Wayman Vs. Southard

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Appellant : Wayman

Respondent : Southard

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Wayman v. Southard

23 U.S. (10 Wheat.) 1

ON CERTIFICATE OF DIVISION OF OPINION BETWEEN THE

JUDGES OF THE CIRCUIT COURT FOR THE DISTRICT OF KENTUCKY

SYLLABUS

Congress has, by the Constitution, exclusive authority to regulate the proceedings in the courts of the United States, and the states have no authority to control those proceedings except so far as the state process acts are adopted by Congress or

by the courts of the United States under the authority of Congress.

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

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

The thirty-fourth section of the Judiciary Act of 1789, c. 20, which provides "that the laws of the several states, except . . . shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply," does not apply to the process and practice of the courts. It is a mere legislative recognition of the principles of universal jurisprudence as to the operation of the *lex loci.*

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

The case of *Palmer v. Allen,* 7 Cranch 550, 2 Cond. 607, reviewed and reconciled with the present decision.

This cause was certified from the Circuit Court for the District of Kentucky upon a certificate of a division of opinion between the judges of that court on several motions which occurred on a motion made by the plaintiffs to quash the marshal's return on an execution issued on a judgment obtained in that court and also to

quash the replevin bond taken on the said execution for the following causes:

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

"2. That if the statutes of Kentucky in relation to executions are binding on this court, *viz.,* the statute which requires the plaintiff to endorse on the execution that bank notes of the Bank of Kentucky or notes of the Bank of the Commonwealth

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of Kentucky will be received in payment or that the defendant may replevy the debt for two years, are in violation of the Constitution of the United States and of the State of Kentucky and void."

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

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

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

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MR. CHIEF JUSTICE MARSHALL delivered the opinion of the Court, and, after stating the case, proceeded as follows:

Some preliminary objections have been made by the counsel for the defendants to the manner in which these questions are brought before the Court, which are to be

disposed of before the questions themselves can be considered.

It is said that the proceeding was *ex parte.* The law which empowers this Court to take cognizance of questions adjourned from a circuit gives jurisdiction over the single point on which the judges were divided, not over the whole cause. The inquiry, therefore, whether the parties

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were properly before the circuit court cannot be made at this time in this place.

The defendants also insist that the judgment, the execution, and the return ought to be stated in order to enable this Court to decide the question which is adjourned.

But the questions do not arise on the judgment or the execution, and so far as they depend on the return, enough of that is stated to show the court that the marshal had proceeded according to the late laws of Kentucky. In a general question respecting the obligation of these laws on the officer, it is immaterial whether he has been exact or otherwise in his observance of them. It is the principle on which the judges were divided, and that alone is referred to this Court.

In arguing the first question, the plaintiffs contend that the common law, as modified by acts of Congress and the rules of this Court and of the circuit court by which the judgment was rendered, must govern the officer in all his proceedings upon executions of every description.

One of the counsel for the defendants insists that Congress has no power over executions issued on judgments obtained by individuals, and that the authority of the states on this subject remains unaffected by the Constitution. That the government of the Union cannot by law regulate the conduct of its officers in the service of executions on judgments rendered in the federal courts, but that the state legislatures retain complete authority over them.

The Court cannot accede to this novel construction.

The Constitution concludes its enumeration of granted powers with a clause authorizing Congress to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof. The Judicial Department is invested with jurisdiction in certain specified cases, in all which it has power to render judgment.

That a power to make laws for carrying into execution all the judgments which the Judicial Department has power to pronounce is expressly conferred by this clause seems to be one of those plain propositions which reasoning cannot render plainer. The terms of the clause neither require nor admit of elucidation. The Court therefore will only say that no doubt whatever is entertained on the power of Congress over the subject. The only inquiry is how far has this power been exercised?

The 13th section of the Judiciary Act of 1789, c. 20, describes the jurisdiction of the Supreme Court and grants the power to issue writs of prohibition and mandamus in certain specified cases. The 14th section enacts

"That all the beforementioned courts of the United States shall have power to issue writs of *scire facias,* habeas corpus, and all other writs not specially provided by statute which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles and usages of law."

