The Antelope

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The Antelope

23 U.S. (10 Wheat.) 66

APPEAL FROM THE CIRCUIT

COURT OF GEORGIA

SYLLABUS

The African slave trade is contrary to the law of nature, but is not prohibited by the positive law of nations.

Although the slave trade is now prohibited by the laws of most civilized nations, it may stall be lawfully carried on by the subjects of those nations who have not

prohibited it by municipal acts or treaties.

The slave trade is not piracy unless made so by the treaties or statutes of the nation to whom the party belongs.

The right of visitation and search does not exist in time of peace. A vessel engaged in the slave trade, even if prohibited by the laws of the country to which it belongs, cannot, for that cause alone, be seized on the high seas and brought in for adjudication in time of peace in the courts of another country. But if the laws of that other country be violated or the proceeding be authorized by treaty, the act of capture is not in that case unlawful.

It seems that in case of such a seizure, possession of Africans is not a sufficient evidence of property, and that the *onus probandi* is thrown upon the claimant to show that the possession was lawfully acquired.

Africans who are first captured by a belligerent privateer, fitted out in violation of our neutrality, or by a pirate, and then recaptured and brought into the ports of the United States under a reasonable suspicion that a violation of the slave trade acts was intended are not to be restored without full proof of the proprietary interest, for in such a case the capture is lawful.

And whether in such a case restitution ought to be decreed at all was a question on which the Court was equally divided.

Where the Court is equally divided, the decree of the court below is, of course, affirmed so far as the point of division goes.

Although a consul may claim for subjects unknown of his nation, yet restitution cannot be decreed without specific proof of the individual proprietary interest.

These cases were allegations filed by the Vice-Consuls of Spain and Portugal, claiming certain Africans as the property of subjects of their nation. The material facts were as follows:

A privateer, called the *Colombia,* sailing under a Venezuelan commission, entered the port of Baltimore in the year 1819, clandestinely shipped a crew of thirty or forty men, proceeded to sea, and hoisted the Artegan flag, assuming the name of the *Arraganta,* and prosecuted a voyage along the coast of Africa, her officers and the greater part of her crew being citizens of the United States. Off the coast of Africa she captured an American vessel, from Bristol, in Rhode Island, from which she took twenty-five Africans; she captured several Portuguese vessels, from which she also took Africans, and she captured a Spanish vessel, called the *Antelope,* in which she

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also took a considerable number of Africans. The two vessels then sailed in company to the coast of Brazil, where the *Arraganta* was wrecked and her master, Metcalf and a great part of his crew made prisoners; the rest of the crew, with the armament of the *Arraganta,* were transferred to the *Antelope,* which, thus armed, assumed the name of the *General Ramirez,* under the command of John Smith, a citizen of the United States, and on board this vessel were all the Africans who had been captured by the privateer in the course of her voyage. This vessel, thus freighted, was found hovering near the coast of the United States by the revenue cutter *Dallas,* under the command of Captain Jackson, and finally brought into the port of Savannah for adjudication. The Africans, at the time of her capture, amounted to upwards of two hundred and eighty. On their arrival, the vessel and the Africans, were libeled and claimed by the Portuguese and Spanish Vice-Consuls reciprocally. They were also claimed by John Smith as captured *jure belli.* They were claimed by the United States as having been transported from foreign parts by American citizens in contravention to the laws of the United States and as entitled to their freedom by those laws and by the law of nations. Captain Jackson, the master of the revenue cutter, filed an alternative claim for the bounty given by law if the Africans should be adjudged to the United States, or to salvage if the whole subject should be adjudged to the Portuguese and Spanish Consuls.

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The court dismissed the libel and claim of John Smith. It dismissed the claim of the United States except as to that portion of the Africans which had been taken from the American vessel. The residue was divided between the Spanish and Portuguese claimants.

