

Penhallow Vs. Doan's Administrators

Penhallow Vs. Doan's Administrators

SooperKanoon Citation : sooperkanoon.com/78116

Court : US Supreme Court

Decided On : 1795

Appeal No. : 3 U.S. 54

Appellant : Penhallow

Respondent : Doan's Administrators

Judgement :

Penhallow v. Doan's Administrators - 3 U.S. 54 (1795)

U.S. Supreme Court Penhallow v. Doan's Administrators, 3 U.S. 3 Dall. 54 54 (1795)

Penhallow v. Doan's Administrators

3 U.S. (3 Dall.) 54

ERROR TO THE CIRCUIT

COURT OF NEW HAMPSHIRE

SYLLABUS

Congress had power before the ratification of the Articles of Confederation, to establish courts of appeals for all prize causes, and the decision of the court of

appeals is final against all proceedings in courts of admiralty erected by or under the authority of the separate states of the union.

Courts of appeal in cases of admiralty and maritime jurisdiction may, having all the matter in controversy before them, make such a decree as the inferior court, from which the case was removed, should have given.

The district courts of the United States having admiralty jurisdiction may sustain a libel to carry into effect the decree of the court of appeals, erected by Congress under the Articles of Confederation. A decree of a court of admiralty *in rem* is final and conclusive as to all the matters in controversy, and the grounds of the decree cannot be inquired into in another admiralty court on a libel to carry the decree into execution.

An appeal from the decree of a court of admiralty suspends the effect of the decree from which the appeal is taken.

The case was argued from the sixth to the seventeenth of February.

The case, reduced to an historical narrative by Judge Paterson in delivering his opinion, exhibits these features:

"This cause has been much obscured by the irregularity of the pleadings, which present a medley of procedure, partly according to the common and partly according to the civil law. We must endeavor to extract a state of the case from the record, documents, and acts which have been exhibited."

It appears, that 25 November, 1775, Congress passed a series of Resolutions respecting captures. These Resolutions are as follow:

"Whereas it appears from undoubted information that many vessels, which had cleared at the respective custom houses in these colonies, agreeable to the regulations established by acts of the British Parliament, have, in a lawless manner, without even the semblance of just authority, been seized by His Majesty's ships of war and carried into the harbor of Boston and other ports, where they have been rifled of their cargoes by order of His Majesty's naval and military

officers there commanding without the said vessels' having been proceeded against by any form of trial and without the charge of having offended against any law."

"And whereas orders have been issued in His Majesty's name to the commanders of his ships of war to proceed as in the case of actual rebellion against such of the sea port towns and places being accessible to the King's ships, in which any troops shall be raised or military works erected,

Page 3 U. S. 55

under color of which said orders the commanders of His Majesty's said ships of war have already burned and destroyed the flourishing and populous town of Falmouth, and have fired upon and much injured several other towns within the United Colonies and dispersed at a late season of the year, hundreds of helpless women and children with a savage hope that those may perish under the approaching rigor's of the season, who may chance to escape destruction from fire and sword, a mode of warfare long exploded amongst civilized nations."

"And whereas the good people of these colonies, sensibly affected by the destruction of their property and other unprovoked injuries, have at last determined to prevent as much as possible a repetition thereof and to procure some reparation for the same, by fitting out armed vessels and ships of force, in the execution of which commendable designs it is possible that those who have not been instrumental in the unwarrantable violences above mentioned may suffer unless some laws be made to regulate and tribunals erected competent to determine the propriety of captures. Therefore resolved"

"1. That all such ships of war, frigates, sloops, cutters, and armed vessels as are or shall be employed in the present cruel and unjust war against the United Colonies and shall fall into the hands of or be taken by the inhabitants thereof be seized and forfeited to and for the purposes herein after mentioned."

"2. Resolved that all transport vessels in the same service, having on board any troops, arms, ammunition, clothing, provisions, military or naval stores of what kind

soever, and all vessels to whomsoever belonging, that shall be employed in carrying provisions or other necessaries to the British army or armies or navy that now are or shall hereafter be within any of the United Colonies, or any goods, wares, or merchandise for the use of such fleet or army shall be liable to seizure, and with their cargoes shall be confiscated."

"3. That no master or commander of any vessel shall be entitled to cruise for or make prize of any vessel or cargo before he shall have obtained a commission from the Congress or from such person or persons as shall be for that purpose appointed in some one of the United Colonies."

"4. That it be and is hereby recommended to the several legislatures in the United Colonies as soon as possible to erect courts of justice or give jurisdiction to the courts now in being for the purpose of determining concerning the captures to be made as aforesaid and to provide that all trials in

Page 3 U. S. 56

such case be had by a jury under such qualifications as to the respective legislatures shall seem expedient."

"5. That all prosecutions shall be commenced in the court of that colony in which the captures shall be made, but if no such court be at that time erected in the said colony or if the capture be made on open sea, then the prosecution shall be in the court of such colony as the captor may find most convenient, provided that nothing contained in this resolution shall be construed so as to enable the captor to remove his prize from any colony competent to determine concerning the seizure after he shall have carried the vessel so seized within any harbor of the same."

"6. That in all cases an appeal shall be allowed to the Congress or such person or persons as it shall appoint for the trial of appeals, provided the appeal be demanded within five days after definitive sentence and such appeal be lodged with the Secretary of Congress within forty days afterwards, and provided the party appealing shall give security to prosecute the said appeal to effect, and in case of the death of the Secretary during the recess of Congress, then the said appeal to

be lodged in Congress within twenty days after the meeting thereof."

"7. That when any vessel or vessels shall be fitted out at the expense of any private person or persons, then the captures made shall be to the use of the owner or owners of the said vessel or vessels; that where the vessels employed in the capture shall be fitted out at the expense of any of the united colonies, then one-third of the prize taken shall be to the use of the captors and the remaining two-thirds to the use of the said colony, and where the vessels so employed shall be fitted out at the continental charge, then one-third shall go to the captors and the remaining two-thirds to the use of the united colonies, provided nevertheless that if the capture be a vessel of war, then the captors shall be entitled to one-half of the value, and the remainder shall go to the colony or continent as the case may be, the necessary charges of condemnation of all prizes being deducted before distribution made."

That on 23 March, 1776, Congress resolved that the inhabitants of these colonies be permitted to fit out armed vessels to cruise on the enemies of the united colonies.

That on 2 April, 1776, Congress agreed on the form of a commission to commanders of private ships of war; that the commission run in the name of the delegates of the united colonies of New Hampshire &c.;, and was signed by the President of Congress.

"That on 3 July, 1776, the Legislature of New Hampshire

Page 3 U. S. 57

passed an act for the trial of captures, of which the part material in the present controversy is as follows: "

"And be it further enacted that there shall be erected and constantly held in the Town of Portsmouth or some town or place adjacent in the County of Rockingham a court of justice by the name of the Court Maritime by such able and discreet person as shall be appointed and commissioned by the council and assembly for

that purpose, whose business it shall be to take cognizance and try the justice of any capture or captures of any vessel or vessels that have been, may, or shall be taken by any person or persons whomsoever and brought into this colony or any recaptures that have or shall be taken and brought thereinto."

"And be it further enacted that any person or persons who have been or shall be concerned in the taking and bringing into this colony any vessel or vessels employed or offending or being the property as aforesaid shall jointly or either of them by themselves or by their attorneys, or agents, within twenty days after being possessed of the same in this colony, file before the said judge a libel in writing, therein giving a full and ample account of the time, manner, and cause of the taking such vessel or vessels. But in case of any such vessel or vessels already brought in as aforesaid, then such libel shall be filed within twenty days next after the passing of this act, and at the time of filing such libel shall also be filed all papers on board such vessel or vessels, to the intent that the jury may have the benefit of the evidence therefrom arising. And the judge shall as soon as may be appoint a day to try by a jury the justice of the capture of such vessel or vessels, with their appurtenances and cargoes, and he is hereby authorized and empowered to try the same. And the same judge shall cause a notification thereof, and the name, if known, and description of the vessel so brought in, with the day set for the trial thereon, to be advertised in some newspapers printed in the said colony (if any such paper there be) twenty days before the time of the trial, and for want of such paper, then to cause the same notification to be affixed on the doors of the Town House, in said Portsmouth to the intent that the owner of such vessel, or any persons concerned, may appear and show cause (if any they have) why such vessel, with her cargo and appurtenances, should not be condemned as aforesaid. And the said judge shall, seven days before the day set and appointed for the trial of such vessel or vessels, issue his warrant to any constable or constables within the county aforesaid commanding them or either of them to assemble the inhabitants of their towns respectively and to draw out of the box, in manner provided for drawing jurors, to serve at the Superior

Court of Judicature so many good and lawful men as the said judge shall order, not less than twelve nor exceeding twenty-four, and the constable or constables shall, as soon as may be, give any person or persons so drawn to serve on the jury in said court due notice thereof, and shall make due return of his doings therein to the said judge, at or before the day set and appointed for the trial."

"And the said jurors shall be held to serve on the trial of all such vessels as shall have been libeled before the said judge, and the time of their trial, published, at the time said jurors are drawn, unless the judge shall see cause to discharge them, or either of them before, and if seven of the jurors shall appear and there shall not be enough to complete the number of twelve (which shall be a panel) or if there shall be a legal challenge to any of them, so that there shall be seven, and not a panel, it shall and may be lawful for the judge to order his clerk, the sheriff, or other proper officer attending said court to fill up the jury with good and lawful men present, and the said jury when so filled up and empanelled shall be sworn to return a true verdict on any bill, claim, or memorial which shall be committed to them according to law and evidence, and if the jury shall find that any vessel or vessels against which a bill or libel is committed to them have been offending, used, employed or improved as aforesaid, or are the property of any inhabitants of Great Britain as aforesaid, they shall return their verdict thereof to the said judge, and he shall thereupon condemn such vessel or vessels, with their cargoes and appurtenances and shall order them to be disposed of as by law is provided, and if the jury shall return a special verdict, therein setting forth certain facts relative to such vessel or vessels (a bill against which is committed to them) and it shall appear to the said judge by said verdict that such vessel or vessels have been infesting the seacoast of America or navigation thereof, or that such vessels have been employed, used, improved, or offending, or are the property of any inhabitant or inhabitants of Great Britain as aforesaid, he, the said judge, shall condemn such vessel or vessels and decree them to be sold, with their cargoes and appurtenances, at public vendue, and shall also order the charges of said trial and condemnation, to be paid out of the money which such vessel and cargo, with her appurtenances, shall sell for to the officers of the court according to the table of fees last established by law of this colony, and shall order the residue thereof to be

delivered to the captors, their agents, or attorneys for the use and benefit of such captors and others concerned therein, and if two or more vessels (the commanders whereof shall be properly commissioned) shall jointly take such vessel, the money which she and her cargo shall sell for (after payment of charges as aforesaid) shall

Page 3 U. S. 59

be divided between the captors in proportion to their men. And the said judge is hereby authorized to make out his precept, under his hand and seal, directed to the sheriff of the county aforesaid (or if thereto requested by the captors or agents to any other person to be appointed by the said judge) to sell such vessel and appurtenances and cargo at public vendue, and such sheriff or other person after deducting his own charges for the same, to pay and deliver the residue according to the decree of the said judge."

