs or papers furnished at the request of any party, ten cents per folio.

For holding a court of inquiry or other proceedings before a jury, including the summoning of a jury, five dollars.

The marshal of the district of South Carolina shall hereafter be entitled to receive a salary of two hundred dollars per annum.

The respective courts of the United States shall appoint criers for their courts, to be allowed the sum of two dollars per day; and the marshals are hereby authorized to appoint such a number of persons, not exceeding five, as the judges of their respective courts shall determine, to attend upon the grand and other juries, and for other necessary purposes, who shall be allowed for their services the sum of two dollars per day, to be paid by and included in the accounts of the marshal, out of any money of the United States in his hands; the compensation to be given only for actual attendance; and when both courts are in session at the same time, to be paid but for attendance on one court.

For expenses while employed in endeavoring to arrest under process, any person charged with or convicted of a crime, the sum actually expended, not to exceed two dollars per day, in addition to his compensation for service and travel.

For disbursing money to jurors and witnesses, and for other expenses, two per centum.

For attending examinations before a commissioner, and bringing in, guarding, and returning prisoners charged with crime, and witnesses, two dollars per day, and the same for each deputy necessarily attending, not exceeding two.

SEC. 2. *And be it further enacted,* That there shall be paid to the marshal his fees for services rendered for the United States, for summoning jurors and witnesses in behalf of the United States, and in behalf of any prisoner to be tried for a capital offense; for the maintenance of prisoners of the United States, confined in jail for any criminal offense; for the commitment or discharge of such prisoners; for the expenses necessarily incurred for fuel, lights and other contingencies that may accrue in holding the courts within the district, and providing the books necessary to record the proceedings thereof; *Provided,* That the marshal shall not incur an expense of more than twenty dollars in any one year for furniture, or fifty dollars for rent of building and making improvements thereon, without first submitting a statement and estimates to the secretary of the interior, and getting his instructions in the premises.

SEC. 3. *And be it further enacted,* That every district attorney, clerk of a district court, clerk of a circuit court, and marshal of the United States, shall, until otherwise directed by law, upon the first

day of January and July in each year, commencing with the first day of July next, or within thirty days from and after the days specified, make to the secretary of the interior, in such form as he shall prescribe, a return in writing, embracing all the fees and emoluments of their respective offices, of every name and character, distinguishing the fees and emoluments received or payable under the bankrupt act, from those received or payable for any other service; and in the case of a marshal, further distinguishing the fees and emoluments received or payable for services by himself personally rendered, from those received or payable for services rendered by a deputy; and also distinguishing the fees and emoluments so received or payable for services rendered by each deputy, by name, and the proportion of such fees and emoluments, which, by the terms of his service, each deputy is to receive; and, also, embracing all the necessary office expenses of such officer, together with the vouchers for the payment of the same for the half year ending on the said first day of January or July, as the case may be, which return shall be, in all cases, verified by the oath of the officer making the same. And no district attorney shall be allowed by the said secretary of the interior to retain of the fees and emoluments of his said office, for his own personal compensation, over and above his necessary office expenses, the necessary clerk hire included, to be audited and allowed by the proper accounting officers of the treasury, a sum exceeding six thousand dollars per year, and at and after that rate for such time as he shall hold the office; and no clerk of a district court, or clerk of a circuit court, shall be allowed by the said secretary to retain of the fees and emoluments of his said office, or, in case both of the said clerkships shall be held by the same person of the said offices, for his own personal compensation, over and above the necessary expenses of his office, and necessary clerk hire included, also to be audited and allowed by the proper accounting officers of the treasury, a sum exceeding three thousand five hundred dollars per year, for any such district clerk, or circuit court, or at and after that rate for such time as he shall hold the office: *Provided*, That, when the compensation of any clerk shall be less than five hundred dollars per annum, the difference, ascertained and allowed by the proper accounting officer of the treasury, shall be paid to him therefrom; and no marshal shall be allowed by the said secretary to retain of the fees and emoluments of his office, for his own personal compensation, over and above a proper allow-

ance to his deputies, which shall in no case exceed three-fourths of the fees and emoluments received as payable for the services rendered by the deputy to whom allowance is made, and may be reduced below that rate by the said secretary of the interior whenever the return shall show that rate of allowance to be unreasonable, and over and above the necessary office expenses of the said marshal, the necessary clerk hire included, also to be audited and allowed by the proper accounting officers of the treasury, a sum exceeding six thousand dollars per year, or at and after that rate for such times as he shall hold the office; and every such officer shall, with each such return made by him, pay into the treasury of the United States, or deposit to the credit of the treasurer thereof, as he may be directed by the secretary of the interior, any surplus of the fees and emoluments of his office, which his half-yearly return so made as aforesaid shall show to exist over and above the compensation and allowances hereinbefore authorized to be retained and paid by him. And in every case where the return of any such officer shall show that a surplus may exist, the said secretary of the interior shall cause such returns to be carefully examined, and the accounts of disbursements to be regularly audited by the proper officers of his department, and an account to be opened with such officer in proper books to be provided for that purpose, and the allowances for personal compensation for each calendar year shall be made from the fees and emoluments of that year, and not otherwise: *And, provided further,* That nothing in any existing law of congress authorizing the payment of a per diem compensation to a district attorney, clerk of a district court, or clerk of a circuit court, or marshal, or deputy marshal, for attendance upon the district or circuit courts during their sittings, shall be so construed as to authorize any such payment to any one of those officers for attendance upon either of those courts while sitting for the transaction of business under the bankrupt law merely, or for any portion of the time for which either of the said courts may be held open or in session by the authority conferred in that law; and no such charge in an account of any such officer shall be certified as payable, or shall be allowed and paid out of the money hereinbefore appropriated for defraying the expenses of the courts of the United States. And no per diem or other allowance shall be made to any such officer for attendance at rule days of the circuit or district courts; and when the circuit court and district courts sit at the same time, no greater

per diem or other allowance shall be made to any such officer than for attendance on one court.

The two last provisos of paragraph one hundred and sixty-seven of the civil and diplomatic appropriation act, approved May eighteenth, one thousand eight hundred and forty-two, which require clerks to certify accounts, and confine the marshals, clerks and district attorneys of the northern and southern districts of New York to the fees allowed by the state law to clerks, attorneys, counselors and sheriffs, for similar services in the state courts, are hereby repealed.

Commissioners' fees.] For administering an oath, ten cents; taking an acknowledgment, twenty-five cents.

For hearing and deciding on criminal charges, five dollars per day for the time necessarily employed.

For attending to a reference in a litigated matter in a civil cause at law, in equity, or in admiralty, in pursuance of an order of court, three dollars per day.

For taking and certifying depositions to file, twenty cents for each folio of one hundred words, and ten cents per folio for each copy of the same furnished to a party on request.

For issuing any warrant or writ, or any other service, the same compensation as is allowed to clerks for like services.

For issuing any warrant under the tenth article of the treaty of the ninth of August, eighteen hundred and forty-two, between the United States and the Queen of the United Kingdom of Great Britain and Ireland, against any person charged with any of the crimes or offenses set forth in said article, two dollars; and the same sum for any warrant issued under the provisions of the convention for the surrender of criminals, between the United States and the King of the French, concluded at Washington on the ninth of November, eighteen hundred and forty-three; and for hearing and deciding upon the case of any person charged with any offense or crime, and arrested under the provisions of said treaty or convention, five dollars per day for the time necessarily employed.

Witnesses' fees.] For each day's attendance in court, or before any officer pursuant to law, one dollar and fifty cents, and five cents per mile for traveling from his place of residence to said place of trial or hearing, and five cents per mile for returning. When a witness is subpœnaed in more than one cause between the same parties in different suits at the same court, but one travel fee and one per diem compen-

sation shall be allowed for attendance, to be taxed in the first case disposed of, and "per diem" only in the other causes, to be taxed from that time in each case, in the order in which they may be disposed of.

When a witness is detained in prison for want of security for his appearance, he shall be entitled to a compensation of one dollar per day over and above his subsistence.

When a clerk or other officer of the United States shall be sent away from his place of business as a witness for the Government, either with or without papers or books, his salary shall continue; his necessary expenses, stated in items and sworn to, in going, returning and attendance on the court, shall be audited and paid, but no mileage nor other compensation shall in any case be allowed.

There shall be paid to such seaman or other person as has been or shall be sent to the United States from any foreign port, station, sea or ocean, by any United States Minister, Charge d'Affaires, Consul, Commander or Captain, to give testimony in any criminal case which has been or may be depending in any court of the United States, such compensation as the court, which had or shall have cognizance of the crime, shall adjudge to be right and proper, not to exceed one dollar for each day the said seaman or person has been or shall be necessarily on the voyage, and arriving at the place of examination or trial, exclusive of sustenance and transportation; the court to take into consideration, in fixing said compensation, the condition of said seaman or witness; whether his voyage has been broken up, to his injury, by his being sent to the United States, or not.

If said seaman or person has been or shall be transported in an armed vessel of the United States, no charge for sustenance or transportation shall be made; if in any other vessel, the court may adjudge what compensation shall be paid to the captain of the said vessel, and the same shall be paid accordingly: *Provided*, That in no case shall transportation and subsistence be allowed at a rate exceeding fifty cents per diem.

Jurors' fees.] For actual attendance at any court or courts, two dollars per day during such attendance.

For traveling from their residence to said court or courts, five cents per mile for going and the same for returning.

Printers' fees.] For publishing any statute, notice or order required by law, or the lawful order of any court, department, bureau or other person, in any newspaper, forty cents per folio for the first insertion,

and twenty cents per folio for each subsequent insertion. That the compensation herein provided shall include the furnishing lawful evidence, under oath of publication, to be made and furnished by the printer or publisher making such publication.

The term folio, in this act, shall mean one hundred words, counting each figure as a word. When there are over fifty and under one hundred words they shall be counted as one folio, but not when there are less, except when the whole statute, notice or order contains less than fifty words.

The bill of fees of clerk, marshal and attorneys, and the amount paid printers and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use or trial in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court, and be included in and form a portion of a judgment or decree against the losing party. Such taxed bills shall be filed with the papers in the cause.

In cases where the United States are parties, the marshal shall, on the order of the court, to be entered in its minutes, pay to the jurors and witnesses all such fees as they may appear by such order to be entitled to, which sums shall be allowed him at the treasury in his accounts.

The fees of the marshals, clerks, commissioners and district attorneys, in cases where the United States are liable to pay the same, shall be paid on settling their accounts at the treasury, such accounts to be made out and verified by the party under oath, and forwarded to the first auditor of the treasury.

In prize cases, where there is a condemnation and sale, the costs, so far as they are payable and can be paid out of the proceeds of sale, shall be paid on the order of the court upon the filing of the taxed bills, making them a portion of the record in the case.

No district attorney, marshal or clerk, or their deputies, shall receive any other or greater compensation for any services rendered by him than is provided in this act; and all acts and parts of acts, allowing to either of them any other or greater fees than is herein provided, are hereby repealed, and to receive any other or greater compensation is hereby declared to be a misdemeanor. And if any officer hereinbefore mentioned, or his deputy, shall, by reason or cover of his office, willfully and corruptly demand and receive any other or greater fees than those allowed in this act, he shall, on conviction thereof in any court

of the United States, forfeit and pay a fine not exceeding five hundred dollars, and be imprisoned not exceeding six months, at the discretion of the court before whom the conviction shall be had. But this shall not be construed to prohibit the payment of any salary authorized by statute: *Provided*, That in the State of California and the Territory of Oregon, officers, jurors and witnesses shall be allowed, for the term of two years, double the fees and compensation allowed by this act, and the same fees allowed by this act, with fifty per cent added thereto, for two years thereafter.

That before any bill of costs shall be taxed by any judge or other officer, or allowed by any officer of the treasury, in favor of clerks, marshals, commissioners, or district attorneys, the party claiming such bill shall prove by his own oath, or some other person having a knowledge of the facts, to be attached to such bill, and filed therewith, that the services charged therein have been actually and necessarily performed, as therein stated.

That witnesses who are required to attend any term of the court on the part of the United States, shall be subpœnaed to attend to testify generally on their behalf, and not depart the court without leave of the court or district attorney, under which it shall be their duty to appear before the grand jury or petit jury, or both, as they shall be required by the court or district attorney. No writ shall be necessary to bring into court any prisoner or person in custody, or for remanding him from the court into custody; but the same shall be done on the order of the court or district attorney, for which no fee shall be charged by the clerk or marshal.

SEC. 4. *And be it further enacted*, That if any person shall falsely take an oath or affirmation in relation to any matter authorized by this act, such person shall be deemed guilty of perjury, and, upon conviction thereof, shall suffer the pains and penalties in that case provided.

SEC. 5. *And be it further enacted*, That all laws and regulations heretofore made, which are incompatible with the provisions of this act, are hereby repealed and abrogated: *Provided, nevertheless*, That this act shall not be construed to repeal or modify any clause or provision of an act approved the eighteenth September, eighteen hundred and fifty, entitled "An act to amend and supplementary to the act entitled 'An act respecting fugitives from justice, and persons

escaping from the service of their masters,' approved February twelfth, seventeen hundred and ninety-three."

SEC. 6. *And be it further enacted*, That the act approved September twenty-eighth, eighteen hundred and fifty, entitled "An act to provide for extending the laws and judicial system of the United States to the state of California," be so amended as to confer on the district court of the state of California jurisdiction in all criminal cases as fully and completely as is conferred by law upon the district or circuit court of the state of New York.

Approved *February* 26, 1853.

II.

Rules of the Supreme Court of the United States, Revised and Corrected at the December Term, 1858.

No. 1.—Clerk.

The clerk of this court shall reside and keep the office at the seat of the national government, and he shall not practice either as an attorney or counselor in this court, or any other court, while he shall continue to be clerk of this court.

The clerk shall not permit any original record or paper to be taken from the supreme court room, or from the office, without an order from the court.

No. 2.—Attorneys, &c.

It shall be requisite to the admission of attorneys and counselors to practice in this court, that they shall have been such for three years past in the supreme courts of the states to which they respectively belong, and their private and professional character shall appear to be fair.

They shall respectively take the following oath or affirmation, viz.: "I do solemnly swear (or affirm, as the case may be), that I will demean myself, as an attorney and counselor of this court, uprightly, and according to law, and that I will support the constitution of the United States."

No. 3.—Practice.

This court consider the practice of the courts of King's Bench and of Chancery, in England, as affording outlines for the practice of this court; and they will from time to time make such alterations therein as circumstances may render necessary.

No. 4.—BILL OF EXCEPTIONS.

Hereafter the judges of the circuit and district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepted; and that such matters of law, and those only, shall be inserted in the bill of exceptions, and allowed by the court.

No. 5.—PROCESS.

All process of this court shall be in the name of the President of the United States.

When process at common law, or in equity, shall issue against a state, the same shall be served on the governor, or chief executive magistrate, and attorney-general of such state.

Process of subpœna, issuing out of this court, in any suit in equity, shall be served on the defendant sixty days before the return day of the said process; and if the defendant, on such service of the subpœna, shall not appear at the return day contained therein, the complainant shall be at liberty to proceed *ex parte*.

No. 6.—MOTIONS.

All motions hereafter made to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

No. 7.—LAW LIBRARY—CONFERENCE ROOM.

1. During the session of the court, any gentleman of the bar having a cause on the docket, and wishing to use any book or books in the law library, shall be at liberty, upon application to the clerk of this court, to receive an order to take the same (not exceeding at any one time three) from the library, he being thereby responsible for the due return of the same within a reasonable time, or when required by the clerk. And it shall be the duty of the clerk to keep, in a book for that purpose, a record of all books so delivered, which are to be charged against the party receiving the same. And in case the same shall not be so returned, the party receiving the same shall be responsible for, and pay twice the value thereof; as also one dollar per day for every day's detention beyond the limited time.

2. The clerk shall take charge of the books of the court, together with such of the duplicate law books as congress may direct to be transferred to the court, and arrange them in the conference room, which he shall have fitted up in a proper manner; and he shall not permit such books to be taken therefrom by any one, except the judges of the court.

No. 8.—RETURN TO WRIT OF ERROR, &C.

1. The clerk of the court to which any writ of error shall be directed, may make return of the same by transmitting a true copy of the record, and of all proceedings in the cause, under his hand and the seal of the court.

2. No cause will hereafter be heard, until a complete record, containing in itself, without reference *aliunde*, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court, shall be filed.

3. Whenever it shall be necessary or proper, in the opinion of the presiding judge of any circuit court, or district court exercising circuit court jurisdiction, that original papers should at any time be inspected in the supreme court, upon appeal, such presiding judge may make such rule or order for the safe keeping, transporting and return of such original papers, as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

No. 9.—DOCKETING CASES.

1. 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 commencement of the term, it shall be the duty of 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; and if the writ of error or appeal shall be brought from a judgment or decree rendered less than thirty days before the commencement of the term, it shall be the duty of the plaintiffs in error or appellant to docket the cause and file the record thereof with the clerk of this court within the first thirty days of the term; and if the plaintiff in error or appellant shall fail to comply with the rule, the defendant in error or appellee may have the cause docketed and dismissed, upon producing the certificate of the clerk of the court

wherein the decree or judgment was rendered, stating the cause, and certifying that such writ of error or appeal has been sued out and allowed.

And in no case shall the plaintiff in error or appellant be entitled to docket the cause and file the record, after the same shall have been docketed and dismissed under this rule, unless by order of the court.

2. But the defendant in error or appellee may, at his option, docket the cause and file a copy of the record with the clerk of this court; and if the case is docketed, and a copy of the record filed with the clerk of this court, by the plaintiff in error or appellant, within the periods of time above limited and prescribed by this rule, or by the defendant in error or appellee, at any time thereafter during the term, the case shall stand for argument at the term.

3. In all cases where the period of thirty days is mentioned in this rule, it shall be extended to sixty days in writs of error or appeals from California, Oregon, Washington, New Mexico and Utah. [Amended. See Rule 34.]

No. 10.—SECURITY FOR COSTS—PRINTING RECORDS—ATTACHMENT FOR COSTS.

1. In all cases, the clerk shall take of the party a bond, with competent security to secure his fees, in the penalty of two hundred dollars, or a deposit to that amount, to be placed in bank, subject to his draft.

2. In all cases, the clerk shall have fifteen copies of the record printed for the court; and the cost of printing shall be charged to the government, in the expenses of the court.

3. The clerk shall furnish copies to the printer, shall supervise the printing, and shall take care of and distribute the printed copies to the judges, the reporter and the parties, from time to time as required.

4. In each case, the clerk shall charge the parties the legal fees for but one manuscript copy in the case.

5. In all cases, the clerk shall deliver a copy of the printed record to each party. And in cases of dismission, reversal or affirmance with costs, the fees for the said manuscript copy of the record shall be taxed against the party against whom costs are given, and which charge includes the charge for the copy furnished him.

6. In cases of dismission for want of jurisdiction, each party shall be charged with one-half the legal fees for a copy.

7. Upon the clerk's producing satisfactory evidence, by affidavit or acknowledgment of the parties or their sureties, of having served a copy of the bill of fees due by them respectively in this court, on such parties or their sureties, an attachment shall issue against such parties or sureties respectively, to compel the payment of said fees.

No. 11.—TRANSLATIONS.

Whenever any record transmitted to this court upon a writ of error or appeal, shall contain any document, paper, testimony or other proceeding, in a foreign language, and the record does not also contain a translation of such document, paper, testimony or other proceeding, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed, but the case shall be reported to this court by the clerk, and the court will thereupon remand it to the inferior court, in order that a traslation may be there supplied and inserted in the record.

No. 12.—EVIDENCE.

1. In all cases where further proof is ordered by the court, the depositions which shall be taken shall be by a commission to be issued from this court, or from any circuit court of the United States.

2. In all cases of admirality and maritime jurisdiction where new evidence shall be admissible in this court, the evidence by testimony of witnesses shall be taken under a commission to be issued from this court, or from any circuit court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories to be filed by the party applying for the commission, and notice to the opposite party, or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross-interrogatories within twenty days from the service of such notice: *Provided, however,* that nothing in this rule shall prevent any party from giving oral testimony in open court in cases where by law it is admissible.

No. 13.—DEEDS, &C., NOT OBJECTED TO, &C., ADMITTED, &C.

In all cases of equity and admiralty jurisdiction heard in this court, no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit found in the record, as evidence, unless objection was taken thereto in the court below, and

entered of record; but the same shall otherwise be deemed to have been admitted by consent.

No. 14.—CERTIORARI.

No *certiorari* for diminution of the record shall be hereafter awarded in any cause, unless a motion therefor shall be made in writing; and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for such *certiorari* shall be made at the first term of the entry of the cause; otherwise the same shall not be granted, unless upon special cause shown in court, accounting satisfactorily for the delay.

No. 15.—DEATH OF A PARTY.

1. 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 the defendant in error, shall be entitled to have the writ of error or appeal dismissed; and if the party so moving shall be the 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, for three successive weeks, at least sixty days before the beginning of the term of the supreme court then next ensuing.

2. When the death of a party is suggested, and the representatives of the deceased do not appear by the tenth day of the second term next ensuing the suggestion, and no measures are taken by the opposite party, within that time, to compel their appearance, the case shall abate.

No. 16.—NO APPEARANCE OF PLAINTIFF IN ERROR.

When there is no appearance of the plaintiff in error when the case is called for trial, the defendant may have the plaintiff called, and

dismiss the writ of error, or may open the record and pray for an affirmance.

No. 17.—No Appearance of Defendant in Error.

Where the defendant in error fails to appear when the cause shall be called for trial, the court may proceed to hear an argument on the part of the plaintiff, and give judgment according to the right of the cause.

No. 18.—No Appearance of Either Party.

When a cause is reached in the regular call of the docket, and no appearance is entered for either party, the case shall be dismissed, at the costs of the plaintiff.

No. 19.—Neither Party Ready at the Second Term.

When a case is called for argument at two successive terms, and upon the call at the second term, neither party is prepared to argue it, it shall be dismissed at the costs of the plaintiff, unless sufficient cause is shown for further postponement.

No. 20.—Printed Arguments.

1. In all cases brought here on appeal, writ of error or otherwise, the court will receive printed arguments, without regard to the number of the case on the docket, if the counsel on both sides shall choose so to submit the same. But the arguments must be filed within the first ten days of the term, and signed by attorneys or counselors of this court.

2. When a case is reached in the regular call of the docket, and argued orally in behalf of one of the parties, no printed argument will be received unless it is filed before the oral argument begins, and the court will proceed to consider and decide the case upon the *ex parte* argument. [First paragraph amended. See Rule 33.]

No. 21.—Two Counsel—Two Hours—Briefs.

1. Only two counsel shall be permitted to argue for each party, plaintiff and defendant, in a cause.

2. No counsel will be permitted to speak in the argument of any case more than two hours, without the special leave of the court, granted before the argument begins.

3. Counsel will not be heard, unless a printed brief or abstract of the case be filed, together with the points intended to be made, and the authorities intended to be cited in support of them arranged under the respective points; and no other book or case [shall] be referred to in the argument.

4. The same shall be signed by an attorney or counselor of this court.

5. If one of the parties omits to file such statement, he cannot be heard, and the case will be heard *ex parte* upon the argument of the party by whom the statement is filed.

6. Fifteen printed copies of the abstract, points and authorities, required by this rule, shall be filed with the clerk three days before the cause is called for argument; nine of these copies for the court, one for the reporter, one to be retained by the clerk, and the residue for counsel.

7. When no counsel appears for the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party. But if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel. [Sixth paragraph amended. See Rule 31.]

No. 22—ORDER OF ARGUMENT.

The plaintiff or appellant in this court shall be entitled to open and conclude the case. But when there are cross-appeals they shall be argued together as one case, and the plaintiff in the cause below shall be entitled to open and conclude the argument.

No. 23.—INTEREST, &c.

1. In cases where a writ of error is prosecuted to the supreme court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the state where such judgment is rendered.

2. The same rule shall be applied to decrees for the payment of money in cases in chancery, unless otherwise ordered by this court.

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

shall be calculated from the date of the judgment in the court below, until the money is paid.

No. 24.—COSTS.

1. In all cases where a suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction, costs shall be allowed to the defendant in error, or appellee, as the case may be, unless otherwise agreed by the parties.

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, as the case may be, unless otherwise ordered by the court.

3. In all cases of reversal of any judgment or decree in this court, costs shall be allowed in this court for the plaintiff in error or appellant, as the case may be, unless otherwise ordered by the court.

4. Neither of the foregoing rules shall apply to cases where the United States are a party; but in such cases no costs shall be allowed for or against the United States.

5. In all cases of the dismissal of any suit in this court, it shall be the duty of the clerk to issue a mandate, or other proper process, in the nature of a *procedendo*, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

6. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

No. 25.—OPINIONS OF THE COURT.

1. All opinions delivered by the court shall immediately, upon the delivery thereof, be delivered over to the clerk to be recorded. And it shall be the duty of the clerk to cause the same to be forthwith recorded, and to deliver the originals, with a transcript of the judgment or decree of the court thereon, to the reporter, as soon as the same shall be recorded.

2. And all the opinions of the court, as far as practicable, shall be recorded during the term, so that the publication of the reports may not be delayed thereby.

3. The original opinions of the court, delivered to the reporter, shall be filed in the office of the clerk of the court, for preservation, as soon as the volume of reports for the term at which they are delivered, shall be published.

No. 26.—CALL OF THE DOCKET.

The court, on the second day of each term, will commence calling the cases for argument in the order in which they stand on the docket, and proceed from day to day during the term in the same order; and if the parties, or either of them, shall be ready when the case is called, the same shall be heard; and if neither party shall be ready to proceed in the argument, the cause shall go down to the foot of the docket, unless some good and satisfactory reason to the contrary be shown to the court. The ten causes only shall be considered liable to be called on each day during the term, including the one under argument, if the same shall not be concluded on the preceding day. No cause shall be taken up out of the order on the docket, or be set down for any particular day, except under special and peculiar circumstances, to be shown to the court. Every cause which shall be called in its order, and passed, and put at the foot of the docket, shall, if not reached again, during the term it is called, be continued to the next term of the court.

No. 27.—MOTION DAY.

The court will not hear arguments on Saturday (unless for special cause it shall order the contrary), but will devote that day to the other business of the court; and on Friday of each week, during the sitting of the court, motions in cases not required by the rules of the court to be put on the docket shall be entitled to preference, if such motions shall be made before the court shall have entered on the hearing of a cause upon the docket.

No. 28.—ADJOURNMENT.

The court will at every session announce on what day it will adjourn, at least ten days before the time which shall be fixed upon; and the court will take up no case for argument, nor receive any case upon printed briefs, within three days next before the day fixed upon for adjournment.

No. 29.—DISMISSING CASES IN VACATION.

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in any appeal, shall at any time hereafter, in vacation and out of term time, by their respective attorneys, who are entered as such on the record, sign and file with the clerk an agreement in writing, directing the case to be dismissed, and specifying the terms upon which it is to be dismissed as to costs, and also paying to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party, which may request it, a copy of the agreement filed; but no mandate or other process is to issue without an order by the court.

ADDITIONAL RULES.

No. 30.—COSTS ON REVERSAL.

The third paragraph of the twenty-fourth rule of this court is amended, so that it will read as follows:

In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, as the case may be, unless otherwise ordered by the court. The costs of the transcript of the record from the court below shall be a part of such costs.

No. 31.—1865.

The sixth paragraph of the twenty-first rule of this court is amended so as to read as follows:

Twenty copies of the abstract, points and authorities required by this rule, shall be filed with the clerk by the plaintiff in error, or appellant, six days, and by the defendant in error or appellee three days, before the case is called for argument.

No. 32.

The third paragraph of the third rule of this court is amended so as to read as follows:

In all cases where the period of thirty days is mentioned in this rule, it shall be extended to sixty days, in writs of error and appeals from California, Oregon, Nevada, New Mexico and Utah.

No. 33.

The first paragraph of the twentieth rule of this court is amended so as to read as follows:

In all cases brought here on appeal, writ of error or otherwise, the court will receive printed arguments, without regard to the number of the case on the docket, if the counsel on both sides shall choose so to submit the same within the first thirty days of the term; but twenty copies of the arguments, signed by attorneys or counselors of this court, must first be filed; ten of these copies for the court, two for the reporter, three to be retained by the clerk, and the residue for counsel.

No. 34.

All cases on the calendar, except cases as hereinafter provided, shall be heard when reached, in the order in which they are entered.

Criminal cases may be advanced, by leave of the court, on motion of either party.

Revenue cases, and causes in which the United States are concerned, which also involve or affect some matter of general public interest, may also, by leave of the court, be advanced on motion of the attorney-general.

Two or more causes, also, involving the same question, may, by leave of the court, be heard together, but they must be argued as one case.

No. 35.[1]

Upon filing the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the plaintiff in error or appellant shall be entered, and no motion to dismiss, except on special assignment by the court, shall be heard unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

No. 36.