The 17th section authorizes the courts "to make all necessary rules for the orderly conducting business

in the said courts," and the 18th empowers a court to suspend execution in order to give time for granting a new trial.

These sections have been relied on by the counsel for the plaintiffs.

The words of the 14th are understood by the Court to comprehend executions. An execution is a writ which is certainly "agreeable to the principles and usages of law."

There is no reason for supposing that the general term "writs" is restrained by the words "which may be necessary for the exercise of their respective jurisdictions," to original process, or to process anterior to judgments. The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied. Many questions arise on the process subsequent to the judgment in which jurisdiction is to be exercised. It is therefore no unreasonable extension of the words of the act to suppose an execution necessary for the exercise of jurisdiction. Were it even true that jurisdiction could technically be said to terminate with the judgment, an execution would be a writ necessary for the perfection of that which was previously done, and would consequently be necessary to the beneficial exercise of jurisdiction. If any doubt could exist on this subject, the 18th section, which treats of the authority of the court over its executions as actually existing, certainly implies that the power to issue them had been granted in the 14th section. The same implication is afforded by the 24th

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and 25th sections, both of which proceed on the idea that the power to issue writs of execution was in possession of the courts. So too, the Process Act, which was depending at the same time with the Judiciary Act, prescribes the forms of executions, but does not give a power to issue them.

On the clearest principles of just construction, then, the 14th section of the Judiciary Act must be understood as giving to the courts of the Union, respectively, a power to issue executions on their judgments.

But this section provides singly for issuing the writ, and prescribes no rule for the conduct of the officer while obeying its mandate. It has been contended that the 34th section of the act supplies this deficiency.

That section enacts

"That the laws of the several states except where the Constitution, treaties, or statutes, of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."

This section has never, so far as is recollected, received a construction in this Court, but it has, we believe, been generally considered by gentlemen of the profession as furnishing a rule to guide the court in the formation of its judgment; not one for carrying that judgment into execution. It is "a rule of decision," and the proceedings after judgment are merely ministerial. It is, too, "a rule of decision in trials at

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common law;" a phrase which presents clearly to the mind the idea of litigation in court, and could never occur to a person intending to describe an execution, or proceedings after judgment, or the effect of those proceedings. It is true that if, after the service of an execution, a question respecting the legality of the proceeding should be brought before the court by a regular suit, there would be a trial at common law, and it may be said that the case provided for by the section would then occur, and that the law of the state would furnish the rule for its decision.

But by the words of the section, the laws of the state furnish a rule of decision for those cases only "where they apply," and the question arises do they apply to such a case? In the solution of this question it will be necessary to inquire whether they regulate the conduct of the officer serving the execution, for it would be contrary to all principle to admit that, in the trial of a suit depending on the legality of an official act, any other law would apply than that which had been previously prescribed for the government of the officer. If the execution is governed by a different rule, then these laws do not apply to a case depending altogether on the regularity of the proceedings under the execution. If, for example, an officer take the property of A. to satisfy an execution against B., and a suit be brought by A., the question of property must depend entirely on the law of the state. But if an

execution issue against A., as

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he supposes, irregularly, or if the officer should be supposed to act irregularly in the performance of his duty, and A. should in either case proceed against the officer, the state laws will give no rule of decision in the trial, because they do not apply to the case unless they be adopted by this section as governing executions on judgments rendered by the courts of the United States. Before we can assume that the state law applies to such a case, we must show that it governs the officer in serving the execution, and consequently its supposed application to such a case is no admissible argument in support of the proposition that it does govern the execution. That proposition, so far as it depends on the construction of the 34th section, has already been considered, and we think that, in framing it, the legislature could not have extended its views beyond the judgment of the court.

The 34th section, then, has no application to the practice of the court or to the conduct of its officer in the service of an execution.

The 17th section would seem, both from the context and from the particular words which have been cited as applicable to this question, to be confined to business actually transacted in court, and not to contemplate proceedings out of court.