No evidence was offered to show which of the Africans were taken from the American vessel and which from the Spanish and Portuguese, and the court below decreed that, as about one-third of them died, the loss should be averaged among these three different classes, and that sixteen should be designated by lot from the whole number and delivered over to the Marshal according to the law of the United States as being the fair proportion of the twenty-five proved to have been taken from an American vessel.

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

In prosecuting this appeal, the United States asserts no property in itself. It appears in the character of guardian or next friend of these Africans, who are brought, without any act of their own, into the bosom of our country, insist on their right to freedom, and submit their claim to the laws of the land and to the tribunals of the nation.

The Consuls of Spain and Portugal, respectively, demand these Africans as slaves, who have, in the regular course of legitimate commerce, been acquired as property by the subjects of their respective sovereigns and claim their restitution under the laws of the United States.

In examining claims of this momentous importance -- claims in which the sacred rights of liberty and of property come in conflict with each other, which have drawn from the bar a degree of talent and of eloquence worthy of the questions that have been discussed -- this Court must not yield to feelings which might seduce it from the path of duty, and must obey the mandate of the law.

That the course of opinion on the slave trade should be unsettled ought to excite no surprise. The Christian and civilized nations of the world

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with whom we have most intercourse have all been engaged in it. However abhorrent this traffic may be to a mind whose original feelings are not blunted by familiarity with the practice, it has been sanctioned in modern times by the laws of all nations who possess distant colonies, each of whom has engaged in it as a common commercial business which no other could rightfully interrupt. It has claimed all the sanction which could be derived from long usage and general acquiescence. That trade could not be considered as contrary to the law of nations which was authorized and protected by the laws of all commercial nations, the right to carry on which was claimed by each and allowed by each.

The course of unexamined opinion which was founded on this inveterate usage received its first check in America, and as soon as these states acquired the right of self-government, the traffic was forbidden by most of them. In the beginning of this century, several humane and enlightened individuals of Great Britain devoted themselves to the cause of the Africans, and by frequent appeals to the nation, in which the enormity of this commerce was unveiled and exposed to the public eye, the general sentiment was at length roused against it and the feelings of justice and humanity, regaining their long lost ascendancy, prevailed so far in the British Parliament as to obtain an act for its abolition. The utmost efforts of the British government, as well as of that of the United States, have since been assiduously

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employed in its suppression. It has been denounced by both in terms of great severity and those concerned in it are subjected to the heaviest penalties which law can inflict. In addition to these measures operating on their own people, they have used all their influence to bring other nations into the same system, and to interdict this trade by the consent of all.

Public sentiment has in both countries kept pace with the measures of government, and the opinion is extensively if not universally entertained that this unnatural traffic ought to be suppressed. While its illegality is asserted by some governments but not admitted by all, while the detestation in which it is held is growing daily, and even those nations who tolerate it in fact almost disavow their own conduct and rather connive at, than legalize, the acts of their subjects, it is not wonderful that public feeling should march somewhat in advance of strict law, and that opposite opinions should be entertained on the precise cases in which our own laws may control and limit the practice of others. Indeed, we ought not to be surprised if, on this novel series of cases, even courts of justice should in some instances have carried the principle of suppression further than a more deliberate consideration of the subject would justify.

The Amedie, 1 Acton 240, which was an American vessel employed in the African trade, was captured by a British cruiser and condemned in the Vice Admiralty Court of Tortola.

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An appeal was prayed, and Sir William Grant, in delivering the opinion of the court, said that, the trade being then declared unjust and unlawful by Great Britain,

"a claimant could have no right, upon principles of universal law, to claim restitution in a prize court of human beings carried as his slaves. He must show some right that has been violated by the capture, some property of which he has been dispossessed and to which he ought to be restored. In this case, the laws of the claimant's country allow of no right of property such as he claims. There can therefore be no right of restitution. The consequence is that the judgment must be affirmed."

The Fortuna, 1 Dodson 81, was condemned on the authority of *The Amedie,* and the same principle was again affirmed.