Supersedeas bonds in the circuit courts must be taken with good and sufficient security that the plaintiff in error or appellant shall

[1] This rule is numbered by the Reporter 31 (5 Wallace), and the succeeding rules to 37 inclusive have correspondent numbers. Rule 37, consequently, is by him numbered 33. I cannot discover any reason for this, and am obliged to believe it is a mistake. It may not be amiss also to state that I have thought it advisable to omit the rule amending the second rule by prescribing an additional oath for attorneys and counselors (which if retained would have been numbered 32), and also the rule, made soon after, rescinding this amendment, which if retained would have been numbered 34.

prosecute his writ of error or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including "just damages for delay," and costs and interest on the appeal; but in all suits where the property in controversy follows the amount of the suit, as in real actions, replevin, and in suits on mortgages; or where the property is in custody of the marshal, under admiralty process, as in case of capture or seizure; or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity in such cases is required only in an amount sufficient to secure the sum recovered for the use or detention of the property, and the costs of the suit and "just damages for delay," and costs and interest on appeal.

No. 37.

In cases where final judgment is rendered more than thirty days before the first day of the next term of this court, the writ of error and citation, if taken before, must be made returnable on the first day of the said term, and be served before that day; but in cases where the judgment is rendered less than thirty days before the said first day, the writ of error and citation may be made returnable on the third Monday of said term, and be served before that day.

III.

Rules of Practice for the Courts of Equity of the United States.

[It will be recollected, that, by the process act of 1792, it was ordained that the forms and modes of proceeding in suits in equity should be according to the principles, rules and usages which belong to courts of equity, subject, however, to such alterations and additions as the courts respectively should, in their discretion deem expedient, *or such regulations as the Supreme Court of the United States should think proper from time to time, by rule, to prescribe to any circuit or district court concerning the same.* In virtue of the authority with which the supreme court was thus invested, a set of rules for the regulation of equity practice was promulgated by the supreme court in 1822, which were printed in the earlier editions of this work; but these have been superseded by the following more full and elaborately devised body of rules adopted in 1842. Although they relate to a subject not treated of in this work, and notwithstanding the considerable space they occupy, the author is of opinion that his professional brethren would not approve of their omission. By the 90th rule, it will be seen, the practice of the high court of chancery in England is adopted in all cases not provided for by these rules, or by such additional rules *not inconsistent therewith,* as the respective inferior courts may adopt. The only remaining general rules or orders prescribed by the supreme court, in virtue of the above mentioned authority, are the body of rules promulgated in 1845, regulating the practice of the courts of the United States in admiralty, and the rules since made in addition thereto. These will be found in "Conkling's Admiralty."]

I.

The circuit courts, as courts of equity, shall be deemed always open for the purpose of filing bills, answers and other pleadings, for issuing and returning mesne and final process and commissions, and for

making and directing all interlocutory motions, orders, rules and other proceedings, preparatory to the hearing of all causes upon their merits.

The circuit courts, as courts of equity, shall be always open for the purpose of filing bills, petitions answers, pleas and other pleadings, for issuing and returning mesne and final process and commissions, and for making and directing all interlocutory motions, orders, rules and other proceedings whatever, preparatory to the hearing of all causes pending therein upon their merits. And it shall be competent for any judge of the court, upon reasonable notice to the parties, in the clerk's office, or at chambers, and in vacation as well as in term, to make, direct and award all such process, commissions and interlocutory orders, rules and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court.

II.

The clerk's office shall be open, and the clerk shall be in attendance therein, on the first Monday of every month, for the purpose of receiving, entering, entertaining and disposing of all motions, rules, orders and other proceedings, which are grantable of course, and applied for, or had by the parties or their solicitors in all causes pending in equity, in pursuance of the rules hereby prescribed.

III.

Any judge of the circuit court, as well in vacation as in term, may, at chambers, or on rule days, at the clerk's office, make and direct all such interlocutory orders, rules and other proceedings, preparatory to the hearing of all causes upon their merits, in the same manner and with the same effect as the circuit court could make and direct the same in term, reasonable notice of the application therefor being first given to the adverse party, or his solicitor, to appear and show cause to the contrary at the next rule day thereafter, unless some other time is assigned by the judge for the hearing.

IV.

All motions, rules, orders and other proceedings made and directed at chambers, or on rule days, at the clerk's office, whether special or of course, shall be entered by the clerk in an order book, to be kept at the

clerk's office on the day when they are made and directed, which book shall be open at all office hours, to the free inspection of the parties in any suit in equity, and their solicitors. And, except in cases where personal or other notice is specially required or directed, such entry in the order book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices and other proceedings entered in such order book, touching any and all the matters in the suits, to and in which they are parties and solicitors. And notice to the solicitors shall be deemed notice to the parties for whom they appear and whom they represent, in all cases where personal notice on the parties is not otherwise specially required. Where the solicitors for all the parties in a suit reside in or near the same town or city, the judges of the circuit court may, by rule, abridge the time for notice of rules, orders or other proceedings, not requiring personal service on the parties, in their discretion.

V.

All motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and execute decrees, for filing bills, answers, pleas, demurrers and other pleadings; for making amendments to bills and answers; for taking bills *pro confesso;* for filing exceptions, and for other proceedings in the clerk's office, which do not, by the rules hereinafter prescribed, require any allowance or order of the court, or of any judge thereof, shall be deemed motions and applications, grantable of course by the clerk of the court. But the same may be suspended or altered, or rescinded, by any judge of the court, upon special cause shown.

VI.

All motions for rules or orders and other proceedings, which are not grantable of course, or without notice, shall, unless a different time be assigned by a judge of the court, be made at a rule day, and entered in the order book, and shall be heard at the rule day next after that on which the motion is made. And if the adverse party, or his solicitor, shall not then appear, or shall not show good cause against the same, the motion may be heard by any judge of the court *ex parte*, and granted as if not objected to, or refused, in his discretion.

PROCESS.

VII.

The process of subpœna shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill; and, unless otherwise provided in these rules, or specially ordered by the circuit court, a writ of attachment, and if the defendant cannot be found, a writ of sequestration or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

VIII.

Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the circuit court in suits at common law in actions of assumpsit. If the decree be for the performance of any specific act, as for example, for the execution of a conveyance of land, or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court, or of a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found, a writ of sequestration shall issue against his estate, upon the return of *non est inventus*, to compel obedience to the decree.

IX.

When any decree or order is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

X.

Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause; and every person, not being a party in any cause, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such order as if he were a party in the cause.

SERVICE OF PROCESS.

XI.

No process of subpœna shall issue from the clerk's office in any suit in equity, until the bill is filed in the office.

XII.

Whenever a bill is filed, the clerk shall issue the process of subpœna thereon, as of course, upon the application of the plaintiff, which shall be returnable into the clerk's office the next rule day, or the next rule day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof. At the bottom of the subpœna shall be placed a memoradum, that the defendant is to enter his appearance in the suit in the clerk's office, on or before the day at which the writ is returnable; otherwise, the bill may be taken *pro confesso*. Where there are more than one defendant, a writ of subpœna may, at the election of the plaintiff, be sued out separately for each defendant, except in the case of husband and wife, defendants, or a joint subpœna against all defendants.

XIII.

The service of all subpœnas shall be by a delivery of a copy thereof, by the officer serving the same, to the defendant personally, or, in the case of husband and wife, to the husband personally, or by leaving a copy thereof at the dwelling-house, or usual place of abode of each defendant, with some free white person, who is a member or a resident in the family.

XIV.

Whenever any subpœna shall be returned not executed as to any defendant, the plaintiff shall be entitled to another subpœna, *toties*

quoties, against such defendant, if he shall require it, until due service is made.

XV.

The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or some other person specially appointed by the court for that purpose, and not otherwise; in the latter case, the person serving the process shall make affidavit thereof.

XVI.

Upon the return of the subpœna, as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of the entry.

APPEARANCE.

XVII.

The appearance day of the defendant shall be the rule day, to which the subpœna is made returnable; provided, he has been served with the process twenty days before that day; otherwise, his appearance day shall be the next rule day succeeding the rule day when the process is returnable.

The appearance of the defendant, either personally or by his solicitor, shall be entered in the order book, on the day thereof, by the clerk.

BILLS TAKEN PRO CONFESSO.

XVIII.

It shall be the duty of the defendant, unless the time shall be otherwise enlarged, for cause shown, by a judge of the court, upon motion for that purpose, to file his plea, demurrer, or answer to the bill in the clerk's office, on [or before?] the rule day next succeeding that of entering his appearance; in default thereof, the plaintiff may, at his election, enter an order (as of course) in the order book, that the bill be taken *pro confesso;* and thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the court at the next ensuing term thereof accordingly, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to

obtain a proper decree, shall be entitled to process of attachment against the defendant, to compel an answer; and the defendant shall not, when arrested upon such process, be discharged therefrom, unless, upon filing his answer, or otherwise complying with such order, as the court or a judge thereof may direct, as to pleading to, or fully answering the bill, within a period to be fixed by the court or judge, and undertaking to speed the cause.

XIX.

When the bill is taken *pro confesso*, the court may proceed to a decree at the next ensuing term thereof, and such decree rendered shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit of the defendant. And no such motion shall be granted, unless upon the payment of the costs of the plaintiff in the suit up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.

FRAME OF BILLS.

XX.

Every bill, in the introductory part thereof, shall contain the names, places of abode, and citizenship of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form, in substance, shall be as follows:

"To the judges of the circuit court of the United States for the district of ——: A. B., of ——, and a citizen of the state of ——, brings this, his bill, against C. D., of ——, and a citizen of the state of ——, and E. F., of ——, and a citizen of the state of ——. And thereupon your orator complains and says, that," &c.

XXI.

The plaintiff, in his bill, shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff; also what is commonly called the charging part of the bill, setting forth the matters or excuses, which the

defendant is supposed to intend to set up by way of defense to the bill; also, what is commonly called the jurisdiction clause of the bill, that the acts complained of are contrary to equity, and that the plaintiff is without any remedy at law; and the bill shall not be demurrable therefor. And the plaintiff may, in the narrative or stating part of his bill, state and avoid, by counter averments, at his option, any matter or thing which he supposes will be insisted upon by the defendant, by way of defense or excuse, to the case made by the plaintiff for relief. The prayer of the bill shall ask the special relief, to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief; and if an injunction, or writ of *ne exeat regno*, or any other special order pending the suit, is required, it shall also be specially asked for.

XXII.

If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they cannot be joined without ousting the jurisdiction of the court as to the other parties. And, as to persons who are without the jurisdiction, and may properly be made parties, the bill may pray that process may issue to make them parties to the bill, if they should come within the jurisdiction.

XXIII.

The prayer for process of subpœna in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact, so that the court may take order thereon as justice may require, upon the return of the process. If an injunction, or a writ of *ne exeat regno*, or any other special order pending the suit, is asked for in the prayer for relief, that shall be sufficient without repeating the same in the prayer for process.

XXIV.

Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part, that, upon the instructions given to him and the case laid before him, there is good ground for the suit, in the manner in which it is framed.

XXV.

In order to prevent the unnecessary costs and expenses, and to promote brevity, succinctness and directness in the allegations of bills and answers, the regular taxable costs for every bill and answer shall in no case exceed the sum which is allowed in the state court of chancery in the district, if any there be; but if there be none, then it shall not exceed the sum of three dollars for every bill or answer.

SCANDAL AND IMPERTINENCE IN BILLS.

XXVI.

Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recitals of deeds, documents, contracts or other instruments, in *hæc verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit. If it does, it may, on exceptions, be referred to a master by any judge of the court for impertinence, or scandal, and, if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the court or a judge thereof shall otherwise order. If the master shall report that the bill is not scandalous or impertinent, the plaintiff shall be entitled to all costs occasioned by the reference.

XXVII.

No order shall be made by any judge for referring any bill, answer or pleading, or other matter, or proceeding depending before the court for scandal or impertinence, unless exceptions are taken in writing, and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent; nor unless the exceptions shall be filed on or before the next rule day, after the process on the bill shall be returnable, or after the answer or pleading is filed. And such order, when obtained, shall be considered as abandoned, unless the party obtaining the order shall, without any unnecessary delay, procure the master to examine and report on the same on or before the next succeeding rule day, or the master shall certify that further time is necessary for him to complete the examination.

AMENDMENTS OF BILLS.

XXVIII.

The plaintiff shall be at liberty as a matter of course, and without payment of costs, to amend his bill in any matters whatsoever, before any copy has been taken out of the clerk's office, and in any small matter afterwards such as filing blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors, and generally in matters of form. But if he amend in a material point (as he may do, of course), after a copy has been so taken, before any answer or plea or demurrer to the bill, he shall pay the defendant the costs occasioned thereby, and shall, without delay, furnish him a fair copy thereof, free of expense, with suitable references to the places where the same are to be inserted. And, if the amendments are numerous, he shall furnish, in like manner, to the defendant, a copy of the whole bill as amended, and, if there be more than one defendant, a copy shall be furnished to each defendant affected thereby.

XXIX.

After an answer or plea, or demurrer is put in, and before replication, the plaintiff may, upon motion or petition, without notice, obtain an order from any judge of the court, to amend his bill on or before the next succeeding rule day, upon payment of costs, or without payment of costs, as the court, or a judge thereof may, in his discretion, direct. But, after replication filed, the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon a special order of a judge of the court, upon motion or petition, after due notice to the other party, and upon proof, by affidavit, that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not, with reasonable diligence, have been sooner introduced into the bill, and, upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause.

XXX.

If the plaintiff, so obtaining any order to amend his bill after answer or plea or demurrer, or after replication, shall not file his amendments or amended bill, as the case may require, in the clerk's office, on or

before the next succeeding rule day, he shall be considered to have abandoned the same, and the cause shall proceed, as if no application for any amendment had been made.

DEMURRERS AND PLEAS.

XXXI.

No demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel, that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant, that it is not interposed for delay; and if a plea, that it is true in point of fact.

XXXII.

The defendant may, at any time before the bill is taken for confessed, or afterwards, with the leave of the court, demur or plead to the whole bill, or to a part of it, and he may demur to part, plead to part, and answer as to the residue; but in every case, in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea, and explicitly denying the fraud and combination, and the facts on which the charge is founded.

XXXIII.

The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him, as far as in law and equity they ought to avail him.

XXXIV.

If, upon the hearing, any demurrer or plea is overruled, the plaintiff shall be entitled to his costs in the cause up to that period, unless the court shall be satisfied that the defendant had good ground, in point of law or fact, to interpose the same, and it was not interposed vexatiously or for delay. And upon the overruling of any plea or demurrer, the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea of demurrer, the next succeeding rule day, or at such other period, as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, be reasonably

done; in default whereof, the bill shall be taken against him, *pro confesso*, and the matter thereof proceeded in and decreed accordingly.

XXXV.

If, upon the hearing, any demurrer or plea shall be allowed, the defendant shall be entitled to his costs. But the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill upon such terms as it shall deem reasonable.

XXXVI.

No demurrer or plea shall be held bad and overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to.

XXXVII.

No demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea.

XXXVIII.

If the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument, on the rule day, when the same is filed, or on the next succeeding rule day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for the purpose.

XXXIX.

The rule, that, if a defendant submits to answer, he shall answer fully to all the matters of the bill, shall no longer apply in cases where he might by plea protect himself from such answer and discovery. And the defendant shall be entitled in all cases by answer to insist upon all matters of defense (not being matters of abatement, or to the character of the parties, or matters of form), in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters, than he would be compellable to answer and discover upon filing a plea in bar, and an answer in support of such plea, touching the matters set forth in the bill, to avoid or repel the bar or defense. Thus, for example, a *bona fide* purchaser, for a valuable

consideration, without notice, may set up that defense by way of answer, instead of plea, and shall be entitled to the same protection, and shall not be compelled to make any further answer or discovery of his title than he would be in any answer in support of such plea.

XL.

A defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto; and a defendant shall not be bound to answer any interrogatory in the bill, except those interrogatories which such defendant is required to answer; and where a defendant shall answer any statement or charge in the bill, to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent. [Rescinded; see Rule 93.]

XLI.

The interrogatories contained in the interrogating part of the bill, shall be divided as conveniently as may be from each other, and numbered consecutively, 1, 2, 3, &c.; and the interrogatories, which each defendant is required to answer, shall be specified in a note at the foot of the bill, in the form or the effect following; that is to say: "The defendant (A B) is required to answer the interrogatories numbered respectively 1, 2, 3," &c.; and the office copy of the bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill.

XLII.

The note at the foot of the bill, specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill, and the addition of any such note to the bill, or any alteration in or addition to such note after the bill is filed, shall be considered and treated as an amendment of the bill.

XLIII.

Instead of the words of the bill now in use, preceding the interrogating part thereof, and beginning with the words "To the end, therefore," there shall hereafter be used words in the form or to the effect following: "To the end, therefore, that the said defendants may,

if they can, show why your orator should not have the relief hereby prayed, and may, *upon their several and respective corporal oaths, and* according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer; that is to say—

"1. Whether, &c.

"2. Whether," &c.

XLIV.

A defendant shall be at liberty, by answer, to decline answering any interrogatory or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill, from which he might have protected himself by demurrer.

XLV.

No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without the payment of costs, as the court or the judge thereof may, in his discretion, direct.

XLVI.

In every case where an amendment shall be made after answer filed, the defendant shall put in a new and supplemental answer, on or before the next succeeding rule day after that on which the amendment or amended bill is filed, unless the time therefor is enlarged or otherwise ordered by a judge of the court; and upon his default the like proceedings may be had as in cases of an omission to put in an answer.

PARTIES TO BILLS.

XLVII.

In all cases where it shall appear to the court that persons who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties

before the court, the court may, in their discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

XLVIII.

Where the parties on either side are very numerous, and cannot without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court, in its discretion, may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties.

XLIX.

In all suits concerning real estate, which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate, or the proceeds, or the rents and profits, in the same manner, and to the same extent, as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons, beneficially interested in such real estate, or rents and profits, parties to the suit; but the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.

L.

In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiff shall be at liberty to make the heir at law a party, where he desires to have the will established against him.

LI.

In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

LII.

Where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the clerk's order book, in the form or to the effect following (that is to say): "Set down upon the defendant's objection for want of parties." And where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled, as of course, to an order for liberty to amend his bill by adding parties. But the court, if it thinks fit, shall be at liberty to dismiss the bill.

LIII.

If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by plea or answer taken the objection, and therein specified, by name or description, the parties to whom the objection applies, the court (if it shall think fit) shall be at liberty to make a decree, saving the rights of the absent parties.

NOMINAL PARTIES TO BILLS.

LIV.

Where no account, payment, conveyance, or other direct relief, is sought against a party to a suit, not being an infant, the party, upon service of the subpœna upon him, need not appear and answer the bill, unless the plaintiff specially requires him so to do by the prayer of his bill; but he may appear and answer at his option; and if he does not appear and answer, he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer, he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct.

LV.

Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance, and plead, demur or answer to the same within the time prescribed therefor by these

rules, the plaintiff shall be entitled, as of course, upon motion without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the court in term, or by a judge thereof in vacation, after a hearing, which may be *ex parte*, if the adverse party does not appear at the time and place ordered. In every case, where an injunction, either the common injunction or a special injunction, is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some other order of the court.

BILLS OF REVIVOR AND SUPPLEMENTAL BILLS.

LVI.

Whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor, or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same, which bill may be filed in the clerk's office at any time; and, upon suggestion of the facts, the proper process of subpœna shall, as of course, be issued by the clerk, requiring the proper representatives of the other party to appear and show cause, if any they have, why the cause should not be revived. And if no cause should be shown at the next rule day which shall occur after fourteen days from the time of the service of the same process, the suit shall stand revived, as of course.

LVII.

Whenever any suit in equity shall become defective from any event happening after the filing of the bill (as, for example, by a change of interest in the parties), or for any other reason a supplemental bill, or a bill in the nature of a supplement bill may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court or on any rule day, upon proper cause shown, and due notice to the other party. And, if leave is granted to file such supplemental bill, the defendant shall demur, plead or answer thereto, on the next succeeding rule day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by a judge of the court.

LVIII.

It shall not be necessary in any bill of revivor, or supplemental bill, to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.

LIX.

Every defendant may swear to his answer before any justice or judge of any court of the United States, or before any commissioner appointed by any circuit court to take testimony or depositions, or before any master in chancery appointed by any circuit court, or before any judge of any court of a state or territory.

AMENDMENT OF ANSWERS.

XL.

After an answer is put in, it may be amended as of course, in any matter of form, or by filling up a blank, or correcting a date, or reference to a document or other small matter, and be resworn at any time before a replication is put in, or the cause is set down for a hearing upon bill and answer. But, after replication, or such setting down for a hearing, it shall not be amended in any material matters, as by adding new facts or defenses, or qualifying or altering the original statements, except by special leave of the court, or of a judge thereof, upon motion and cause shown after due notice to the adverse party, supported, if required, by affidavit. And, in every case where leave is so granted, the court, or the judge granting the same, may, in his discretion, require that the same be separately engrossed, and added as a distinct amendment to the original answer, so as to be distinguishable therefrom.

EXCEPTIONS TO ANSWERS.

LXI.

After an answer is filed on any rule day, the plaintiff shall be allowed until the next succeeding rule day to file in the clerk's office exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose, upon cause shown to the court or a judge thereof; and, if no exception shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient.

LXII.

When the same solicitor is employed for two or more defendants, and separate answers shall be filed, or other proceedings had, by two or more of the defendants separately, costs shall not be allowed for such separate answers or other proceedings, unless a master, upon reference to him, shall certify that such separate answers and other proceedings were necessary or proper, and ought not to have been joined together.

LXIII.

Where exceptions shall be filed to the answer for insufficiency, within the period prescribed by the rules, if the defendant shall not submit to the same, and file an amended answer on the next succeeding rule day, the plaintiff shall forthwith set them down for a hearing on the next succeeding rule day thereafter, before a judge of the court; and shall enter, as of course, in the order book an order for that purpose. And if he shall not so set down the same for a hearing, the exceptions shall be deemed abandoned, and the answer shall be deemed sufficient; provided, however, that the court, or any judge thereof, may, for good cause shown, enlarge the time for filing exceptions, or for answering the same, in his discretion, upon such terms as he may deem reasonable.

LXIV.

If, at the hearing, the exceptions shall be allowed, the defendant shall be bound to put in a full and complete answer thereto on the next succeeding rule day; otherwise the plaintiff shall, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or, at his election, he may have a writ of attachment to compel the defendant to make a better answer to the matter of the exceptions; and the defendant, when he is in custody upon such writ, shall not be discharged therefrom but by an order of the court, or of a judge thereof, upon his putting in such answer, and complying with such other terms as the court or judge may direct.

LXV.

If, upon argument, the plaintiff's exceptions to the answer shall be overruled, or the answer shall be adjudged insufficient, the prevailing

party shall be entitled to all the costs occasioned thereby, unless otherwise directed by the court, or the judge thereof, at the hearing upon the exceptions.

REPLICATION AND ISSUE.

LXVI.

Whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule day thereafter; and in all cases where the general replication is filed, the cause shall be deemed, to all intents and purposes, at issue, without any rejoinder or other pleading on either side. If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for a dismissal of the suit; and the suit shall thereupon stand dismissed, unless a court or a judge thereof shall, upon motion for cause shown, allow a replication to be filed *nunc pro tunc*, the plaintiff submitting to speed the cause, and to such other terms as may be directed.

TESTIMONY, HOW TAKEN.

LXVII.

After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in terms, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same, in the clerk's office, ten days' notice thereof being given to the adverse party, to file cross interrogatories before the issuing of the commission; and if no cross interrogatories are filed at the expiration of the time, the commission may issue *ex parte*. In all cases the commissioner or commissioners shall be named by the court, or by a judge thereof. If the parties shall so agree, the testimony may be taken upon oral interrogatories by the parties, or their agents, without filing any written interrogatories. [Amended; see Rule 95.]

LXVIII.

Testimony may also be taken in the cause, after it is at issue, by deposition, according to the acts of congress. But in such case, if no notice is given to the adverse party of the time and place of taking

the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross-examination of the witness, either under a commission or by a new deposition taken under the acts of congress, if a court or a judge thereof shall, under all the circumstances, deem it reasonable.

LXIX.

Three months, and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the court or a judge thereof shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing. Immediately upon the return of the commissions and depositions containing the testimony into the clerk's office, publication thereof may be ordered in the clerk's office by any judge of the court, upon due notice to the parties, or it may be enlarged, as he may deem reasonable under all the circumstances. But by consent of the parties, publication of the testimony may at any time pass in the clerk's office, such consent being in writing, and a copy thereof entered in the order book, or indorsed upon the deposition or testimony.

TESTIMONY DE BENE ESSE.

LXX.

After any bill filed, and before the defendant hath answered the same, upon affidavit made that any of the plaintiff's witnesses are aged or infirm, or going out of the country, or that any of them is a single witness to a material fact, the clerk of the court shall, as of course, upon the application of the plaintiff, issue a commission to such commissioner or commissioners as a judge of the court may direct, to take the examination of such witness or witnesses *de bene esse*, upon giving due notice to the adverse party of the time and place of taking his testimony.

FORM OF THE LAST INTERROGATORY.

LXXI.

The last interrogatory in the written interrogatories to take testimony now commonly in use, shall in the future be altered, and stated in substance thus: "Do you know, or can you set forth, any other matter or thing, which may be a benefit or advantage to the parties at

issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? if yea, set forth the same fully and at large in your answer."

CROSS BILL.

LXXII.

Where a defendant in equity files a cross bill for discovery only against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto, before the original plaintiff shall be compellable to answer the cross bill. The answer of the original plaintiff to such cross bill may be read and used by the party filing the cross bill, at the hearing, in the same manner and under the same restrictions as the answer, praying relief, may now be read and used.

REFERENCE TO AND PROCEEDINGS BEFORE MASTERS.

LXXIII.

Every decree for an account of the personal estate of a testator or intestate shall contain a direction to the master, to whom it is referred to take the same, to inquire and state to the court what parts, if any, of such personal estate are outstanding or undisposed of, unless the court shall otherwise direct.

LXXIV.

Whenever any reference of any matter is made to a master to examine and report thereon, the party at whose instance or for whose benefit the reference is made, shall cause the same to be presented to the master for a hearing on or before the next rule day succeeding the time when the reference was made; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the cost of the party procuring the reference.

LXXV.

Upon every such reference, it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties or their solicitors; and if either

party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed *ex parte*, or in his discretion to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed, with all reasonable diligence, in every such reference, and with the least practicable delay; and either party shall be at liberty to apply to the court or a judge thereof for an order to the master to speed the proceedings, and to make his report, and to certify to the court or judge the reason for any delay.

LXXVI.

In the report made by the master to the court, no part of any state of facts, charge, affidavit, deposition, examination or answer, brought in or used before him, shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination or answer, shall be identified, specified and referred to, so as to inform the court what state of facts, charge, affidavit, deposition, examination or answer were so brought in or used.

LXXVII.

The master shall regulate all the proceedings in every hearing before him, upon every such reference; and he shall have full authority to examine the parties in the cause upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers and other documents applicable thereto; and also to examine on oath, *viva voce*, all witnesses produced by the parties before him, and to order the examination of other witnesses to be taken, under a commission to be issued upon his certificate from the clerk's office, or by deposition according to the acts of congress, or otherwise, as hereinafter provided; and also to direct the mode in which the matters requiring evidence, shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof, and the rights of the parties.

LXXVIII.

Witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a master or examiner appointed

in any cause, by subpœna in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioner, master or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear, or to give evidence, it shall be deemed a contempt of court, which being certified to the clerk's office by the commissioner, master or examiner, an attachment may issue thereupon by order of the court or any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the court. But nothing herein contained shall prevent the examination of witnesses, *viva voce*, when produced in open court, if the court shall in its discretion deem it advisable.

LXXIX.

All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties, who shall not be satisfied with the account so brought in, shall be at liberty to examine the accounting party *viva voce*, or upon interrogatories in the master's office, or by deposition, as the master shall direct.

LXXX.

All affidavits, depositions and documents, which have been previously made, read, or used in the court, upon any proceeding in any cause or matter, may be used before the master.

LXXXI.

The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories, or *viva voce*, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examination shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court if necessary.

LXXXII.

The circuit courts may appoint standing masters in chancery in their respective districts, both the judges concurring in the appointment; and they may also appoint a master *pro hac vice* in any partic-

ular case. The compensation to be allowed to every master in chancery, for his services in any particular case, shall be fixed by the circuit court, in its discretion, having regard to all the circumstances thereof; and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

EXCEPTIONS TO REPORT OF MASTER.

LXXXIII.

The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order book. The parties shall have one month from the time of filing the report, to file exceptions thereto; and if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule day after the month is expired. If exceptions are filed, they shall stand for hearing before the court if the court is then in session, or if not, then at the next sitting of the court which shall be held thereafter by adjournment or otherwise.