The act to "regulate processes in the courts of the United States," passed in 1789, has also been referred to. It enacts

"That until further provision shall be made and except where by this act or other statutes of the United States

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is otherwise provided, the forms of writs and executions, except their style and modes of process, in the circuit and district courts in suits at common law shall be the same in each state respectively as are now used in the supreme courts of the same."

This act, so far as respects the writ, is plainly confined to form. But form in this particular, it has been argued, has much of substance in it, because it consists of the language of the writ, which specifies precisely what the officer is to do. His duty is prescribed in the writ, and he has only to obey its mandate.

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

To "the forms of writs and executions" the law adds the words "and modes of process." These words must have been intended to comprehend something more than "the forms of writs and executions." We have not a right to consider them as mere tautology. They have a meaning, and ought to be allowed an operation more extensive than the preceding words. The term is applicable to writs and executions, but it is also applicable to every step taken in a cause.

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It indicates the progressive course of the business from its commencement to its termination, and "modes of process" may be considered as equivalent to modes or manner of proceeding. If, by the word "process," Congress had intended nothing more than a general phrase, which might comprehend every other paper issuing out of a court, the language would most probably have resembled that of the first section, where the word "processes," not "process," is used in that sense. But the introduction of the word "modes" and the change of the word "processes" for "process" seem to indicate that the word was used in its more extensive sense, as denoting progressive action -- a sense belonging to the noun in the singular number rather than in the sense in which it was used in the first section, which is appropriate to the same noun in its plural number.

This construction is supported by the succeeding sentence, which is in these words: "and the forms and modes of proceedings, in causes of equity, and of admiralty, and maritime jurisdiction shall be according to the course of the civil law."

The preceding sentence had adopted the forms of writs and executions and the modes of process then existing in the courts of the several states as a rule for the federal courts "in suits at common law." And this sentence adopts "the forms and modes of proceedings" of the civil law "in causes of equity and of admiralty and maritime jurisdiction." It has not, we believe,

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been doubted that this sentence was intended to regulate the whole course of proceeding "in causes of equity, and of admiralty and maritime jurisdiction." It would be difficult to assign a reason for the solicitude of Congress to regulate all the proceedings of the court, sitting as a court of equity or of admiralty, which would not equally require that its proceedings should be regulated when sitting as a court of common law. The two subjects were equally within the province of the legislature, equally demanded their attention, and were brought together to their view. If, then, the words making provision for each fairly admit of an equally extensive interpretation, and of one which will effect the object that seems to have been in contemplation, and which was certainly desirable, they ought to receive that interpretation. "The forms of writs and executions, and modes of process in suits at common law" and "the forms and modes of proceedings in causes of equity, and of admiralty and maritime jurisdiction" embrace the same subject, and both relate to the progress of a suit from its commencement to its close.

It has been suggested that the words "in suits at common law" restrain the preceding words to proceedings between the original writ and judgment. But these words belong to "writs and execution" as well as to "modes of process," and no more limit the one than the other. As executions can issue only after a judgment,

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the words "in suits at common law" must apply to proceedings which take place after judgment.

But the legal sense of the word "suit" adheres to the case after the rendition of the judgment, and it has been so decided. *

This construction is fortified by the proviso, which is in these words:

"Provided that on judgments in any of the cases aforesaid where different kinds of executions are issuable in succession, a *capias ad satisfaciendum* being one, the plaintiff shall have his election to take out a *capias ad satisfaciendum* in the first instance and be at liberty to pursue the same until a tender of the debt and costs in gold or silver shall be made."