"And be it enacted by the authority aforesaid that any person or persons claiming the whole or any part or share, either as owner or captor of any such vessel or vessels against which a libel is so filed, may jointly or by themselves or by their attorneys or agents, five days before the day set and appointed for the trial of such vessel or vessels, file their claim before the said judge, which claim shall be committed to the jury, with the libel, which is first filed, and the jury shall thereupon determine and return its verdict, of what part or share such claimant or claimants shall have of the capture or captures, and every person or persons who shall neglect to file his or their claim in the manner as aforesaid shall be forever barred therefrom."

"And be it further enacted by the authority aforesaid that every vessel which shall be taken and brought into this colony by the armed vessels of any of the united colonies of America and shall be condemned as aforesaid, the proceeds of such vessels and cargoes shall go and be one-third part to the use of the captors and the other two-thirds, to the use of the colony at whose charge, such armed vessel was fitted out."

"And where any vessel or vessels shall be taken by the fleet and army of the united colonies and brought into this colony and condemned as aforesaid, the said judge shall distribute and dispose of the said vessels and cargoes according to the resolves and orders of the American Congress."

"And whereas the honorable Continental Congress has recommended that in certain cases an appeal should be granted from the court aforesaid."

"Be it therefore enacted that from all judgments or decrees hereafter to be given in the said Court Maritime on the capture of any vessel, appurtenances, or cargoes where such vessel is taken or shall be taken by any armed vessel fitted out at the charge of the united colonies, an appeal shall be allowed to the Continental Congress or to such person or persons as they already have, or shall hereafter appoint for the trials of appeals, provided the appeal be demanded within five days after definitive sentence given, and such appeal shall be lodged

Page 3 U. S. 60

with the Secretary of the Congress within forty days afterwards, and provided the party appealing shall give security to prosecute said appeal with effect, and in case of the death of the Secretary during the recess of the Congress, the said appeal shall be lodged in Congress within twenty days after the next meeting thereof, and that from the judgment, decrees, or sentence of the said court on the capture of any vessel or cargo which have been or shall hereafter be brought into this colony by any person or persons, excepting those who are in the service of the united colonies, an appeal shall be allowed to the Superior Court of Judicature which shall next be held in the county aforesaid."

"And whereas no provision has been made by any of the said resolves for an appeal from the sentence or decree of the said judge where the capture of any such vessel or vessels may be made by a vessel in the service of the united colonies and of any particular colony or person together,"

"Therefore be it enacted by the authority aforesaid that in such cases the appeal shall be allowed to the then next superior court as aforesaid, provided the

appellant shall enter into bonds with sufficient sureties to prosecute his appeal with effect. And such superior court, to which the appeal shall be shall take cognizance thereof in the same manner as if the appeal was from the inferior court of common pleas, and shall condemn or acquit such vessel or vessels, their cargoes, and appurtenances, and in the sale, and disposition of them proceed according to this act. And the appellant shall pay the court and jury such fees as are allowed by law in civil actions."

That on the 30 January, 1777, Congress resolved that a standing committee, to consist of five members be appointed to hear and determine upon appeals brought against sentences passed on libels in the courts of admiralty in the respective states.

That Joshua Stackpole, a citizen of New Hampshire, commander of the armed brigantine called the *McClary*, acting under the commission and authority of Congress, did, in the month of October, 1777, on the high seas, capture the brigantine *Susanna* as lawful prize.

That John Penhallow, Joshua Wentworth, Ammi R. Cutter, Nathaniel Folsom, Samuel Sherburne, Thomas Martin Moses Woodward, Neil McIntire, George Turner, Richard Champney, and Robert Furness, all citizens of New Hampshire, were owners of the brigantine *McClary*.

That George Wentworth was agent for the captors.

That, on 11 November 1777, a libel was exhibited to the Maritime Court of New Hampshire in the names of John

Page 3 U. S. 61

Penhallow and Jacob Treadwell in behalf of the owners of the *McClary* and of George Wentworth, agent for the captors, against the *Susanna* and her cargo, to which claims were put in by Elisha Doane, Isaiah Doane, and James Shepherd, citizens of Massachusetts.

That on 16 December, 1777, a trial was had before the said court, when the jury found a verdict in favor of the libellants, whereupon judgment was rendered that the *Susanna*, her cargo &c.;, should be forfeited and deemed lawful prize, and the same were thereby ordered to be distributed according to law.

That an appeal to Congress was in due time demanded, but refused by the said court because it was contrary to the law of the state.

That then the said claimants prayed an appeal to the Superior Court of New Hampshire, which was granted.

That on the first Tuesday of September, 1778, the Superior Court of New Hampshire proceeded to the trial of the said appeal, when the jury found in favor of the libellants; that thereupon the court gave judgment that the *Susanna*, with her goods, claimed by Elisha Doane, Isaiah Doane, and James Shepherd, were forfeited to the libellants, and the same were ordered to be sold at public vendue for their use and benefit, and that the proceeds thereof, after deducting the costs of suit and charges of sale, be paid to John Penhallow and Jacob Treadwell, agents for the owners, and to George Wentworth, agent for the captors, to be by them paid and distributed according to law.

That the claimants did in due time demand an appeal from the said sentence to Congress, and did also tender sufficient security or caution to prosecute the said appeal to effect, and that the same was lodged in Congress within forty days after the definitive sentence was pronounced in the Superior Court of New Hampshire.

That on 9 October, 1778, a petition from Elisha Doane was read in Congress, accompanied with the proceedings of a court of admiralty for the State of New Hampshire on the libel *Treadwell and Penhallow v. Brig Susanna*, praying, that he may be allowed an appeal to Congress, whereupon it was ordered that the same be referred to the committee on appeals. Fourth Journal of Congress 586.

That on 26 June, 1779, the commissioners of appeal or the Court of Commissioners gave their opinion that they had jurisdiction of the cause.

That the Articles of Confederation bear date 9 July, 1778, and were ratified by all the states on 1 March, 1781.

Page 3 U. S. 62

That by these articles, the United States was vested with the sole and exclusive power of establishing courts for receiving and determining finally appeals in all cases of capture.

That such a court was established by the style of "The Court of Appeals in Cases of Capture." By the commission, the judges were "to hear, try, and determine all appeals from the courts of admiralty in the states respectively, in cases of capture." 6th Journal of Congress, pp. 14, 21, 75.

That on 24 May, 1780, Congress resolved

"That all matters respecting appeals in cases of capture now depending before Congress or the Commissioners of Appeals, consisting of members of Congress, be referred to the newly erected Court of Appeals, to be there adjudged and determined according to law."

That in the month of September, 1783, the Court of Appeals, before whom appeared the parties by their advocates, did, after a full hearing and solemn argument, finally adjudge and decree that the sentences or decrees passed by the Inferior and Superior Courts of Judicature of New Hampshire, so far as the same respected Elisha Doane, Isaiah Doane, and James Shepherd, should be revoked, reversed, and annulled, and that the property specified in their claims should be restored, and that the parties each pay their own costs on the said appeal.

Here the cause rested till the adoption of the existing Constitution of the United States, except an ineffectual struggle before Congress on the part of New Hampshire and an unavailing experiment at common law to obtain redress on the part of the appellants. After the organization of the judiciary under the present government, the representatives of Elisha Doane, who was one of the appellants, exhibited a libel in the District Court of New Hampshire which was legally

transferred to the circuit court against John Penhallow, Joshua Wentworth, Ammi R. Cutter, Nathaniel Folsom, Samuel Sherburne, Thomas Martin Moses Woodward, Neil McIntire, George Turner, Richard Champley, Robert Furness & George Wentworth.

This libel, after setting forth the proceedings in the different courts, states that the brigantine *Susanna*, with her tackle, furniture, apparel, and cargo and also the monies arising from the sales thereof, came, after the capture, to the hands and possession of Joshua Wentworth, and George Wentworth, whereby they became liable for the same, together with the captors and owners. That after the death of Elisha Doane, letters of administration of the personal estate of the said Elisha were granted to Anna Doane, his widow, and Isaiah Doane, and that the widow afterwards intermarried with David Stoddard Greenough. The libellants pray process against the respondents

Page 3 U. S. 63

to show cause why the decree of the Court of Appeals should not be carried into execution, and they also pray that right and justice may be done in the premises and that they may recover such damages as they have sustained by reason of the taking of the *Susanna*.

The respondents, protesting, that they never were owners of the *McClary*, and that they have none of the effects of the *Susanna*, nor her cargo in their possession, say that the *Susanna* was in the custody of the marshal and, upon the final decree of the Superior Court of New Hampshire, sold for the benefit of the owners and mariners of the *McClary*, and distributed among them according to law; that the decision of the said court was final; that no other court ever had or hath or ever can have power to revoke, reverse, and annul the said decree, and, in a subsequent part of the pleadings, that the District Court of New Hampshire hath no authority to carry the decree of the Court of Appeals into execution or to give damages.

To this sort of plea and answer, neither and yet both, the libellants reply that the matters contained in their libel are just and true, and that they are ready to verify and prove the same; that the matters and things alleged by the respondents are false and untrue; that the Court of Commissioners and Court of Appeals were duly constituted and had jurisdiction of the subject matter; that no other court hath or can have authority to draw into question the legality of their decisions, and that the District Court of New Hampshire hath jurisdiction.

I have extracted and consolidated the material parts of the libel, plea, answer, replication, rejoinder, surrejoinder, etc., if they may be so termed, without detailing the allegations of the parties as they arise in the course of procedure.

Upon these pleadings, the parties went to a hearing before the Circuit Court of New Hampshire, which, after full consideration, decreed that the respondents should pay to the libellants their damages and costs occasioned by their not complying with the decree of the Court of Appeals, the quantum of which to be ascertained by commissioners. This interlocutory sentence was pronounced 24 October, 1793.

The commissioners reported, that the *Susanna*, her cargo, etc. were, on 2 October, 1778, being the assumed time of sale, worth 5,895 14s. 10p.

That they calculated thereon sixteen years interest, viz., from 2 October 1778, to 2 October 1794, amounting to 5,659 17s. 4p.

Page 3 U. S. 64

On this report's being affirmed, the circuit court pronounced its definitive sentence on 24 October, 1794, that the libellants recover against the respondents the sum of \$38,518.69 damages and \$154.30 costs. The respondents, conceiving themselves aggrieved, have removed the cause before this Court for revision.

The record being returned, the plaintiff in error, on 2 February, 1798, assigned the following errors:

"To the Chief Justice and the Associate Justices of the Supreme Court of the United States, to be holden at the City of Philadelphia on the first Monday of February, 1795, John Penhallow, Joshua Wentworth, Ammi Ruhammah Cutter, Nathaniel Fulsom, Samuel Sherburne, Sr. Thomas Martin Moses Woodward, Neil McIntire, George Turner, Richard Champney, Robert Furness, and George Wentworth, plaintiffs in error, against David Stoddart Grenough and Anna his wife and Isaiah Doane, Administrators of the estate of Elisha Doane, deceased, defendants."