LXXXIV.

And in order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled shall, for every exception overruled, pay costs to the other party, and for every exception allowed shall be entitled to costs—the costs to be fixed in each case by the court, by a standing rule of the circuit court.

DECREES.

LXXXV.

Clerical mistakes in decrees, or decretal orders, or errors arising from any accidental slip or omission, may, at any time before an actual enrollment thereof, be corrected by order of the court or a judge thereof, upon petition without the form or expense of a rehearing.

LXXXVI.

In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin in substance as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz.:" [Here insert the decree or order.]

GUARDIANS AND PROCHEINS AMIS.

LXXXVII.

Guardians *ad litem* to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons, who are under guardianship, or otherwise incapable to sue for themselves; all infants and other persons so incapable, may sue by their guardians, if any, or by their procheins amis, subject, however, to such orders as the court may direct for the protection of infants and other persons.

LXXXVIII.

Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party, or by some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the supreme court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.

LXXXIX.

The circuit courts (both judges concurring therein) may make any other and further rules and regulations for the practice, proceedings and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same.

XC.

In all cases, where the rules prescribed by this court, or by the circuit court, do not apply, the practice of the circuit court shall be regulated by the present practice of the high court of chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local convenience of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.

XCI.

Whenever under these rules an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof, make solemn affirmation to the truth of the facts stated by him.

XCII.

These rules shall take effect, and be of force in all the circuit courts of the United States, from and after the first day of August next; but they may be previously adopted by any circuit court in its discretion; and when and as soon as these rules shall so take effect, and be of force, the rules of practice for the circuit courts in equity suits, promulgated and prescribed by this court in March, 1822, shall henceforth cease, and be of no further force or effect. And the clerk of this court is directed to have these rules printed, and to transmit a printed copy thereof, duly certified, to the clerks of the several courts of the United States, and to each of the judges thereof.

ADDITIONAL RULES.

XCIII.—1850.

Ordered, That the fortieth rule, heretofore adopted and promulgated by this court as one of the rules of practice in suits in equity in the circuit courts, be and the same is hereby repealed and annulled. And it shall not hereafter be necessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the complainant desires to do so, to obtain a discovery.

XCIV.—1854.

Ordered, That the sixty-seventh rule, governing equity practice, be so amended as to allow the presiding judge of any court, exercising

jurisdiction, either in term time or vacation, to vest in the clerk of the said court general power to name commissioners to take testimony in like manner that the court or judge thereof can now do by the said sixty-seventh rule.

XCV.—1861.

AMENDMENT OF RULE 67.

Ordered, That the last paragraph in the sixty-seventh rule in equity be repealed, and the rule be amended as follows:

Either party may give notice to the other that he desires the evidence to be adduced in a cause to be taken orally, and thereupon, all the witnesses to be examined shall be examined before one of the examiners of the court, or before the examiner to be specially appointed by the court, the examiner to be furnished with a copy of the bill, and answer, if any, and such examination shall take place in the presence of the parties, or their agents, by the counsel or solicitors, and the witnesses shall be subject to cross-examination, and which shall be conducted as near as may be in the mode now used in common law courts. The depositions taken upon such oral examination shall be taken down in writing by the examiner in the form of narrative, unless he determines the examination shall be by question and answer in special instances, and when completed shall be read over to the witnesses and signed by him in the presence of the parties or counsel, or such of them as may attend; provided, if the witness shall refuse to sign the said deposition, then the examiner shall sign the same; and the examiner may, upon all examinations, state special matters to the court, as he shall think fit, and any question or questions which may be objected to, shall be noted by the examiner upon the deposition, but he shall not have power to decide on the competency, materiality or relevancy of the questions, and the court shall have power to deal with the costs of incompetent, immaterial or irrelevant depositions, or parts of them, as may be just.

The compulsory attendance of witnesses, in cases of refusal to attend, to be sworn, or to answer any question put by the examiner, or counsel, or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses, to be produced on examination before an examiner of said court on written interrogatories.

Notice shall be given by the respective counsel or solicitors to the opposite counsel or solicitors, or parties, of the time and place of

the examination, for such reasonable time as the examiner may fix by order in each cause.

When the examination of witnesses before the examiner is concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the court, to be there filed of record, in the same mode as prescribed in the 30th section of the act of congress, September 24, 1789.

Testimony may be taken on commission in the usual way by written interrogatories and cross-interrogatories, on motion to the court in term time, or to a judge in vacation, for special reasons satisfactory to the court or judge.

XCVI.—1864.

In suits of equity for the foreclosure of mortgages in the circuit court of the United States, or in any of the courts of the territories, having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided by the eighth rule of this court regulating equity practice, where the decree is solely for the payment of money.

IV.

Rules of Practice of the Court of Claims and of the Supreme Court, Regulating Appeals therefrom.

I.—The Action.

Every claim shall be stated in a printed petition addressed to the court, and signed by the claimant or his counsel. And there shall be appended to the petition the post-office address of the claimant and of his counsel.

II.—The Petition.

The petition will consist of—

1st. The title of the action, wherein shall be set forth the names of all the parties plaintiff.

2d. A plain, concise statement of the facts and circumstances hereinafter enumerated, giving place and date, free from argumentative and impertinent matter.

3d. The prayer, in which the claimant must state distinctly the amount for which he demands judgment, or the relief to which he may be entitled.

4th. The verification as hereinafter required.

The claimant may append to his petition, as exhibits, the instruments or documents to which it refers; but such exhibits will not be made evidence thereby, nor the claimant be relieved from proving them should he wish to use them as evidence.

The petition must set forth a full statement of the claim, and of the action thereon in Congress, or by any of the departments, if such action has been had, specifying also what person or persons are owners thereof, or interested therein, and when and upon what consideration such person or persons became so interested.

In every case where the claim is such as is ordinarily settled in any executive department, the petition shall show that application for its allowance has been made to that department, and without success, and its decision thereon.

If the claim be founded upon any law of congress, or upon any regulation of an executive department, the act of congress, and the section thereof upon which the claimant relies, must be stated, and the particular regulation of the department must be specified. If the claim be founded upon any express contract with the government of the United States, such contract must be set forth in the petition, and, if it be in writing, in the words of the contract. If it be founded upon any implied contract, the circumstances upon which the claimant relies as tending to prove a contract must be specified. If it consist of several matters or items, each shall be separately stated or articulated.

The petition shall also set forth that the claimant, if a citizen of the United States, and the original and every prior owner thereof when the claim has been assigned, has at all times borne true allegiance to the government of the United States; and, whether a citizen or not, that he has not in any way voluntarily aided, abetted, or given encouragement to the rebellion against the said government.

There must be annexed to the petition an affidavit of the claimant, his agent or attorney, stating that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made, except as in said petition stated; that said claimant is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets; and that he believes the facts as stated in said petition are true.

In all cases where the petition of the claimant shall be signed, and the affidavit thereto shall be made by the agent or attorney of the claimant, there shall be filed with the petition a regular warrant of attorney, duly executed by the claimant or claimants to the party so acting on his behalf. And on failure to file such warrant of attorney the petition will be dismissed.

III.—DEPARTMENTS.

When a petition is filed the clerk shall transmit a copy thereof to the department or departments having cognizance of the subject-matter of the claim, with a letter stating that such an action has been commenced, and requesting that all the information known to or on file in the department, which may be necessary to protect the interests of the government, be communicated to this court.

If no reply be received within one month the clerk shall communicate with the head of such department, advising him of such omission to answer.

IV.—FEMES COVERT, &c.

When a feme covert is a claimant, her husband must be joined with her as a party plaintiff. And where infants, lunatics, or other persons not *sui juris* are claimants, the guardian, trustee, committee, or other proper legal representatives duly appointed by the tribunal having jurisdiction of the person or estate of such persons must be made plaintiffs, and their appointment as such, duly certified, be filed with the petition at the commencement of the action.

V.—EXECUTORS, &c.

If the claimant die pending the suit, his proper representatives may, on motion, be admitted to prosecute the claim, upon filing a duly authenticated copy of the letters testamentary or of administration granted to such representatives.

VI.—DISCOVERY.

When the petitioner cannot state his case with the requisite particularity without an examination of papers in one of the executive departments, and has been unable to obtain a sufficient examination of such papers on application, he may file a manuscript petition, stating his claim as far as is in his power, and specifying as definitely as he can the papers he requires in order to enable him to state his claim. The court will thereupon make a special order calling upon the proper department for such information or papers, as it may deem necessary, to be delivered to the clerk of the court to be filed in his office. The manuscript petition may then be amended, and the amended petition printed and filed, and may occupy upon the docket the place of the original petition.

VII.—ORDERS IN VACATION.

In vacation an application for a special order to call upon a department for papers for such purpose, or for information or evidence, may be made to a judge of the court at chambers.

VIII.—COPIES OF PETITION.

The claimant, when, or within ten days after, he files his petition, shall deliver to the clerk *fifteen* printed copies thereof for the use of

the judges and the attorney-general. The printed copies must show the clerk's indorsement of the filing of the original, with the date thereof.

IX.—DEMURRERS AND SPECIAL DEFENSES.

The solicitor shall demur to or traverse the petition within sixty days after the filing of the same, unless, for special cause shown on motion of the court, or to a judge in vacation at chambers, the time be extended; and he may put in a special defense to the claim at any time before the hearing of the cause.

X.—GROUNDS OF DEMURRER.

When the solicitor demurs to the petition, he shall set forth the grounds of the demurrer specially in writing, and file the same of record. But, if the ground of demurrer be that the petition does not set forth facts sufficient to constitute a cause of action, that objection may be stated generally.

XI.—AMENDMENT.

After the decision on the special demurrer, the claimant may amend within thirty days, except in cases where the demurrer is sustained on the ground of want of jurisdiction, or legal capacity in the claimant to sue, in which cases the petition shall be dismissed.

XII.—COUNTERCLAIMS, &C.

Where a set-off, counterclaim, or other special defense on the part of the United States is set up by the solicitor, the grounds of such defense shall be distinctly set forth in writing, and filed before the hearing of the cause. And the claimant shall, within thirty days after receiving notice of the filing of the same, file his answer thereto in writing, verified by affidavit.

XIII.—FRAUDS.

When the solicitor shall interpose, as a defense to the claim, that the claimant has corruptly practiced, or attempted to practice, a fraud against the United States in the proof, statement, establishment, or allowance of any claim, or any part thereof, he shall specify in writing, and file the same of record, the grounds and facts upon which the same is based, and which constitute the fraud, or attempted fraud, alleged against the claimant. And the claimant shall, within twenty

days after receiving a copy of such specification and notice of the filing of the same, file his answers to the same, verified by affidavit.

XIV.—DOCKETS.

There shall be kept a general docket, in which an abstract of all the proceedings in each case, with reference to the papers filed, shall be entered. Also a journal or minute-book, in which the proceedings of the court shall be entered. Motions and interlocutory orders, when made in writing, shall not be entered *in extenso* upon the journal or docket, but an abstract of the same shall be entered, with a reference to the paper filed. There shall also be kept a trial docket, on which the cases for hearing upon testimony shall be entered in the order in which they may be traversed. Cases traversed on the same day shall take precedence according to their seniority. A law docket or list shall also be kept, on which all cases of demurrer, motions for new trials, and all other motions for hearing, in the order in which the demurrers are filed, or the motions made, shall be entered by the clerk.

There shall also be kept a "judgment index," in which an abstract of every final judgment or decree rendered by the court shall be recorded, containing the name or names of the claimants, the number and term of the case, the general docket and page upon which the same is entered, the date and amount of the judgment, the time when the appeal, if any, is entered, the result of the appeal, and the date of *remittitur*, and the date when certified for payment.

XV.—TRIAL DOCKETS.

1. The clerk shall keep a docket to be called the "watch book," and the claimant or his counsel may at any time enter his case upon said watch book by a notice, giving its style and number, and stating that the testimony in chief on the part of the claimant has been closed, and directing the case to be entered upon the trial docket for the next succeeding term.

2. All such cases so entered upon the watch book, at least one month prior to the making up of a trial list as hereafter provided, shall be placed upon such trial list by the clerk, and in the order in which they stand upon the watch book.

3. No testimony in chief on the part of the claimant will be admitted after a claimant has placed his case upon the watch book, except by order of the court.

4. The trial lists referred to will be made up by the clerk for the first Monday of December, the first Monday of February, and the first Monday of April.

5. The peremptory call of the trial lists will begin on the Tuesday after the first Monday of December, February and April, of each term. A stated number of cases will be called each day, and those not ready when called will be stricken off of that trial list or continued for the term, unless, for special cause shown, the court shall order otherwise.

6. Cases in which the counsel reside at a distance may be set down for a day certain, with the consent of the solicitor for the United States, without regard to their position upon the trial docket.

7. All issues of law and motions shall be placed on a law docket, which will be taken up on Monday of each week during the term.

8. Cases marked "continued" are to be understood as continued to the next term of the court, and will be brought on then as if never on the trial list. Cases marked "off" are to be understood as stricken off the trial list, and must be placed by the claimant on a subsequent trial list. Cases marked for February on any subsequent trial list will be placed thereon by the clerk without the action of the claimant.

XVI.—PRINTED TRIAL LIST.

The clerk shall furnish printed trial and argument lists to the court from time to time, which shall contain the names of parties and the counsel, and the position of each case.

XVII.—COUNSEL.

No counsel will be permitted to practice in the court unless he is a man of good moral character, and has been admitted or licensed to practice in the supreme court of the United States, or in the highest court of the District of Columbia, or in the highest court of some state or territory, of which admission he shall furnish evidence satisfactory to the court.

XVIII.—CLAIMANT IN PRO. PER.

Any claimant may appear in person and manage his own case.

XIX.—COMMISSIONER.

The court will appoint permanent commissioners for the taking of testimony, and special commissioners as circumstances may require.

Every permanent commissioner shall take an oath, before he enters upon his duties, that he will faithfully discharge them so long as his commission remains in force; and every special commissioner shall take an oath faithfully to discharge his duties.

The form of a commission to a permanent commissioner shall be as follows:

COURT OF CLAIMS,

To —— ——, of ——, in the county of —— and State of ——:
——, esquire:

You are hereby appointed a commissioner, for the term of two years, for the State of ——, to take the testimony of such witnesses as may come before you, to be used in the investigation of such claims as may be presented to this court against the United States. In the performance of this duty you will be guided by the rules of this court. You will take no deposition unless by consent of the parties, until it is shown to you, by the return upon the original notice, that the adverse party has been duly notified; and if he do not appear, you will affix the original notice to your certificate, and return it therewith for the information of the court.

—— ——, *Clerk.*

When special commissions are issued, such variations from the above form as may be necessary will be made. The several judges of the courts of record for the time being in the states and territories of the United States are hereby appointed commissioners to take testimony to be used in the investigation of claims before this court, in the counties in which they may respectively reside, during the pleasure of this court; and this rule shall be a sufficient commission to each of said judges in the premises. The commissioners appointed by the circuit and district courts of the United States for the purpose of taking testimony are hereby appointed commissioners to take testimony in the circuits or districts for which they are respectively appointed by such courts.

XX.—SUBPŒNA.

The form of a subpœna shall be as follows:

COURT OF CLAIMS,

To —— ——:

You are hereby commanded to appear before —— ——, commissioner appointed by this court to take depositions, on the —— day of ——, A. D. 186–, at —— o'clock in the —— noon, then and there to testify in the case of —— —— against the United States, now pending in this court. Fail not of appearance, at your peril.

Dated this —— day of ——, A. D. 186–.

—— ——, *Clerk,*

XXI.—EVIDENCE (BY DEPOSITION).

The party proposing to take depositions shall cause fifteen days' notice to be given thereof to the attorney-general, or to the claimant or his counsel, as the case may be. The notice must be in writing, and must state the names of the commissioner and of the witnesses, and the day of the month, the hour, and the place of taking the deposition, and must be subscribed by the attorney-general or counsel acting for the United States, or by the claimant or his attorney of record. When the claimant proposes to take a deposition, and the witness resides more than five hundred miles from Washington, or where the solicitor proposes to take the deposition, and the witness resides more than five hundred miles from the claimant or his counsel, one day's further notice shall be given for every additional hundred miles.

Provided, That if the claimant proposes to take a deposition in the city of Washington, three days' notice shall be sufficient. And a like notice by the attorney-general shall be sufficient when the claimant's attorney or his counsel resides in the city of Washington.

Prouided, also, That when the attorney-general, or his assistant, attends in person at the place for taking depositions, the claimant shall not be limited to the examination of the witnesses named in the notice. The same privilege shall extend to the defendants when the counsel for the claimant personally attends. Should the commissioner named in the notice be absent or decline to act, the depositions may be taken before any other person duly qualified to act in the premises.

XXII.—EVIDENCE (OFFICER).

Whenever it is charged in the petition that a contract has been made or other liability incurred through an officer or agent of the United States other than the head of an executive department, or the chief of a bureau, the claimant will be required to prove that such person was an officer or agent of the United States, by the certificate of the proper executive department, or by other legal and sufficient evidence.

XXIII.—EVIDENCE (DOCUMENTARY).

The records, papers or documents from an executive department which may be offered in evidence by a claimant must be those which have been transmitted to the court under a regular call for the same,

or otherwise they must be duly certified and authenticated pursuant to the acts of congress in such cases made and provided. And all such papers must be filed with the clerk before being printed.

XXIV.—EVIDENCE (*Duces Tecum*).

The court may, at the instance of the attorney-general or his assistant, grant a rule upon any claimant, his agent or attorney, to produce in court, or before any commissioner, any letters, papers, deeds, documents, or other writings in his possession, or subject to his control, in any way relating to said claim; and any claimant, his agent or attorney, who shall, after due notice, refuse to produce such letters, papers, deeds, documents or other writings, when in his power to do so, shall be subject to attachment for contempt of such order; and, persisting in such refusal, the court will direct the petition to be dismissed.

XXV.—EVIDENCE (WITNESSES).

If the witness, having been duly summoned and his fees tendered him, shall fail or refuse to appear and testify before any commissioner, a rule upon him shall be issued, on motion, to show cause why a fine should not be imposed upon him; and, if he fail to show sufficient cause, he shall be fined not exceeding one hundred dollars.

XXVI.—EVIDENCE (OATHS, &C.)

All witnesses shall be sworn or affirmed, before any questions are put to them, to tell the truth, the whole truth, and nothing but the truth, relative to the cause in which they are to testify; and each witness shall then state his name, his occupation, his age, if under twenty-one years, his place of residence for the past year; whether he has any interest, direct or indirect, in the claim which is the subject of inquiry; and whether, and in what degree, he is related to the claimant. At the conclusion of the deposition, the witness shall state whether he knows of any other matter relative to the claim in question; and if he do, he shall state it. The testimony of the witness when completed shall be read over to him by the commissioner, and be signed by him in the presence of the commissioner.

XXVII.—EVIDENCE (DEPOSITION).

The commissioner shall state, in the caption of the deposition, the cause in which it was taken, the place where taken, the name of the

witness, the party by whom called, the date, and the names of the parties and counsel present. And in the body of the deposition shall also be shown by whom the witness was examined and cross-examined.

XXVIII.—EVIDENCE (DEPOSITION).

In his return the commissioner shall show that the deposition was taken under competent authority; that the witness was properly sworn or affirmed; and that the answers were taken down by the commissioner, and read over to and signed by the witness.[1]

XXIX.—EVIDENCE (DEPOSITION).

The commissioner shall inclose the commission, depositions, and exhibits, if any, in a packet under his seal, and direct the same to the clerk at Washington, and deposit the packet in the post-office, or in an express office, or he may transmit the same by a messenger, whose name shall be by him indorsed upon the packet.

XXX.—EVIDENCE (COMMISSIONERS' FEES).

The commissioner shall not be obliged to certify and forward the depositions taken for either party until his fees for the taking of the same, and the postage, shall have been paid or tendered to him by the party at whose instance the commission issued, which fees shall be such as are now, or may hereafter be, prescribed by congress for the performance of similar duties by commissioners; and the fees of witnesses shall also be such as are now, or may hereafter be, prescribed by congress, and shall be paid by the party at whose instance the witnesses appear.

XXXI.—EVIDENCE (DEPOSITIONS).

Depositions shall be taken by oral examination, or they may, with consent of the parties or under an order of the court, or by order of a judge in vacation, be taken by written interrogatories.

[1] *Catharine Martin* v. *The United States.* (C. Cls. R., vol. III, p. 384.)

PER CURIAM: "A commissioner should so connect the sheets of a deposition that they could not be tampered with, and should return them sealed together, so that the unbroken seal would be conclusive proof in their favor. He should sign each sheet, and make the witness sign each sheet, and generally he should spare no pains to return to the court the exact evidence he has taken."

XXXII.—EVIDENCE (INTERROGATORIES).

Where it is proposed to take depositions upon written interrogatories, they shall be filed at least fifteen days before the issuing of the rule, and notice given of the same, to enable the opposite party to file cross-interrogatories.

XXXIII.—EVIDENCE (ORAL EXAMINATION).

Where a deposition is taken by oral examinations, the questions propounded to the witness shall not be written down in the deposition, but the testimony shall be taken in form of narrative, and, as nearly as can be, in the words of the witness. But where a question is specially objected to as illegal in form or substance, it shall be written down, and the objection noted by the commissioner. And any question asked upon cross-examination, or re-examination, and the answer thereto, shall be written down, if requested by the party interrogating the witness.

XXXIV.—EVIDENCE (INTERROGATORIES).

Where a deposition is taken upon written interrogatories filed, neither the solicitor for the United States, nor the claimant, his agent, attorney, or any other person, shall be present at the examination of such witness, which fact shall be certified by the commissioner taking the deposition. The commissioner shall, in such cases, propound the interrogatories, and cross-interrogatories, if any, to the witness in their order, and reduce his answer to writing, as nearly as practicable, in the precise words of the witness.

XXXV.—EVIDENCE (OBJECTIONS).

All objections to the notice, or the form and manner of taking or returning the testimony, shall be made in writing, and filed within thirty days after notice of the filing of any deposition, or they will be considered as waived; and no other objections to the deposions will be considered on the hearing of the cause than such as would be available in a court of common law if the witness were produced for examination in court.

XXXVI.—EVIDENCE (ORDER).

When a petition is filed the clerk shall enter, as of course, an order for taking testimony.

XXXVII.—BRIEFS, FILING.

The brief of the claimant shall be filed, or a copy delivered to the attorney-general, at least thirty days before the hearing of the cause.

XXXVIII.—BRIEFS (REQUISITES).

The brief shall contain: 1st. The style of the suit, embracing the names of all the parties, upon what founded, and how the cause was brought into court—whether by original petition, or was referred by one of the houses of congress. 2d. A succinct history of the case, embracing all the leading facts upon which the claim is founded. 3d. An epitome or condensed statement of the evidence adduced by the claimant, with a reference to the pages of the record upon which it is printed. 4th. The argument on the facts. 5th. The argument on matters of law.

Where authorities are referred to in the brief, the principle in support of which they are cited shall be stated, or the syllabus or a short extract shall be quoted.

The brief of the attorney-general shall conform, as nearly as the circumstances of the case will admit, to the form prescribed for the brief of the claimant, and shall, in the statement or history of the case, specify wherein his view of the facts differs from that contained in plaintiff's brief. The attorney-general's brief shall be filed within twenty days after receiving that of the claimant, unless the time be extended by the court upon cause shown.

On the argument of a motion or demurrer the briefs will be confined to the points of laws arising in the case, a synopsis of the argument, and a citation of the authorities.

XXXIX.—ITEMS WAIVED.

All items of claim not specified in the brief will be considered as waived.

XL.—PRINTING.

The testimony and briefs shall be printed, and furnished to the judges at least one day before the hearing of the case. In all cases where the amount claimed exceeds three thousand dollars each party shall be at the expense of his own printing. In all cases under that amount the printing shall be done, as heretofore, under the direction

of the clerk. The printed papers required by these rules shall be in small pica type, and in pages known to printers as royal octavo, and the style and number of the case shall be prefixed to all printed papers and to records of evidence. A proper index of the contents and page shall also be prefixed.

XLI.—NOTICES, TIME OF.

When notice is to be given by the attorney-general to a claimant or his attorney, residing in a territory, or in a state on the Pacific, of any thing done or to be done in any other state, or in the District of Columbia, double time shall be allowed; and also when notice is to be given to the attorney-general by any claimant or his attorney of any thing done or to be done in a territory, or in a state on the Pacific.

XLII.—NOTICES (CLERK).

Whenever a notice is required to be given by these rules by any other person than by the parties, it shall be the duty of the clerk to send such notice by mail as soon as practicable after the paper requiring such notice shall have been filed in his office.

XLIII.—NOTICES, PROOF OF.

The clerk's entry on the docket of notice sent shall be *prima facie* evidence of the service of the notice.

XLIV.—TIME.

In the computation of time mentioned in these rules the day of the service of any notice shall be excluded, and the day on which the party is required to appear, or on which an act is required to be done, shall be included.

XLV.—NON PROS. AND DISCONTINUANCE.

If the claimant neglect for six months after issue joined to proceed thereon, the defendants may give notice of a motion to dismiss the petition, returnable in not less than sixty days, or the first Monday of any month during the term.

In vacation, a claimant, with the approval of a judge of the court, may discontinue a suit pending by a writing filed of record, signed by himself or his attorney of record; and thereupon he shall be entitled to withdraw any papers filed therein, by filing a descriptive list

thereof with the clerk. But this rule shall not apply to any case in which fraud is charged, or a set-off pleaded by the United States.

XLVI.—MOTIONS.

All motions submitted to the court shall be in writing, with the style and number of the case to which the motion relates, and signed by the counsel submitting the same; and in no case shall the clerk be required to enter the motion unless this rule be complied with.

A judge will attend at the court room, at 10½ o'clock A. M., of every day, except Monday, to hear motions. All motions must be heard in the first instance before a single judge, except that in cases of importance or doubt he may direct the hearing to be before the court sitting in banc, and then they will go upon the law docket.

Applications for rules, orders relative to evidence, calls upon the executive departments, motions relating to the trial lists or day docket, must be thus submitted to the single judge in the first instance. After the court sitting in banc take up the day docket, the time of the court will be given exclusively to the trial of cases. A case not then ready will go off for the day, and a motion for postponement must be heard by a single judge on the following morning; or the case will go upon the law docket, and the motion be heard on the following Monday, as the court may direct.

XLVII.—EVIDENCE (WITNESS TO BE PRODUCED BEFORE COURT).

The court will reserve the right to remand any case to the docket and order a witness or a claimant to be produced before the court, or one of the judges thereof, and to be re-examined. But the claimant may be produced in the first instance, before the court or one of the judges at chambers, in vacation, and his testimony be thus taken, instead of before a commissioner, and such an examination will be a sufficient compliance with this rule.

XLVIII.—EVIDENCE (FOREIGN DEPOSITIONS).

Where it is proposed to take depositions in any foreign country, they must be taken upon written interrogatories in the manner provided by rule XXXII of the court; and if the moving party be the claimant at the time of filing his interrogatories, he must also file a full and detailed statement of the testimony expected to be given by the witnesses respectively; and thereupon a special commission will

be issued by the court (or by the chief justice, or one of the judges during vacation), to the consul or vice-consul of the United States at the place designated by the moving party. The taking of such depositions and the manner of proceeding by the commission and parties shall be subject to rules XVI, XXVIII, XXIX, XXX, XXXIV, and XXXV, of this court.

XLIX.—APPEALS.

All applications for an appeal to the supreme court of the United States from any judgment or decree of this court which shall hereafter be rendered or made shall be in writing, and be signed by the claimant or his attorney of record, if the appeal be on his behalf; or if taken by the United States, shall be signed by the attorney-general or his assistant.

L.—APPEAL IN VACATION.

Whenever such application for an appeal is made in vacation, the same shall be filed with the clerk of this court, and the date of filing the same shall be by him indorsed upon [it] and noted upon the record; and such filing shall be deemed the date of the application for an appeal.

Regulations prescribed by the Supreme Court of the United States, at December Term, 1865, *under which appeals may be taken from the Court of Claims to said Supreme Court.*

I.

In all cases hereafter decided in the court of claims in which, by the act of congress, such appeals are allowable, they shall be heard in the supreme court upon the following record, and none other:

1. A transcript of the pleadings in the case, of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments, and decrees as may be necessary to a proper review of the case.

2. A finding of the facts in the case by the said court of claims, and the conclusions of law on said facts on which the court founds its judgment or decree. The finding of the facts and the conclusion of law to be stated separately and certified to this court as part of the record.

The facts so found are to be the ultimate facts or propositions which the evidence shall establish, in the nature of a special verdict, and not the evidence on which these ultimate facts are founded. (See *Burr* v. *Des Moines Co.*, 1 Wallace, 99.)

II.