The proviso is generally intended to restrain the enacting clause and to except something which would otherwise have been within it, or, in some measure, to modify the enacting clause. The object of this proviso is to enable the creditor to take out a *capias ad satisfaciendum* in the first instance and to pursue it until the debt be satisfied, notwithstanding anything to the contrary in the enacting clause. It is perfectly clear that this provision is no exception from that part of the enacting clause which relates to the "forms of writs and executions," and can be an exception to that part only which relates to the "modes of process." It secures the right to elect the *capias ad satisfaciendum* in the first instance, where that writ was at all issuable under the law of the state, and to pursue it until the debt and

costs be tendered in gold or silver. It relates to the time and circumstances under which the execution may issue, and to the conduct of the officer while in possession of the execution. These, then, are objects which Congress supposed to be reached by the words "modes of process" in the enacting clause.

This law, though temporary, has been considered with some attention because the permanent law has reference to it and adopts some of its provisions. It was continued until 1792, when a perpetual act was passed on the subject. This,

whether merely explanatory or also amendatory of the original act, is the law which must decide the question now before the Court.

It enacts

"That the forms of writs, executions, and other process except their style and the forms and modes of proceeding in suits in those of common law, shall be the same as are now used in the said courts respectively in pursuance of the act entitled 'An act to regulate processes in the courts of the United States,' except so far as may have been provided for by the act to establish the judicial courts of the United States, subject, however, to such alterations and additions as the said courts respectively shall in their discretion deem expedient or to such regulations as the Supreme Court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same."

This act is drawn with more deliberation than the original act, and removes, so for as respects

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

September, 1789. The act adopts the state law as it then stood, not as it might afterwards be made.

A comparison of the proviso to the permanent act with that which had been introduced into the temporary act will serve to illustrate the idea that the proceedings under the execution were contemplated in the enacting clause, and supposed to be prescribed by the words "modes of process"

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in the one law and "modes of proceeding" in the other.

The proviso to the act of 1789 authorizes the creditor to sue out a *capias ad satisfaciendum* in the first instance, and to continue it "until a tender of the debt in gold and silver shall be made." The proviso to the act of 1798 omits this last member of the sentence.

The appraisement laws existing in some of the states authorized a debtor taken in execution to tender property in discharge of his person, and this part of the proviso shows an opinion that the enacting clause adopted this privilege, and an intention to deprive him of it. The enacting clause of the act of 1793 adopts the state law to precisely the same extent with the enacting clause of the act of 1789, and the omission of the clause in the proviso which has been mentioned leaves that part of the adopted law which allows the creditor to discharge his person by the tender of property in force.

The subject was resumed in 1793 in the act, entitled "An act in addition to the act entitled an act to establish the judicial courts of the United States."

The 8th section enacts

"That where it is now required by the laws of any state that goods taken in execution on a writ of *fieri facias* shall be appraised previous to the sale thereof, it shall be lawful for the appraisers appointed under the authority of the state to appraise goods taken in execution on a *fieri facias* issued out of any court of the United States in the same manner

as if such writ had issued out of a court held under the authority of the state, and it shall be the duty of the marshal in whose custody such goods may be to summon the appraisers in like manner as the sheriff is by the laws of the state required to summon them, . . . and if the appraisers, being duly summoned, shall fail to attend and perform the duties required of them, the marshal may proceed to sell such goods without an appraisement."

This act refers to the appraisement laws of the respective states which were in force at the time of its passage, without distinguishing between those which were enacted before and those which were enacted after September, 1789. The fact, however, is understood to be that they were enacted previous to that time, generally as temporary laws, and had been continued by subsequent acts. They required, so far as they have been inspected, that appraisers should be appointed by the local tribunals to appraise the property taken in execution. Supposing laws of this description to have been adopted by the act of 1789, the regular mode of proceeding under them would have been for the courts of the United States respectively to appoint appraisers, who should perform the same duty with respect to executions issuing out of the courts of the Union as was performed by appraisers appointed under state authority with respect to executions issuing out of the courts of the state. It was unquestionably much more convenient to employ that machinery which was already in operation for such a

purpose than to construct a distinct system; it was more convenient to employ the appraisers already existing in the several counties of a state than to appoint a number of new appraisers, who could not be known to the courts making such appointments. Accordingly, the section under consideration does not profess to adopt the appraisement laws of the several states, but proceeds on the idea that they were already adopted, and authorizes the officer to avail himself of the agency of those persons who had been selected by the local tribunals to appraise property taken in execution. Had these laws been supposed to derive their

authority to control the proceedings of the courts of the United States not from being adopted by Congress, but from the vigor imparted to them by the state legislatures, the intervention of Congress would have been entirely unnecessary. The power which was competent to direct the appraisement was competent to appoint the appraisers.