"Humbly show that in the record and process aforesaid, hereto annexed, and in passing the final decree, it is manifestly erred in this, *viz.*, that whereas it was decreed in favor of the said David Stoddart Grenough, and Anna his wife, and Isaiah Doane, the said decree ought to have been in favor of the said John Penhallow and others, the plaintiffs, and for other and further errors they assign the following, *viz.*, "

"Firstly. That by said decree it was ordered that the said John Penhallow and others, plaintiffs, be condemned in damages for their not performing a certain decree of a court claiming appellate jurisdiction in prize causes, held in the City of Philadelphia on 17 September, 1783, when in fact the said last mentioned court had no jurisdiction, power, or authority whatever by law to make and pass the said decree, and that the said decree was illegal and a nullity."

"Secondly. That there is also manifest error in this, *viz.*, that if the said last mentioned court had at the time of their passing said decree appellate jurisdiction of said cause, yet said decree was altogether erroneous and impossible to be performed or executed because (as by the said Greenough's and others own showing in their libel aforesaid) the said Elisha Doane was, at the time of making and passing the said decree, *viz.*, on 17 September, 1783, and long before that time, dead, when, by the same decree, it is ordered that restoration of said property be made to said Elisha Doane."

"Thirdly. There is also manifest error in this, *viz.*, that said cause was not brought before Congress or the commissioners

by it appointed to hear and try appeals in prize causes according to the resolve of Congress, but repugnant thereto, viz., by way of complaint, and that no appeal from the said decree of said court of New Hampshire was allowed by the same court or by Congress."

"Fourthly. There is also manifest error in this viz., that in and by the said libel upon which the decree aforesaid in said circuit court is made, damages for not performing the decree of said Court of Appeals are not prayed for, wherefore the said circuit court ought not to have decreed or condemned the plaintiffs in damages as is done by said final decree."

"Fifthly. There is also manifest error in this, viz., that said final decree of said circuit court was not made upon a due trial and examination of the merits of the capture of the said Brigantine *Susanna*, her tackle, apparel and furniture, and of the goods, wares, and merchandises, and of the evidence or proofs which might have been adduced by the plaintiffs in error if such trial had been had. But the decree of the Court of Appeals was received and admitted as the only evidence of the right of claim of the said Grenough and others, the libellants, to the said Brigantine, her tackle, apparel and furniture, and of the said goods, wares, and merchandises condemned, and of the illegality of the capture and condemnation aforementioned in said libel, which is contrary to the usage and customs of admiralty Maritime and prize courts and altogether unwarranted by law."

"Sixthly. There is manifest error also in this, viz., that by the showing of the said libellants, the monies arising from the sale of said brigantine and cargo, etc., were paid to the said Joshua Wentworth and George Wentworth as agents, to be distributed according to law, viz., one-half to the owners of the said privateer, *McClary*, and the other to the captors, viz., to the officers and seamen on board, which were distributed accordingly. Whereas in fact by said final decree, they, the plaintiffs in error and Joshua and George as agents and the other plaintiffs as owners, are made liable and condemned in full damages for the whole value of said brigantine, her tackle, apparel, and furniture and of said goods, wares and

merchandises, which is altogether illegal."

"Seventhly. There is also manifest error in this, viz., that it doth not appear by the copy of the record of said Court of Appeals filed and used in this cause how the same cause in which that court decreed as aforesaid, came before said court or was legally instituted or had day therein at the time of passing said decree."

"Eighthly. There is manifest error in this also, viz., that said circuit court, in passing said final decree and in all the

Page 3 U. S. 66

proceedings in the same, acted and proceeded as a court of admiralty when as such, they by law, had no jurisdiction of said cause and could not legally take cognizance thereof."

"Wherefore, for these and other errors in the record and process and final decree aforesaid of the said circuit court, the said plaintiffs in error pray that the final decree aforesaid of the said circuit court may be reversed, annulled, and held to be altogether void, and they restored to all things which they have lost."

"JOHN S. SHERBURNE"

The defendants replied *in nullo est erratum*, and thereupon issue was joined.

Page 3 U. S. 89

IREDELL, JUSTICE.

This case, which is of so much novelty and importance, has been argued at the bar with very great ability on both sides. I have listened with the most respectful attention to everything that has been said upon it, and the opinion, which I am now to deliver is the result of the best consideration which I have been able to bestow on the subject.

The order in which it has appeared to me most convenient to arrange the different heads of inquiry is as follows:

1. Whether either of the decrees of June, 1779, or September, 1783, was originally valid?
2. If either of them was so, whether it was a decree which the District Court of New Hampshire, or the Circuit Court of New Hampshire, acting specially in this cause for the legal reason alleged, had authority to enforce, either by decreeing a specific execution, or awarding damages for a nonperformance of it?
3. Whether, if the district or circuit court had such an authority, it has been executed properly in this instance, under all the circumstances of the case?
4. Whether, in case the libellants were entitled to a decree in their favor, but it shall appear that the decree has been erroneous in respect to the relief given, either in the whole or in part, this Court can rectify the decree, or order it to be rectified by the court below, or must affirm or reverse in the whole?

Under the first head it will be proper previously to consider if either of the decrees was final and conclusive because if that point should be decided in the affirmative, it will render

Page 3 U. S. 90

unnecessary a decision of many important questions that otherwise arise in this cause. This previous point, however, cannot be decided on satisfactory principles without in some measure tracing the origin of the general powers of Congress from the time of the earliest exercise of its authority to the period when definite and express powers were solemnly and formally given to it by the Articles of Confederation. I shall therefore make a few preliminary observations on this subject, though I by no means think it material to go into a full detail.

Under the British government, and before the opposition to the measures of the Parliament of Great Britain became necessary, each province in America composed (as I conceive) a body politic, and the several provinces were not

otherwise connected with each other than as being subject to the same common sovereign. Each province had a distinct legislature, a distinct executive (subordinate to the King) a distinct judiciary, and in particular the claim as to taxation, which began the contest, extended to a separate claim of each province to raise taxes within itself; no power then existed or was claimed for any joint authority on behalf of all the provinces to tax the whole. There were some disputes as to boundaries, whether certain lands were within the bounds of one province or another, but nobody denied that where the boundaries of any one province could be ascertained, all the permanent inhabitants within those boundaries were members of the body politic and subject to all the laws of it. When acts were passed by the Parliament of Great Britain which were thought unconstitutional and unjust, and when every hope of redress by separate applications appeared desperate, then was conceived the noble idea, which laid the foundation of the present independence and happiness of this country, (though independence was not then in contemplation) of forming a common council to consult for the common welfare of the whole so far as an opposition to the measures of Great Britain was concerned. In order to compose this common council, each province chose for itself, in its own way and by its own authority, without any previous concerted plan of the whole, deputies to attend at a general meeting to be held in this city, some appointed by their assemblies; others by Conventions; some perhaps in other modes; but, in whatever way the appointment was made, it was notoriously done with the hearty consent and approbation of the great body of the people in each province, and therefore the appointment was unexceptionable to all those who thought the opposition just and a union of the whole in the measures of opposition necessary. Each province even appointed as many or as few deputies as it pleased, at its own discretion, which was not objected to because the members of Congress did not

Page 3 U. S. 91

vote individually, but the votes given in Congress were by provinces, as they afterwards were (subsequent to the Declaration of Independence, and until the present Constitution of the United States was formed) by states.

The powers of Congress at first were indeed little more than advisory, but in proportion as the danger increased, their powers were gradually enlarged, either by express grant or by implication arising from a kind of indefinite authority, suited to the unknown exigencies that might arise. That an undefined authority is dangerous and ought to be entrusted as cautiously as possible every man must admit, and none could take more pains than Congress for a long time did to get their authority regularly defined by a ratification of the Articles of Confederation. But that previously thereto they did exercise, with the acquiescence of the states, high powers of what I may perhaps, with propriety for distinction, call external sovereignty is unquestionable. Among numerous instances that might be given of this (and which were recited very minutely at the bar) were the treaties of France in 1778, which no friend to his country at the time questioned in point of authority nor has been capable of reflecting upon since without gratitude and satisfaction. Whether among these powers comprehended within their general authority was that of instituting courts for the trial of all prize causes was a great and awful question -- a question that demanded deep consideration and not perhaps susceptible of an easy decision. That in point of prudence and propriety it was a power most fit for Congress to exercise I have no doubt. I think all prize causes whatsoever ought to belong to the national sovereignty. They are to be determined by the law of nations. A prize court is in effect a court of all the nations in the world, because all persons in every part of the world are concluded by its sentences in cases clearly coming within its jurisdiction. Even in the case of citizen and citizen I do not think it a proper subject for mere municipal regulation, because as was observed at the bar, a citizen may make a colorable claim which the court may not be able to detect, and yet a foreigner be fatally injured by it. In case of a *bona fide* claim, it may appear to be good by the proofs offered to the court, but another person living at a distance may have a superior claim, which he has no opportunity to exhibit. It is true a general monition issues, and this is considered notice to all the world, but though this be the construction of the law from the necessity of the case, it would be absurd to infer in fact that all the world had actual notice, and therefore no superior claimant to the one before the court could possibly exist. The court therefore can never know with certainty whether citizens only are interested in the inquiry.

But the words

Page 3 U. S. 92

"citizen and citizen" in this case are very ill applied to the parties in question, they not having been citizens of the same state, the captors having been citizens of New Hampshire and the claimant a citizen of Massachusetts Bay. It never was considered that before the actual signature of the Articles of Confederation, a citizen of one state was to any one purpose a citizen of another. He was to all substantial purposes as a foreigner to their forensic jurisprudence. If rigorous law had been enforced, perhaps he might have been deemed an alien, without an express provision of the state to save him. And as an unjust decision upon the law of nations, in the case of a foreigner to all the states, might, if redress had not been given, have ultimately led to a foreign war, an unjust decision on the same law in one state, to the prejudice of a citizen of another state, might have ultimately led, if redress had not been given, to a civil war, an evil much the more dreadful of the two. I have made these observations merely as to the propriety that this power should have been delegated, and therefore to show that if it was assumed without adequate authority, it was not an arbitrary and unnatural assumption of a power that ought exclusively to belong to a single state, but by no means with a view to argue that because it was proper to be given, therefore it was actually given -- a position which, as it would lead to dangerous and inadmissible consequences, cannot be the ground of a legitimate argument.

Some of the arguments at the bar, if pushed to an extreme, would tend to establish that Congress had unlimited power to act at its discretion so far as the purposes of the war might require, and it was even said that the *jus belli* never was in any one of the states, and therefore it could not be delegated by any state to Congress. My principles on this subject are totally different from those which were the foundation of this opinion, and as it is a point of no small importance, and I find on this occasion, as I have formerly done on others, considerable mistakes (as I conceive) by very able men, owing to a misapprehension of terms, I will endeavor to state my own principles on the subject with so much clearness that, whether my opinion be right or wrong, it may at least be understood what the

opinion really is.