In all cases in which judgments or decrees have heretofore been rendered, when either party is by law entitled to an appeal, the party desiring it shall make application to the court of claims by petition for the allowance of such appeal. Said petition shall contain a distinct specification of the errors alleged to have been committed by said court in its rulings, judgment, or decree in the case. The court shall, if the specification of alleged error be correctly and accurately stated, certify the same, or may certify such alterations and modifications of the points decided and alleged for error as, in the judgment of said court, shall distinctly, fully, and fairly present the points decided by the court. This, with the transcript mentioned in Rule 1 (except the statement of facts and law therein mentioned), shall constitute the record on which those cases shall be heard in the supreme court.

III.

In all cases an order of allowance of appeal by the court of claims, or the chief justice thereof in vacation, is essential, and the limitation of time for granting such appeal shall cease to run from the time an application is made for the allowance of appeal.

V.

Rules of the Circuit Court of the United States for the Northern District of New York.

[Adopted in 1841.]

I.

Attorneys and counselors of the supreme court, and solicitors and counselors of the court of chancery of the state of New York, may, on motion in open court, or on presentation of their licenses to the clerk in vacation, be admitted of course to the same degrees in this court; and attorneys and solicitors of the said courts may, also, in like manner, be admitted as proctors; and counselors of the said courts may be admitted as advocates on the admiralty side of this court.

II.

All persons who had been admitted and were entitled to practice as attorneys, counselors, solicitors, proctors or advocates, in the district court of the United States for the northern district of New York, on the third day of March, eighteen hundred and thirty-seven, shall be entitled to practice in the like capacity in this court.

III.

Grand and petit jurors, to serve at the session of the court required by law to be held at Albany, shall be taken alternately from the counties of Albany and Rensselaer; and those to serve at the session required to be held at Canandaigua shall be taken from the county of Ontario; and they shall be drawn, summoned and returned in the manner prescribed by the rules of the district court for the northern district of New York, for the drawing, summoning and returning of jurors to serve therein.

[Rule IV and V obselete.]

VI.

In cases not provided for by the rules of this court, the rules of the district court for the northern district of New York, so far as the same are, in their nature, applicable, are to be considered as rules of this court.

VII.

In cases of opposition of the opinion between the judges, whether in civil or criminal cases, either party may, within four days after such opposition of opinion occurs, serve on the other party a statement in writing of the point or points of disagreement, and also of such facts and of so much of the pleadings in the case as are necessary to present the said point or points with clearness and precision; and, if no amendments are proposed thereto within two days, such statement shall be filed and shall be engrossed by the clerk, and certified under the seal of this court to the supreme court. When amendments are proposed, such statement and amendments shall be submitted to the court for settlement, like a case or bill of exceptions.

VIII.

All general rules of practice heretofore made are abrogated.

ADDITIONAL RULES.

IX.—1854.

Ordered, That the clerk of this court be, and he is hereby vested, with general power to name commissioners in commissions to be issued, to take testimony in like manner that the court or judge thereof can now do by the 67th equity rule, prescribed by the supreme court of the United States.[1]

X.—1858.

This rule abrogates a former rule constituting the first judges and clerks of counties, commissioners of the court.

[1] As the 67th rule expressly directs that "in all cases the commissioner or commissioners shall be named by the court or a judge thereof," this rule being in conflict with it seems unquestionably invalid.

XI.—1864.

This and the next following rule are transcripts of rules 95 and 96 of the district court, which see.

XII.

The cases and points, and all other papers furnished to the court in calendar causes other than causes for trial before a jury, except the papers sent up from the district courts on appeals in admiralty cases, shall be printed on white writing paper, with a margin on the outer edge of the leaf not less than two inches wide. The printed page, exclusive of any marginal note or reference, shall be seven inches long, and three and a half inches wide. The folios, numbering from the commencement to the end of the papers, shall be printed on the outer margin of the printed page. But the court, or either judge thereof, may, before the papers are printed, and at least ten days before the time for which the cause is noticed, or is to be noticed, for hearing, by written order, dispense with the printing of papers as aforesaid, a copy of which order shall be served on the attorneys of the parties to the suit, interested in such hearing, at least ten days before the day appointed for such hearing.

XIII.

No cause shall be noticed for trial before a jury, or for hearing, upon pleadings and proofs, or upon a case or bill of exceptions, at the adjourned term in January, in the city of Albany, without leave of the court therefor, granted at the previous stated term. But all causes may be noticed for trial or hearing at the adjourned circuit to be held on the third Tuesday of March, in the city of Utica, the same as at a stated term.

XIV.—1868.

Rule 31, of the district court, having been so amended as to permit the defendant or claimant, as well as the adverse party, to any issue of fact to notice it for trial, and to bring on the trial in pursuance of such notice, this rule adopts the amendment. See rule 31, as amended.

[The following rules, relating, as they do, exclusively to one branch of jurisdiction, were numbered as a distinct set from one onward, and are accordingly so numbered here.]

Rules regulating Appeals from the District Court.—June Term, 1848.

I.

The transcript, to be sent to this court, on appeal thereto from a sentence or decree of the district court, may be certified by the clerk of the latter court, under his hand and the seal of the court.

II.

Eight days' notice of hearing on appeal shall in all cases be given by the service thereof on the adverse party or on his proctor.

III.

When an appeal from a decree of the district court is interposed twenty days before the next stated session of this court, it may be noticed for hearing at such session by either party.

There was formerly a rule constituting the first judges and clerks of counties, commissioners of the court, which was abrogated in 1858.

IV.

When an appeal from a decree of the district court is interposed less than twenty days before the next stated session of this court, the appellee may, at his option, notice the cause for hearing at such session, on the first day or other day thereof; or have the cause continued until the next stated session.

V.

Transcripts of the depositions taken in any cause in the district court, according to law, whether *de bene esse* under the acts of congress, or on commission, and read at the hearing of the cause in that court, may be transmitted to the court on appeal, and read by either party as evidence at the hearing of the cause in this court.

VI.

A copy of the notes taken by the judge, or, under his direction, by the clerk of the district court, of the evidences of witnesses examined orally therein, shall be certified and transmitted to this court on appeal, along with the transcript of the record and other proceedings in the cause, and shall be admitted to prove the evidence given by such witnesses; but nothing herein contained shall be construed to abridge the right of the parties to re-examine such witnesses in this court, if they see fit to do so.

VI.

Rules of the District Court of the United States in and for the Northern District of New York.

I.

The clerk of this court shall reside and keep his office at Utica, until otherwise ordered by the court.[1]

II.

Proctors of any circuit or district court of the United States, attorneys of the supreme court, and solicitors of the court of chancery of the state of New York, may, on motion in open court, or on presentation of their licenses to the clerk in vacation, be admitted attorneys and proctors of this court; and counselors and advocates of any circuit or district court, and counselors of the said supreme court and court of chancery may, in like manner, be admitted counselors and advocates of this court, of course, on taking the oath or affirmation prescribed by the third rule of this court.

III.

All persons admitted to practice in this court shall, in open court, take either an oath or affirmation of the tenor following, viz.: I do solemnly swear (or affirm, as the case may be) that I will demean myself as attorney (or counselor, solicitor, proctor or advocate, as the case may be), of this court, uprightly and according to law, and that I will support the constitution of the United States.

IV.

Every attorney, proctor and solicitor of this court, who does not reside in Utica,[1] shall have an agent residing there. But if such attorney, proctor or solicitor has an agent in the supreme court of the state

[1] By an order made at the January term, 1853, the clerk is required to keep his office at the city of Buffalo, where it is now kept.

residing there, he shall be considered the agent of such attorney, proctor or solicitor in this court. The appointment of agents in this court shall be in writing, signed by the principal, and filed in the office of the clerk, who shall keep a catalogue of the appointments filed, with the names of the attorneys alphabetically arranged; and no person shall be agent unless he is an attorney of this court or of the supreme court of the state.[1]

V.

When the attorneys, proctors or solicitors of the adverse parties do not reside within forty miles of each other, service may be made on the agent.

VI.

If the attorney, proctor or solicitor, not resident in Utica, has no agent there, either in the supreme court of the state or in this court, service of all papers and notices may be made as to him, by affixing the same in a conspicuous place in the office of the clerk of this court.[1]

VII.

When the service is on the agent, or is made by affixing the notice or paper in the clerk's office, it must be double the time of service required where the service is on the attorney, proctor or solicitor.

VIII.

All notices shall be in writing, and shall be served on the attorney, proctor or solicitor in the cause, or his agent, or by affixing in the clerk's office, and not on the party; but where a party, who is also an attorney, proctor or solicitor of this court, shall prosecute or defend in person, all notices and other papers shall be served on him in like manner, except where the proceeding is by bill, in which case the bill shall be personally served; and where the object is to bring a party into contempt for disobeying any rule or order of court, the service shall be personal, unless otherwise ordered by the court.

IX.

Notices and papers may be served on an attorney, solicitor or proctor, during his absence from his office, by leaving the same with

[1] Since the removal of the clerk's office to Buffalo, this rule, it is presumed, is held applicable to that city.

his clerk in such office, or with a person having charge thereof; or, where no person is to be found in the office, by leaving the same between the hours of six in the morning and nine in the evening, in some suitable and conspicuous place in such office; or, if the office be not open so as to admit of service therein, then by leaving the same at the residence of the attorney, solicitor or proctor, with some person of suitable age and discretion.

X.

Where a party, other than an attorney, solicitor or proctor of this court, prosecutes or defends in person, the service of notices and papers may be on such party personally, or by putting the same into the post-office, directed to him or her at his place of residence. And no service of notices or papers in the ordinary proceedings in a cause, shall be necessary to be made on a defendant, who has not appeared therein, except where the defendant is returned imprisoned for want of bail, in which case a copy of the declaration and notice of the rule to plead shall be delivered to him, or to the sheriff or jailer, in whose custody he may be; and where an exception is entered to bail, and no notice of retainer of attorney to defend is given, notice of such exception shall be delivered to the sheriff or one of his deputies.

XI.

Actions brought for the recovery of any debt, or for damages only, may be commenced, either —

1. By the issuing and service of a *capias ad respondendum* against persons not privileged from arrest;

2. By summons against corporations; or,

3. By filing in the office of the clerk of this court a declaration; entering a rule in the book of common rules kept by such clerk, requiring the defendant to plead to such declaration, according to the practice of the court; and serving a copy of such declaration and notice of such rule personally on the defendant; which last mode of commencing an action may be adopted against any person, whether privileged from arrest or not.

XII.

Upon due proof of the service of a declaration personally upon all the defendants in the cause, their appearance shall be entered by the

clerk in the same manner as if they had indorsed their appearance on a capias; and their default may be entered for not pleading, and the same proceedings may be had against them, in all respects, as if they had appeared.

XIII.

All process, if issued in term time, may be tested on any day in that term, and made returnable on any day in the same term, or in the next term; and if issued in vacation, may be tested on any day in the preceding term, and be made returnable on any day in the next term; and the term shall include every day from the commencement thereof until the final adjournment of the court, notwithstanding intermediate adjournments. And in any case any stated term shall not be held, process may be tested on the day fixed by law for the commencement of such term.

XIV.

Upon the service of a *capias ad respondendum*, which does not require the defendant to be held to bail, he may indorse his appearance on such writ, or, if he refuse to do so, the officer may return the writ *personally served;* and, in either case, it shall be the duty of the clerk, upon the return of the writ, to enter the appearance of the defendant upon whom the same was served; and proceedings may thereupon be had against such defendant, as if he had actually appeared.

XV.

When the capias has been served on the real party intended, the plaintiff, before or after its return, may amend, of course, any error in the name of the party inserted in the process, giving the defendant notice of such amendment.

XVI.

The court will not entertain a motion to set aside the process or proceedings in a cause on the ground of the misnomer of the party arrested; but will leave him to his remedy by a plea in abatement.

XVII.

No person shall be held to bail on a *capias ad respondendum*, unless the true cause of action be particularly expressed therein.

XVIII.

The defendant may be held to bail in the cases and in the manner, and subject to the exceptions prescribed by the laws of this state; and bail may be put in, and the bail piece filed before the return day of the writ, for the purpose of surrendering the principal.

XIX.

In suits brought against persons accountable for public money, for the recovery thereof, in which the defendant is held to bail, it shall be the duty of the officer making the arrest, to exact a bail bond, conditioned for the appearance of the defendant on the return day of the writ, and unless it shall be made to appear that the plaintiff is not entitled by law to judgment at the return term, special bail shall be put in, and the bail, if excepted to, shall justify within two days after the return day of the writ, and before the adjournment of the court at the return term; otherwise the plaintiff may sue out process upon the bail bond, returnable on any day in the ensuing vacation, and upon the return of such process, served, may proceed to judgment and execution, as of the preceeding term, unless the defendant shall interpose a valid plea, verified by affidavit; and judgement may also be entered in the principal suit in the same manner as if special bail had been put in and perfected. But if, within the time herein allowed for putting in and perfecting special bail, the defendant shall, by making the oath or affirmation prescribed by law, entitle himself to a continuance until the next term, he shall have the same time allowed as is allowed in other cases after the return day of the writ, to put in and perfect such bail.

XX.

In suits upon bonds for the payment of duties, and in suits brought against persons accountable for public money, for the recovery thereof, the declaration may be filed on the day upon which the writ is returnable and returned, and the district attorney may thereupon move in open court for judgment, and, no plea being interposed, may have final judgment entered *instanter*.

XXI.

When, in suits upon bonds for the payment of duties, and in suits brought against persons accountable for public money, for the recovery thereof, the defendant interposes a plea, the district attorney may have

the cause placed on the calendar, at the same term, without other notice; and may bring the same to trial when called, unless the court shall continue the cause over at the instance of the defendant.

XXII.

In suits in which the United States are plaintiffs, or in which they are interested though not plaintiffs, if the bail to the arrest become special bail, the assignment of the bail bond and the acceptance thereof by the plaintiff's attorney, shall not preclude him from excepting to the sufficiency of such special bail; and the marshal shall still be responsible for good bail, notwithstanding such assignment and acceptance of the bail bond.

XXIII.

No plea shall be received in any suit instituted in this court upon a bond executed to the United States for the payment of duties, or, in any suit instituted upon a bail bond taken in consequence of such suit, unless such plea shall be accompanied by an affidavit of the truth of the matters in the plea contained.

In seizure cases, the defendant or claimant, instead of specially traversing any or all of the allegations of the information, may plead in substance "that the goods, articles and property, in the said information mentioned, did not, nor did any, or either of them, or any part thereof, become forfeited in manner and form, as is in the said information in that behalf alleged," or may otherwise directly and expressly deny, in similar general terms, the forfeiture alleged, which shall be deemed a good plea of the general issue, to such information, and shall put in issue all the allegations thereof.

When, in any such seizure case, the defendant or claimant shall, in his plea, make any affirmative allegation or allegations of matters of fact, by way of defense or answer to the information therein, the same shall be considered as denied by the district attorney and the United States, and no replication, either general or special, shall be required or allowed. Within twenty days after such plea shall be filed and served the United States may amend the information, as of course, and may add new allegations for the purpose of avoiding, explaining or adding to the new matter alleged in such plea, and the defendant or claimant shall have twenty days after the filing and service of such amended information to file and serve his plea to the same.

XXIV.

The time for putting in special bail, and giving notice thereof, shall be twenty days from the day on which the process shall be returnable; the time for exception and notice thereof, twenty days from the day of notice of bail; the time of justification, eight days from the day of notice of exception; and notice of justification shall be given four days before the day of justification. Bail may justify in open court, or before the judge at chambers, or before the clerk, with the right of appeal in the last case to the court, or judge at chambers.

XXV.

The following shall be the terms on which proceedings shall be stayed in suits on bail bonds:

1. Putting in and perfecting bail above, and paying the costs of the suit on the bail bond, and of the motion for relief.

2. Pleading issuably, and consenting to place the cause on the calendar, and to proceed to trial at the same term; or in case of refusal so to plead and consent, the entry of a judgment on the bail bond to stand as security.

XXVI.

Common rules (or rules of course, without special cause shown), and rules by consent may be entered in the proper book in the clerk's office in term or in vacation; the day of entering the same being noted therein; and the party may enter such rule as he may conceive himself entitled to, of course, but at his peril,

XXVII.

The defendant, having perfected his appearance, may at any time thereafter take a rule against the plaintiff to declare in twenty days after service of notice of the rule, or that judgment of discontinuance be entered against him.

XXVIII.

The rule to plead, to answer, or to join in demurrer, shall be a rule of twenty days; but the plaintiff shall not be held to accept a plea in abatement after four days from the day of service of the notice of the rule to plead, and a copy of the declaration; and the rule to join the demurrer to such plea shall be a rule of four days only.

XXIX.

When there shall have been judgment of *respondeas ouster*, on a demurrer to a plea in abatement, and the plaintiff shall have served the defendant with a notice of such judgment, the defendant shall plead within four days from the day of service of such notice, or his default in not pleading may be entered.

XXX.

The party in whose favor a default has been entered may, on any day afterwards in term, have a rule entered for such judgment as is to be rendered by law by reason of such result. In all actions sounding in damages, after judgment for the plaintiff by default or on demurrer, the damages shall be assessed on a writ of inquiry, or by the clerk, as the case may be.

XXXI.

Fourteen days' notice of trial, and six days' notice of countermand, shall be given in all cases. A party defendant or claimant, as well as the opposite party, may notice any issue of fact for trial, and bring on the trial thereof in pursuance of such notice. The like notice of assessment and of inquiry (where such notices are necessary) shall also be given, and may be given at any time after default entered, and for any day in term; but no notice of assessment or of inquiry shall be required, except when the defendant shall have appeared by attorney, or shall have given notice of his intention to appear and defend the action.

XXXII.

Rules for final judgment, unless cause to the contrary be shown, shall become absolute upon the expiration of four days in term, after the entry thereof, or, if there shall not be so many days remaining in term, then upon the expiration of the term.

XXXIII.

Where notice of retainer shall be received before the defendant's default in not pleading has been entered, a copy of the declaration and notice of the rule to plead (unless they shall have been served on the defendant personally) shall be served on the attorney retained, and the rule to plead shall be from the time of such service, and the service of all other pleadings, papers and notices, to be made after notice of retainer, shall be on the attorney retained.

XXXIV.

If the plaintiff shall make default in declaring, then the defendant, or if either party shall make default in answering, then the opposite party, may have the default entered in the book of common rules; but where the previous service of a notice of a rule, copy of a pleading, or of any other matter, shall be requisite, the default shall not be entered unless an affidavit of such service shall be filed; neither shall it be entered until special bail, if required, is put in, and, if excepted to, has justified.

XXXV.

The defendant's default being duly entered, the plaintiff shall not be bound afterwards to accept a plea, unless the defendant, as soon as he shall know that the default has been entered, shall file an affidavit of merits, and serve a copy, pay or tender the amount of the costs of default, plead issuably, and consent to go to trial at the next term.

XXXVI.

The plaintiff may, at any time before the default for not replying shall be entered, if the plea shall be a special plea, or a plea in abatement, or within twenty days after service of a copy of the plea, if it shall be the general issue, amend his declaration. After plea, either party may, before default for not answering shall be entered, amend the pleading to be answered; and, where there shall be a demurrer to a declaration or other pleading, such pleading may be amended at any time before the default for not joining in demurrer shall be entered. The respective parties may amend under this rule of course, and without costs, but shall not be entitled so to amend more than once.

This rule shall be construed to allow amendments to be made by adding new counts or pleas, but not so as to allow of any amendment to a plea in abatement.

XXXVII.

In order to amend, a rule for that purpose shall be entered in the clerk's office, which, however, need not specify the amendments; but a copy of the amended pleading shall be filed; and the rule to plead or answer, if notice thereof shall have been given, shall be from the day of the service of a copy of the pleading as amended and on file.

XXXVIII.

If the defendant shall plead the general issue, the cause shall be at issue, unless the plaintiff shall, within twenty days thereafter, amend

his declaration; and if either party shall, in pleading in any degree after the plea, tender an issue to the country, and if the opposite party shall not demur to the pleading within twenty days after service of a copy thereof, the cause shall in each of these cases be deemed at issue.

XXXIX.

Applications made by a party in pursuance of the fifteenth section of the judicial act, to require the opposite party to produce books and writings, must be made upon petition, verified by affidavit, setting forth plainly the facts and circumstances upon which the application is founded; and in such petition, or in the affidavit thereunto subjoined, it must be stated that the books or writings, the production whereof is sought, are not in the possession nor under the control of the petitioner, and that he is advised by his counsel, and verily believes, that the production of the books or writings mentioned in such petition is necessary to enable him safely to proceed in the prosecution or defense (as the case may be) of his suit.

XL.

The petition may be presented to the judge of this court in vacation, as well as to the court in term; and the order to be made thereon shall be that the party against whom the application is made shall produce the books or writings mentioned in the petition, or show cause, on the day and at the place to be therein specified, why the prayer of such petition should not be granted.

XLI.

Such order shall also specify the manner in which such books or writings shall be produced, and may require the party either to produce and deposit the same with the clerk of this court, or to deliver to the petitioner or his attorney copies thereof, verified by oath.

XLII.

A copy of such petition, together with a copy of the order made thereon, shall be served upon the attorney of the party against whom the order is directed a reasonable time, to be prescribed in the order, before the day therein prescribed for showing cause.

XLIII.

Commissions to take the examination of witnesses, resident without the district, may issue by order of the court in term, or of the judge

thereof in vacation, in the manner, and subject to the regulations, *so far as the same are applicable, mutatis mutandis,* prescribed by the Revised Statutes of this state.

XLIV.

Such commissions may also be issued by consent. But the agreement for that purpose shall be in writing, and filed in the clerk's office; and the clerk shall, in such case, make an indorsement upon the commission, under his signature, in the following form: *Allowed by consent of parties.*

XLV.

When a cause is noticed for trial, a notice thereof, with a note of the issue and of the pleadings, and the attorneys' names, shall be delivered to the clerk on or before the Thursday preceding term; the clerk shall, as early as the following day, have the calendar of causes to be tried made up, arranging them according to the dates of their issues; and no cause shall be put upon the calendar without the special order of the court, unless the note of issue shall be furnished, as is hereby required.

XLVI.

For the purpose of summoning and returning jurors to serve upon trials of issues in this court at the terms thereof appointed by law, or which may be appointed by the special order of the judge thereof, to be held in the village of Utica, the clerk of this court, together with the marshal, or his deputy, resident in Utica, shall, at least fourteen days previous to every such term, repair to the office of the clerk of the county of Oneida, where the clerk of this court, in presence and with the assistance of the said clerk of the county of Oneida, and of the marshal or his said deputy, shall proceed to draw out of the box kept in the said office, containing the names of the jurors of the said county, thirty-six slips of paper; and the clerk of this court shall immediately thereafter make out and certify, under his hand, a list of the jurors so drawn as aforesaid, with their respective additions and places of abode, and deliver the same to the said marshal, or his said deputy, who shall summon the persons named in such list to serve as jurors.

And for the purpose of summoning and returning jurors to serve upon the trial of issues in this court, at the terms thereof appointed

by law, or which may be appointed by the special order of the judge thereof, to be held in the city of Albany, the marshal, or his deputy resident in the said city, shall, at least fourteen days previous to every such term, repair, alternately, from term to term, to the office of the clerk of the city and county of Albany, and to the office of the clerk of the county of Rensselaer, where, in the presence and with the assistance of such clerk, the marshal or his said deputy shall proceed to draw out of the box kept in the said office, containing the names of the jurors of such county, thirty-six slips of paper, and shall immediately thereafter make out a list of the jurors so drawn as aforesaid, with their respective additions and places of abode, and shall request such clerk to certify the same, under his hand, and, in case of his refusal so to do, shall certify the same under his own hand, and thereupon proceed to summon the persons named in such list to serve as jurors; and, in like manner, shall jurors, to serve at the terms of the court appointed by law, or by special order, to be held at other places, be drawn, summoned and returned by the marshal or one of his deputies; and, in these cases, the jurors shall be taken from the counties respectively in which the term of the court at which they are to serve is to be held. At least six days' notice of the drawing of every jury shall be given by the clerk of this court, by affixing such notice upon the outer door of the house where the court for which such jury is to be drawn is to be held.

The jurors to serve at any court shall be summoned at least six days previous to the sitting thereof, by giving personal notice to each person, or by leaving a written notice at his place of residence, with some person of proper age. The marshal or his deputy, by whom the jurors are summoned, shall return the list of jurors to the court at the opening thereof, specifying those who were summoned, and the manner in which each person was notified.

It shall be the duty of the marshal, or of his deputy, having possession of the same, to furnish any person applying therefor, and paying therefor a fee of twenty-five cents, a copy of the list of jurors drawn to attend any court.[1]

[1] Since the date of this rule, the clerk having, by successive orders, been required to remove his office, first to the city of Auburn, and next to the city of Buffalo, the provisions contained in the first paragraph of the rule have been modified accordingly. At present, therefore, it is at the clerk's office of Erie county that the presence of the clerk is required when jurors are to be drawn.

XLVII.

Whenever it shall be intended to move to set aside a nonsuit or verdict, except for irregularity, a case shall be prepared by the party intending to make the motion, and a copy thereof shall be served within four days after the trial on the opposite party, who may, within four days thereafter, prepare amendments thereto, and serve a copy on the party who prepared the case, who may then, within four days thereafter, serve the opposite party with notice to appear, within a convenient time, before the judge, to have the case and amendments settled. The judge shall thereupon correct and settle the case, as he shall deem to consist with the truth of the facts. The time for settling the case must be specified in the notice, and shall be not less than four, nor more than twenty days, after service of such notice.

XLVIII.

If the party omit to make a case within the time above limited, he shall be deemed to have waived his right thereto; and when a case is made and the parties shall omit, within the several times above limited, the one party to propose amendments, and the other to notify an appearance before the judge, they shall respectively be deemed, the former to have agreed to the case as prepared, and the latter to have agreed to the amendments as proposed. If judgment has been rendered upon a verdict, the party intending to move for a new trial shall give four days' notice in writing to the opposite party of any motion to stay execution thereon, and also of the petition intended to be filed pursuant to the 18th section of the act of September 24th, 1789, unless a shorter time be allowed by the court or the judges.

XLIX.

General verdicts may be taken subject to the opinion of the court on a case to be made by the party in whose favor the verdict is taken, containing all the evidence given at the trial, the case to be prepared and settled in the manner prescribed in the foregoing rules.

L.

In cases of exceptions taken, demurrer to evidence or special verdict, the party shall not be required to prepare at the trial his bill of exceptions, demurrer, statement of evidence or special case, or to put in form the special verdict, but shall merely reduce such exceptions

to writing, or make a minute to the demurrer to the evidence, and of the facts found specially by the jury, as the case may happen to be, and deliver it to the judge, or the judge will himself note the points, as he may direct; and the bill, demurrer or special verdict, shall afterwards be drawn up, amended and settled within such times and under the same regulations as are made with respect to cases.

LI.

A bill of exceptions may, before judgment, be used instead of a case on motion for a new trial, and notice of such motion, together with an order to stay proceedings, and a copy of such bill of exceptions shall operate to stay all further proceedings until the decision of the court: *Provided*, that proceedings shall not be longer stayed than if a case had been made.

LII.

All questions for argument and all motions shall be brought before the court on motion for that purpose, and, if the opposite party shall not appear to oppose, the party making the motion shall be entitled to the rule or judgment moved for, on proof of due service of the notice and papers required to be served by him.

LIII.

Enumerated motions are motions in arrest of judgment; to bring on to be argued questions arising on special verdict, case reserved at the trial, case agreed between the parties without trial; demurrer to evidence or pleadings; and all motions to set aside nonsuit, verdict or inquisition, for other cause than irregularity only.

LIV.

Enumerated motions shall be noticed for the first day in term, by a notice of at least eight days, and may be noticed and brought on by either party. When such notice is given by the party whose duty it is to furnish the case, demurrer-books, or other papers on which the motion is founded, such notice shall be accompanied with copies of such papers.

LV.

Enumerated motions set down for argument shall be placed on the calendar after the causes noticed for trial, and the same rules relative

to the furnishing of the clerk with notes of issue, &c., and to the making up of the calendar in cases of issues of fact, shall be applicable to them also. The date of the issue shall be, in case of motion in arrest of judgment, of special verdict, case reserved at the trial, motion to set aside verdict or nonsuit, bill of exceptions, or demurrer to evidence, the day on which the trial took place; and in case of demurrer to pleadings, the day on which the joinder in demurrer was received.

LVI.

The party bringing on the argument shall, at the opening thereof, furnish the judge with a copy of the case, demurrer to evidence, special verdict, or, where the motion is for a new trial upon newly discovered evidence, with copies of the affidavits and other papers, if any, on which the motion is founded or opposed; or if the motion be in arrest of judgment, with copies of the pleadings, or so much thereof as may be necessary. A note of the points or questions intended to be raised by each of the respective parties shall also, at the same time, be furnished to the judge and to the opposite party.

LVII.