The Diana, 1 Dodson 95, was a Swedish vessel captured with a cargo of slaves by a British cruiser and condemned in the Court of Vice Admiralty at Sierra Leone.

This sentence was reversed on appeal, and Sir William Scott, in pronouncing the sentence of reversal, said

"The condemnation also took place on a principle which this Court cannot in any manner recognize, inasmuch as the sentence affirms 'that the slave trade, from motives of humanity, hath been abolished by most civilized nations and is not at the present time legally authorized by any.' This appears to me to be an assertion by no means sustainable."

The ship and cargo were restored on the principle that the trade was allowed by the laws of Sweden.

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The principle common to these cases is that the legality of the capture of a vessel engaged in the slave trade depends on the law of the country to which the vessel belongs. If that law gives its sanction to the trade, restitution will be decreed; if that law prohibits it, the vessel and cargo will be condemned as good prize.

This whole subject came on afterwards to be considered in *The Louis,* 2 Dodson 238. The opinion of Sir William Scott in that case demonstrates the attention he had bestowed upon it and gives full assurance that it may be considered as settling the law in the British courts of admiralty as far as it goes.

The Louis was a French vessel, captured on a slaving voyage before she had purchased any slaves, brought into Sierra Leone, and condemned by the Vice Admiralty court at that place. On an appeal to the Court of Admiralty in England, the sentence was reversed.

In the very full and elaborate opinion given on this case, Sir William Scott in explicit terms lays down the broad principle that the right of search is confined to a state of war. It is a right, strictly belligerent in its character, which can never be exercised by a nation at peace except against professed pirates, who are the enemies of the human race. The act of trading in slaves, however detestable, was not, he said, "the act of freebooters, enemies of the human race, renouncing every

country and ravaging every country in its coasts and vessels indiscriminately." It was not piracy.

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He also said that this trade could not be pronounced contrary to the law of nations.

"A court, in the administration of law, cannot attribute criminality to an act where the law imputes none. It must look to the legal standard of morality, and upon a question of this nature that standard must be found in the law of nations as fixed and evidenced by general and ancient and admitted practice by treaties and by the general tenor of the laws and ordinances and the formal transactions of civilized states, and, looking to those authorities, he found a difficulty in maintaining that the transaction was legally criminal."

The right of visitation and search being strictly a belligerent right, and the slave trade being neither piratical nor contrary to the law of nations, the principle is asserted and maintained with great strength of reasoning that it cannot be exercised on the vessels of a foreign power unless permitted by treaty. France had refused to assent to the insertion of such an article in her treaty with Great Britain, and consequently the right could not be exercised on the high seas by a British cruiser on a French vessel.

"It is pressed as a difficulty," says the judge,

"what is to be done if a French ship laden with slaves is brought in. I answer without hesitation, restore the possession which has been unlawfully devested; rescind the illegal act done by your own subject, and leave the foreigner to the justice of his own country."

This reasoning goes far in support of the proposition

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that in the British courts of admiralty, the vessel even of a nation which had forbidden the slave trade, but had not conceded the right of search, must, if wrongfully brought in, be restored to the original owner. But the judge goes further and shows that no evidence existed to prove that France had by law forbidden that trade. Consequently, for this reason as well as for that previously assigned, the sentence of condemnation was reversed and restitution awarded.

In the United States, different opinions have been entertained in the different circuits and districts, and the subject is now, for the first time, before this Court.

The question whether the slave trade is prohibited by the law of nations has been seriously propounded, and both the affirmative and negative of the proposition have been maintained with equal earnestness.

That it is contrary to the law of nature will scarcely be denied. That every man has a natural right to the fruits of his own labor is generally admitted, and that no other person can rightfully deprive him of those fruits and appropriate them against his will seems to be the necessary result of this admission. But from the earliest times, war has existed, and war confers rights in which all have acquiesced. Among the most enlightened nations of antiquity, one of these was that the victor might enslave the vanquished. This, which was the usage of all, could not be pronounced repugnant to the law of nations, which is certainly to be tried by the test of general

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usage. That which has received the assent of all must be the law of all.