If Congress, previous to the Articles of Confederation, possessed any authority, it was an authority, as I have shown, derived from the people of each province in the first instance. When the obnoxious acts of Parliament passed, if the people in each province had chosen to resist separately, they undoubtedly had equal right to do so as to join in general measures of resistance with the people of the other provinces, however unwise and destructive such a policy might and undoubtedly

Page 3 U. S. 93

would have been. If they had pursued this separate system, and afterwards the people of each province had resolved that such province should be a free and independent state, the state from that moment would have become possessed of all the powers of sovereignty internal and external -- viz., the exclusive right of providing for their own government, and regulating their intercourse with foreign nations -- as completely as any one of the ancient kingdoms or republics of the world, which never yet had formed or thought of forming any sort of federal union whatever. A distinction was taken at the bar between a state and the people of the state. It is a distinction I am not capable of comprehending. By a state forming a republic (speaking of it as a moral person) I do not mean the legislature of the state, the executive of the state, or the judiciary, but all the citizens which compose that state and are, if I may so express myself, integral parts of it, all together forming a body politic. The great distinction between monarchies and republics (at least our republics) in general is that in the former, the monarch is considered as the sovereign, and each individual of his nation as subject to him, though in some countries with many important special limitations. This, I say, is generally the case, for it has not been so universally.

But in a republic, all the citizens, as such, are equal, and no citizen can rightfully exercise any authority over another but in virtue of a power constitutionally given by the whole community, and such authority, when exercised, is in effect an act of the whole community which forms such body politic. In such governments, therefore, the sovereignty resides in the great body of the people, but it resides in

them not as so many distinct individuals, but in their politic capacity only. Thus A. B. C. and D., citizens of Pennsylvania and as such together with all the citizens of Pennsylvania, share in the sovereignty of the state. Suppose a state to consist exactly of the number of 100,000 citizens, and it were practicable for all of them to assemble at one time and in one place, and that 99,999 did actually assemble. The state would not be in fact assembled. Why? Because the state in fact is composed of all the citizens, not of a part only, however large that part may be, and one is wanting, in the same manner as 99 is not a hundred, because one pound is wanting to complete the full sum.

But as such exactness in human affairs cannot take place, as the world would be at an end or involved in universal massacre and confusion if entire unanimity from every society was required; as the assembling in large numbers, if practicable as to the actual meeting of all the citizens, or even a considerable part of them, could be productive of no rational result because there could be no general debate, no consultation of the whole, nor

Page 3 U. S. 94

of consequence a determination grounded on reason and reflection, and a deliberate view of all the circumstances necessary to be taken into consideration, mankind has long practiced (except where special exceptions have been solemnly adopted) upon the principle that the majority shall bind the whole, and in large countries, at least, that representatives shall be chosen to act on the part of the whole. But when they do so, they decide for the whole, and not for themselves only.

Thus when the legislature of any state passes a bill by a majority, competent to bind the whole, it is an act of the whole assembly, not of the majority merely. So when this Court gives a judgment by the opinion of a majority, it is the judgment, in a legal sense, of the whole Court. So I conceive when any law is passed in any state in pursuance of constitutional authority, it is a law of the whole state acting in its legislative capacity, as are also executive and judiciary acts constitutionally authorized, acts of the whole state in its executive or judiciary capacity, and not

the personal acts alone of the individuals, composing those branches of government. The same principles apply as to legislative, executive, or judicial acts of the United States, which are acts of the people of the United States in those respective capacities, as the former are of the people of a single state. These principles have long been familiar in regard to the exercise of a constitutional power as to treaties. These are deemed the treaties of the two nations, not of the persons only whose authority was actually employed in their formation. There is not one principle that I can imagine which gives such an effect as to treaties that has not such an operation on any other legitimate act of government, all powers being equally derived from the same fountain, all held equally in trust, and all, when rightfully exercised, equally binding upon those from whom the authority was derived.

I conclude, therefore, that every particle of authority which originally resided either in Congress or in any branch of the state governments was derived from the people who were permanent inhabitants of each province in the first instance and afterwards became citizens of each state; that this authority was conveyed by each body politic separately, and not by all the people in the several provinces or states jointly, and of course that no authority could be conveyed to the whole but that which previously was possessed by the several parts; that the distinction between a state and the people of a state has in this respect no foundation, each expression in substance meaning the same thing; consequently, that one ground of argument at the bar, tending to show the superior sovereignty of Congress in the instance in question, was not tenable, and therefore that upon that ground the exercise of the authority in question can not be supported.

Page 3 U. S. 95

I have already, however, stated my opinion that from the nature of our political situation it was highly reasonable and proper that Congress should be possessed of such an authority, and this is a consideration of no small weight to induce an inference that they actually possessed it when their powers were so indefinite and when it seems to have been the sense of all the states that Congress should

possess all the incidents to external sovereignty, or, in other words, the power of war and peace, so far as other nations were concerned, though the states in some particulars differed as to the construction of the general powers given for that purpose.

Two principles appear to me to be clear. 1. The authority was not possessed by Congress unless given by all the states. 2. If once given, no state could, by any act of its own, disavow and recall the authority previously given without withdrawing from the confederation. In the case of the *Active*, ten states out of twelve recognized the authority, New Hampshire voting in support of it. This was in 1779, long after the act of New Hampshire was passed which has given occasion to the controversy in this cause, and in the same year when the second act of New Hampshire was passed, which allowed an appeal to Congress in cases (as the act expressed it)

"wherein any subject or subjects of any foreign nation or state in amity with this and the United States of America should in due form of law claim the whole or any part of the vessel and cargo in dispute."

The resolution of Congress was dated 6 March, 1779; the act of New Hampshire in November following. The vote of the delegates of New Hampshire in the case of the *Active* would not, indeed, be equivalent to a clear grant of the power, but it is a respectable support of the construction contended for by the defendants in error. It has been properly observed that a court cannot by its own decision give itself jurisdiction where it had none before, but if courts are so constituted that one is necessarily superior to another, the decision of the superior must, to be sure, prevail. This perhaps is not conclusive as to the Court of Commissioners, because it cannot be decided whether it was in fact the superior court in respect to New Hampshire without deciding whether it was constitutionally so in virtue of power from all the states. This point it would be now necessary for this Court to decide if it were not for the decision of the Court of Appeals in 1783, a court of acknowledged prize jurisdiction, established in virtue of express authority from all the states (New Hampshire included) and made a court in the last resort as to all prize causes, or in other words (as expressed in the article of confederation itself)

in all cases of captures. And the decision of this Court on the subject of the two contending jurisdictions, I

Page 3 U. S. 96

consider to be final and conclusive for the following reasons.

1. At the time the decision was given, it was the only court of final appellate jurisdiction, as to cases of captures, in the United States. It seems therefore to follow necessarily that upon all questions of capture, its decision should be final and conclusive, as much as the decision of this Court upon a writ of error from the circuit court, or any other branch of its jurisdiction would be so.

2. To the suggestion at the bar, that the Court of Appeals could have no retrospect, several answers, I conceive, may be given.

1. It is taking for granted the very point in dispute -- that this decision was retrospective. If Congress possessed this authority before, and the Articles of Confederation amounted only to a solemn confirmation of it, it was in no manner retrospective. It was in effect a continuance of the same court acting under an express, instead (as before) of acting under an implied authority, and allowing the full benefit of an appeal regularly prayed, and rightfully enforced by the superior tribunal, after an unwarranted disallowance by the inferior.

2. Whether the article in the confederation giving authority to this Court as a superior tribunal in all cases of capture did authorize it to receive appeals in cases circumstanced like this was a point for them to decide, since it was a question arising in a case of capture, of all which cases (without any exception) they were constituted judges in the last resort. The merits of their decision we surely cannot now inquire into, but their authority to decide, not being limited, there was no method, by applying to any other court, of correcting any error they might commit, if in reality they should have committed any.

3. Whether their decision was right or wrong, yet nobody can deny that the jurisdiction of the commissioners was at least doubtful; of course, the Court of

Appeals found a case then depending in the former court of the commissioners, after a preliminary, but not a final, determination, for such I consider it to have been. It was therefore a cause then *sub judice*, and it being a case of capture and a question of appeal, no other court on earth but that, in my opinion, could decide it. And no objection can be urged in this case against the authority of such a decision, or the propriety of its being final, but such as may be urged against all courts in the last resort with respect to the merits of whose decisions there may be eternal disputes, but such disputes would be productive of eternal war if some court had not authority to settle such questions forever.

I therefore have not the smallest doubt that the decision of

Page 3 U. S. 97

the court in 1783 was final and conclusive as to the parties to the decree. And this point appears to me so plain that I think it useless to take notice of any authorities quoted on either side in relation to it, none of them, I conceive, in any manner contravening the conclusive quality of such decrees upon the principles I have stated, and some of them clearly and beyond all question supporting it.

The decree of September, 1783, being by me thus deemed final and conclusive, the next inquiry is whether it was a decree which the District Court of New Hampshire or the Circuit Court of New Hampshire acting, specially in this cause for the legal reason alleged, had authority to enforce, either by decreeing a specific execution or awarding damages for a nonperformance of it.

Upon this branch of the subject, a few words will be sufficient. The district court, by the act of Congress, hath the whole original jurisdiction in admiralty and maritime causes. Whatever doubt might otherwise have arisen, the decision of this Court upon the writ of error from Maryland last February fully established that this includes a prize jurisdiction, as well as other cases of a maritime nature. I was not present when the decision was given; had I been so, I probably should have concurred in it, because the words, "all civil causes of admiralty and maritime jurisdiction" evidently include all maritime causes, whether peculiarly of admiralty

jurisdiction or not; because a question of prize on the high seas is clearly of a maritime nature, and therefore the English distinction between an instance (which is strictly an admiralty) court and a prize court does not apply to this case, more especially as the district court having as large authority given to it in all maritime causes of a civil nature, as the Constitution itself prescribes. If that court does not possess such an authority, no court can be instituted with powers adequate to that purpose, so that under the present Constitution there could be no prize jurisdiction at all, and the very tenure of all the judges (which is for good behavior) naturally excludes the idea of a temporary and occasional establishment of any courts whatsoever. I mention these reasons not because the authority of the case receives any additional sanction from my opinion, but because I was desirous to take so favorable an opportunity of expressing my concurrence in a decision of so much importance. *Glass v. The Betsey*, ante, [3 U. S. 6](#).

It was clearly shown at the bar that a court of admiralty in one nation can carry into effect the determination of the court of admiralty of another. A court of prize being equally grounded on the law of nations as a court of admiralty and proceeding also, as that does, on the principles of the civil law,

Page 3 U. S. 98

must in common reason have the same authority. I think it was rightly observed that the sentence consisted in effect of two parts -- one reversing the decree, and therefore vesting a right to a restitution or a recovery in value in the appellant, the other ordering a specific restitution. If that specific redress is from any cause rendered impracticable, those who have unjustly, and upon a sentence determined to be erroneous, received the property or its value to their own use must in justice be accountable; otherwise form, which ought only to be the handmaid of right, might prove its treacherous destroyer. The district court, having sole original authority in cases of this kind, must have equal power as to such subjects with the power possessed by this Court in any case where it has original jurisdiction, with this difference only, that in the one case a writ of error is allowed, in the other not. The Court of Appeals, which passed the final decree, having expired, there seems at least as much reason for a court of similar jurisdiction as to the subject matter

proceeding to give effect to its decisions as there can be for a court of admiralty of one nation giving effect to the decision of a court of admiralty of another to which perhaps it is a perfect stranger and of which it may know little more than that they equally belong to the great family of mankind. I am therefore of opinion that the district court or the circuit court, acting specially in this instance on account of the incapacity of the former (as the law empowered it to do), had authority to enforce the decree in question by decreeing damages in lieu of a specific restitution, which was impracticable.