Whenever an order to stay proceedings shall be granted to enable the party to make a special motion, service of such order, with copies of the affidavits upon which it is granted and notice of the motion, shall operate as a stay of proceedings until the further order of the court. But if the party shall neglect to bring on the motion to be heard during the term, according to his notice, the proceedings shall not be longer stayed, and he shall be liable to pay the costs of attending to resist the motion.

LVIII.

No private agreement or consent between the parties or their attorneys in respect to the proceedings in a cause shall be binding, unless the same shall be reduced to the form of a rule by consent, and entered accordingly in the book of common rules, or unless the evidence thereof shall be in writing, subscribed by the party, or his attorney, against whom the same shall be alleged.

LIX.

Non-enumerated motions shall be noticed for the first day of term, by a notice of at least eight days, accompanied with copies of the

affidavits and papers on which the same shall be made; and notice shall not be for a later day in term, unless sufficient cause be shown in the affidavits served for not giving notice for the first day.

LX.

When a party shall, before motion, offer to comply fully with the terms of the order which it is the practice of the court upon motion in like cases to make, and shall also pay the costs, if any, on the same being thereupon taxed and demanded, he shall be entitled to costs from the opposite party, if the motion shall be afterwards made.

LXI.

In all cases where a motion shall be granted on payment of costs, or on the performance of any condition, or where the order shall require such payment or performance, the party whose duty it shall be to comply therewith, shall have twenty days for that purpose, unless otherwise directed in the order. And where, by the terms of any order, an act is directed to be done *instanter*, it shall be understood to require such act to be performed within twenty-four hours.

LXII.

Whenever the plaintiff shall have neglected to bring his cause to trial, according to the practice of the court, he may, if he have not before stipulated, tender a stipulation and offer to pay the costs to which the defendant is entitled, up to that time; and if the defendant shall afterwards move for judgment as in case of nonsuit, he shall pay costs to the plaintiff, except where the plaintiff shall, after demand, have refused to pay the costs as taxed.

LXIII.

When on motion for judgment, as in case for non-suit, the plaintiff shall be permitted to stipulate, he shall, within twenty days thereafter, tender a stipulation to the defendant, and shall pay the costs ordered to be paid thereon; and if the stipulation be not tendered, and the costs paid within that time, the defendant on filing an affidavit of such omission of tender and non-payment, may, after the expiration of twenty days, enter judgment as in case of non-suit as of the preceding term.

LXIV.

The provisions contained in Title 2d of Chapter 10th of Part 3d of the Revised Statutes of this state, relative to security for costs, shall be taken and held to be rules of this court.

LXV.

To effect a surrender of bail, the bail or principal shall produce to the judge two certified copies of the bail piece, on one of which the judge will endorse a *committitur*, and on the other an order that the plaintiff show cause before him, on such day as he may designate, why the bail should not be exonerated.

LXVI.

On due proof of the service of such order on the plaintiff or his attorney, and on proof by the certificate of the marshal or his deputy, to whose custody the defendant has been committed in virtue of such *committitur*, acknowledged before the judge by such officer, or proved by the oath of a subscribing witness thereto, if no sufficient cause to the contrary be shown, the judge will indorse an order on the second certified copy of the bail piece, that an *exoneretur* be entered. If the plaintiff, or his attorney, upon whom the rule to show cause is served, resides at the time of service more than one hundred miles from the place at which cause is to be shown, such rule shall be served eight days before the time specified therein for showing cause; in other cases four days shall be sufficient.

LXVII.

Such certified copy shall be filed, and the clerk shall indorse thereon an *exoneretur*, and shall also enter in the register of bail the discharge of the bail.

LXVIII.

Whenever a bail bond shall be taken on the arrest of a defendant, the bail therein may surrender their principal, or he may surrender himself in exoneration of the bail, in the same manner, and with the like effect, as in the case of special bail, except that true copies of the bail bond, proved to be such by the affidavit of the marshal or his deputy, or of a subscribing witness, shall be used instead of certified copies of the bail piece.

LXIX.

In case a defendant who has procured special bail in a suit in this court, shall be afterwards arrested in any other district, and committed to a jail, the use whereof has been ceded to the United States for the custody of prisoners, he may be surrendered at the request of his bail, and in pursuance of the act of congress in such case made and provided, in the manner provided in the foregoing rules for ordinary cases.

LXX.

All moneys paid into court which any collector of customs is entitled by law to receive, shall, after deducting the costs, be paid over to him by the clerk, upon an order to be entered, *of course*, for that purpose.

LXXI.

All moneys paid into court which are required by law to be deposited in a branch bank of the United States, shall forthwith be deposited by the clerk in the Oneida Bank, in the city of Utica, to the credit of the court.[1]

LXXII.

All checks for money so deposited, to be drawn out of the bank, shall be signed by the clerk, as clerk, and such check shall be written on the same paper which contains the order of the judge for that purpose.

LXXIII.

A book shall be kept by the clerk, in which he shall enter a full and particular account, under the title of each cause depending in the court, of all moneys paid into court in such cause, and of the payment thereof; and such book shall at all times be open to the inspection and examination of the judge of this court, the attorney of the United States, and the marshal of the district; and any particular account may also, upon request, be inspected by any person interested therein.

LXXIV.

All process issued by this court shall be of like form and effect with process issued in like cases by the supreme court of this state, unless otherwise directed by rule.

[1] By a subsequent order the Hollister Bank in the city of Buffalo was substituted for that mentioned in the above rule.

LXXV.

The marshal, his deputies, and all other persons concerned in the service of any process of this court, are respectively prohibited from becoming bail in any suit depending in this court, unless for the purpose of surrendering the defendant, in which case the surrender shall be made within fourteen days after special bail shall have been put in.

LXXVI.

The bond required by law to be executed by the clerk of this court for the faithful performance of his duties as such, shall be recorded in his office, and immediately thereafter deposited in the Branch Bank of the United States in the village of Utica, subject to be delivered, upon the order of the judge, to such person as shall be designated in such order; and the marshal's bond shall be recorded and filed in the clerk's office.

LXXVII.

In causes wherein the marshal of the district or his deputy is a party in interest, all process shall be directed and delivered to the sheriff or under sheriff of the county of Oneida, for the time being, who is hereby appointed, *ex officio*, in pursuance of the act of congress in such case made and provided, to serve and execute such process.

LXXVIII.

The clerk of this court, the first judges of each of the counties in this district, the recorder of the city of Albany, and the clerks of each of the said counties, except of the county of Oneida, for the time being shall, *ex officio*, be commissioners to take affidavits and acknowledgements of bail in civil causes depending in this court. The officers aforesaid are hereby appointed such commissioners, pursuant to the provisions of the acts of congress authorizing the appointment thereof, and all orders heretofore made for the appointment of such commissioners shall be annulled after the first day of June next.

LXXIX.

The clerk may tax and certify bills of costs, and sign judgment records.

LXXX.

On an indictment found by the grand jury, the district attorney may forthwith sue out a *capias* under the seal of the court, for the arrest of the person indicted.

LXXXI.

Where default is made by any party or witness, bound by recognizance in any criminal proceeding, the clerk shall immediately issue a *scire facias* thereon.

LXXXII.

Where a fine is imposed by the court on any person for any cause, and the party is not thereupon committed, and such fine is not discharged previously to the close of the term, the clerk shall issue to the marshal a warrant of execution, commanding him to levy and make such fine of the goods and chattels, or, in default thereof, of the lands and tenements of the party.

LXXXIII.

In all cases not provided for by the rules of this court, or by law, the practice of the supreme court of this state, as prescribed by the Revised Statutes of this state, and by the rules of the said court, shall regulate the practice of this court, so far as the same may be applicable.

LXXXIV.

Persons summoned to serve as jurors in this court will be discharged or excused from serving therein, whenever by the law of this state, it would be the duty of the courts of the state to discharge or excuse such persons from serving therein.[1]

LXXXV.

Any issue of fact, which, according to the act of congress of July 7, 1838, entitled "An act to increase and regulate the terms of the circuit and district courts for the northern district of the state of New York," would be triable at a term of the court required by law to be held in any one of the divisions of the said district into which

[1] This rule is superseded by the act of congress, July 20, 1840, chap. 40, prescribing a rule of practice exactly of the same import for all the courts of the United States.

it is divided by the said act, may be tried at a term of the court required to be held in any other of the said divisions of the said district, provided the adverse parties or their attorneys, by a stipulation in writing, signed by them and filed in the clerk's office, shall enter into an agreement to such effect.

DELIVERY OF PROPERTY UNDER SEIZURE, PENDENTE LITE.

LXXXVI.

1. Applications for the delivery to the claimant of property, seized as forfeited under any law of the United States, may be made at any time after the service of the monition and warrant of arrest.

2. At least four days' notice of the application shall be given to the district attorney and to the collector of the collection district in which the seizure was made, accompanied by the service on each of them of a copy of the petition for delivery; unless the application be made in open court, when the district attorney and the collector are present; in which case no previous notice shall be necessary.

3. Unless a claim duly verified shall have already been interposed by the applicant, he shall show, at the time of his application, by his own oath or other evidence, that he is lawfully entitled to appear as claimant in the case.

4. The appraisers shall be sworn faithfully and fairly to appraise the property in question, and make a true report of the value thereof, according to the best of their understanding, without unnecessary delay.

5. Reasonable notice of the time and place appointed by the appraisers to make the appraisement shall be given to the district attorney, the collector and the claimant.

6. For the purpose of ascertaining the value of the property to be appraised, the appraisers may examine such persons on oath, and receive such affidavits, taken before one of the commissioners of this court (who are hereby authorized to take such affidavits), as they may think proper.

7. On the return of the appraisement to the court, or to the judge in vacation, accompanied by a certificate from the collector and naval officer (if there be one), that the duties on the property seized, if any be chargeable thereon, have been paid; and on satisfactory evidence that the expenses of the appraisement have been paid by the claimant;

and, on the execution by the claimant of a bond, in conformity with the statutes of the United States in such case made and provided, before the court, the judge, or the clerk, an order will be granted for the delivery of the property to the claimant.

8. The appraisers shall severally be entitled to be paid, for their services in making an appraisement, three dollars a day for each day necessarily spent in the performance of such services.

9. But whenever, in any case, the value of the property seized shall be agreed upon between the collector and district attorney in behalf of the United States and the claimant, and a certificate in writing, expressive of such agreement shall be signed by them, and filed in the clerk's office, such valuation (in conformity with the practice of the court heretofore) shall have the same validity and effect as if it had been made and reported by appraisers duly appointed for that purpose.

SALE OF PERISHABLE PROPERTY.

LXXXVII.

1. Application for the sale of perishable property seized as forfeited under any law of the United States, may be made either by the district attorney in behalf of the United States, or by the claimant, at any time after the service of the monition and warrant of arrest.

2. At least four days' notice of the application, when made by the claimant, shall be given to the district attorney, and to the collector within whose collection district the seizure was made, accompanied by the service of a copy of the petition for the decree or order of sale; and a like notice shall be given to the claimant, if there be one, or to his proctor or attorney, when the application is made by the district attorney. But when the application is made in open court, and the proctor or attorney of the opposite party is present, no previous notice shall be necessary.

3. When the application is made by the claimant before a claim duly verified shall have been already interposed, he shall be required to show, at the time of his application, by his own oath, or other evidence, that he is lawfully entitled to appear as claimant in the case.

4. The place of sale, and the length of the notice of sale to be given by the marshal (which, unless otherwise specially directed, shall be given in the manner prescribed by the 90th section of the collection act of March 2, 1799, in cases of condemnation), will be determined

by the court or the judge, in each case, according to its nature and circumstances, and prescribed in the order of sale.

5. When the application for an order of sale is resisted by the opposite party, and the propriety of such order appears doubtful, surveyors will be appointed, preliminarily, to examine and report as to the condition of the property.

REMISSION OF FINES, PENALTIES, FORFEITURES AND DISABILITIES.

LXXXVIII.

Preparatory to the presentation of a petition for the remission or mitigation of any fine, penalty, forfeiture or disability, a copy of such petition, together with a notice of the time and place of presenting the same, shall be served on the attorney of the United States, and another copy with the like notice on the person or persons claiming the fine, penalty or forfeiture, ten days before the time of presenting the petition.

LXXXIX.

The petition, in addition to the other circumstances of the case, shall state whether any and what suit has been instituted, and what proceedings have been had for the recovery of the fine, penalty or forfeiture, up to the time of preferring the petition.

XC.

The clerk, under the direction of the judge, shall prepare a statement of the facts relative to the case which appear upon the inquiry, and forthwith transmit the same, together with the petition, to the secretary of the treasury.

XCI.

The fees of the clerk shall be paid by the petitioner before the transmission of the petition and statement to the secretary of the treasury; and where there are several petitioners or distinct claimants, not being partners, or several cases or importations embraced in one petition, the clerk shall be entitled to the same fees as if a distinct petition had been presented in each case.

XCII.

[This rule prescribed the fees of the marshal for the custody of vessels and other property under seizure in behalf of the United States,

and it is therefore supposed to have been superseded by the act of February 26, 1853, ch. 80, which see, *supra*. The terms of the act do not embrace land seizures, these not being of admiralty jurisdiction; but the courts will doubtless deem it most discreet, at least, to apply its provisions to such seizures as well as to seizures on navigable waters.]

XCIII.

The clerk is authorized to enter satisfaction of record of any judgment rendered in this court in behalf of the United States, on filing an acknowledgment of satisfaction of the same, duly made, by the district attorney.

XCIV.

[This rule, prescribing the fees of practitioners and the clerk, has been superseded with respect to suits at law and in admiralty, and it is presumed also with respect to suits in equity, by the act of February 26, 1853, ch. 80, which see, *supra*.]

The following elaborately and carefully devised additional rules doubtless owe their origin to the highly important duties of the court imposed by the INTERNAL REVENUE ACTS, though the language of most of them comprises, also, cases arising under the antecedent laws regulating commerce with foreign nations.

XCV.—DECEMBER 9, 1863.

When a fine or penalty is paid into court, and the whole thereof shall belong to the United States, or one-half thereof shall belong to the government, and the other half thereof to any other party, the clerk shall, as soon thereafter as practicable, unless a stated term of the court shall then be in session, and then as soon as practicable after the end of such term, pay to the proper depositary the amount thereof belonging to the United States; and every person claiming any portion of such fine or penalty as the discoverer or informer, or prosecutor of the offender incurring such fine or penalty, shall, on or before the first day of the next stated term of the court, file with the clerk of the court his affidavit, and such other papers as he may think proper, showing his right to a moiety of such fine or penalty, which affidavit and papers shall be presented to the court by the clerk on the second day of such term.

XCVI.

In cases under the act "to provide Internal Revenue," &c., the person claiming shall file with such affidavit and papers the written consent of the collector of the Internal Revenue for the district in which such fine or penalty was incurred; that a moiety shall be paid to such claimant, or shall show by affidavit that a copy of such affidavit and papers had been served on such collector at least eight days before the commencement of such term.

XCVII.—NOVEMBER 26, 1867.

In all cases of seizure, where a bond shall have been executed and the property seized returned, in pursuance of the provisions of section forty-eight of the act of June thirtieth, eighteen hundred and sixty-four, entitled "An act to provide Internal Revenue to support the government, to pay interest on the public debt, and for other purposes," and acts amendatory thereof, before the filing of the information against the same, the information shall state the fact of the execution of such bond and the return of said property, and shall set forth in an appropriate form of pleading the substance, terms and conditions of such bond, and the names and residences of the parties executing the same.

Upon the filing of such an information the clerk shall insert in the process issued thereon to the marshal a condensed and brief general statement of the allegations so made in respect to such bond, including the names and residences of the parties executing the same, as stated in such information; and shall also insert a command to the marshal that he summon and give notice to the persons named as the parties executing such bond to appear at the return day of said process to answer the allegations of the information, and to show cause, if any they have, why such bond should not be enforced against them; which summons and notice shall be served by leaving a copy of such process with each of such parties, if he can be found within the district, and, if not, by leaving the same at the usual place of abode of such party, with some person of suitable age and discretion residing there, at least ten days previous to the day when such process shall be returnable; and such service of such summons and notice, or the publication thereof, as hereinafter provided, shall be sufficient notice of the pendency of the proceedings in court against the property so seized, and upon such bond.

In case the marshal shall be unable for any reason to effect a personal service of such process and summons upon such parties, or either of them, or to serve the same at their usual place of abode, as above provided, the same shall be served by publishing a copy thereof three times, at least ten days previous to the day when such process shall be returnable, in each of the newspapers designated by the general rules of this court for the publication of notices in bankruptcy, required to be published within the county where such seizure was made.

In case any such bond shall be taken and property returned, after any information shall be filed against such property, but before the said property shall be seized or arrested by the marshal under the process of the court, such allegation in respect to such bond and return may be made by way of supplemental information, or information in the nature of a supplemental information, upon which, like statement and commands may be inserted in the proper process to be issued to the marshal in such suit, and like service thereof shall be made, and like proceedings shall be had thereon.

The parties named in any information as having executed any such bond may appear and answer such information, and may defend the suit in which such process shall have been issued, and may contest the alleged forfeiture and their liability under such bond.

XCVIII.—MARCH 2, 1869.

[The sole purpose of this rule or order is to regulate the publication of the numerous notices, required by law, of the marshal. It is designed for his guidance alone, and is of great length.]

It is hereby ordered that the following shall be, and the same hereby are, adopted and added to the general rules heretofore adopted and now in force as general rules of this court, and shall constitute additional general rules of practice therein, viz.:

XCIX.—AUGUST 30, 1869.

In order that the United States may be relieved from the payment of costs in cases in which an informer should be held liable for the same, and also in order to give to claimants and defendants their proper remedy against such informers, it is hereby provided that in

all cases of seizure, and in all other cases prosecuted in the name of the United States, in which any prosecutor, informer or other person shall claim or intend to claim that any share of the penalty, forfeiture or recovery for which the suit in such case is prosecuted will belong to him, as an informer or prosecutor, the person so claiming such share shall, within fifteen days after the filing of the declaration or information therein, file with the clerk of this court, a statement, in writing, setting forth that he claims to be the informer or prosecutor who is entitled to a share of the forfeiture, penalty or recovery for which such suit is brought: and no person shall be allowed any share of any penalty, forfeiture or recovery in any such suit who shall not have filed the statement hereinbefore required, in the manner and within the time aforesaid.

C.

In all such cases, and in all other cases civil or criminal, in which a moiety or other share of any penalty, forfeiture, fine or recovery is claimed by any informer or prosecutor, the claimant thereof shall serve a copy of his claim and also of his affidavit and all other papers intended to be used in support thereof, on the Attorney of the United States at least eight days before the commencement of the term at which the same shall be presented to the court for allowance; and the same shall be presented to the court on the morning of the first day of the term, in order that the same may be heard and determined. In case any such claimant was an officer or employee of the United States or was in any manner in the pay of the government or any officer thereof, at the time he received, obtained or gave the information upon which he bases his claims, or at any time within six months before he received, obtained or gave such information, he shall in his affidavit state the particulars in respect to such official position or employment or pay, and, in all other cases, he shall state that he was not at the time, or within six months before the time, when he received, obtained or gave such information, in any such official position, or employment or in the pay of the United States Government or of any officer thereof.

CI.

Proceedings in *rem* for a forfeiture, and *in personam* for an offense, fine, penalty or debt, may be joined in one information, when having relation to the same transaction or transactions, cause or causes of for-

feiture; and if not so joined the separate suits prosecuted therefor may, on motion of any party in interest, be consolidated. If not so joined or consolidated the costs of only one of such suits will, under ordinary circumstances, be taxed against any informer, claimant or other party liable to costs therein.

CII.

No party shall be held to bail on an information *in personam*, or in a suit brought to recover any penalty or forfeiture, without the mandate or order of the judge, except when bail is required by statute; and to obtain such mandate or order it must be shown, as cause therefor, that the defendant or respondent is a transient person, or that there is reason to believe that the defendant is about to depart out of the jurisdiction of the court.

[The following additional rules made in 1860 and subsequently in some respects modified, relate, it will be seen, exclusively to suits in admiralty, and do not, therefore, come within the scope of this work. But on account of their importance, and for the purpose of making the body of rules to which they belong complete, I append them.]

I.

In order to prevent the commencement of suits upon small demands, and the consequent accumulation of costs altogether disproportionate to the sum demanded, the clerk will issue no process for seaman's wages, when the sum sworn to be due to a sole libellant is less than ten dollars, or to several joint libellants is less than fifteen dollars, or for any other demand, when the amount sworn to be due is less than twenty dollars, except when specially ordered by the court or the judge thereof, or such judge shall be absent from his place of residence. When the amount recovered shall be less than the sums above named, no costs will, in ordinary cases, be decreed to the libellant unless it shall be shown upon the hearing that such libellants could not have had a complete and perfect remedy in a court of a justice of the peace.

II.

In suits for seamen's wages, the clerk shall insert in the warrant of arrest and monition, after the words "in a cause of subtraction of wages civil and maritime," the words "and also to answer unto all other

persons having demands against the said vessel, for wages earned on board thereof, who may choose to make themselves parties to the libel of the said, (naming the libellant or libellants), by way of amendment or supplement, without further process or citation." And all mariners having claims against such vessels may, thereupon, so long as the vessel remains in custody, or any proceeds thereof remain in the registry, make themselves parties to such libel or suit, by a petition and proper allegations, by way of amendment or supplement to such original libel, and may have a decree for the payment of their demands as though they were named as parties to the original libel, and no new warrant of arrest or monition shall be issued in favor of any seaman, who, in respect to the demand on which he seeks such process, is entitled to make himself a party to proceedings already commenced; and no costs shall be allowed to any such seaman who shall, without sufficient excuse, fail to apply to make himself a party to such a suit on the return day of such a process, or the first court day thereafter. And in order to allow such seamen to make such application, no final order of reference in any case for seamen's wages shall be made until the next court day after the return day of the process issued thereon.

III.

No warrant of arrest shall issue on behalf of a seaman for wages on board a British or Canadian vessel, where it shall appear that such seaman shipped and was discharged in Canada or elsewhere out of the United States; or in favor of any subject of Great Britain against any British vessel, until the written consent thereto of the British consul, or an order of the judge therefor, shall have been filed.

IV.

All decrees for seamen's wages shall direct the amount decreed for such wages to be paid to the libellant in person; and all checks or orders for the payment of such wages shall be drawn, payable to the order of the seamen to whom such wages shall have been decreed.

V.

No allowance for the expenses of keeping any ship, or vessel, or other property, beyond the sum of fifty cents per day, or fifteen dollars in the aggregate, shall be allowed to the marshal, except upon the affidavit of the shipkeeper or other custodian, stating his employment and service, and the amount he has been actually paid therefor,

and that such payment was received for such service only, and was received wholly for his own benefit, and not for the benefit of any officer of the court; and also, that there is no understanding or intention that the whole, or any part thereof, shall be paid, or in any way disposed of or allowed to the marshal or his deputy, or for his or their benefit; and a copy of such affidavit shall be served with the copy of bill of fees or statement of allowance claimed.

VI.

In collision causes, unless the libel and answer shall respectively state or admit, either positively or upon information and belief, and as fully and accurately as practicable,—

1. The names of the vessels which came into collision, and of their respective masters;

2. The time of the collision, and whether in the night or day time;

3. The name of the officer or person in charge of the deck of the vessel of the party;

4. The place of the collision;

5. The general course or direction of the vessel of the party, and her direction at the time of the collision;

6. The state of the weather, and, if in the night, the character of the night in respect to darkness, rain, &c.;

7. The course and speed of the party's vessel, when the other was first seen;

8. The lights, if any, carried by her, and their position;

9. The bearing and apparent distance of the other vessel when the vessel itself was first seen;

10. The lights, if any, of the other vessel which were first seen, and their bearing, and their estimated apparent distance at that time;

11. Whether any lights of the other vessel other than those first seen came into view before the collision, and the particulars thereof;

12. The names of the person or persons, if any, stationed and acting as lookout on the vessel of the party at the time the other vessel or her light was first seen;

13. What measures were taken, and when, to avoid the collision, and, particularly, whether any and what change of helm or sails was made for that purpose;

14. The parts of each vessel which first came into contact, and the manner in which they struck;

15. The character and extent of the injury, if any, to the party's vessel.

The opposite party may, on showing, to the satisfaction of the court, by affidavit or otherwise, that a more full and specific statement of the circumstances of the collision mentioned in such libel or answer, in respect to some one or more of the particulars above mentioned, is necessary to the proper preparation of an answer to such libel, or the proper preparation, on his part, for the final hearing of such cause, or will materially reduce the expenses of procuring testimony for such hearing, may, on motion (due notice of such motion, with copies of affidavits and papers, other than the files of the court, on which such motion is to be made, having been first served on the opposite proctor at least four days before the day for which such motion is noticed), obtain a special order of the court for the amendment of such libel or answer, in regard to such particulars, within such time, and upon such conditions, and with such consequences, in a case of a non-compliance with such order as the court shall prescribe. And an order staying proceedings on any defective libel, or striking out any defective answer, may be made, on a further notice of motion for that purpose, in case any amendment ordered by the court is not made and filed as required by such order, unless some satisfactory cause for the non-compliance with such order shall be shown.

VII.

Practical Forms.

[See Index — Precedents.]

I.

IN SUITS AT COMMON LAW.

[A proper attention to the brief directions which have already been given under the appropriate heads, relative to the forms of process and pleadings, in suits at common law in the courts of the United States, will, it is hoped, in general, be found sufficient to guide the young practitioner in these matters. But it may nevertheless conduce to his convenience, to illustrate, by a few examples, what is peculiar in these respects to those tribunals.]

PROCESS.

CAPIAS IN THE CIRCUIT COURTS.

The President of the United States of America, to the Marshal of the District of Greeting: You are hereby commanded that you take , if he shall be found in your district, and him safely keep, so that you may have his body before the Circuit Court of the United States of America, for the District of in the Circuit to be held at[1] in the said District before the judges of the said Court, on the day of next, to answer unto , in a plea of trespass. [If the defendant is to be held to bail, here insert the *ac etiam* clause in the usual form.] And have you then there this writ.

[1] When the court is expressly required by law to be held in some particular building, the process ought to be made returnable there; but when only the city or village is designated by law, the process is made returnable at such city or village.

Witness, the *Honorable* , Chief Justice of the Supreme Court of the United States, at , in the said District, this day of in the year of our Lord, one thousand eight hundred and .

, CLERK.

CAPIAS IN THE DISTRICT COURTS.

The President of the United States of America, to the marshal of the District of GREETING: You are hereby commanded, that you take , if he shall be found in your District, and him safely keep, so that you may have his body before the District Court of the United States of America, for the District of to be held at in the said District, before the judge of the said Court, on the day of next, to answer, &c. [as in the preceding form.] Witness, Esquire, Judge of the said Court, at in the said District, this, &c. [as in the preceding form.]

WRIT OF INQUIRY IN THE CIRCUIT COURTS.

The President of the United States of America, to the Marshal of the District of GREETING: Whereas, lately in the Circuit Court of the United States of America, for the District of before the judges thereof, at in the said District, by bill, without our writ impleaded being in custody, &c., for that [here insert the declaration] to the damage of the said of as he said, and thereupon he brought his suit, &c. And such proceedings were thereupon had, in the said Circuit Court, before the judges thereof, that the said ought to recover against the said his damages by reason of the premises; but because it is not known to the said Court what damages the said hath sustained by means of the premises aforesaid; therefore, you are hereby commanded, that, by the oaths of twelve good and lawful men of your District, you diligently inquire what damages the said hath sustained, as well by means of the premises aforesaid, as for his costs and charges, by him about his suit in this behalf expended, and the inquisition which

you shall take thereon, do you return to the judges of the said Circuit Court, at in the said District, on under your seal and the seals of those by whose oaths you shall take such inquisition, and have you this writ there at the same time. Witness the *Honorable* Chief Justice, &c.

CLERK.

INQUISITION THEREON.

An inquisition indented, taken at on before me Marshal of the District of by virtue of the writ to me directed, and to this inquisition annexed, by the oaths of good and lawful men of my District, who being charged and sworn, say upon their oaths that in the said writ named, hath sustained damages occasioned by reason of the premises therein contained, besides costs and charges, six cents. In witness whereof, as well I, the said Marshal, as the jurors aforesaid, our seals to this inquisition have severally put, the day and year aforesaid.

The form of the writ of inquiry in the District Courts is the same except in the description of the Court, and the teste. See the form of the capias in the District Courts.

The Inquisition is in all respects the same.

SUBPŒNA TO TESTIFY IN A CIRCUIT OR DISTRICT COURT.

The President of the United States of America, to GREETING: You are hereby commanded, that, laying aside all business and excuses, you [and each of you] be and appear in your proper persons, before the Circuit Court of the United States, for the Circuit and District of to be held before the judges of the said Court (or, before the District Court of the United States, for the District of to be held before the judge of the said Court), at in the said District, on the day of by o'clock in the noon of the same day, to testify all and singular those things which you [or either of you] know in a certain cause now depending in the said Circuit (or District) Court of the United States, between plaintiff, and defendent, of a plea of on the part of the and on that

day to be tried by a jury of the country; and this you shall by no means omit under the penalty upon you [or each of you] of dollars.[1] Witness, &c. [See the preceding forms.]