The act passed in 1800 "for the relief of persons imprisoned for debt" takes up a subject on which every state in the Union had acted previous to September, 1789. It authorizes the marshal to allow the benefit of the prison rules to those who are in custody under process issued from the courts of the United States in the same manner as it is allowed to those who are imprisoned under process issued from the courts of the respective states.

Congress took up this subject in 1792, and provided for it by a temporary law which was

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continued from time to time until the permanent law of 1800. It is the only act to which the attention of the Court has been drawn that can countenance the opinion that the legislature did not consider the Process Act as regulating the conduct of an officer in the service of executions. It may be supposed that in adopting the state laws as furnishing the rule for proceedings in suits at common law, that rule was as applicable to writs of *capias ad satisfaciendum,* as of *fieri facias,* and that the marshal would be as much bound to allow a prisoner the benefit of the rules under the act of Congress as to sell upon the notice, and on the credit prescribed by the state laws.

The suggestion is certainly entitled to consideration. But were it true that the process acts would, on correct construction, adopt the state laws which give to a debtor the benefit of the rules, this single act of superfluous legislation, which might be a precaution suggested by the delicacy of the subject, by an anxiety to insure such mitigation of the hardships of imprisonment, as the citizens of the respective states were accustomed to see, and to protect the officer from the

hazard of liberating the person of an imprisoned debtor, could not countervail the arguments to be drawn from every other law passed in relation to proceedings on executions, and from the omission to pass laws which would certainly be requisite to direct the conduct of the officer if a rule was not furnished by the Process Act.

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But there is a distinction between the cases sufficient to justify this particular provision. The jails in which prisoners were to be confined did not belong to the government of the Union, and the privilege of using them was ceded by the several states under a compact with the United States. The jailers were state officers, and received prisoners committed under process of the courts of the United States in obedience to the laws of their respective states. Some doubt might reasonably be entertained, how far the Process Act might be understood to apply to them.

The resolution of Congress under which the use of the state jails was obtained

"recommended it to the legislatures of the several states to pass laws making it expressly the duty of the keepers of their jails to receive, and safe keep therein all prisoners committed under the authority of the United States, until they shall be discharged by due course of the laws thereof."

The laws of the states, so far as they have been examined, conform to this resolution. Doubts might well be entertained of permitting the prisoner, under this resolution and these laws, to have the benefit of the rules. The removal of such doubts seems to have been a prudent precaution.

The case of *Palmer v. Allen,* 7 Cranch 550, may be considered, at first sight, as supporting the opinion that the acts for regulating processes in the courts of the United States do not adopt the laws of the several states as they stood in September, 1789, as the rule by

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which the officers of the federal courts are to be governed in the service of process issuing out of those courts; but, upon an examination of that case, this impression will be removed.

In that case, as appears from the statement of the judge who delivered the opinion of this Court, Palmer, as deputy marshal, arrested Allen on a writ sued out of the District Court of Connecticut by the United States to recover a penalty under a statute of the United States. Bail was demanded, and, not being given, Allen was committed to prison. For this commitment Allen brought an action of trespass, assault and battery, and false imprisonment in the state court. Palmer pleaded the whole matter in justification, and upon demurrer the plea was held insufficient. The judgment of the state court was brought before this Court by writ of error and was reversed, this Court being of opinion that the plea was a good bar to the action.

The demurrer was sustained in the state court because, by an act of the Legislature of Connecticut, the officer serving process similar to that which was served by Palmer must, before committing the person on whom it is served to jail, obtain a mittimus from a magistrate of the state authorizing such commitment, and that court was of opinion that the act of Congress had adopted this rule so as to make it obligatory on the officer of the federal court.