The third question is whether the authority hath been exercised properly in this instance under all the circumstances of the case.

The material circumstances to be considered, either from facts admitted on the face of the record or the public proceedings referred to by it and of which we are judicially to take notice, seem to be as follow:

That the brig *McClary* was fitted out under the authority and pursuant to certain resolutions of Congress, in consequence of which an act of the legislature had passed in the State of New Hampshire which complied partially with those resolutions, but made some regulations apparently intended as a restriction upon them (whatever might be their legal operation). That on 30 Oct. 1777, she captured the brig *Susanna* and cargo on the high seas. That the captured property was libeled in the Court Maritime of New Hampshire (erected by the state law) on 11 November, 1777. That Elisha Doane (whose administrators are the defendants in error in this cause) exhibited his claim on 1 December following; and

Page 3 U. S. 99

on the 16th the property was condemned and ordered to be distributed according to law. That within five days (the time for praying an appeal prescribed by the resolutions of Congress), Doane prayed an appeal to Congress, which was disallowed. That he then prayed and obtained an appeal to the Superior Court of New Hampshire, agreeably to the directions of the state law, which allowed of such an appeal in cases of this kind, the act providing for an appeal to Congress

only in case of a capture by an armed vessel fitted out at the charge of the united colonies. That on the first Tuesday in September, 1778, the superior court adjudged the property to be forfeited and ordered it to be sold by the sheriff at public vendue for the use of the libellants, and the court further ordered

"that the proceeds thereof, after deducting charges, should be paid to John Penhallow and Jacob Treadwell, agents for the owners, and to George Wentworth agent for the captors, to be by the said agents paid and distributed to the persons mentioned therein according to the law of the state in that case made."

That an appeal from this decree to Congress was prayed within five days, and disallowed, and that afterwards, in obedience to the decree and in virtue of it, the property was sold and distributed to those entitled under the decree, and the proportionate shares (upon the supposition of a lawful capture) are admitted to have rightly been one-half to the owners and the other half to the officers, mariners, and seamen.

That an application was afterwards made to the commissioners for hearing appeals under the authority of Congress, and after due notice to the libellants in the original suit, who appeared and pleaded to the jurisdiction, stating not only the defect of the authority of the court to sustain the appeal under any circumstances, but also special reasons why the appellant was not entitled to the benefit of an appeal under the circumstances of the case (viz., the appellant's waiving the benefit of his appeal to Congress by taking an actual appeal to the Superior Court of New Hampshire; that the appeal first demanded, was not prosecuted for more than forty days, and that by the resolution of Congress, no appeal should be had from the verdict of a jury, but only the sentence of the judge). The commissioners, on 26 June, 1779, decreed that they had jurisdiction but declined any further proceedings at that time in the cause for a reason they allege.

That on 12h September, 1783, this case again came before the Court of Appeals, established under the Articles of Confederation, which, after a full hearing and solemn argument by the advocates on both sides, passed a definitive decree in these words, viz.:

"It is hereby considered and finally adjudged and decreed by this Court that the sentences or decrees passed by the Inferior and Superior Courts of Judicature for the County of Rockingham in the above cause so far as the same have relation to the property specified in the claims of Elisha Doane, Isaiah Doane, and James Shepherd, be and the same are hereby revoked, reversed, and annulled, and that the said property specified in the said claims be restored to the said claimants respectively, and it is hereby ordered that the parties to the appeal each pay their own costs, which have accrued in the prosecution of the said appeal in this Court."

In this case, considerable difficulty has arisen from the peculiar manner of pleading, which is said to be warranted by local practice but which certainly has very much contributed to embarrass the question in the cause. There is neither a complete demurrer nor, I conceive, a regular issue, and it may be deemed doubtful whether what is termed a plea ought to be considered as a plea or an answer. I had therefore at first strong doubts whether there was sufficient matter before us to ground a final decree. But upon reflection it seems to me that as the case has been argued on both sides upon a supposition that a final decree could be made; as there has been no application on either for the examination of testimony, but the hearing took place without objection upon the pleadings as they stand, and consequently we can regard the facts only as stated on the record; as an express consent that the cause should be decided on this footing would undoubtedly have been binding, and the circumstances in this case evidently prove an implied one, I think the pleadings as they stand will afford sufficient foundation for a decree, especially according to those principles of practice which we are told prevail in the state from which this record comes -- a practice which, until altered, we undoubtedly ought to pursue when it is not substantially inconsistent with justice.

Several objections have been offered (admitting the validity of the final decree, in respect to the authority of the court upon the points then before them) which I will consider in the best manner in my power.

1. It is objected that the appellant Doane was dead before the final decision which was given in September, 1783, and this it is alleged, though not appearing on the face of the record, does appear from the letters of administration produced by the libellants, which letters are dated in February, 1783.

Admitting that the courts are bound to inspect the date of the letters and to regard that date as conclusive, and to infer the fact accordingly from it, several answers have been given to this objection, either of which, if valid, is decisive.

Page 3 U. S. 101

1. That the proceeding in question was a proceeding *in rem*, and upon such proceeding in civil law courts the death of a party does not abate. I incline to think the law is so, but as my opinion is clear on other points in answer to the objection, I avoid giving an opinion on this.

2. That admitting the decree for this cause to be erroneous, it can only be avoided by a solemn proceeding in the nature of a proceeding in error, and cannot be inquired into in this collateral way.

Upon this point I am clear -- that the decree was not rendered absolutely void, but must stand regularly good 'till reversed for this error, if it be one. So the matter stood while the Court of Appeals was in being. If the appellees could have avoided the decree for this error, they might have applied to that court to have reviewed its decree upon this suggestion. The expiration of the court is no reason why the law in this particular should be considered as changed. It is true, in many cases where there has been error in a suit, and this has affected the right of a person not a party, this error has been admitted to be shown in a suite where the point came collaterally in question. But it has never been permitted to a party who might have set aside the original judgment for error. I speak now of proceedings at common law. The same reason, I think, applies in this case. It does indeed seem reasonable that if one party can proceed in the district court to enforce the decree, the other party may to impeach it. But then this ought to be done in the same mode as in the other court, and that for a very substantial reason -- because when

that suggestion is the sole ground of inquiry, the other party may come prepared to show many things to do away its force. He may (for aught I know) be permitted to show a mistake in the date of the letters. He may show an actual knowledge of the fact by the other party previous to the decree, and an acquiescence in it. He may possibly show that the administrators were in fact before the court, though this does not appear on the face of the proceedings. As the inquiry in this case is into a fact, perhaps anything of this kind may be shown, and, if so, there surely ought to be an opportunity of doing it.

3. There seems great reason in what was alleged at the bar that though it might have been competent for the administrators, had the decree been against Doane, to have shown this fact for error, because neither the principal nor they had any opportunity of supporting their right before the court, when the decree was given, the former being dead, and the latter not being called upon, yet that it is not competent for the appellees, who were before the court, were heard, and cannot allege (had that been the fact) that they had sustained any prejudice by their being heard *ex parte*.

Page 3 U. S. 102

It is a rule at common law (the reason applies in equity and other civil law cases) that if a party can plead a fact material to his defense, and omits to do it at the proper time, he can never avail himself of it afterwards.

They had a day in court to plead the death of the appellant. If they say they did not know of it, the same might be alleged in any case at common law, where we know it will not avail. The law rather chooses that a party should incur a risk of this nature than leave a door open to endless litigation upon pretenses the truth of which it is very difficult to discover.

4. This is an error in fact, and in my opinion it was a powerful argument, that if we cannot reverse a decree even of a district or circuit court for any error in fact, we have no ground to set aside the solemn and final decree of a court that has expired for such an error. The argument, in my opinion is altogether *a fortiori*.

II. The death of Doane has been alleged for another purpose.

It is said that the decree is to restore to Elisha Doane, which was impossible because Elisha Doane was not then in being. Admitting that upon this record we are to take judicial notice that Doane was dead at the time of pronouncing the decree (in which I am by no means clear), yet if this was the real reason why the plaintiffs in error had withheld the property or its proceeds, they might themselves have said so. They have not, and as each party generally makes the best of his own case, we are to presume that did not in fact constitute their reason. In this case it could be of no avail but at the utmost to prevent the allowance of interest until a demand actually made. It never could destroy the whole beneficial effect of a decree given *in rem*, and when the parties who make the objection were in court and parties to the very decree complained of. I think nothing can be more evident than that if the decree be not totally void, the administrators are entitled to the benefit of it, at least until it is set aside for error, if there be any error in it, and such a remedy is now practicable. If a *scire facias* was necessary before execution could have been obtained out of the court which passed the decree, it could be for no other reason than that the other party might have an opportunity to contest the validity of the letters and the existence of the administration, if any such objection could be supported. Such an objection might have been made here. It has not been made. There is therefore, I conceive, no principle of law or justice which forbids giving effect to the decree upon this ground.

Page 3 U. S. 103

III. Another objection is that the cause was not regularly brought up to the Court of Appeals, and proceeded on agreeably to the resolutions of Congress.

There does not appear any ground for this objection in point of fact. But I am clear that this is a point not now inquirable into. When a court has final and exclusive jurisdiction in a case and has pronounced a solemn judgment, every other court must presume that all their previous proceedings were right, of which indeed they were the only competent judges.

IV. It is alleged damages were not prayed for by the libel. It is a sufficient answer that there is a prayer for general. And so little do I think of this objection, and so much of the duty of a court, unaided by formal applications, where there is a substantial one, that I am strongly induced to think, if a case proper for a specific relief was laid before a civil law court, and the direct contrary to the proper relief was prayed for, yet the court even in this case would be justified in granting the relief that might be properly afforded if the party who had committed the mistake consented to it; without that indeed it might be improper, for no court ought to force a benefit on a party unwilling to receive it.

These objections being all got over, which were urged against any relief whatsoever, it is necessary to consider the particular objections against the relief actually afforded. And here, I think, very formidable objections occur.

I think the decree erroneous in these particulars:

1. In decreeing interest for the time previous to the date of the decree in 1783.
 2. In granting full damages against all the parties, without distinguishing between the owners to whom one-half was distributed, and the agent who received the other half for the benefit of the officers, mariners and seamen.
 3. In making George Wentworth, the agent, personally liable for any part.
1. As to the first point, as this libel proceeds only, and can be supported, as I conceive, upon no other ground, upon the principle of enforcing the decree of September 1783, so that the libellants might recover such benefit from it as the nature of the case could admit, their case is not to be made better or worse, as to the original right, than as the Court of Appeals decided it.

The Court of Appeals might have decreed satisfaction for detention, but did not. They did not even decree costs, but ordered each party to pay his own costs. These things were altogether discretionary in the court. That was the proper court to judge, whether any damages should be allowed for. If the decree is to be final and conclusive as to the

subject matter, it must be so as completely in respect to the detention, which formed one part of the case, as to the restoration, which formed the principal object of it.