SUBPŒNA TICKET.

To Mr. ———

By virtue of a writ of subpœna to you directed, and herewith shown to you, you are personally to be and appear before the Circuit Court of the United States, for the Circuit and District of to be held before the judges of the said Court (or before the District Court of the United States for the District of to be held before the judges of the said Court), at in the said District, on the day of at o'clock in the noon to testify what you know in a certain case now depending, and then and there to be tried, between plaintiff, and defendant, of a plea of on the part of the and this you are not to omit under the penalty of dollars. Dated the day of, &c.

SUBPŒNA DUCES TECUM.

The *duces tecum* clause differs in no respect from that used in subpœnas from the state courts.

SUBPŒNA ON A WRIT OF INQUIRY.

——— before the Marshal of the said district at in the said District on at o'clock in the noon, to testify, &c. (*as before*) in which said action a writ of inquiry of damages is then and there to be finally executed. And this, &c., (*as before.*)

[1] In New York, witnesses who fail to attend court in obedience to a subpœna, in addition to their liability to be punished for a contempt of the court from which the process is issued, and to an action for damages at the suit of the party aggrieved, are subject also to a forfeiture of fifty dollars to such party; and it is usual, in subpœnas from the state courts, to insert this sum as the penalty of disobedience.

AFFIDAVIT TO OBTAIN A HABEAS CORPUS AD TESTIFICANDUM.

Circuit Court of the United States
in the Circuit and District of
or
District Court of the United States
in and for the District of

A. B.
v.
C. D. } District of ss.

A. B. of the above named plaintiff, maketh oath and saith, that now a prisoner for debt (or as the case may be) in the custody of the sheriff of (or as the case may be), is a material witness for this deponent at the trial of this cause, without whose testimony, as he is advised by his counsel and verily believes, this deponent cannot safely proceed to the trial thereof.

HABEAS CORPUS AD TESTIFICANDUM.

The President of the United States of America, to the Sheriff of (or as the case may be), GREETING: You are hereby commanded that you have the body of now in prison (or as the case may be), under your custody, as it is said, under safe and secure conduct, before, &c. (*as in the subpœna*) to testify the truth, according to his knowledge, in a certain case now depending, &c. (*as in the subpœna*) and immediately after the said shall have then and there have given his testimony, that you return him to the said prison (or as the case may be), under safe and secure conduct, and have there then this writ. Witness, &c. (*as in the capias.*)

AFFIDAVIT FOR A DEDIMUS PROTESTATEM, OR COMMISSION.

The requisite contents of this affidavit depend in some measure upon the rules of the respective courts.

According to the laws of New York, it is sufficient in the state courts to show that the cause is at issue, or, that an interlocutory judgment has been obtained; that the witness named is material in the prosecution or defense of the suit, and that he is beyond the reach of the process of the court. And the practice in this particular of the District Court for the Northern District of New York, is, as we have

seen, conformable to that of the Supreme Court of the State. But by the rules of the Circuit and District Courts for the Southern District of New York, the party applying for a commission is required to state *what he expects to prove* by the witness or witnesses whom he seeks to examine.

DEDIMUS PROTESTATEM OR COMMISSION.

The President of the United States of America to

GREETING: Know ye, that in confidence of your prudence and fidelity, you have been appointed, and by these presents you or any two or more of you, are invested with full power and authority to examine . on his corporal oath, as a witness in a cause depending in the Circuit Court of the United States, for the circuit and district of (or, in the District Court of the United States in and for the district of) wherein is plaintiff, and defendant, on the part of the upon the interrogatories annexed to this commission; and, therefore, you are hereby commanded, that you, or any two or more of you, at certain days and places to be appointed by you for that purpose, do cause the said to come before you, and then and there examine him on oath upon the said interrogatories, and that you take such examination, and reduce the same into writing, and return the same annexed to this writ, closed up under your seals, or the seals of any two or more of you, into the said Circuit (or District) Court, before the judges (or judge) thereof, with all convenient speed. Witness, &c. (*as in the capias.*)

The interrogatories and cross interrogatories (if any) to be annexed to the commission, and the depositions are to be drawn up in the usual form.

SUBPŒNA TO COMPEL THE ATTENDANCE OF WITNESSES BEFORE COMMISSIONERS.

As has been stated in treating of this subject in the Second Part of the preceding work, provision is made by act of congress to compel the attendance of witnesses before commissioners acting within the United States by process of subpœna.

For this purpose the following form may be used:

The President of the United States of America, to

GREETING: You are hereby commanded, that, laying aside all business and excuses, you, and each of you, be and appear in your

proper persons, before commissioners duly appointed and authorized in virtue of a commission from the Circuit Court of the United States for the circuit and district of (or, District Court of the United States for the district of) to examine you as a witness in a cause depending in the said Circuit (or District) Court, wherein is plaintiff, and is defendant, on the part of the upon interrogatories annexed to the said commission, at on the day of at o'clock in the noon, to answer truly all such questions as shall then and there be asked of you upon such interrogatories; and this you, or any of you, shall by no means omit, under the penalty upon each of you of dollars. Witness, &c. (*as in other cases.*)

FIERI FACIAS (UPON A JUDGMENT FOR THE PLAINTIFF IN ASSUMPSIT).

The President of the United States of America to the Marshal of the District of GREETING: You are hereby commanded, that, of the goods and chattels of C. D., in your district, you cause to be made which A. B., lately in the Circuit Court of the United States for the Circuit and District of recovered against him for his damages, which he had sustained, as well on occasion of the non-performance of certain promises and undertakings then lately made by the said C. D. to the said A. B., as for his costs and charges by him about his suit in that behalf expended, whereof the said C. D. is convicted, as appears to us, of record; and, if sufficient goods and chattels of the said C. D. cannot be found in your district, then you are commanded that you cause the said damages to be made of the lands and tenements whereof the said C. D. was seized on the day of or at any time afterward, in whose hands soever the same may be; and have that money before the judges of the said court at on to render to the said A. B. for his damages aforesaid. And have there then this writ. Witness, &c.

In other forms of action, the writ is, of course, to be varied accordingly. And so, where the judgment is in favor of the defendant.

CAPIAS AD SATISFACIENDUM.

By the aid of the preceding forms there can be no difficulty in framing this writ.

It will be found easy, also, to frame the *Testatum Fi. Fa.*, and *Ca. Sa.*, the writ of *habere facias possessionem*, &c.

WRIT OF SCIRE FACIAS (ON A JUDGMENT IN ASSUMPSIT).

The President, &c., to the Marshal, &c., GREETING: Whereas, A. B., lately in the District Court in and for the District of before the judge thereof, by the judgment of the said court, recovered against C. D. for his damages which he had sustained, as well, &c., as for his costs and charges, by him, &c., whereof the said C. D. is convicted, as appears of record: nevertheless, execution of the said judgment yet remains, as *we*[1] have received information from the said A. B., and *we*,[1] willing that those things which are just and right should have a due execution, do therefore command you, that, by honest and lawful men of your district, you make known to the said C. D., that he be before the judge of the said District Court, at on the day of to show, if he has or know of any cause, why the said A. B. ought not to have execution against him, of the damages aforesaid, according to the force, form and effect of the said recovery, if he shall think it expedient for him so to do; and have you there the names of those by whom you shall so make known to him, and this writ. Witness, &c.

[1] Instead of the usual form, *we command you*, I have elsewhere used the phrase, *you are hereby commanded*. In general the change is easily made without varying the form of the process in other respects. But, as will be seen, it is otherwise with a writ of *scire facias*. In this instance, therefore, I have retained the accustomed form: not choosing to assume the responsibility of introducing a more extensive modification. Perhaps the most simple and convenient mode of avoiding all embarrassment and incongruity, would be to use the first person *singular*. This would be in strict accordance with established usage. In England, process runs in the name of the king, who, when he addresses himself officially to his subjects, always speaks in the plural number. Thus, for example, in proclamations, civil commissions, letters patent, &c., the plural form is always used; and so it comes, of course, to be used in process from his courts. In the state of New York, process issues in the name of the people; and, therefore, the plural form is adopted. But the President of the United States never uses this form. In the examples above given, for instance, of proclamations, commissions to persons appointed to office, and letters patent, the first person singular is always used. Why, then, should it not also be employed in the process?

DECLARATIONS.

The chief design of the following forms is to furnish suitable precedents for the averments which are necessary in the cases to which they relate, to enable the courts of the United States to exercise jurisdiction. [*Vide, supra,* 365, *et seq.*]

1. BY AN ALIEN AGAINST A CITIZEN OF THE UNITED STATES.

Circuit Court of the United States for the
Circuit and District of
or,
District Court of the United States
for the district of

Of Term in the
year

District of ss.

A. B., who is a subject of the king (or emperor, or a citizen of the republic) of and an alien, complains of C. D., who is a citizen of the State of for that, &c.

2. BY A CITIZEN OF THE UNITED STATES AGAINST AN ALIEN.

A. B., who is a citizen of the State of complains of C. D., who is a subject (or a citizen) of and an alien, for that, &c.

3. BY A CITIZEN OF ANOTHER STATE AGAINST A CITIZEN OF THE STATE IN WHICH THE SUIT IS BROUGHT.

A. B., who is a citizen of the State of complains of C. D., who is a citizen of the State of for that, &c.

4. BY A CITIZEN OF THE STATE IN WHICH THE SUIT IS BROUGHT, AGAINST A CITIZEN OF ANOTHER STATE.

A. B., who is a citizen of the State of complains of C. D., who is a citizen of the State of for that, &c.

5. BY OR AGAINST A BODY CORPORATE.

The company, citizens of the State of , incorporated by that name, by the said State, and having their principal place of business therein, complain of

or,

A. B., who is a citizen, &c. (or a subject, &c.), complains of the company, citizens, &c., [as above].

6. BY THE FIRST INDORSER OF A PROMISSORY NOTE AGAINST THE MAKER.

A. B., who is a citizen of the State of (or a subject, &c., or a citizen, &c., and an alien), complains of C. D., who is a citizen of the State of (or a subject, &c., or a citizen, &c., and an alien), in custody, &c. For that, whereas the said C. D., on at made his certain note in writing, commonly called a promissory note, his own proper hand being thereunto subscribed, bearing date the day and year last aforesaid, and then and there delivered the said note to one E. F., who is a citizen of the State of (or a subject, &c., or a citizen, &c., and an alien), by which said note, he, the said C. D., then and there promised to pay, six months after the date thereof, to the said E. F. or order, the sum of for value received; and the said E. F., to whom or to whose order the payment of the said money in the said note specified, was, by the said note, to be made, after the making of the said note, and before the payment of the said money, in the said note specified, to wit, on aforesaid, at aforesaid, indorsed the said note, his own proper hand being to such indorsement subscribed, by which said indorsement, he, the said E. F., then and there ordered and appointed the said sum of money in the said note specified, to be paid to the said A. B., and then and there delivered the said note, so indorsed as aforesaid, to the said A. B., of which said indorsement so made as aforesaid, the said C. D., afterwards to wit, on aforesaid, had notice: by means whereof, and by force of the statute in such case made and provided, the said defendant then and there became liable to pay to the said plaintiff the said sum of money in the said note specified, when he, the said defendant, should be thereunto afterwards requested; and, being so liable, he, the said defendant, in consideration thereof, afterwards, to wit, on last aforesaid, at aforesaid, undertook, and then and there faithfully promised the said plaintiff to pay him the said sum of money in the said promissory note specified, when he, the said defendant, should be thereunto afterwards requested. Nevertheless, the said defendant, not regarding his said several promises and undertakings, hath not yet paid the said sum of money, or any part thereof, to the said plaintiff (although often requested so to do); but the said defendant to pay him the same hath hitherto wholly neglected and refused, and still doth neglect and refuse, to the damage of the said plaintiff of dollars, and therefore he brings his suit, &c.

7. BY THE INDORSEE AGAINST A REMOTE INDORSER.

The form in this case is precisely like that in the last preceding case, except that the intermediate indorsements are to be set out; which, however, may be done without any averment of the citizenship or alienage of the *intermediate* indorsers; since it is only necessary in this, as in the preceding case (in addition to showing that the *parties to the suit* possess the requisite character), to show that the *immediate or last indorser,* might also, before his indorsement to the plaintiff, have maintained a suit on the note *against the defendant.*

In like manner, in a suit by an alien who "sues for a tort only in violation of the laws of nations, or a treaty of the United States," the character of the plaintiff, and also the fact that the injury complained of arose in the specified manner, must be distinctly stated; and so in a suit in the District Court against a consul or vice-consul, the official character of the defendant must be averred.

With respect to the mode in which it must be made to appear upon the face of the declaration, that the amount in controversy is sufficient to give the court jurisdiction, the directions in the body of the work will, it is believed, be found sufficient. [*Vide supra,* 370, *et seq.*]

II.

OF PROCEEDINGS BY WRIT OF ERROR.

BOND TO BE EXECUTED BY THE PLAINTIFF TO THE DEFENDANT IN ERROR.

Supreme Court of the United States,

or

Circuit Court of the United States for the District of

Know all men dy these presents, That we, A. B., &c., are held and firmly bound unto C. D. in the sum of dollars, to be paid to the said C. D., his executors or administrators. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents. Sealed with our seals, and dated, &c.

Whereas, the above named A. B. hath prosecuted a writ of error to the Supreme Court of the United States, or to the Circuit Court of the United States for the District of to reverse the judgment rendreed in the above entitled suit, by the [*here insert the name of the court to which the writ of error is directed.*].

Now, therefore, the condition of this obligation is such, that if the above named A. B. shall prosecute his said writ of error to effect, and answer all *damages and costs*[1] if he shall fail to make good his plea, then this obligation shall be void: otherwise the same shall be and remain in full force and virtue.

Sealed and delivered in the presence of

WRIT OF ERROR TO A CIRCUIT COURT.

United States of America, ss.

The President of the United States, to the judges of the Circuit Court of the United States for the District of

GREETING:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit Court, before you, between and a manifest error hath happened, to the great damage of the said as by complaint appears. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the Monday next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States, should be done.

[1] If the writ of error is not a *supersedeas* (*vide, supra* 666), the words *damages and* may be omitted. [As to the amount of the penalty vide ibid, and appendix rule 33 of S. C. Rules.]

Witness the Honorable Chief Justice of the said Supreme Court, the day of in the year of our Lord one thousand eight hundred and

clerk of the Supreme Court of the United States.

or

clerk of the Circuit Court for the District of

CITATION THEREON.

United States of America, ss.

To GREETING: You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the Monday of next, pursuant to a writ of error, filed in the clerk's office of the Circuit Court of the United States for the district of , wherein is plaintiff, and you[1] are defendant, in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Chief Justice of the said Supreme Court of the United States, this day of in the year of our Lord one thousand eight hundred and .

Chief Justice (or one of the Justices) of the Supreme Court of the United States.

To the citation, before it is filed in the office of the clerk of the court to which it is directed, there must be annexed an affidavit of the service on the defendant in error personally, of a true copy, stating the day of service.

WRIT OF ERROR TO A DISTRICT COURT.

United States of America. ss.

The President of the United States to the Judge of the District Court of the United States for the District of GREETING:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said court, before you, between and a manifest error hath hap-

[1] When a *State* is defendant in error, the citation is addressed to such State, and is, as we have seen, served on the governor and attorney-general of the State; and in such case the phraseology is, wherein is plaintiff, and *the said State of* is defendant in error; and so, when the United States are defendants in error, and the service is to be made on the District Attorney.

pened, to the great damage of the said as by complaint appears. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Circuit Court of the United States, together with this writ, so that you may have the same at in the said district, on the day of next, in the said Circuit Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Chief Justice of the Supreme Court of the United States, the day of in the year of our Lord one thousand eight hundred and .

Clerk of the Circuit Court of the United States for the District of .

The form of the citation is the same as the case of a writ of error to a circuit court, *mutatis mutandis*, and it must be accompanied, on filing, with a like affidavit of service.

WRIT OF ERROR TO A STATE COURT.

United States of America, ss:

The President of the United States, to the Honorable, the Judges of the Court of Appeals of the State of New York (or otherwise, as the case may be), GREETING:

Because the record and proceedings, and also in the rendition of the judgment, of a plea which is in the said Court of Appeals, before you, or some of you, being the highest court of law or equity of the said State, in which a decision could be had in the said suit, between and wherein was drawn in question the validity of a treaty (or statute) of (or an authority exercised under), the United States, and the decision was against its validity; [or, wherein was drawn in question the validity of a statute of (or an authority exercised under), the said State, on the ground of its being repugnant to the constitution (treaties, or laws) of the United States, and the decision was in favor of such its

validity]; [or wherein was drawn in question the construction of a clause of the constitution (or of a treaty or statute) of (or of a commission held under) the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said constitution (treaty, statute, or commission),] a manifest error hath happened, to the great damage of the said as by complaint appears. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the Monday of next, in the said Supreme Court to be then and there held, that the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and, according to the laws and customs of the United States, should be done.

Witness, the Honorable Chief Justice of the said Supreme Court, the day of , in the year of our Lord, one thousand eight hundred and

Clerk of the Supreme Court of the United States,

or

Clerk of the Circuit Court of the United States for the District of

The form of the citation and the proof of service is the same as in the preceding cases, *mutatis mutandis*.

ASSIGNMENT OF GENERAL ERRORS, IN THE SUPREME COURT, IN A JUDGMENT FOR THE PLAINTIFF IN THE COURT BELOW.

Supreme Court of the United States.

C. D.
v.
A. B. } In Error.

Of December Term, in the year of our Lord one thousand eight hundred and

Afterwards, to wit, on the first Monday of December, in this same term, before the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, comes

the said C. D., by his attorney, and says that in the record and proceedings aforesaid, there is manifest error in this, to wit [that the declaration aforesaid, and the matters therein contained, are not sufficient in law for the said A. B. to have or maintain his aforesaid action thereof against the said C. D.; there is also error in this, to wit], that by the record aforesaid it appears that the judgment aforesaid given, was given for the said A. B. against the said C. D., whereas, by the law of the land, the said judgment ought to have been given for the said C. D. against the said A. B.; and the said C. D. prays that the judgment aforesaid may be reversed, annulled and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

Attorney for Plaintiff in Error.

When the judgment of the court below is in favor of the defendant, omit the allegation of insufficiency of the declaration, included in brackets.

JOINDER IN ERROR.

Supreme Court of the United States.

A. B. *ads.* C. D. } In Error.

And afterwards, to wit, on the first Monday of December in December term, in the year of our Lord one thousand eight hundred and the said A. B., by his attorney, freely comes here into court, and says, that there is no error, either in the record and proceedings aforesaid, or in the giving of the judgment aforesaid: and he prays that the said Supreme Court of judicature, before the justices thereof now here, may proceed to examine, as well the record and proceedings aforesaid, as the matters aforesaid above assigned for error; and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

Attorney for Defendant in Error.

When the writ of error is to the circuit court, the forms are the same *mutatis mutandis*.

III.

PROCEEDINGS TO TAKE TESTIMONY DE BENE ESSE.

[*Vide, supra*, p. 413, *et seq.*]

AFFIDAVIT TO OBTAIN AN ORDER FOR THE EXAMINATION OF A WITNESS IN BEHALF OF THE PLAINTIFF.

[When the application is in behalf of the defendant, there will be no difficulty in making the required alterations.]

Circuit Court of the United States for the
Circuit and District of

or,

District Court of the United States in and
for the District of

A. B.
v.
C. D. } District of ss.[1]

A. B., &c., being sworn, says that he is the plaintiff in the above entitled cause; that he is advised by his counsel and verily believes, that the testimony of E. F., at present of mariner (or as the fact may be), is material and necessary for this deponent in the prosecution of such cause; *that the said E. F., lives at more than one hundred miles from where the court, at which this deponent expects the said cause will be tried, is appointed by law to be held (or, is bound on a voyage to sea; or is about to go out of the district in which the said cause is pending, and to a greater distance than one hundred miles, as this deponent is informed and verily believes; or, is so aged, or, so infirm, as to render it probable that he will not be able to attend as a witness at the trial of such cause).* And this deponent further says that, as he is informed and believes, C. D., the above named defendant, resides at about miles distant from the place where the examination of the said witness is expected to be

[1] When the deposition is to be taken out of the district in which the suit is pending, the affidavit may, and in strictness ought to be made in the district in which the proceeding is to take place. In practice it is usually, though perhaps not necessarily, sworn to before the officer to whom the application is made to take the examination. But in whatever district it is sworn to, the name of *that* district should be used at the beginning of it.

taken; and that as he is also informed and believes, G. H., the attorney of the said C. D., resides at about miles from as aforesaid.

ORDER THEREON.

Circuit [or District] Court, &c.,

[*as in the affidavit.*]

A. B.
v.
C. D.

Let E. F., the witness named in the above [or within] affidavit, be examined *de bene esse* before me accordingly, at on the day of at o'clock in the noon. [If either the defendant or his attorney resides within one hundred miles of the place of examination, then add] and let days' notice be given *to the said defendant* [or, *to G. H., the attorney of the said defendant,* as either may be nearest, of such examination.]

NOTICE TO THE OPPOSITE PARTY OR HIS ATTORNEY.

Circuit [or District] Court, &c.,

[*as above.*]

A. B.
v.
C. D.

Sir, you are hereby notified that E. F. will be examined *de bene esse,* before me,[1] at on the day of at o'clock in the noon, as a witness for the above plaintiff, according to the act of congress in such case made and provided; at which time and place you are entitled by law to be present, and to put interrogatories to the said witness.

Dated, &c.

J. S.

To C. D., the above named defendant,

or,

(F. G., attorney for the above named defendant.)

THE DEPOSITION.

Be it remembered, that on the day of one thousand, &c., at *A. B. personally appeared* before me, J. S., a

[1] The act requires a "notification *from the magistrate.*" It is safer, therefore, that the notice should purport to emanate from, and be signed by him.

commissioner appointed under the laws of the United States to take affidavits and acknowledgments of bail (or as the case may be), *and made oath* (or if the application is made by another in behalf of the party, or on an affidavit made by such party, before a judge of the United States or commissioner elsewhere, then say, *application was made to me, J. S., &c., upon the affidavit of A. B., stating*) that he, the said A. B., was plaintiff in a suit then pending in the Circuit Court of the United States, for the Circuit and District of (or District Court of the United States, in and for the District of) wherein C. D. was defendant, that the testimony of E. F., of mariner, was material and necessary for him, the said plaintiff, in the prosecution of such suit, and that he, the said E. F., lived at more than one hundred miles from where the court, at which the said plaintiff expected the said cause would be tried, was appointed by law to be held (or otherwise as the case may be, according to the affidavit); that C. D., the above named defendant, resided at about miles from aforesaid; and that G. H., his attorney, resided at about miles from aforesaid; and the said A. B. requested me (or I was requested in behalf of the said A. B.) that the said E. F. might be examined, according to the directions of the act of Congress in such case made and provided.

Whereupon I ordered that the said E. F, should be examined *de bene esse* before me at [and that days' notice should be given to the said C. D. [or G. H.] of such examination, to the end, that he might, if he should see fit, be present at the examination and put interrogatories; and I having satisfactory proof that such notice had been given[1]] *and as well as the said A. B. as the said C. D.* (or, if the defendant does not appear in person, or by attorney, then say, *the said A. B.*) appearing before me at on this day of I have therefore proceeded with the said examination.

And the said E. F., being carefully examined and cautioned, and duly sworn [or affirmed], to testify the truth, the whole truth, and nothing but the truth, saith, &c. [*stating clearly every pertinent*

[1] If both the opposite party and his attorney reside more than one hundred miles distant, and no notice is on that account given, the part included in brackets is of course to be omitted.

declaration of the witness and his replies to the questions put by, or at the instance of either party.] And I do further certify, that the preceding deposition was reduced to writing by me [or by the said E. F. in my presence], and signed by the said E. F., and that I am not of counsel or attorney for either of the parties to the said suit, nor am I interested in the event thereof.

J. S.

IV.

IN CASES OF MUNICIPAL SEIZURE.

LIBELS OF INFORMATION[1] AND INFORMATIONS.

[*Vide, supra, p.* 541, *et seq.*]

Inasmuch as these pleadings are always drawn by public officers, who may reasonably be presumed to be fully competent to the proper discharge of their duties, and especially as definite forms deemed to be sufficient and appropriate, are probably already in use in the respective districts, the insertion of the following precedents under this head may seem to be superfluous.

These reasons are certainly sufficient to render it unnecessary, if not improper, to attempt to give precedents for every case of forfeiture under the laws of the United States. I have accordingly restricted myself to a few cases by way of example. And I trust those I have inserted will at least be worth the space they occupy, for the purpose, if for no other, of assisting the inexperienced general practitioner in acquiring clearer and more satisfactory views of the nature of the proceeding to which these pleadings belong.

[1] Libels of this description, being preferred by a public prosecutor in virtue of his office, are frequently and properly called *Libels of Information*, in contradistinction to libels filed by private persons in ordinary admiralty suits. In some of the reported cases they are loosely called Informations. The correspondent pleading, by which suits in cases of seizure on land or on waters not navigable from the ocean by vessels of ten or more tons burden are instituted, on the common law or exchequer side of the court, is properly denominated an *Information*.

For the reasons assigned (*ante*, p. 486), I abstain from adding precedents especially adapted to cases of seizure under the INTERNAL REVENUE ACTS. In the forms given, the pleader will find a ready and sufficient guide.

COMMENCEMENT OF THE LIBEL OR INFORMATION.

District Court of the United States of America.

District of

To the judge of the District Court of the United States for the District of

A. B., attorney of the United States for the said District of who prosecutes for the said United States, exhibits this his libel of information [or information] against the ship Juno, her boats, tackle, apparel and furniture [or the steamer Helen, her engine, boiler, tackle, apparel and furniture; or six bales of broadcloths, or, &c.], and against all persons lawfully intervening for their interest therein. And thereupon, the said A. B. doth allege, articulately propound and give the said judge to understand, that on the day of in the year[1] at in the District of aforesaid, on waters navigable from the sea by vessels of ten tons or more burden [or on waters not navigable, &c., or on land, as the case may be], C. D., Esquire, collector of customs for the collection district of did seize the aforesaid ship Juno, her boats, tackle, apparel and furniture [or, &c.], and now holds the same in his custody, within the district of aforesaid,[2] as forfeited to the said United States for the causes hereinafter stated, to wit:

1. For that, &c. [Here set out in distinct articles the matters relied on as grounds of forfeiture.]

2. For that, &c.

[1] The well known general rule in pleading is that the day is not material; and the rule is supposed to be applicable here. But as the true day of the seizure ought to be, and probably always is, communicated by the seizing officer to the district attorney, it is easy, and on some accounts advisable, to state the true day.

[2] The 22d rule, regulating admiralty proceedings, as we have seen, requires "the District within which the property *is brought*" to be stated. This clause doubtless has reference to seizures made on the high seas.

Perhaps the allegation in the above form, that the collector "now holds the same in custody, within the district of aforesaid," would be a sufficient compliance with this requirement, since the presence of the property is the important point, and implies, moreover, that it was brought into that district; but it is better, and very easy, to comply literally with the rule.

ALLEGED GROUNDS OF FORFEITURE FOUNDED ON THE ACT OF 2 MARCH, 1821 (CH. 14: 3 STAT. AT LARGE, 616), AGAINST GOODS FOR HAVING BEEN IMPORTED FROM AN ADJACENT FOREIGN TERRITORY INTO THE UNITED STATES WITHOUT THE DELIVERY OF A MANIFEST.

First. For that heretofore, that is to say, on the day of [some day not later than that on which the seizure is stated to have been made], in the year of our Lord one thousand eight hundred and the merchandise[1] aforesaid being subject to duty on being imported into the said United States, was imported and brought from some foreign territory adjacent to the said United States, to the said attorney of the United States unknown, into some port or place within the said United States,[2] to the said attorney of the United States unknown, and on board of some unregistered vessel, or some boat, canoe or raft, or in some carriage or sleigh, or by some person[3] coming from the said adjacent territory to the said attorney of the United States unknown.

Second. For that no manifest of the cargo of the said vessel, boat, canoe or raft, or of the merchandise so brought from such foreign territory was delivered by the master of the said vessel, the person having charge of the said boat, canoe or raft, the conductor or driver

[1] This is the term used in the act, and must, therefore, be considered sufficiently exact for every case; though, as descriptive of some sorts of personal property subject to seizure (domestic animals, for example), its use is not in accordance with common usage.

[2] When the seizure is made within the territory of the United States, the place of seizure, as we have seen, determines the jurisdiction without reference to the place where the offense was committed. It is supposed, therefore, to be unnecessary to allege that the importation was made into the judicial district where the suit is instituted.