This Court was of opinion that the plea made out a sufficient justification, and therefore reversed the judgment of the state court. This

judgment of reversal is to be sustained for several reasons, without impugning the general principle that the acts under consideration adopt the state laws as they stood in September, 1789, as giving the mode of proceeding in executing process issuing out of the courts of the United States.

The act of 1792 for regulating processes in the courts of the United States enacts that

"The modes of proceeding in suits in those of common law shall be the same as are now used in the said courts respectively in pursuance of the act entitled, 'An act to regulate processes in the courts of the United States.'"

The endorsement of a mittimus on the writ had never been used, as appears by the opinion in the case of *Palmer v. Allen,* in the courts of the United States for the District of Connecticut. In connection with this fact, the provision of the act of 1792 subjects the modes of proceeding under the laws of the state "to such alterations and additions as the said courts, respectively, shall in their discretion deem expedient." The uniform course of that court from its first establishment dispensing with this mittimus may be considered as the alteration in this particular which the court was authorized by law to make.

It may very well be doubted, too, whether the act of Congress which conforms the modes of proceeding in the courts of the Union to those in the several states requires the agency of state officers in any case whatever not expressly mentioned. The laws of the Union may permit

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such agency, but it is by no means clear that they can compel it. In the case of the appraisement laws already noticed, it was deemed necessary to pass a particular act authorizing the marshal to avail himself of the appraisers for the state, and the same law dispenses with the appraisement should they fail to attend. If the mittimus should be required by the act of Congress, it should be awarded by a judge of the United States, not by a state magistrate, in like manner as an order for bail, in doubtful cases, is endorsed by a judge of the United States in cases where the state law requires such endorsement to be made by the judge or justice of the court from which the process issues. The mittimus is a commitment for want of bail, and the magistrate who awards it decides, in doing so, that it is a case in which bail is demandable. But in the particular case of *Allen,* that question was decided by the law. The act of Congress (Act of 1799, c. 128. s. 65) required that bail should be given. No application to the judge was necessary. The officer was compelled to arrest the body of Allen and to detain him in custody until bail should

be given. This act therefore dispenses with any order of a judge requiring bail and with a mittimus authorizing a commitment for the want of bail. The officer was obliged to detain the body of Allen in custody, and this duty was best performed by committing him to jail. These reasons operated with the court as additional to the opinion that the law of Connecticut requiring a mittimus in

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civil cases was, in its terms, a peculiar municipal regulation imposing a restraint on state officers, which was not adopted by the Process Act of the United States and was a provision inapplicable to the courts of the Union, a provision which could not be carried into effect according to its letter.

The reasons assigned by the Court for its decision in the case of *Palmer v. Allen,* so far from implying an opinion that the Process Act does not adopt the laws of the several states as giving a rule to be observed by the officer in executing process issuing from the courts of the United States, recognizes the general principle and shows why that case should be taken out of its operation.

So far as the Process Act adopts the state laws as regulating the modes of proceeding in suits at common law, the adoption is expressly confined to those in force in September, 1789. The act of Congress does not recognize the authority of any laws of this description which might be afterwards passed by the states. The system as it then stood is adopted,

"subject, however, to such alterations and additions as the said courts respectively shall, in their discretion, deem expedient or to such regulations as the Supreme Court of the United States shall think proper from time to time, by rule to prescribe to any circuit or district court concerning the same."

This provision enables the several courts of the Union to make such improvements in its

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forms and modes of proceeding as experience may suggest, and especially to adopt such state laws on this subject as might vary to advantage the forms and modes of proceeding which prevailed in September, 1789.

The counsel for the defendants contend that this clause, if extended beyond the mere regulation of practice in the court, would be a delegation of legislative authority which Congress can never be supposed to intend and has not the power to make.