Slavery, then, has its origin in force; but as the world has agreed that it is a legitimate result of force, the state of things which is thus produced by general consent cannot be pronounced unlawful.

Throughout Christendom, this harsh rule has been exploded, and war is no longer considered as giving a right to enslave captives. But this triumph of humanity has not been universal. The parties to the modern law of nations do not propagate

their principles by force, and Africa has not yet adopted them. Throughout the whole extent of that immense continent, so far as we know its history, it is still the law of nations that prisoners are slaves. Can those who have themselves renounced this law be permitted to participate in its effects by purchasing the beings who are its victims?

Whatever might be the answer of a moralist to this question, a jurist must search for its legal solution in those principles of action which are sanctioned by the usages, the national acts, and the general assent of that portion of the world of which he considers himself as a part and to whose law the appeal is made. If we resort to this standard as the test of international law, the question, as has already been observed, is decided in favor of the legality of the trade. Both Europe and America embarked in it, and for nearly two centuries it was carried on without opposition and without censure. A jurist could

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not say that a practice thus supported was illegal and that those engaged in it might be punished either personally or by deprivation of property.

In this commerce, thus sanctioned by universal assent, every nation had an equal right to engage. How is this right to be lost? Each may renounce it for its own people, but can this renunciation affect others?

No principle of general law is more universally acknowledged than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone. A right, then, which is vested in all by the consent of all can be devested only by consent, and this trade, in which all have participated, must remain lawful to those who cannot be induced to relinquish it. As no nation can prescribe a rule for others, none can make a law of nations, and this traffic remains lawful to those whose governments have not forbidden it.

If it is consistent with the law of nations, it cannot in itself be piracy. It can be made so only by statute, and the obligation of the statute cannot transcend the legislative power of the state which may enact it.

If it be neither repugnant to the law of nations nor piracy, it is almost superfluous to say in this Court that the right of bringing in for adjudication in time of peace, even where the vessel belongs to a nation which has prohibited the trade,

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cannot exist. The courts of no country execute the penal laws of another, and the course of the American government on the subject of visitation and search would decide any case in which that right had been exercised by an American cruiser on the vessel of a foreign nation, not violating our municipal laws, against the captors.

It follows that a foreign vessel engaged in the African slave trade, captured on the high seas in time of peace by an American cruiser and brought in for adjudication, would be restored.

The general question being disposed of, it remains to examine the circumstances of the particular case.

The *Antelope,* a vessel unquestionably belonging to Spanish subjects, was captured while receiving a cargo of Africans on the coast of Africa by the *Arraganta,* a privateer which was manned in Baltimore and is said to have been then under the flag of the Oriental republic. Some other vessels, said to be Portuguese, engaged in the same traffic, were previously plundered and the slaves taken from them as well as from another vessel then in the same port were put on board the *Antelope,* of which vessel the *Arraganta* took possession, landed her crew, and put on board a prize master and prize crew. Both vessels proceeded to the coast of Brazil, where the *Arraganta* was wrecked and her captain and crew either lost or made prisoners.

The *Antelope,* whose name was changed to the *General Ramirez* after an ineffectual attempt

to sell the Africans on board at Surinam, arrived off the coast of Florida and was hovering on that coast near that of the United States for several days. Supposing her to be a pirate or a vessel wishing to smuggle slaves into the United States, Captain Jackson, of the revenue cutter *Dallas,* went in quest of her, and finding her laden with slaves, commanded by officers who were citizens of the United States, with a crew who spoke English, brought her in for adjudication.

She was libeled by the Vice Consuls of Spain and Portugal, each of whom claim that portion of the slaves which were conjectured to belong to the subjects of their respective sovereigns, which claims are opposed by the United States on behalf of the Africans.