[3] The several modes of importation here named, are those specified in the act. In cases in which it is really unknown in which of these descriptions of vehicle the goods were brought into the United States, it is proper to enumerate them all, so as to adapt the allegation in this respect to the proof, whatever it may be. And if it is further unknown, whether the goods may not have been brought into the United States by some "other person" (than "the master," "person having charge," or the "conductor or driver" of any such vehicle), it is proper, for the same reason, also to add the words "or by some person," as in the text. But when the mode of importation is known, it should be designated, as should also, when known, the other particulars referred to in this precedent as unknown. See, on this point, as to indictments, *inter al.*, 2 East, P. C., 651; 1 Chit. Cr. Law, 212, 213.

of the said carriage or sleigh, or other person so coming from the said adjacent territory into the said United States with the said merchandise, immediately on his or her arrival within the said United States, at the office of the collector or deputy collector which was nearest the boundary line, between the said adjacent foreign territory and the said United States, or nearest to the road or waters by which such merchandise was brought as aforesaid from the said adjacent foreign territory into the said United States; but the said master of the said vessel, the person having charge of the said boat, canoe or raft, the conductor or driver of such carriage or sleigh, or other person bringing the said merchandise as aforesaid, neglected and refused to deliver the manifest by law in such case required, at the office of the aforesaid collector or deputy collector, and passed by and avoided such office, against the form of the statute in such case made and provided. Whereby and by force of the statute in such case made and provided, the said merchandise has become and is forfeited to the uses in the said statute prescribed.

OR THUS:

First. For that heretofore, that is to say, on the day of in the year of our Lord one thousand eight hundred and , the said ten pieces of blue broadcloth being subject to duty, on being imported and brought into the said United States, were imported and brought from an adjacent foreign territory, to wit, from the province of Upper Canada, being the territory of her Britannic Majesty, into the said United States, to wit, into the port of Buffalo, in the said district of on board of an unregistered vessel, to wit, the sloop Sylph [or on board of a certain unregistered vessel, to wit, a certain sloop called the Sylph; or on board of a certain sloop called the Sylph—the same being an unregistered vessel.]

Second. For that the master or other person having charge of the said vessel so coming from the said foreign adjacent territory into the said United States, with the said ten pieces of broadcloth, did not, immediately on his arrival within the said United States, deliver a manifest of the cargo or loading of the said vessel, or of the said ten pieces of broadcloth,[1] at the office of the collector or deputy collector

[1] These words, "or of the said ten pieces of broadcloth," are probably unnecessary, as the words in the act, "or of the merchandise so brought," &c., were probably intended to apply only to cases embraced by the preceding clause, "or other person."

at the said port of Buffalo, or at the office of any collector or deputy collector nearest to the boundary line between the said foreign territory and the said United States, or nearest to the waters by which the said ten pieces of broadcloth were brought as aforesaid; and the master or other person having charge of the said vessel, on his arrival as aforesaid, did neglect and refuse to deliver the manifest in such case by law required, and did pass by and avoid the office of the collector or deputy collector, at which such manifest ought to have been delivered contrary to the form of the statutes in such case made and provided. Whereby and by force of the statute in such case made and provided, the said ten pieces of broadcloth became and are forfeited to the uses in the said statutes specified.

THE LIKE IN A SUIT FOUNDED ON THE SAME ACT AGAINST THE VESSEL OR OTHER VEHICLE IN WHICH GOODS WERE ILLEGALLY IMPORTED.

First. For that heretofore, that is to say, on the day of in the year of our Lord one thousand eight hundred and , certain goods, wares and merchandise, to wit, ten pieces of woolen broadcloath, being subject to duty on being imported and brought into the United States, were imported and brought in the said steamboat [or in the said schooner, sloop, &c.] which said steamboat [or schooner, &c.] was an unregistered vessel [or in the said boat, canoe, raft, carriage or sleigh], from some foreign territory adjacent to the said United States, to the said attorney of the United States unknown [or from an adjacent foreign territory, to wit, the province of Lower Canada, being the territory of her Britannic Majesty] into some port or place within the said United States to the said attorney of the United States unknown [or, into the United States, to wit, into the collection district of in the said district of].

Second. For that the master or other person having charge of the said vessel (or the person having charge of the said boat, canoe or raft, or, the conductor or driver of the said carriage or sleigh,) so coming from the said adjacent foreign territory into the said United States, with the said merchanise, did not, immediately on his or her arrival within the said United States, deliver a manifest of the cargo or loading of the said vessel [or the said boat, canoe, raft, carriage or sleigh], or of the said merchandise, at the office of the collector or deputy collector nearest to the boundary line between the said foreign territory

and the said United States, or nearest to the waters [or road] by which the said merchandise was brought as aforesaid; and the master or other person having charge of the said vessel [or the person having charge of the said boat, canoe or raft, or the conductor or driver of the said carriage or sleigh], on his or her arrival as aforesaid, did neglect and refuse to deliver the manifest in such case by law required, and did pass by and avoid the office of the collector, or deputy collector, at which such manifest ought to have been delivered, contrary to the form of the statute in such case made and provided. Whereby, and by force of the statutes in such case made and provided, the said vessel [or the said boat, canoe or raft], with the said tackle, apparel and furniture of the same [or the said carriage or sleigh, and the said harness and horses (or cattle) drawing the same],[1] became, and are forfeited to the uses of the said statutes mentioned.

COUNT ON THE SAME ACT AGAINST THE VESSEL OR OTHER VEHICLE AND THE GOODS IMPORTED.

First. For that heretofore, that is to say, on the day of in the year of our Lord one thousand eight hundred and , the said ten pieces of broadcloth, being subject to duty on being imported and brought into the said United States, were imported and brought on board of the said steamboat [or the said schooner, sloop, &c.], which said steamboat [or schooner, sloop, &c.] was an unregistered vessel [or on board of the said boat, canoe or raft, or in the said carriage or sleigh], into the said United States from some foreign territory adjacent to the said United States, to the said attorney of the United States unknown [or otherwise as the case may be; see the preceding counts on this act], on board of the said vessel [or the said boat, canoe or raft, or in the said carriage or sleigh], into some port or place within the said United States, to the said attorney of the United States unknown [or otherwise, as the case may be; see the preceding counts on this act], and the master or other person having charge of the said vesel [or the person having charge of the said boat canoe or raft, or the conductor or driver of the said carriage or sleigh], so coming from the said adjacent foreign territory into the said United States, with the said ten pieces of broadcloth, did not, &c. [as in the last preceding count.]

[1] When merchandise is brought in on horseback, the horse, saddle and bridle are forfeited, and the count is to be framed accordingly.

Whereby, and by force of the statutes in such case made and provided, the said vessel [or the said boat, canoe or raft], with the said tackle, apparel and furniture of the same [or the said carriage or sleigh, and the said harness and horses (or cattle) drawing the same], and also the said ten pieces of broadcloth, became, and are, forfeited to the uses in the said statutes specified.

COUNTS FOUNDED ON THE FOURTEENTH SECTION OF THE ACT OF THE 14TH JULY, 1832, ENTITLED "AN ACT TO ALTER AND AMEND THE SEVERAL ACTS IMPOSING DUTIES ON IMPORTS." CH. 227: 4 STAT. AT LARGE, P. 583.

1. Against *packages*, for being made up with intent to evade or defraud the revenue.

First. For that heretofore, that is to say, on the day of in the year of our Lord one thousand eight hundred and [some day subsequent to the date of the act, and not later than the day of seizure], the said goods, wares and merchandise, being subject to the payment of *ad valorem* duties on being imported into the United States, and being composed wholly or in part of wool [or wholly or in part of cotton], were imported in a ship or vessel called the Frances [or in some ship or vessel to the said attorney unknown], from a foreign port or place, to wit, the port of Liverpool, in the kingdom of Great Britain [or from some foreign port or place to the said attorney unknown], into the port of in the said collection district.

Second. For that afterwards, to wit, on the day of an entry of the said goods, wares and merchandise, duly signed, having been made at the office of the collector of customs aforesaid; and a certain invoice [or certain invoices] of the said goods, wares and merchandise having been thereupon produced and left with the said collector, he, the said collector, afterwards, to wit, on the day and year last aforesaid, and at the port aforesaid, according to the statutes of the United States in such case made and provided, caused the packages of the said goods, wares and merchandise to be opened and examined; and, upon such examination, the packages were then and there found to have been made up with intent to evade and defraud the revenue of the United States, contrary to the form of the statutes in such case made and provided. Whereby, and by force of the statutes

in such case made and provided, the said goods, wares and merchandise became and are forfeited to the uses in the said statutes specified.

NOTE. The offense is charged in the foregoing count in the words of the act; which is believed to be sufficient. The terms of the charge are, however, very indefinite, and as the nature of the device supposed to have been resorted to must of course be known to the attorney, it would be more consistent with the general rules of pleading, and it may be added, with fair dealing towards the owner, to specify the device of which it is intended to give evidence at the trial. This may properly be done immediately after the words "with intent to evade and defraud the revenue of the United States," by adding continuously, the words, *that is to say;* and then proceeding to detail the facts relied on; and concluding as follows: *whereby it was intended to evade the payment of the duties, or some portion thereof, justly chargeable by law on the said goods, wares and merchandise,* contrary to the form, &c. [as above.]

The foregoing and two next succeeding precedents will be found, on comparison, to be more precise in some particulars than the printed forms in use in the district court for the southern district of New York; and yet they are less so than they would have been made but for the desire to avoid the appearance of unnecessary technicality, and the confidence reposed in forms which may be supposed to have received the sanction, express or tacit, of the learned judge of that court. For example, it seems to me proper, if not necessary, to state the name of the person by whom the entry was made, and the character (whether as *owner, consignee, agent* or *factor*) in which he acted, so as to show that he had a right by law to make the entry. The rule, as we have seen, is, that, although it is in general sufficient to charge the offense in the words of the statute, yet that the count must always be so framed as to show *with certainty* that the offense has been committed. But I presume that the allegation that "*an entry, duly signed,*" was made, has been considered to import with sufficient certainty a valid entry, binding upon all concerned.

2. Against articles contained in packages, for not being entered.

First. For that certain packages of goods, wares and merchandise, being subject to *ad valorem* duty on being imported into the United States, and being composed wholly or in part of wool [or wholly or in part of cotton], were imported in a ship or vessel called the Frances

[or in some ship or vessel to the said attorney unknown], from a foreign port or place, to wit, the port of Liverpool, in the kingdom of Great Britain [or from some foreign port or place to the said attorney unknown], into the port of in the said collection district.

Second. For that afterwards, to wit, on the day of an entry of the said goods, wares and merchandise, duly signed, was made at the office of the collector of customs aforesaid, purporting to be a just and true entry of all the goods contained in the said packages; but which said entry did not contain the said article [or articles] of goods, wares and merchandise, so seized as aforesaid, nor was any entry thereof at any time made with the said collector. And on such entry being made as aforesaid, a certain invoice [or certain invoices] of the said goods, wares and merchandise was [or were] produced and left with the said collector, who afterwards, to wit, on the day and year last aforesaid, at the port aforesaid, according to the statutes in such cases made and provided, caused the said packages to be examined; and, upon such examination, the said packages were then and there found to contain the said article [or articles] of goods, wares and merchandise, so seized, as aforesaid, and so omitted as aforesaid in the said entry of the said packages, contrary to the form of the statutes in such case made and provided. Whereby, and by force of the statutes in such case made and provided, the said article [or articles] or goods, wares and merchandise, became and is [or are] forfeited to the uses in the said statutes specified.

COUNTS FOUNDED ON THE EIGHTH SECTION OF THE SAME ACT; FOR FALSE SWEARING BY THE OWNER, IMPORTER OR CONSIGNEE.

First. For that heretofore, that is to say, on the day of in the year of our Lord one thousand eight hundred and [some day subsequent to the date of the act and not later than the day of seizure], the said goods, wares and merchandise being subject to *ad valorem* duty on being imported into the United States, were imported in a ship or vessel called the Frances [or in some ship or vessel to the attorney unknown], from a foreign port or place, to wit, the port of Liverpool, in the kingdom of Great Britain [or from some port or place to the said attorney unknown], into the port of in the said collection district.

Second. For that afterwards, to wit, on the day of an entry of the said goods, wares and merchandise, duly signed, was made at the office of the collector of customs aforesaid; and on such entry being made as aforesaid, a certain invoice [or invoices] of the said goods, or wares and merchandise was [or were] produced and left with the said collector.

Third. For that the said collector, afterwards, to wit, on the day and year last aforesaid, at the port aforesaid, according to the statutes of the United States in such case made and provided, caused the said goods, wares and merchandise to be inspected by appraisers of merchandise, duly appointed and commissioned for the purpose of having the actual value thereof, and the number of the yards, parcels or quantities, and such actual value of every of them, appraised, estimated and ascertained, as required by the said statutes; and thereupon the said appraisers then and there, in pursuance of the power and authority conferred upon them by the said statutes, for that purpose did call before them one A. B., he, the said A. B., being the owner [or the importer, or the consignee] of the said goods, wares and merchandise, and did then and there, in pursuance of the power and authority aforesaid, examine him, the said A. B., upon oath, touching certain matters and things which the said appraisers then and there deemed material in ascertaining the true value of the said goods, wares and merchandise.

Fourth. For that the said A. B., on such examination upon oath, did then and there depose and say, that [here set out the matter supposed to be false], whereas in truth and in fact, as the said A. B. then and there well knew [here state in what the falsity is supposed to consist], contrary, &c. Whereby and by force of the statutes, &c. [as in the preceding forms.]

CONCLUSION OF A LIBEL OR INFORMATION.

The following form is intended to be in conformity with the 22d rule recited, *supra*, p. 544:

Fifth [or as the case may be]. The said attorney of the United States, on behalf the said United States, saith that all and singular the premises are true. Wherefore, he prays that process in due form of law, may issue against the said goods, wares and merchandise, to enforce the forfeiture thereof, and requiring notice to be given to all

persons concerned in interest, to appear and show cause on the return day of the said process, why such forfeiture should not be decreed.

A. B., *District Attorney of U. S.*
for the District of

WARRANT OF ARREST.

[*Vide supra, p.* 553.]

District of , *ss.*

The President of the United States of America, to the Marshal of the District of

L. S. GREETING: Whereas a libel [or a libel of information] hath been filed in the District Court of the United States for the District of on the day of in the year of our Lord one thousand eight hundred and by A. B., Esquire, attorney of the United States for the said district, on behalf of the United States of America, against [here specify the property seized], for reasons and causes in the said libel [or information] mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons interested in the said [goods, wares and merchandise, ship Frances, her tackle, apparel and furniture, &c., &c., according to the fact], may be cited in general and special, to answer the premises, and all due proceedings being had that the said [goods, wares, &c., &c.], may, for the causes in the said libel [or information] mentioned, be condemned, and the proceeds thereof distributed according to law; you are therefore hereby commanded to attach the said [goods, wares, &c., &c.], and to detain the same in your custody until the further order of the court respecting the same, and to give due notice to all persons claiming the same, or knowing or having any thing to say why the same should not be condemned as forfeited, and the proceeds thereof distributed, according to the prayer of the said libel [or information], that they be and appear before the said court, to be held in and for the District of on the day of at o'clock, in the noon of that day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises, do you then and there make return thereof, together with this writ.

Witness, the Honorable Judge of the said court, at in the District of this day of in the year of our Lord one thousand eight hundred and

C. D., *Clerk.*

For the mode of executing the warrant. [*Vide, supra,* p. 553.]

The *Notice* recites the substance of the libel or information, and calls upon all persons concerned to show cause, &c., in the language of the monition.

The *Return* of the marshal (when he has executed the process), is as follows: "In obedience to the within warrant, I have arrested the [here describe the property, in general terms, as cloths, cassimeres, bales of cloth marked ship Frances, her tackle, &c.; horses, wagon, sleigh, &c., &c.], within mentioned, and have cited all persons having or pretending to have any right, title or interest therein, as by the said warrant I am commanded to do.

Dated the day of , 18

E. F., *Marshal.*"

CLAIMS AND DEFENSES.

CLAIM AND ANSWER BY THE OWNER.

District Court of the United States of America.
District of

The claim and answer of G. H., owner and claimant of the ship Juno [or as the case may be], to the libel of information [or information][1] of A. B. in behalf of the United States, against the said ship [or as the case may be].

And now comes G. H. of , owner of the ship Juno, and for answer to the libel of A. B. in behalf of the United States against the said ship, doth allege and propound as follows, to wit:

First. That he, the said G. H., is the true and *bona fide* owner of [or of one-fourth of] the said Juno, her boats, tackle, apparel and furniture, and that no other person is the owner thereof.

Second. That, &c.

Here follows a distinct reference and response "to each separate article and allegation in the libel."

[1] For the sake of brevity and convenience, I propose henceforth to use the appellation *libel* alone.

[In the forms of the libel or information hereinbefore given, the fact of the seizure, by the collector, of the property proceeded against, is alleged in the introductory part of the pleading, the articles designated by numbers, commencing with the matters relied on as grounds or causes of forfeiture. This form will be found most convenient, and it accords best with the rule. But the allegation of the seizure, no less than the articles, requires an answer. It is in virtue of a valid and subsisting seizure alone that the court is empowered to take cognizance of the case. There may have been no lawful seizure, and if there has been, it may have ceased to exist.[1] In such case, the claimant may avail himself of the fact as a defense, by way of exceptive allegation to the jurisdiction of the court, thus: it is not true that the said C. D., in the said libel named, did seize the said ship Juno, her tackle, apparel and furniture, as in the said libel is alleged and pleaded; [*or*, when there has been a seizure followed by an abandonment, thus:] it is true that the said C. D., in the said libel named, did seize the said ship, &c., as above, in the said libel, is alleged and pleaded; but this respondent doth also further allege and propound, that the seizure so made by the said C. D. of the said ship, &c., was by him afterwards, and before the filing of the said libel, voluntarily abandoned, and that the said C. D. does not now hold the same in custody, or any part thereof, as forfeited to the United States, as in the said libel is untruly alleged and pleaded. And of this the said A. B. is ready to make proof, as this honorable court shall direct; [or, if the proceeding is by information on the common law side of the court, then say: and this the said A. B. is ready to verify] wherefore he prays judgment whether this court can or will take further cognizance of the action aforesaid, and that the said libel may be dismissed.

It is very rare, however, that a prosecution is instituted against property not under actual seizure. In general, therefore, the fact of such seizure, and of its continuance, is to be admitted as follows: That it is true [or that this respondent has heard, and he believes it to be true], that the said C. D., in the said libel named, did seize the said ship Juno, her boats, tackle, apparel and furniture, and now holds the same in custody, as in the said libel is alleged and pleaded.]

Then proceed as follows:

Third. That it is true that, &c. [here recite the charge contained in the first article of the libel], as in the first article of the said libel is

[1] *Supra*, p. 487.

alleged and pleaded. Or, if the charge is untrue, then say: that it is not true [or this respondent has no knowledge, information or belief], that, &c., as in the first article of the said libel is untruly alleged and pleaded.

And if, as generally happens, the case requires it, add: for the truth and fact was and is, and this respondent doth allege and propound, that, &c. [describing the transaction as it was.]

When matters partly true and partly erroneous are comprised in one and the same article of the libel, and are so blended as not to admit of convenient separation, the response to such article may be framed thus: That as to the matters contained in the article of the said libel, the same are therein in great part falsely and untruly alleged and pleaded; for the truth and fact was and is, &c. [as above.]

Proceed in like manner to answer all the articles of the libel, concluding as follows:

Fourth, fifth. [or as the case may be.] That all and singular the premises are true. Wherefore the respondent prays that the said ship Juno, her boats, tackel, apparel and furniture [or, &c.] may be restored to him.

[Signed] A. B., *Respondent.*

R. S., *Proctor* [*or Attorney.*]

On the day of appeared personally, A. B., the above named respondent, and was sworn to the truth of the foregoing answer.

Before me. M. T., *Clerk* [*or Commissioner.*]

THE LIKE WHEN THE CLAIM IS INTERPOSED BY AN AGENT OR CONSIGNEE.

District Court of the United States of America.
District of

The claim and answer of E. F., agent of the owner [or of E. F., the consignee] of the ship Juno, &c., to the libel of A. B., in behalf of the United States, against the said ship, &c.

And now comes E. F., of the agent of G. H., of the owner [or comes E. F., of consignee] of the ship Juno, &c., and for answer to the libel of A. B., in behalf of the United States, against the said ship doth allege and propound as follows, to wit:

First. That the said G. H. is the true and *bona fide* owner of the said ship Juno, &c., and that no other person is the owner thereof; and that he, the said E. F. is duly authorized by the said G. H. to put in a claim in his behalf, to the said ship, in this suit.

Second. That, &c.

THE LIKE WHEN THE CLAIM IS INTERPOSED BY THE MASTER OF A VESSEL.

District Court of the United States of America.
District of :

The claim and answer of C. D., master and claimant of the ship Juno, in behalf of G. H., the owner thereof, to the libel of A. B., in behalf of the United States, against the said ship.

And now comes C. D., master of the said ship Juno, and for answer, &c. [as in the last form].

First. That G. H. of is the true and *bona fide* owner of the said ship Juno, and that no other person is the owner thereof; and that he, the said C. D., is now the master of the said ship, and as such master, has the possession and is the lawful bailee thereof for the said G. H.

Second. That, &c.

The foregoing claims and answers, it will be seen, are in the form prescribed by the Supreme Court in causes of civil and maritime jurisdiction.

The brief, simple form permitted by the rules of the Northern and Southern Districts of New York, is sufficiently indicated in the rule 23, of the former of these courts, which see.

BOND REQUIRED, BY THE ACT OF 1799, OF THE CLAIMANT ON FILING HIS CLAIM.

[*Vide supra*, p. 579.]

Know all men by these presents, That we,[1] A. B. and G. H., are held and firmly bound to the United States of America in the sum of two hundred and fifty dollars [or such other sum as the rules and practice of the court may require], lawful money of the said United States, to be paid to the said United States, for the payment of which well and

[1] As to the propriety of exacting a surety in this bond, *vide supra*, p. 580,

truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this day of in the year of our Lord one thousand eight hundred and

Whereas, an information [or libel of information], has been filed in the District Court of the United States of America for the District of , on the day of in the year of our Lord one thousand eight hundred and by J. S., Esquire, attorney of the said United States for the district aforesaid, against [here specify the property proceeded against,] for reasons and causes in the said libel [or information] mentioned, and praying that the same may be condemned as forfeited to the uses in the said libel [or information] specified: And whereas, also, a claim has been filed in the said court, by the said A. B., as owner [or &c., according to the fact] of the said . Now, therefore, the condition of this obligation is such, that in case the said A. B. shall not support his said claim, if the said A. B. and G. H., or either of them, or the heirs, executors or administrators of the said A. B. and G. H., or either of them, shall pay all such costs, as by reason of his failure to support his said claim he ought to pay, then this obligation to be void, otherwise to remain in full force and virtue.

A. B.
G. H.

Sealed, &c.

REPLICATION.

[*Vide supra*, p. 578.]

STIPULATION FOR COSTS AND EXPENSES ON PUTTING IN CLAIM, PURSUANT TO RULE 26 OF THE RULES OF ADMIRALTY PRACTICE.

On the day of in the year of our Lord before A. B., a commissioner duly appointed and empowered to take acknowledgments of bail, affidavits and depositions, &c., within the District of

The United States of America against , in a cause of seizure, civil and maritime, moved and prosecuted in the District Court of the United States of America, for the aforesaid district.

Which day, appeared personally, E. F., of , as claimant of the said , and produced for sureties G. H., of ,

and I. J., of ; and the said E. F., G. H. and I. J., submitting themselves to the jurisdiction of the said court, bound themselves, their heirs, executors and administrators, unto the said C. D., in the sum of [the sum directed by the court, by general rule or special order], to pay all costs and expenses which shall be awarded against the said E. F. in the said cause, by the final decree of the said court, or upon appeal of the appellate court; and, unless he shall do so, they do hereby severally consent that execution shall issue forthwith against them, their heirs, executors and administrators, goods and chattels, wheresoever the same may be found.

E. F.
G. H.
I. J.

Same day, taken and acknowledged before me,

A. B., *Commissioner.*

[As to the right of a third person to intervene for his interest in a prosecution for forfeiture, and the manner of exercising this right, &c., &c., see "Conkling's Admiralty."]

PETITION FOR THE DELIVERY OF PROPERTY ON BOND, PENDENTE LITE.

[*Vide supra*, 555; and *Appendix, Rule* 86, *D. C. N. D. N. Y.*]

To the Honorable , Judge of the United States for the district of

The petition of A. B. respectfully shows, that he is the owner of [here specify the property seized, as *a certain vessel called the* , or *certain goods, wares or merchandise, to wit,*], lately seized by the collector of the district of , and now in the custody of the marshal, in virtue of process issued from the district court for the said district of

And your petitioner now prays your honor to order the said to be delivered to him, upon his executing a bond to the United States, with sureties, according to the statutes in such case made and provided.

A. B.

C. D., *Proctor* [*or attorney*].

District of ss. On the day of , 18 , personally appeared before me the above named A. B., and made oath

that he is the true and *bona fide* owner of the above mentioned, and that no other person is the owner thereof.

A. L., *Clerk* [or *Commissioner, &c.*]

[If a claim has already been actually put in, this oath is unnecessary.

The act of Congress, as we have seen, requires *three* appraisers. It is usual for each party to nominate persons for appointment; a selection is then made from the names thus furnished.

A notice to each of the appraisers is to be drawn up and signed by the clerk.]

NOTICE TO THE APPRAISERS.

District Court of the United States
for the district of

The United States
v.

SIR: Please to take notice, that you, together with C. D. and E. F., have this day been appointed an appraiser to appraise the goods [or vessel, &c.] mentioned in the above entitled suit, and you are hereby requested to appear before the said court [or, if the application be made in vacation, *before the judge of the said court*], at on at o'clock in the noon, to take the oath required by law.

Dated 18 .

A. L., *Clerk.*

To

[The oath is also drawn up by the clerk.]

APPRAISERS' OATH.

[Title of the cause, as in the notice.]

We, the subscribers, having been duly appointed appraisers to appraise the goods [or vessel, &c.] mentioned in the above entitled suit, do severally solemnly swear, that we will faithfully and fairly appraise the same, and make a true report of the value thereof, according to the best of our understanding, without unnecessary delay.

Sworn, &c. [either in open court, or, if in vacation, before the judge].

A. B.
C. D.
E. F.

Notice of the time and place of appraisement is to be given by the appraisers to the district attorney, the collector and the claimant. In the Southern District of New York, the practice is to do this by posting up a notice of the place (near the U. S. Court Rooms) where the marshal usually posts his notices, in the following form:

[Title of the suit as above.]

Public notice is hereby given, that we, the subscribers, will proceed to appraise the goods [or, &c.], mentioned in the above entitled suit, on the day at o'clock in the noon, at the store No. street, in the city of New York. Dated

A. B.
C. D.
E. F.

But where the district attorney, collector and claimant do not reside on the spot, this form of notice would certainly be insufficient. In such case there should be a notice to each by personal service.

Accompanying the report, there must be an affidavit of the service of this notice, made before the clerk or a commissioner.

FORM OF THE APPRAISERS' REPORT.

[Title of the cause as above.]

We, the subscribers, appraisers duly appointed and sworn in the above entitled suit, report that we have carefully examined the above named goods [or vessel called the ; or, &c.], and that the value thereof is dollars [or, if, as is generally the case, the property in question consists of several distinct parcels or articles, then say, the value thereof *is as follows, to wit:* and then specify the various parcels or articles, successively, and place opposite to each sum which is appraised].

Dated

A. B.
C. D.
E. F.

Rule *tenth* of the rules of practice in admiralty, regulating the right of the owner to the delivery to him of the property *pendente*

lite, like the *twenty-sixth* rule, designates a *stipulation* as the form of security to be given; and, like the latter rule, its language is sufficiently general to embrace cases of municipal seizure prosecuted on the admiralty side of the court. What is there said, therefore, of the security to be given on putting in a claim is equally applicable to the case of a delivery of the property *pendente lite;* and a form both of a bond and of a stipulation is accordingly subjoined.

BOND FOR VALUE OF PROPERTY ON DELIVERY, REQUIRED BY THE ACT OF 1799.

[*Vide supra*, 555, *et seq.*]

Know all men by these presents, that we, A. B. and G. H., are held and firmly bound unto the United States of America, in the sum of dollars [double the amount specified in the condition], to be paid to the said United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the day of in the year of our Lord one thousand eight hundred and

Whereas, an information [or libel of information], has been filed in the District Court of the United States of America, for the District of , on the day of in the year of our Lord one thousand eight hundred and , by J. S., Esquire, attorney of the United States for the said District, on behalf of the said United States, against [here specify the property proceeded against], for reasons and causes in the said libel [or information] mentioned; and whereas the said is [or are] now in the custody of the marshal of the said district, under the process issued in pursuance of the prayer of the said libel [or information]; and whereas, the value of the said as appears by the appraisement [or agreement], now on file in the said court is dollars; now, therefore, the condition of this obligation is such, that in case the said shall, by the sentence, decree or judgment of the said court, be condemned as forfeited, if the said A. B. and G. H., or either of them, or the heirs, executors or administrators of the said A. B. and G. H., or of either of them, shall thereupon

pay into the said court, the sum of dollars,[1] then this obligation to be void, otherwise to remain in full force and virtue.