But Congress has expressly enabled the courts to regulate their practice, by other laws. The 17th section of the Judiciary Act of 1789, c. 20. enacts

"That all the said courts shall have power . . . to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States,"

and the 7th section of the act, "in addition to the act entitled, *An act to establish the judicial courts of the United States'" (Act of 1793, ch. 22. s. 7), details more at large the powers conferred by the 17th section of the Judiciary Act. These sections give the Court full power over all matters of practice, and it is not reasonable to suppose that the Process Act was intended solely for the same object. The language is different, and the two sections last mentioned have no reference to state laws.*

It will not be contended that Congress can delegate to the courts or to any other tribunals powers which are strictly and exclusively legislative.

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But Congress may certainly delegate to others powers which the legislature may rightfully exercise itself. Without going further for examples, we will take that the legality of which the counsel for the defendants admit. The 17th section of the Judiciary Act and the 7th section of the additional act empower the courts respectively to regulate their practice. It certainly will not be contended that this might not be done by Congress. The courts, for example, may make rules

directing the returning of writs and processes, the filing of declarations and other pleadings, and other things of the same description. It will not be contended that these things might not be done by the legislature without the intervention of the courts, yet it is not alleged that the power may not be conferred on the Judicial Department.

The line has not been exactly drawn which separates those important subjects which must be entirely regulated by the legislature itself from those of less interest in which a general provision may be made and power given to those who are to act under such general provisions to fill up the details. To determine the character of the power given to the courts by the Process Act, we must inquire into its extent. It is expressly extended to those forms and modes of proceeding in suits at common law which were used in the state courts in September, 1789, and were adopted by that act. What, then, was adopted?

We have supposed that the manner of proceeding under an execution was comprehended by the words "forms and modes of proceeding in suits" at common law. The writ commands the officer to make the money for which judgment has been rendered. This must be understood as directing a sale, and perhaps as directing a sale for ready money. But the writ is entirely silent with respect to the notice, with respect to the disposition which the officer is to make of the property between the seizure and sale, and probably with respect to several other circumstances which occur in obeying its mandate. These are provided for in the Process Act. The modes of proceeding used in the courts of the respective states are adopted for the courts of the Union, and they not only supply what is not fully expressed in the writ, but have in some respects modified the writ itself by prescribing a more indirect and circuitous mode of obeying its mandate than the officer could be justified in adopting. In some instances, the officer is permitted to leave the property with the debtor on terms prescribed by the law, and in others to sell on a prescribed credit instead of ready money.

Now suppose the power to alter these modes of proceeding which the act conveys in general terms was specifically given. The execution orders the officer to make the sum mentioned in the writ out of the goods and chattels of the debtor. This is completely a legislative provision, which leaves the officer to exercise his discretion respecting the notice. That the legislature

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may transfer this discretion to the courts and enable them to make rules for its regulation will not, we presume, be questioned. So, with respect to the provision for leaving the property taken by the officer in the hands of the debtor till the day of sale. He may do this, independent of any legislative act, at his own peril. The law considers the property as his for the purposes of the execution. He may sell it, should it be produced, in like manner as if he had retained it in his personal custody, or may recover it, should it be withheld from him. The law makes it his duty to do that which he might do in the exercise of his discretion, and relieves him from the responsibility attendant on the exercise of discretion in a case where his course is not exactly prescribed and he deviates from that which is most direct. The power given to the court to vary the mode of proceeding in this particular is a power to vary minor regulations which are within the great outlines marked out by the legislature in directing the execution. To vary the terms on which a sale is to be made and declare whether it shall be on credit or for ready money is certainly a more important exercise of the power of regulating the conduct of the officer, but is one of the same principle. It is, in all its parts, the regulation of the conduct of the officer of the court in giving effect to its judgments. A general superintendence over this subject seems to be properly within the judicial province, and has been always so considered. It is undoubtedly proper for the legislature to prescribe the manner

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in which these ministerial offices shall be performed, and this duty will never be devolved on any other department without urgent reasons. But in the mode of obeying the mandate of a writ issuing from a court, so much of that which may be

done by the judiciary under the authority of the legislature seems to be blended with that for which the legislature must expressly and directly provide that there is some difficulty in discerning the exact limits within which the legislature may avail itself of the agency of its courts.