I should indeed have had some doubts as to the subsequent interest had it appeared that the defendants had been unable to comply substantially with the decree owing to the death of Doane and the want (had that been the case) of a subsequent demand by the Administrators. But as that is not alleged, and they set up their whole defense upon the point of right, merely, we are not to presume that those circumstances (if the Administrators did not make a demand, with respect to which nothing appears) had any weight in inducing their noncompliance with the decree.

I am of the opinion that damages against all the defendants jointly ought not to have been given. We are to look at substance, not form. There were, in effect, two decrees originally, one-half of the value of the property to one party the other half to another. The reversal of the decree ought to affect the decree itself in the manner in which it was given. Consequently each party ought only to be required to restore what he was adjudged to receive. The case of joint trespasses stated at the bar does, in my opinion, by no means apply. The privateer in question had a lawful commission. In the execution of such an authority difficulties often arise. Where they happen *bona fide*, the matter is considered in no fault, and neither he nor his owners made accountable, even in case of a mistaken seizure, but for restoration, and at the utmost, costs. In case of gross misbehavior, not only costs but damages will be allowed by the court of prize. It seems now to be settled that they have exclusive jurisdiction on all such subjects. As not even costs were allowed in this case, we are to infer that the seizure was *prima facie* innocent; consequently, if a principle of the common law, deemed by many highly rigorous and founded, perhaps, rather on the forms of proceeding than on strict justice if those forms did not interfere, could be applied to a case arising in a court, not only authorized but bound to distinguish between a mere mistake and a wanton abuse of power, there is no foundation for such an application in fact in the present

instance.

As owners are in all instances made jointly liable *ex contractu*, and their respective shares are matters of private cognizance, so that they in all instances appear jointly before the court and a payment to one owner is in law a payment to all, I can discover no principle upon which any discrimination could be properly made in this case in regard to the different interests and actual receipts of the owners. I think, therefore, the decree in regard to one moiety ought to be jointly against all the owners.

Page 3 U. S. 105

3. The third error in the decree, in my opinion, is making George Wentworth, the agent, liable for any part. I have had considerable doubts on this subject, but upon the fullest consideration I have been able to bestow on it, I think he is not liable. Had he held any of the property at the time of the decree of the Court of Appeals, he would have been undoubtedly liable. Had he any now, or any of the proceeds in his hands, he would also be liable. Perhaps he might, had he held any of the property or proceeds after actual notice of the Court of Appeals taking cognizance of this case. Neither of these facts appears on the face of the record, and as they are of importance, and neither is asserted, neither is to be presumed. The contrary, indeed, may be fairly inferred from the statement on the record, and has been candidly acknowledged to be the real truth. He therefore appears in the character of a mere agent, acting avowedly for the benefit of others, and not for his own; and as he had paid away the money in virtue of a decree of a court having *prima facie* authority for the time to decide whether an appeal did or did not lie, I think he ought not to be ordered to refund. It is alleged that the prayer of an appeal, in a case where an appeal lies, *ipso facto* suspends the proceedings, and all afterwards is *coram non judice*. I cannot admit the doctrine in that extent. Where there are inferior and superior jurisdictions and an appeal is allowed from the former to the latter, and it is the express duty of the party praying an appeal to apply in the first instance to the inferior court (as I conceive it was in this case under the resolutions of Congress, which directed an appeal to be prayed for

within five days, and security to be taken), I must presume that that court is *prima facie* to judge whether it is applied for in a proper manner and whether all the requisites previous to his being fully entitled to it are complied with.

If the court decides in any of these particulars erroneously, it would be absurd to say that the party should lose the benefit of his appeal, but in my opinion it would be equally unjust to hold that a party who obeyed the decree of a court over whom he had no control should suffer by his respect to the law which constituted that court and which must therefore mean to support its decisions in a cause coming within its jurisdiction while they remain uncontrolled by any superior tribunal. It was shown that an inhibition in cases of this kind sometimes at least issues to forbid the court's further proceeding. Can there be a stronger proof that the court had authority *de facto* (whatever may be said as to its authority *de jure*) without that interposition? The law never does a nugatory act, and therefore, I presume, would not forbid the doing of a thing, which if done, is totally and absolutely void. It was said this was to bring the judge into contempt.

Page 3 U. S. 106

But if the conduct of the judge who is bound to know his jurisdiction is in the meantime innocent, surely an obedience to him by a party, who is not to be presumed capable of deciding on the jurisdiction by his own judgment, must be so.

George Wentworth, on the face of the whole proceedings, was a mere agent, an attorney in fact, and for aught I can see as little liable to refund in a case of this sort as any attorney in fact or even an attorney at law to who money had been paid under a judgment or decree, and who had paid it away to his client. An agent in cases of this kind is allowed by law. They are recognized, I believe, in all prize acts. Mariners, whose employment is on the sea, cannot be required without injustice to attend their cases in person. In cases of privateers, the captors are so numerous that the employment of one or more agents on shore seems unavoidable. The law, when it allows a benefit, never intends that it shall be imperfectly enjoyed; therefore, in allowing privateering, it allows agents. These I consider as nominal parties, and that the real parties are their principals.

Now I will suppose that in a common law case an infant sues in a personal action by his guardian and obtains a judgment; the guardian receives the money and pays it to the infant after he comes of age. The judgment is afterwards reversed. Can the guardian ever be made to refund to the defendant, or must the person who was the infant do it? This case appears to me a very parallel one in all its circumstances. The infant cannot act for himself, and therefore is allowed to act by his guardian. The law takes notice, by allowing agents, that persons concerned in privateers, at least, cannot do well without them. The guardian is nominally a party; so is the agent; but the infant in the one case, and the principals in the other are the real parties. The guardian is accountable to the infant for money he received for him; so is the agent to the principal for money he receives. There is that I can imagine but one difference that can be suggested between them -- that in the one case the judgment is good till reversed, and therefore all lawful acts intermediately done are valid. But the disallowance of the appeal is said to be a nullity, and all subsequent proceedings in that court are void. I admit the consequence if the law be so. But I have already stated reasons why I think it is otherwise. A court of justice, indeed, ought at its peril to take notice of its own jurisdiction, and it is not often that cases of such doubt arise that a judge can be at a loss on the subject. But it may happen and does sometimes happen that innocent and serious doubts are really entertained. Is a court therefore, because its judgments may be finally dissented from by a superior tribunal, to be considered as flying in the face of the law, so that parties before it shall not

Page 3 U. S. 107

only be protected in disobeying it but punished for their obedience? If this be the case, the old maxim *cedunt arma togae* will very ill apply to courts of justice. Instead of being the peaceful arbiters of right and the sacred asylum of unprotected innocence, their very forums will be the seat of war and confusion. I admit, indeed, where there is a conflict of jurisdiction and the party entitled to a decree is prohibited from obeying it by a power claiming a superior cognizance, he must at his peril obey one or the other; but this arises from the absolute necessity of the case, because whether the one or the other be right or wrong must depend

on a subsequent decision. In this case, George Wentworth, before the distribution, received no monition or any other process from the tribunal alleged to be superior. He could not even be certain that the appellants would carry their application further. I consider him, therefore, justifiable in obeying the decree, which at the time was compulsory upon him and for a disobedience to which he might have been committed for a contempt according to the opinion of the court which pronounced it. The parties still have their remedy against those who actually received the money, or their representatives, if they can be found. They may perhaps be entitled to a remedy under the bond given when the commission of the privateer was granted. If either of these remedies be difficult or inefficient, that does not make George Wentworth, in point of law, more liable than if they were perfectly easy and clearly effectual. It will be one melancholy instance, in addition to a thousand others, of the distress incident to a doubtful and imperfect system of jurisprudence, which has been since happily changed for one so precise and so comprehensive as to leave little room for such painful and destructive questions hereafter.

The 4th question is whether this Court can now rectify the decree in respect to the parts of it considered to be erroneous, or must affirm or reverse in the whole.

The latter is certainly the general method at common law, and it has been contended that as this proceeding is on a writ of error, it must have all the incidents of a writ of error at common law. The argument would be conclusive if this was a common law proceeding, but as it is not, I do not conceive that it necessarily applies. An incident to one subject cannot be presumed, by the very name of such an incident, to be intended to apply to a subject totally different. I presume the term, "writ of error" was made use of because we are prohibited from reviewing facts, and therefore must be confined to the errors on the record. But as this is a civil law proceeding, I conceive the word "error" must be applied to such errors

as are deemed such by the principles of the civil law, and that in rectifying the error, we must proceed according to those principles. In a civil law court, I believe, it is the constant practice to modify a decree upon an appeal as the justice of the case requires, and in this instance it appears to me, under the 24th section of the Judicial Act, we are to render such a decree as in our opinion the district court ought to have rendered. If this was a case wherein damages were uncertain and wherein for that reason the cause should be remanded for a final decision (which it does not appear to be, because the libellants in the original suit had a decree in their favor, which is now to be affirmed in part), yet the damages here are not uncertain, because we all agree that interest ought to be allowed from the date of the decree in September, 1783, upon the value of the property as specified in the report against those who are to be adjudged to pay the principal.

Upon the whole, my opinion is that the decree be affirmed in respect to the recovery of the libellants in the original action against all the defendants but George Wentworth; that the libel against him be adjudged to be dismissed; but that there be recovered against the other defendants in the original action the value of the property they received, as ascertained in the circuit court, with interest from 17 September, 1783.

I am also of the opinion that the respective parties should pay their own costs.

BLAIR, JUSTICE.

When this cause came before me at Exeter, in New Hampshire, I felt myself in a delicate situation in having a cause of such magnitude and at the same time of such novelty and difficulty as to have drawn the judgment of men of eminence different ways brought before me for my single decision. It was, however, a consolation to know that whatever that decision might be, it was not intended to be final, and I can truly say it will give me pleasure to have any errors I may have committed corrected in this Court. Two points, and if I mistake not, only two, were brought before me: the first, whether under the description of admiralty and maritime jurisdiction, the judiciary bill gave to the district court any jurisdiction concerning prizes, I decided in the affirmative, and the same decision having been

afterwards made in this Court in the case of Glaffe, and others, I consider that as now settled. The other point was whether the Court of Appeals, erected by Congress, had authority to reverse the sentences given in the courts of admiralty of the several states, and the source of the objection upon this point was the defect of authority in the Congress itself. Here also, my sentence affirmed the jurisdiction.

I have attended as diligently and as impartially as I could

Page 3 U. S. 109

to the arguments of the gentlemen upon the present occasion to discover, if possible, how I may have been led astray in the decision of this question, but as the impressions which my mind first received continue uneffaced (whether through the force of truth or from the difficulty of changing opinions, once deliberately formed), I will repeat here the opinion which I delivered in the circuit court as the best method I can take for explaining the reasons upon which it was founded. I would presume, however, that it contains something relative to what had been said at the bar of the circuit court, but which I believe was not mentioned on this occasion.