A. B.
G. H.

Sealed and delivered
in presence of

STIPULATION FOR VALUE OF PROPERTY ON DELIVERY PURSUANT TO RULE TENTH.

On the day of in the year of our Lord , before A. B., a commissioner, duly appointed and empowered to take acknowledgments of bail, affidavits and depositions, &c., within the District of

The United States of America against in a cause of seizure, civil and maritime, moved and prosecuted in the District Court of the United States of America, for the aforesaid District.

Which day, appeared personally, E. F. of as owner of the said , and produced for sureties G. H. of , and I. J. of ; and the said E. F., G. H. and I. J., submitting themselves to the jurisdiction of the said court, bound themselves, their heirs, executors and administrators, unto the said United States, if the said shall, by the final decree of the said court, or upon appeal of the appellate court, be condemned as forfeited, to pay the sum of , being the appraised value of the said .[2]

(Signed) E. F.
G. H.
I. J.

Same day, taken and acknowledged
before me, A. B., *Commissioner.*

PETITION FOR THE SALE OF PERISHABLE PROPERTY, PENDENTE LITE.

[*Vide supra* 567; *and Appendix, Rule* 87, *D. C. N. D. N. Y.*]

To the Honorable judge of the United States for the District of .

[1] There ought to be no engagement to pay costs. If a claim be interposed, it must be accompanied by security for costs. If none is interposed no costs can be adjudged.

[2] See note to last form.

The petition of A. B. respectfully shows, that he is the owner of [here specify the property seized—as a certain vessel called the , or certain goods, wares and merchandise, to wit:] lately seized by the collector of the district of , and now in the custody of the marshal in virtue of process issued from the District Court for the said District of . And your petitioner further shows, that the said is in a perishable condition, so as, in the opinion of your petitioner, to require an immediate sale thereof. Your petitioner therefore prays your honor to order the same to be sold, and the proceeds thereof to be paid into the said court, to abide the definite decree and order of the said court. A. B.

C. D., *Proctor* [*or Attorney.*]

District of *ss.* On the day of , 18 personally appeared before me, the above named A. B., and made oath to the truth of the foregoing petition.

A. L., *Clerk* [*or Commissioner, &c.*]

[When the application is made by the District Attorney, the above form will, of course, be modified accordingly. In England, and probably in some of the districts of the United States, a commission is issued for the survey of the property in question in order to ascertain its condition. But this is not, ordinarily, the practice in the New York Districts.

In these districts the usual writ of *venditioni exponas,* with slight alterations, is used for the sale of perishable property—which see, *post.* To adapt the form given, to this purpose, it is only necessary to change the word *"final,"* before sentence and decree, to *interlocutory,* and to omit the words *"condemned as forfeited," &c.*]

VENDITIONI EXPONAS.

District of *ss.*

The President of the United States of America to the Marshal of the District of

L. S. GREETING: Whereas, a libel [or information] has been filed in the District Court of the United States for the District of on the day of in the year of our Lord one thousand eight hundred and by J. A. S., Esquire, attorney of the United States, for the said district,

on behalf of the United States of America, against [here specify the property seized] and praying that the same may be condemned as forfeited, and the proceeds thereof distributed according to law. And whereas the said has [or have] been attached by the process issued out of the said District Court, in pursuance of the prayer of the said libel [or information] and is [or are] now in custody by virtue thereof; and such proceedings have been thereupon had, that by the final sentence and decree of the said court, in this cause made and pronounced, on the day of eighteen hundred and the said was [or were] condemned as forfeited, and ordered to be sold by you, the said marshal, at after giving days' notice of such sale, according to law; and that you have the moneys arising from such sale, together with this writ, at the next stated [or special] session of the District Court of the United States, to be held for the District of at on the day of and that you then pay the same to the clerk of this court. Therefore, you, the said marshal, are hereby commanded to cause the said to be sold at aforesaid, in the manner and form by law required. And that you have and pay the moneys arising from such sale, pursuant to the aforesaid order or decree; and have you also then and there this writ.

Witness, the Honorable judge of the said court, at in the District of this day of in the year of our Lord one thousand eight hundred and

A. L., *Clerk.*

MARSHAL'S RETURN.

In obedience to the within precept, I have sold the within mentioned , and such sale amounts to which sum I have paid to the clerk of this court, as I am within commanded.

C. R., *U. S. Marshal.*

WARRANT OF RESTITUTION.

District of *ss.*

The President of the United States of America, to the Marshal of the District of

[L. S.] GREETING: Whereas, a libel [or information] has been filed in the District Court of the United States for the District of , on the day of , in the year of our Lord one thousand eight hundred and , by J. A. S., Esquire, attorney of the United States, for the said District, on behalf of the United States of America, against [here specify the property in question], praying that the same may be condemned as forfeited to the said United States. And, whereas, the said has been attached by the process of the said court, in pursuance of the prayer of the said libel [or information], and is [or are] now in your custody, in virtue of the said process; and, whereas, also, a claim has been interposed and filed in the said court, by A. B. as owner [or, &c., according to the fact] of the said , and such proceedings have been thereupon had, that by the final sentence and decree of the said court, in this cause made and pronounced, on the day of , eighteen hundred and , the said was [or were] adjudged to belong as claimed, and was [or were] ordered to be restored to the said claimant. Therefore, you, the said marshal, are hereby commanded to release the said from arrest, and deliver and restore the same unto the said A. B. And what you shall have done in the premises, do you make return thereof before the said court of , on the day of , at o'clock, in the noon of that day, if the same shall be a day of jurisdiction, otherwise, on the next day of jurisdiction thereafter, together with this writ.

Witness, the Honorable , judge of the said court, at , in the District of , this day of in the year, &c.

A. L., *Clerk.*

MARSHAL'S RETURN.

In obedience to the within precept, I have delivered the within mentioned to A. B., the within named claimant,

C. R., *Marshal.*

PETITION FOR THE REMISSION OF A FORFEITURE.

To the Honorable , judge of the District Court of the United States, for the District of

The petition of A. B., of , respectfully shows, that he is the owner of [here specify the property seized, as a certain vessel called the , or certain goods, wares and merchandise, to wit,] which have been seized by the collector of customs for the District of , by force of the laws of the United States for laying, levying and collecting duties on imports, [or concerning the registering and recording of ships or vessels, or, &c., according to the fact, and if, as will generally be the case, a libel or information has already been filed, then add], and against which a libel [or information] has been filed in this court, by J. S., Esquire, attorney of the United States for the said District of

praying, for the reasons and causes therein set forth, that the same may be condemned as forfeited to the United States.

And your petitioner, being desirous of obtaining a remission of the forfeiture of the said , truly and particularly sets forth the circumstances of his case as follows, to wit: That [here state, with precision and clearness, the facts and circumstances of the case]. Wherefore your petitioner, averring that he had no intention in the premises of violating any law of the United States, prays that your honor will inquire in a summary manner into the circumstances of the case, and cause the facts, which shall appear on such inquiry, to be stated and annexed to this, his petition, and direct their transmission to the Secretary of the Treasury of the United States, to the end that he may remit the said forfeiture, if he shall see fit to do so, upon such terms and conditions as he may deem reasonable and just, according to the statute in such case made and provided,

A. B.

J. S., *Proctor* [*or Attorney*].

District of *ss.* On the day of , 18 , personally appeared before me, the above named A. B., and made oath that the facts and circumstances set forth in the foregoing petition are true.

C. D., *Clerk* [*or Commissioner to take Affidavits in and for the District of*].

FORM OF TRANSMISSION BY THE CLERK TO THE SECRETARY OF THE TREASURY.

United States of America
District of *ss.*

In the matter of the petition of A. B., }
for the remission of a forfeiture. }

The petitioner having on the day of presented to the judge of the said district, the petition hereunto annexed [or a petition, a copy whereof is hereunto annexed], praying, for the reasons therein set forth, that the said judge would make a summary inquiry into the circumstances of his case, and cause a statement thereof to be transmitted to the Secretary of the Treasury of the United States; and it appearing to the said judge that reasonable notice had been given to the person [or persons] claiming such forfeiture, and to the attorney of the United States for the said District, of the intention of the said petitioner to present his said petition on the said day, by the service on the said person [or persons] of a copy of the said petition, together with a notice of such intention; the said judge thereupon proceeded to inquire in a summary manner into the circumstances of the case. And the said judge did then and there order and direct, that the facts appearing on such inquiry should be stated and annexed to the said petition, and that the same should be transmitted to the Secretary of the Treasury of the United States; all which is accordingly done by these presents.

Witness, Esquire, judge of the United States for the District of
[L. S.] this day of in the year of our Lord one thousand eight hundred and

A. L., *Clerk.*

When the application is for the remission or mitigation of a *penalty*, there will, it is hoped, be little difficulty in so modifying the preceding forms as to adapt them to such a case.

V.

CERTIFICATE OF DIVISION IN OPINION.

[The principles which regulate the structure of this important certificate have already been stated, and the necessity of their exact observance sufficiently inculcated, in an antecedent part of this volume. The questions which may be certified to the Supreme Court, and the circumstances under which they may arise, are so various as necessarily to lead to considerable diversity in the form of the certificate. The intelligent pleader will, however, find little difficulty in adapting a form suitable for any given case, to any other case upon which he may be required to act. The following certificate is copied *verbatim* from Cranch's Reports, vol. 2, p. 272. The reason assigned by the reporter for inserting it at length is, that the case to which it pertained was the first that had occurred under the act of Congress (then recently passed) by which this remedy is given.

The certificate, it will be seen, was drawn up under the direction of Chief Justice MARSHALL and the judge of the district of North Carolina; and it was undoubtedly framed with much care and deliberation.]

"United States of America,
North Carolina District.

"At a Circuit Court of the United States, begun and held at Raleigh, for the District of North Carolina, on Wednesday the twenty-ninth of December, in the year of our Lord one thousand eight hundred and two, and in the twenty-seventh year of American Independence.

"Present, the Honorable JOHN MARSHALL,
and
HENRY POTTER, } Esquires.

"*Robert Ogden*, administrator *de bonis non*, with the will annexed of *Samuel Cornell*,

v.

"*Richard Blackledge*, executor of *Robert Salter*, deceased.

"State of the pleadings.

"This is an action of debt upon a bond given by the defendant's testator to the testator of the plaintiff, on the 2d day of March, 1775.

"The defendant, among other pleas, pleads in bar an act of the General Assembly of the State of North Carolina, passed in the year 1715, entitled 'An act concerning proving wills and granting letters of administration; and to prevent frauds in the management of intestate estates;' the ninth section of which is in the following words:

"*And be it further enacted*, That creditors of any persons deceased shall make their claim within seven years after the death of said debtor, otherwise such creditor shall be forever barred.

"To which plea the plaintiff replies, in substance, that the plaintiff's testator was, at his death, a British subject, and the debt within the true intent and operation of the fourth article of the treaty of peace concluded between the King of Great Britain and the United States.

"To this replication the defendant demurs, and the plaintiff joins in demurrer.

"This case coming on to be argued at this term, it occurred as a question whether the act of assembly recited in the plea of the defendant was, under all the circumstances stated, and the various acts passed by the Legislature of North Carolina, a bar in this action.

"On which question the opinions of the judges were opposed.

"Whereupon, on a motion of the plaintiff, by his counsel, that the point on which the disagreement hath happened may, during the term, be stated under the direction of the judges, and certified under the seal of the court, to the Supreme Court to be finally decided,—

"It is ordered, that the foregoing state of the pleading and the following statement of facts, which is made under the direction of judges, be certified according to the request of the plaintiff, by his counsel, and the law in that case made and provided; to wit:

"First. That Samuel Cornell, the plaintiff's testator, was, and till his death continued to be, a subject of the King of Great Britain; and the defendant's testator was, and till his death continued to be, a citizen of North Carolina.

"Second. That the defendant's testator died in the year one thousand seven hundred and eighty; and the defendant, in the same year, was qualified as executor.

"Third. That the plaintiff sued out a writ in this suit, on the fifth day of October, in the year of our Lord one thousand seven hundred and ninety-eight.

"United States of America,
North Carolina District.

"I, William Henry Haywood, clerk of the Circuit Court for the District of North Carolina, do hereby certify the foregoing to be a true copy from the minutes. Given under my hand and the seal of office, at Raleigh, on the fifth day of January, in the year of our Lord one thousand eight hundred and two.

"W. H. HAYWOOD,
"*Clerk.*"

VI.

LETTERS ROGATORY.

[The following form is copied from Peters's C. C. Rep., p. 236, note. A commission in the usual form had been issued, but the authorities of Havana would not permit it to be executed.

Letters rogatory were then substituted, and the testimony sought was obtained.]

United States,
District of Pennsylvania, } Sct.

The President of the United States, to any judge or tribunal having jurisdiction in civil causes at Havana, GREETING:

Whereas, a certain suit is pending before us in which John D. Nelson, Henry Abbott and Joseph F. Tatem are the claimants of the schooner Perseverance and cargo, and the United States of America are the defendants; and it has been suggested to us, that there are witnesses, residing within your jurisdiction, without whose testimony, justice cannot completely be done between the said parties: We therefore request you, that in furtherance of justice, you will, by the proper and usual process of your court, cause such witness or witnesses as shall be named or pointed out to you by the said parties, or either of them, to appear before you, or some competent person by you for that purpose to be appointed and authorized, at a precise time and place by you to be fixed, and there to answer, on their oaths and affirmations, to the several interrogatories hereunto affixed; and that you will cause their depositions to be committed to writing, and returned to us under cover, duly closed and sealed up together with these presents. And we shall be ready and willing to do the same for you in a similar case, when required. Witness, &c.

VIII.

Observations on the case of Nevins v. Johnson, decided in the Circuit Court of the United States for the Southern District of New York.

[*Vide supra*, p. 124, n. 1.]

Very soon after the organization of the constitutional government Congress passed "An act to promote the progress of the useful arts," by which a right of "action on the case," in the circuit court, was given to patentees for the infringement of their rights. This act was followed and superseded by a series of acts, all affording a like remedy, but none of them giving any remedy in equity, until the act of February 15, 1819, ch. 19. But the English court of chancery had always possessed jurisdiction for the purpose of restraining the violation of patented rights, *by injunction;* and to this purpose, primarily, it was limited. In the case of *Livingston* v. *Van Ingen* (Paine's R., 48, 52), in the Circuit Court of the United States for the Southern District of New York, that court then being composed of Mr. Justice Livingston and Judge Van Ness,—a bill in equity, praying an injunction to restrain the infringement of a patent, was dismissed, on the ground that the remedy given by the patent act of 1800 was only by "an action on the case;" and that the court accordingly possessed no jurisdiction in equity over the case.

Then came the act of 1819, above cited, by which it was enacted—

"That the circuit courts of the United States shall have original cognizance, as well in equity as at law, of all actions, suits, controversies, and cases, arising under any law of the United States, granting or confirming to authors or inventors the exclusive right to their respective writings, inventions and discoveries; and upon any bill in equity, filed by any party aggrieved in such cases, shall have authority to grant injunctions, according to the course and principles of courts of equity, to prevent the violation of the rights of any authors or inventors, secured to them by the laws of the United States, on such terms and conditions as the said courts may deem fit and reasonable."

Then follows a proviso, giving an appeal to the supreme court. The act has but one section, and that in the words above recited, without the proviso.

It is very clear, therefore, that it was passed for the sole purpose of curing what was regarded as a defect in the existing law. And what was this defect? Can it be doubted that it was the lack, in the circuit courts, of the power which had been found so beneficial in England, to interpose by injunction, in aid of the courts of law, for the more effectual protection of authors and inventors? This is the power expressly designated by the act, which also regulates its exercise by enjoining conformity "to the course and principles of courts of equity." References of this kind have always been considered to point to the courts of that country whence the principles of our jurisprudence are mainly derived.

Soon after the passage of this act another case arose in the circuit of the United States for the Southern District of New York. Mr. Justice THOMPSON having in the mean time succeeded Mr. Justice LIVINGSTON. In that case, alluding to the equity jurisdiction conferred by the act of 1819, the court said the equity jurisdiction exercised by the court over patents, is "merely in aid of the common law, in order to give more complete effect to the provisions of the statutes under which the patent is granted." *Sullivan* v. *Redfield.* Paine's Rep. 441. On this footing stood this new branch of jurisdiction until the passage of the elaborate patent act of July 4, 1836, ch. 357, repealing all former acts relating to patents, and re-enacting the above recited section of the act of 1819, with slight variations of language, and these, as far as possible, from expressing or inferring any intent to enlarge the equity jurisdiction conferred by that act. During all this long period of about twenty-eight years, so far as the published reports of the decisions of the courts of the United States show, no one imagined that the jurisdiction in question exceeded the limits assigned to it by the court in the case just cited. But in Mr. Law's useful digest of decisions in patent, copyright and trades-mark cases, I find the case of *Nevins* v. *Johnson,* 3 Blachf., p. 83, stated to have been decided 1853, by the Circuit Court of the United States for the Southern District of New York, in which it was held that "the patent act of 1836, § 17, confers jurisdiction in equity upon the circuit courts, *irrespective of the right of the plaintiff to an injunction, or of his demand for one*!" The bill in equity alleged an infringement by the defendant for which it claimed damages, but prayed for no injunction. The bill was demurred to and *the demurrer was overruled.* The volume of reports from which this digest of the case was taken is not, as I can learn, to be found in Western New York, and a fruitless inquiry was made for it last year in Albany. But the case is mentioned by Mr.

Curtis at the close of his learned work on patents: and in a note he gives what appears to be an extract from the reported opinion of the court, assigning the reason for its decision, as follows:

"The arrangement of the provisions of sec. 17 may fairly be referred to, as implying that the power to award injunctions was introduced by Congress, rather as auxiliary to the general equity jurisdiction imparted, than as the substantive and primary purpose of the enactment. It bears more the aspect of an incident to the jurisdiction before conferred than a condition of the jurisdiction itself."

Of this reason I have only to observe that, if there is any thing in the act which gives it either force or plausibility, the learned reader must discover it for himself.

It is true, that, independently of the right to relief by injunction, in suits for the recovery of damages for the violation of patented rights, as in other cases, the aid of a court of equity may, though very rarely, be required, and may, in strict accordance with the rules and principles belonging to equity jurisdiction, be afforded. And it may be conceded that it was, by the act of 1819, and the 17th section of the act of 1836, intended to provide for such cases, should any such happen to arise. But is it to be imagined that it was designed to confound the remedies at law and in equity, and permit a patentee whose rights had been infringed to sue either at law, or, at his option, by bill in equity, to recover his damages? If so, why was this monstrous innovation limited to patent cases? Why not by general enactment extend it to cases of assault and battery, slander, assumpsit, trespass, ejectment, &c., &c.? for all such cases are cognizable in the courts of the United States at the suit of a citizen of another state, or an alien. But the truth is, the imputation of any such purpose to congress is preposterous, not to say insulting. The broad distinction between the jurisdiction of the national courts at law and their jurisdiction in equity has, from the outset, been distinctly recognized, first in the constitution, and next in the judiciary act of 1789.

The 16th section of this act, doubtless from abundant caution, considering that in some of the states the distinction between these forms of remedy was but imperfectly understood, expressly enacts, "That suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate and complete remedy may be had at law." This provision, in truth, was merely declaratory, and so it was said by the supreme court in *Boyce's Executors* v. *Grundy*, 3 Peters, 210. And in the early case of *Robinson* v. *Campbell*, 3 Wheat., 212, it was said by that court that, to determine whether there is such remedy at law, reference must be had to the principles

of the common law of England; and this principle is emphatically reiterated in *Thompson* v. *Railroad Companies*, 6 Wallace's S. C. Rep., 134. The English lawyer who should resort to the court of chancery, instead of a court of law, to recover damages for the infringement of a patent, would be pronounced an idiot or a madman.

And what, under this interpretation of the act, becomes of the "right," expressly secured by the constitution, "of trial by jury, in all suits at common law, where the value in controversy shall exceed twenty dollars?"

The established remedy for the violation of rights secured by letters patent had, for centuries in England, and always in this country, been an action at common law. This remedy was expressly given by the first patent act passed by congress, and this provision has been from time to time reiterated, down to the act of 1836, inclusive; and was it the purpose of congress, or if it was, had congress the constitutional authority to put it in the power of a patentee, at his option, to deprive the infringer of his right of trial by jury? The ground on which a party, asking the assistance of a court of equity, is entitled to be heard, is that he "is remediless at law," and although, if the fact be so, it can hardly fail to be evident from the statement of the case in his bill, yet an express allegation to this effect, called "the jurisdiction clause," has always been necessary in England and the omission of it fatal on demurrer to the bill. So it was in the courts of the United States until the promulgation by the supreme court, in 1842, of rules of practice for the courts of equity of the United States; one of the objects of which was, as far as could safely be done, to simplify the forms of pleading and procedure, with a view to the saving of unnecessary expenses to suitors. One of these rules (the 21st) relates to the structure of bills in equity, and provides that—

"The plaintiff, in his bill, shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff; also what is commonly called the charging part of the bill, setting forth the matters or excuses which the defendant is supposed to intend to set up by way of defense to the bill; also what is commonly called the jurisdiction clause of the bill, that the acts complained of are contrary to equity, and that the plaintiff is without any remedy at law, and that the bill shall not be demurrable therefor."

But suppose it clearly appears on the face of the bill that the plaintiff *has* a plain remedy at law—that the injury complained of is one for which redress has always been sought in a court of law, would not the bill be demurrable on this ground?

It seems incredible that any lawyer having any acquaintance with the principles of equity jurisprudence, however superficial, should entertain even a doubt upon this question; and yet, as we have seen, the circuit court of the United States for the southern district of New York, and that, too, in direct opposition to a previous decision of the same court, has given it a negative answer! Whether this most extraordinary and inexcusable error has had the effect of a precedent for its repetition in that district I am not apprised; but I have learned with surprise and regret that it has been repeated by the judge of the district court for the northern district of New York, sitting alone in the circuit court for that district, misled, it may charitably be presumed, by a mistaken sense of what was due from him to his absent associate, by whom, as presiding judge of the circuit court for the southern district, the decision in the case of *Nevins* v. *Johnson* seems to have been pronounced. It is true the district judge refers to what he regards as an implied prayer for *discovery* contained in the bill, and seems to found his decision upon it. But what was the purpose of this prayer? Not the legitimate purpose of obtaining aid in the prosecution of a suit at law for the recovery of damages for the infringement of his patent, but to assist him in his unlawful resort for redress to a court of equity instead of a court of law. The bill prayed, not for damages, *eo nomine*, but that the defendants be compelled to account for and pay over to the complainant "the *profits* by them acquired," by the infringement of his patent, which he avers, however, to be his damages; and this is the prayer which was interpreted as a prayer for a discovery and a valid ground of jurisdiction. For an infringement of his patent, the patentee is entitled by law to recover *damages* or *nothing*. Jurisdiction cannot be acquired by the substitution of a new name. Profits, moreover, are rarely a fit subject of inquiry in determining the sum to be awarded to the patentee. There may be damages to an indefinite amount without profits; and there may be profits without a just claim to more than nominal damages.

POSTSCRIPT.

Before the introduction of the New York Code [*valde defiendus!*], no lawyer, and, for a considerable number of years afterward, only the young members of the profession, were ignorant of the forms of a plea of the general issue, and therefore, in deciding what precedents were likely to be most useful to the practitioner in the courts of the United States (where the English common system of pleading prevailed, and happily, has thus far withstood the spirit of innovation to which the legislatures of so many of the states have yielded), it never once occurred to me that there could be any need of giving forms of this plea; and this delusion continued through the successive editions, until it was at length dissipated by a recent incident. A lawyer called in behalf of one of his professional brethren, and informed me that the latter had been employed to defend a suit for the infringement of a patent; that the defendant denied the charge of infringement in toto, alleging that it had been committed, if at all, by another person, and the question was as to the form of denial adapted to the case. I answered that a simple plea of the general issue was the only proper one. Both these legal gentlemen were highly intelligent, well informed and successful lawyers. Pondering on this incident after the departure of the inquirer, and recollecting the dubious look with which he received this answer, it occurred to me, for the first time, that a young, not to say middle-aged, New York lawyer might never have heard of a plea of the general issue, and was very likely not to have in his library (so largely filled with the countless volumes of reports of decisions upon questions to which the code had given rise) a single book containing a form for this plea, and I accordingly drew up a form and sent it to the gentleman in whose behalf the inquiry had been made. But even then, while it would yet have been in season to insert the following forms in their proper place, I failed to discern the propriety, and, of course, to recognize the obligation, of supplying this deficiency. Nor was it until the foregoing pages were

printed that this blindness passed away. I now avail myself of the only mode left to me of repairing the error. It will naturally occur to the reader that it is the more important to do this, because, in a vast majority of cases, probably more than nineteen in twenty, the plea of the general issue, with or without a notice of special matter to be offered in evidence under it, is the only proper plea.

GENERAL ISSUE IN ASSUMPSIT.

Circuit Court of the United States
in and for the Circuit and District of

or

District Court of the United States
in and for the District of

C. D. *ads.* A. B. } Of the term of [the last preceding, or the pending term] in the year one thousand eight hundred and

And the said C. D., by G. H., his attorney, comes and defends the wrong and injury, when, &c., and says that he did not undertake or promise in the manner and form as the said A. B. hath above thereof complained against him, and of this he puts himself upon the country, &c.

G. H., *Attorney for Defendant.*

IN DEBT.—*Nil debet.*

Caption and title of the cause as above.

And the said C. D., by G. H., his attorney, comes and defends the wrong and injury, when, &c., and says that he does not owe the said sum of dollars above demanded, or any part thereof, in manner and form as the said A. B. hath above thereof complained against him, and of this he puts himself upon the country, &c.

G. H., *Attorney for Defendant.*

IN DEBT.—*Non est factum.*

Caption and title.

And the said C. D., by G. H., his attorney, comes and defends the wrong and injury, when, &c., and says that the said supposed writing

obligatory [or "indenture," or "articles of agreement," as the case may be] is not his deed, &c., and of this he puts himself upon the country, &c.

G. H., *Attorney for Defendant.*

IN DEBT.—*Nul tiel record.*

Caption and title.

And the said C. D., by G. H., his attorney, comes and defends the wrong and injury, when, &c., and says that there is not any record of the said supposed recognizance [or, if the action be on a judgment, "of the said supposed recovery"] in the said declaration mentioned, remaining in the court aforesaid, before the said justices [or judge] thereof, in the manner and form as the said A. B. hath above, in his said declaration, alleged, and this he, the said C. D., is ready to verify, wherefore he prays judgment if the said A. B. ought to have or maintain his aforesaid action thereof against him the said C. D., &c.

G. H., *Attorney for Defendant.*

IN COVENANT.

Caption and title.

And the said C. D., by G. H., his attorney, comes and defends the wrong and injury, when, &c., and says that the said indenture [or "articles of agreement," or "deed-poll"] is not his deed; and of this he, the said C. D., puts himself upon the country, &c.

G. H., *Attorney for Defendant.*

[In all the foregoing cases the action arises *ex contractu, i. e.*, it is founded in contract. The following arise *ex delicto, i. e.*, they are founded in intentional wrong. They comprise actions "on the case," as they are denominated in the common law, and trover; and actions of *trespass vi et armis*, the wrong consisting in a direct act of unlawful invasion of a right of person or property.]

GENERAL ISSUE IN CASE OR TROVER.

Title and caption.

And the said C. D., by G. H., his attorney, comes and defends the wrong and injury, when, &c., and says that he is not guilty of the

said supposed grievances above laid to his charge, in manner and form as the said A. B. hath above thereof complained against him; and of this the said C. D. puts himself upon the country, &c.

G. H., *Attorney for Defendant.*

[This is the form of the general issue belonging to an action to recover damages for the infringement of rights secured by *letters patent.* The 15th section of the patent act of 1836 enumerates several grounds of defence of which the defendant may avail himself by appending to his plea a notice that he will at the trial offer evidence of them.]

IN TRESPASS.

Title and caption.

And that the said C. D., by G. H., his attorney, comes and defends the force and injury, when, &c., and says that he is not guilty of the said supposed trespasses above laid to his charge, or any part thereof, in manner and form as the said A. B. hath above thereof complained against him; and of this he puts himself upon the country.

C. D., *Attorney for Defendant.*

[The proper place for these forms would of course have been next following the forms of declarations.]

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ERRATA.

Expunge "for" at the beginning of paragraph 3, page 105.

Substitute "13–17," for "76–81," at the end of paragraph 3, page 126.

Expunge "and habeas corpus" in the title of Chapter III, Part IV, page 604.