The difference between the departments undoubtedly is that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily.

Congress, at the introduction of the present government, was placed in a peculiar situation. A judicial system was to be prepared, not for a consolidated people, but for distinct societies, already possessing distinct systems and accustomed to laws which, though originating in the same great principles, had been variously modified. The perplexity arising from this state of things was much augmented by the circumstance that in many of the states the pressure of the moment had produced deviations from that course of administering justice between debtor and creditor which consisted not only with the spirit of the Constitution and, consequently, with

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the views of the government, but also with what might safely be considered as the permanent policy, as well as interest, of the states themselves. The new government could neither entirely disregard these circumstances nor consider them as permanent. In adopting the temporary mode of proceeding with executions then prevailing in the several states, it was proper to provide for that return to ancient usage, and just as well as wise principles which might be expected from those who had yielded to a supposed necessity in departing from them. Congress probably conceived that this object would be best effected by placing in the courts of the Union the power of altering the "modes of proceeding in suits at common law," which includes the modes of proceeding in the execution of their judgments, in the confidence, that in the exercise of this power, the ancient,

permanent, and approved system would be adopted by the courts at least as soon as it should be restored in the several states by their respective legislatures. Congress could not have intended to give permanence to temporary laws of which it disapproved, and therefore provided for their change in the very act which adopted them.

But the objection which gentlemen make to this delegation of legislative power seems to the court to be fatal to their argument. If Congress cannot invest the courts with the power of altering the modes of proceeding of their own officers in the service of executions issued on their own judgments, how will gentlemen defend a delegation

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of the same power to the state legislatures? The state assemblies do not constitute a legislative body for the Union. They possess no portion of that legislative power which the Constitution vests in Congress, and cannot receive it by delegation. How then will gentlemen defend their construction of the 34th section of the Judiciary Act? From this section they derive the whole obligation which they ascribe to subsequent acts of the state legislatures over the modes of proceeding in the courts of the Union. This section is unquestionably prospective as well as retrospective. It regards future as well as existing laws. If, then, it embraces the rules of practice, the modes of proceeding in suits; if it adopts future state laws to regulate the conduct of the officer in the performance of his official duties, it delegates to the state legislatures the power which the Constitution has conferred on Congress, and which, gentlemen say, is incapable of delegation.

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

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

have adjourned to this Court. The question really adjourned is whether the laws of Kentucky respecting executions,

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passed subsequent to the Process Act, are applicable to executions which issue on judgments rendered by the federal courts.

If they be, their applicability must be maintained either in virtue of the 34th section of the Judiciary Act or in virtue of an original inherent power in the state legislatures, independent of any act of Congress, to control the modes of proceeding in suits depending in the courts of the United States and to regulate the conduct of their officers in the service of executions issuing out of those courts.

That the power claimed for the state is not given by the 34th section of the Judiciary Act has been fully stated in the preceding part of this opinion. That it has not an independent existence in the state legislatures is, we think, one of those political axioms an attempt to demonstrate which would be a waste of argument not to be excused. The proposition has not been advanced by counsel in this case, and will probably never be advanced. Its utter inadmissibility will at once present itself to the mind if we imagine an act of a state legislature for the direct and sole purpose of regulating proceedings in the courts of the Union or of their officers in executing their judgments. No gentleman, we believe, will be so extravagant as to maintain the efficacy of such an act. It seems not much less extravagant to maintain that the practice of the federal courts and the conduct of their officers can be indirectly regulated by the state legislatures by an act professing to regulate

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the proceedings of the state courts and the conduct of the officers who execute the process of those courts. It is a general rule that what cannot be done directly from defect of power cannot be done indirectly.

The right of Congress to delegate to the courts the power of altering the modes (established by the Process Act) of proceedings in suits has been already stated, but were it otherwise, we are well satisfied that the state legislatures do not possess that power.

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

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

* Co.Litt. 291; 8 Co. 53 *b*