"The immediate question is whether Congress had a right to exercise, by itself, by its committees or by any regular court of appeals by it erected, an appellate jurisdiction to affirm or reverse a sentence of a state court of admiralty in a question whether prize or no prize. If it possessed such an authority, it must be derivative, and its source either mediately or immediately the will of the people; usurpation can give no right. The respondents contend they had no such authority 'till the completion of the Confederation in 1781, but only a recommendatory power; the libellants insist that Congress was considered as the sovereign power of war and peace respecting Great Britain, and that to that power is necessarily incident that of carrying on war in a regular way, of raising armies, making regulations for their discipline and government, commissioning officers, equipping fleets, granting letters of marque and reprisal, the power (now contested) of deciding, in all cases of capture, questions whether prize or not, and every power

necessarily incident to a state of war. It is at least certain that the political situation of the American colonies required a union of council and of force, by wise measures to bring about, if possible, a reconciliation with the mother country on a basis of freedom and security or, if this should fail, by vigorous measures to defeat the designs of their tyrannical invaders, and although this alone cannot suffice for an investiture in Congress of the powers necessary to that end, yet if the powers given be delegated in terms large enough to comprehend this extent of authority, but which may also be satisfied by a more limited construction, the supposed necessity for such powers given to a federal head (and the counsel for the respondents have admitted that it would have been good policy) is no contemptible argument for supposing it actually given."

"In the beginning of the year 1775, our affairs were drawing fast to a crisis, and for some time before the battle of Lexington a state of warfare must in the minds of all men have been an expected event. Some of the delegations (I think three) of members to the Congress which met in May of that year

Page 3 U. S. 110

contain nothing but simple powers to meet Congress; the rest expressly give authority to their delegates to consent to all such further measures, as they and the said Congress shall think necessary for obtaining a redress of American grievances and a security of their rights. It is not in all of them worded alike, but in substance, that seems to be the sense. Everything which may be deemed necessary! I think it cannot well be supposed that in such a delegation of authority at such a time, there was not an eye to war, if that should become necessary. But it is objected that at most, no greater power was given to Congress than to enter into a definitive war with Great Britain, not the right of war and peace generally, and even that war, 'till the declaration of independence, would be only a civil war. But why is not a definitive war against Great Britain (call it if you will a civil war) to be conducted on the same principles as any other. If it was a civil war, still we do not allow it to have been a rebellion -- America resisted and became thereby engaged in what she deemed a just war. It was not the war of a lawless banditti, but of freemen fighting for their dearest rights, and of men lovers of order and

good government. Was it not as necessary in such a war, as in any between contending nations, that the law of nations should be observed and that those who had the conducting of it should be armed with every authority for preventing injuries to neutral powers, and their subjects, and even cruelty to the enemy? The power supposed to have been given to Congress, being confined to a definitive war against Great Britain and not extending to the rights of peace and war generally, appears to me to make no material difference; still the same necessity recurs of confining the evil of the war to the enemy against whom it is waged."

"Till a formal declaration of independence, the people of the colonies are said to have continued subjects to Great Britain; true, and that circumstance it is which denominates the war a civil war, as to which I have already stated how, in my mind, the question is affected by that circumstance. But it was asked whether if during the war, Great Britain, at any time before the Declaration of Independence had declared war against any nation of Europe, that nation would not have had a right to treat America with hostility as being subject to Great Britain? According to this supposition, Great Britain might have had some temptation to declare such war that she might have the cooperation of her enemy, to reduce her colonies to obedience. But Great Britain was too wise to adopt such a policy; she knew that by her engaging in such a war, the colonies, instead of finding a new enemy to oppose, would have known where to find a friend; they might have formed an alliance with such a power, who probably would have considered it as an acquisition,

Page 3 U. S. 111

and Congress might have been the sooner encouraged to separate from Great Britain, by a formal declaration of independence. As the supposition that Congress was invested with all the rights of war in respect to Great Britain is of great moment in the present cause, and as the power may not be so satisfactorily conveyed by the instructions to the several delegates as might be wished, partly because some of them did not exhibit further instructions than to attend Congress and partly because the instructions given to the rest may be satisfied by a different construction, it may be proper to consider the manner in which Congress, by its

proceedings, appears to have considered its powers; not that by anything of this sort, it had a right to extend its authority to the desired point, if it was not given, but because in showing by such means, its sense of the extent of its power, it gave an opportunity to their constituents to express their disapprobation if they conceived Congress to have usurped power, or by their cooperation to confirm the construction of Congress, which would be as legitimate a source of authority as if it had been given at first."

"If they were only a mere council, to unite by their advice and recommendation all the states in the same common measures (which, by the by, if not uniformly pursued, might be disappointed) then the several members might be justly compared to ambassadors met in a Congress, and could only report their proceedings for the ratification of their principals; but Congress resolved to put the colonies in a state of defense; it raised an army, it appointed a commander in chief, with other general and field officers; it modeled the army, disposed of the troops, emitted bills of credit, pledged the confederated colonies for the redemption of them, and in short, acted in all respects like a body completely armed with all the powers of war, and at all this I find not the least symptom of discontent among all the confederated states, or the whole people of America; on the contrary, Congress was universally revered and looked up to as our political fathers, and the saviors of their country. But if Congress possessed the right of war, it had also authority to equip a naval force; it did so, and exercised the same authority over it as it had done over the army; it passed a resolution for permitting the inhabitants of the colonies to fit out armed vessels to cruise against the enemies of America; directed what vessels should be subject to capture, and prescribed a rule of distribution of prizes, together with a form of commission, and instructions to the commanders of private ships of war; it directed that the general assemblies, conventions, and councils or committees of safety of the united colonies should be supplied with blank commissions, signed by the President of Congress,

to be by it filled up and delivered to any person intending to fit out private ships of war on his executing a bond, forms of which were to be sent with the commissions and the bonds to be returned to Congress. These bonds are given to the President of Congress, in trust for the use of the united colonies, with condition to conform to the commission and instructions. The commission, under which the captain of the respondents acted was one of these commissions, it seems, only this is attempted to be qualified by saying that it was countersigned by the Governor of New Hampshire; but this circumstance seems to me to be of no importance. Whoever has the right of commissioning and instructing must certainly have the right of examining and controlling, of confirming or annulling the acts of him who accepts the commission and acts under it. And this exercise of authority in granting commissions seems to have had the special sanction of the several colonies, as they filled up the commissions, took the bonds, and transmitted them to Congress."

"It was urged in the course of the argument that if Congress did enjoy the power contended for, the confederation, which was a thing of such long and anxious expectation, was not of any consequence; but it is to be observed that that instrument contained some important powers which could not be derived from the right of war and peace; it was of importance also as a confirmation of the powers claimed as necessarily incident to war, because some of the states appeared not to be sensible of, nor to have acknowledged such incidency, and yet the power may have existed before. It is true that instrument is worded in a manner, on which some stress has been laid, that the several states should retain their sovereignties, and all powers not thereby expressly delegated to Congress, as if they were, till the ratification of that compact, in possession of all the powers thereby delegated; but it seems to me that it would be going too far from a single expression, used perhaps in a loose sense, to draw an inference so contrary to a known fact, to-wit that Congress was, with the approbation of the states, in possession of some of the powers there mentioned, which yet, if the word 'retain' be taken in so strict a sense, it must be supposed they never had. I take the truth to be that the framers of that instrument were contemplating what powers Congress ought to have had at the beginning, and that in reference to the first

occasion of their assembling to oppose the tyranny of Great Britain, at least in reference to the time of framing the confederation, say, the states shall retain. But however that may be, as I said before, I think it is laying too great a stress upon a single word to contradict some things which were evidently true."

"But it was said that New Hampshire had a right to revoke

Page 3 U. S. 113

any authority she may have consented to give to Congress, and that by her acts of assembly she did in fact revoke it if it were ever given. To this a very satisfactory answer was made: if she had such a right, there was but one way of exercising it -- that is, by withdrawing herself from the confederacy; while she continued a member, and had representatives in Congress, she was certainly bound by the acts of Congress. I am therefore of opinion that those acts of New Hampshire which restrain the jurisdiction of Congress, being contrary to the legitimate powers of Congress, can have no binding force, and that under the authority of Congress, an appeal well lay from the courts of admiralty of that state to the Court of Commissioners of Appeals. That court has already affirmed their jurisdiction in this particular case upon a plea put in against it, and upon that account also I incline to think that this Court, not being a court of superior authority, ought not to call it in question. Under these impressions, I must of course decree (whatever may be the hardship of the case) that the respondents, pay to the libellants their damages and costs occasioned by not complying with the decree of the Court of Appeals, the *quantum* of which to be ascertained by commissioners."

If the reasoning upon which I went in pronouncing the above decree in favor of the jurisdiction of the Court of Appeals be unfound, and if the decree stand in need of some better support, it will probably find it in the Confederation, by which authority is given to Congress to erect courts of appeal in all cases, and from that time the authority of the Court of Appeals is confessed; the present case was then depending before that court, it asserted its jurisdiction and gave a final decree. As to the objection that, previously to the confederation, Congress was itself sensible that it did not possess supreme admiralty jurisdiction because of its recommending

to the several states that they should erect courts of admiralty for the trial of prizes, with appeal to Congress, I see not how such recommendations can prove anything of the kind, for Congress might have authority to establish such courts in the respective states when yet it chose only to recommend to the states to do it. But admitting the authority of the Court of Appeals and the propriety of applying to the District Court of New Hampshire to enforce that decree in the way of damages for not restoring the vessel and cargo, when through the disobedience of the present plaintiffs in error specific restitution was become impossible, yet if anything erroneous can be found in the decree of the circuit court, it is the duty of this Court to correct it. It is objected that the damages allowed were too high, including interest on the appreciation

Page 3 U. S. 114

of the *Susanna* and her cargo from so remote a period as the sale of the vessel and cargo.

That George Wentworth, being a mere agent and having distributed among those who were entitled under the decrees of the courts of admiralty of New Hampshire all the money by him received for their use ought not to have been subjected by the decree of the circuit court to the repayment of that money.

And that a lumping decree, subjecting the respondents indiscriminately to the payment of all the damages, although their interests were several and distinct, was also erroneous.

It does not, indeed, appear to me that the decree is for the payment of too large a sum, the damages having been swelled by interest calculated upon the appraised value of the *Susanna*, her apparel, and of her cargo from so remote a period. The decree of the Court of Appeals was merely for restitution, and that the appellants should be placed at that time in the same situation as they were in previous to the capture. A compensation for the loss they sustained in being in the meantime deprived of their property was not provided for in the decree, nor were even costs allowed. The libel in the circuit court, being bottomed on the decree of reversal,

sought only a compensation in damages equivalent to a restitution at the time of the reversal. Interest, therefore, ought, I think, to have been allowed only from that time.

George Wentworth, it is true, was not concerned in interest; he represented the interest of the officers and seamen, but had none himself, and a mere agent who has paid away all or any part of the money by him received in that character without having been by a monition notified of the appeal will be allowed credit in his account for the money so paid away. But George Wentworth appears, I think, in another character besides that of an agent; he was a party libellant; as such, he knew that the claimants were dissatisfied with the decrees of the admiralty courts of New Hampshire, having prayed an appeal to Congress and offered the requisite security, and when the petition of appeal was referred to the Court of Commissioners and they directed notice to be given to the parties, who appeared before that court, it seems evident that they had notice. What then is the effect of this? Was anything further necessary to suspend the decrees of the state courts? An inhibition is indeed worded in a manner naturally leading to the supposition that that instrument was necessary to effect a suspension, but this I think cannot be the case, for it is observable that by the practice, an interval of three months is allowed before the inhibition is sued out, in which time, if nothing had antecedently suspended the sentence, it might be carried

Page 3 U. S. 115

into complete effect, and everybody be justified in their conduct as paying obedience to a decree continuing in full force. The inhibition may be intended only as a more formal direction to cease further proceedings, when yet they may have been inhibited before; it has a further use also, for it appoints a day for the attendance of the parties. Conformably to this idea, it is said in Domat that the appeal suspends the decree. But a distinction is attempted here; it is admitted that an appeal allowed by the inferior court suspends, while an appeal received by a superior court is denied to have that effect. But according to Domat it works a suspension even against the will of the inferior judge, and it would be very strange if the suspending operation of an appeal to a judge who has an authority to

reverse should depend upon the consent of the inferior judge. But if the sentences of the state courts were indeed suspended, no person had authority to act under them, and if any do he takes upon himself the consequences. Besides, if George Wentworth had innocently and without notice distributed the money which came to his hands, should not this have been shown to the Court of Appeals? If that had been done, perhaps after reversing the decrees of the state court, instead of decreeing restitution, they might have only decreed that the owners should pay to the appellants the moiety of the sales by them received. But they have decreed restitution specifically, and if this Court should so model the decree of the circuit court as to exonerate Mr. Wentworth, as to the moiety of the money by him received, it will substantially alter the decree of the Court of Appeals; and yet we say that the decree now is to be bottomed on that of the Court of Appeals, which is now to be supposed right, and that for that reason it was erroneous in the circuit court to carry interest further back than from the period of reversal, and in this way give damages, which were not intended by the Court of Appeals.

The decree of the circuit court, appears now, I confess, to be wrong in that it subjects all the defendants indiscriminately to the payment of all the damages. In the original libel they had indeed joined, but it was in right of several interests, which I think ought to have been distinguished in the decree; justice obviously requires this -- so obviously that it is enough to state the case to obtain the mind's assent to the propriety of distributive damages, instead of those which the decree contemplates. I will only say further that I have no remembrance of having had this point brought to my view at the circuit court, and it certainly did not occur to myself; but if anything was said upon the point, and I, with deliberation, then preferred the decree as it stands, I am clearly now of a different opinion. Upon the whole, I think the decree of the

Page 3 U. S. 116

circuit court will stand as it ought when corrected by reducing the damages in the manner proposed, and when so reduced by proportioning them among the then defendants according to their distinct interests.

CUSHING, JUSTICE.

The facts of this case being already fully stated by the Court, I shall go on to inquire whether the decree of the circuit court ought to be reversed for any of the errors assigned.

The first is that the Court of Appeals, which made the decree of restoration, had not jurisdiction of the cause.

In answer to this, I concur with the rest of the Court that the Court of Appeals, being a court under the confederation of 1781, U.S. of all the states, and being a court for "determining finally, appeals in all cases of capture," and so being the highest court, the *dernier* resort in all such cases, their decision upon the jurisdiction and upon the merits of the cause, having heard the parties by their council, must be final and conclusive to this and all other courts; to this as a court of admiralty because it is a court of the same kind, as far as relates to prize, and without any controlling or revisionary powers over it; to this as a court of common law, because it is entirely a prize matter, and not of common law cognizance. The cases, therefore, cited to show that the common law is of general jurisdiction, and that the court of King's Bench prohibits, controls, and keeps within their line, admiralty courts, spiritual courts, and other courts of a special, limited jurisdiction do not, I conceive, touch this case.

It is conceded by all that the decision of a court competent is final and binding. Now if the Court of Appeals was, under the confederation of all the states, a court constituted "for determining finally appeals in all cases of capture," it was a court competent, and it has decided. Again, the admiralty of England gives credence and force to the decisions of foreign courts of admiralty. Why not equal reason here?

It is true, the courts of common law there will not allow a greater latitude to the jurisdiction of foreign courts of admiralty than to their own, as it seems natural and reasonable, they should not, for instance, holding plea of a contract made entirely at land, which seems to have been the substantial ground of a prohibition, in the

case cited, respecting the decree in Spain.

If the decree of the Court of Appeals must be considered as binding, as it must or there may never be an end to this controversy; that will carry an answer to several other errors assigned, *viz.*, the third, fifth, and seventh, respecting the cause not being regularly before Congress or the court, and respecting the circuit court not entering into the merits -- and to

Page 3 U. S. 117

some other particular exceptions, as that appealing to the Superior Court of New Hampshire, was a waiver of the right of appeal to Congress. If that appeal was consistent with the resolve of Congress, which only provided an appeal to Congress in the last resort, it was not a waiver. Again, it is said there ought to have been a jury at the Court of Appeals; but that clearly was not the intent of the resolve of Congress nor of the Confederation nor correspondent to the proceedings in courts of admiralty even where trials by jury are used and accustomed in other matters; nor was it thought a proper or necessary provision in the present Constitution, which has been adopted by the people of the United States.

As to the original question of the powers of Congress respecting captures, much has been well and eloquently said on both sides. I have no doubt of the sovereignty of the states, saving the powers delegated to Congress, being such as were "proper and necessary" to carry on, unitedly, the common defense in the open war that was waged against this country and in support of its liberties to the end of the contest.

But, as has been said, I conceive we are concluded upon that point by a final decision heretofore made.

The second exception in error is that the sentence of the Court of Appeals was void by the death of Mr. Doane.

That fact does not appear upon the record of the Court of Appeals, and I think we cannot reverse the decree in this incidental way if it could be done upon a writ of error. If it was pleadable in abatement, it ought to have been pleaded or suggested there by the opposite party.

On the contrary, it is implied by the record that Doane was alive; otherwise he could not have been heard by his council as the record sets forth, for a dead man could not have council or attorney. On the other hand, the letters of administration imply that he was dead at the time; but those letters were not before the court, and therefore could not be a ground for its abating the suit, if it was abateable at all for such a cause. Here seems to be record against record, as far as implications go, and I take it to be an error in fact for which, by the Judicial Act, there is to be no reversal. Upon this head, a case in Sir Thos. Raymond is cited by the counsel for the plaintiff in error of trover by five plaintiffs -- one dies; the rest proceed to verdict and judgment -- and adjudged error, because every man is to recover according to the right he has at the time of bringing the action, and here each one was not, at the time of bringing the action, entitled to so much as at the death of one of the plaintiffs.

But a case in Chancery Cases, p. 122, is more in point -- where money was made payable by the decree to a man that

Page 3 U. S. 118

was dead, and yet adjudged, among other things, no error. But another matter, which seems well to rule this case, is that, being a suit *in rem*, death does not abate it.

So say some books, and I do not remember to have heard any to the contrary. It does not affect the justice of the cause; it makes no odds to the plaintiff in error whether the money is to be paid to colonel Doane being alive or to his legal representatives, if dead.

The fourth exception, that damages are not prayed for, yet decreed, is answered by a prayer for general relief.

The eighth exception is that the district and circuit court possessed not admiralty jurisdiction, and that the circuit court had no right to carry the decree into execution.

If courts of admiralty can carry into execution decrees of foreign admiralties, as seems to be settled law and usage, and if the district and circuit courts have admiralty powers by the law and Constitution, as was adjudged and determined by this Court last February, I think there can be no doubt upon this point.

Another question of consequence is whether Mr. George Wentworth, being agent for the captors and having paid over, can be answerable jointly with the other libellants for the whole, or in any way for any part. If it was simply the case of an agent regularly paying over, I should suppose he could not justly be called upon to refund. But it seems he was an original libellant, a party through the whole course of the suite, and an appeal being claimed in time, at the court and term, at which the libellants obtained the decree (of which, therefore, he had legal notice). the appeal, if a lawful one, in my opinion, suspended the sentence and must make him answerable for whatever monies he should receive under that decree, in case of reversal, every man being bound to take notice of the law at his peril.

It is suggested that an inhibition was necessary to take off the force of the sentence. An inhibition (according to the form of one produced, which issued in England last July, near four months after the trial and appeal at New Providence) inhibits the judge and the party from doing anything in prejudice of the appeal or of the jurisdiction of the court appealed to, and cites the party to appear and answer the party appellant at a certain time and place. The citation to the party to appear and answer at the proper time and place I take to be the most substantial part of the process; the inhibitory part to be rather matter of form, or in pursuance of the suspending nature of the appeal, and as a further guard and caution against misapplying the property. For it appears to me absurd to suppose that an inhibition taken out seven or eight months after the

appeal (nine months being allowed for the purpose) should be the only thing that suspended the sentence, leaving the judge below and the party, all that time, to carry the sentence into complete execution.

The Judicial Act, in providing an appeal in maritime causes to the circuit court, contains no hint of an inhibition as necessary to suspend the sentence. Domat expressly that an appeal has that effect, and I believe other civil law writers.

The rejection of the appeal, if unwarranted, could not take away the right of the citizen.

There does not appear anything actually compulsory upon Mr. George Wentworth to pay the money except what may be supposed to be contained in the decree appealed from, the force of which was suspended. All this matter might have been offered at the Court of Appeals, where the parties were fully heard, and, if offered, was no doubt involved in its decision.

It is said, if I understood the matter right, that there ought to have been a monition from the circuit court to Mr. Wentworth to bring in what he had in his hands.

I see no necessity for a monition exactly in that form. There was a monition to come in and answer the libellants upon the justice of the cause as set forth; he came in and had an opportunity to defend himself, and the question was whether he was answerable upon the circumstances of the case, which was determined by the court.

By the cases in *Durnford and East*, as well as from other books, it is clear that the admiralty has not only jurisdiction *in rem*, but also power over the persons of the captors and all those who have come to the possession of the proceeds of the prize, to do complete justice as the case requires to captors and claimants.

But I cannot conceive why the decree of the Court of Appeals is not conclusive upon Mr. George Wentworth as much as upon the other libellants.

Again, it is objected that the decree being for restoration, damages could not be awarded. The decree was not complied with -- the thing was gone. How, then,

could justice be done without giving damages?

Then the question is how are we to understand the decree -- as joint upon all the libellants for the whole, Mr. George Wentworth included, or as decreeing the owners to restore one-half, and Mr. George Wentworth, agent for the captors, the other half?

If the latter, which perhaps may be a reasonable and just construction, conformable to the spirit of the original libel, then the decree of the circuit court is in that respect erroneous.

Page 3 U. S. 120

Also as to damages, I suppose, interest ought not to have been allowed further back than the decree. The only question that remains is whether this Court can rectify those errors, consistently with the Judicial Act. And I think it may, as there is sufficient matter apparent upon the record to do it by.

I agree that each party bear their own costs of this Court.

By the Court:

Ordered that against all the plaintiffs in error, except George Wentworth, \$16,360.68 be recovered by the defendants in error, and the same sum against George Wentworth, and that against the plaintiffs in error the costs of the circuit court be recovered, one-half against George Wentworth and the other half against the other plaintiffs in error, and that in this Court the parties pay their own costs.