In the argument, the question on whom the *onus probandi* is imposed has been considered as of great importance, and the testimony adduced by the parties has been critically examined. It is contended that the *Antelope,* having been wrongfully dispossessed of her slaves by American citizens and being now, together with her cargo, in the power of the United States, ought to be restored without further inquiry to those out of whose possession she was thus wrongfully taken. No proof of property, it is said, ought to be required. Possession is in such a case evidence of property.

Conceding this as a general proposition, the counsel for the United States deny its application to this case. A distinction is taken between

men, who are generally free, and goods, which are always property. Although with respect to the last possession may constitute the only proof of property which is demandable, something more is necessary where men are claimed. Some proof should be exhibited that the possession was legally acquired. A distinction has been also drawn between Africans unlawfully taken from the subjects of a foreign power by persons acting under the authority of the United States and Africans first captured by a belligerent privateer or by a pirate and then brought rightfully into

the United States, under a reasonable apprehension that a violation of their laws was intended. Being rightfully in the possession of an American court, that court, it is contended, must be governed by the laws of its own country, and the condition of these Africans must depend on the laws of the United States, not on the laws of Spain and Portugal.

Had the *Arraganta* been a regularly commissioned cruiser, which had committed no infraction of the neutrality of the United States, her capture of the *Antelope* must have been considered as lawful, and no question could have arisen respecting the rights of the original claimants. The question of prize or no prize belongs solely to the courts of the captor. But having violated the neutrality of the United States and having entered our ports not voluntarily, but under coercion, some difficulty exists respecting the extent of the obligation to restore, on the more

proof of former possession, which is imposed on this government.

If, as is charged in the libels of both the consuls as well as of the United States, she was a pirate hovering on the coast with intent to introduce slaves in violation of the laws of the United States, our treaty requires that property rescued from pirates shall be restored to the Spanish owner on his making proof of his property.

Whether the *General Ramirez,* originally the *Antelope,* is to be considered as the prize of a commissioned belligerent ship of war unlawfully equipped in the United States, or as a pirate, it seems proper to make some inquiry into the title of the claimants.

In support of the Spanish claim, testimony is produced showing the documents under which the *Antelope* sailed from the Havana on the voyage on which she was captured; that she was owned by a Spanish house of trade in that place; that she was employed in the business of purchasing slaves, and had purchased and taken on board a considerable number when she was seized as prize by the *Arraganta.*

Whether, on this proof, Africans brought into the United States under the various circumstances belonging to this case ought to be restored or not is a question on which much difficulty has been felt. It is unnecessary to state the reasons in support of the affirmative or negative answer to it, because the Court is divided on it, and consequently no principle is settled. So much of the decree of the circuit court as directs

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restitution to the Spanish claimant of the Africans found on board the *Antelope* when she was captured by the *Arraganta* is affirmed.

There is some difficulty in ascertaining their number. The libel claims one hundred and fifty as belonging to Spanish subjects, and charges that one hundred or more of these were on board the *Antelope.* Grondona and Ximenes, Spanish officers of the *Antelope* before her capture, both depose positively to the number of one hundred and sixty-six. Some deduction, however, is to be made from the weight of Grondona's testimony, because, he says in one of his depositions that he did not count the slaves on the last day when some were brought on board, and adds that he had lost his papers and spoke from memory and from the information he had received from others of the crew after his arrival in the Havana. Such of the crew as were examined concur with Grondona and Ximenes as to numbers.

The depositions of the Spanish witnesses on this point are opposed by those of John Smith, the Captain of the *General Ramirez,* and William Brunton, one of the crew of the *Arraganta,* who was transferred to the *Antelope.*

John Smith deposes that ninety-three Africans were found on board the *Antelope* when captured who he believes to have been Spanish property. He also says, that one hundred and eighty-three were taken out of Portuguese vessels.

William Brunton deposes that more slaves

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were taken out of the Portuguese ship than were in any other, and that ninety-odd were represented by the crew to have been on board the *Antelope* when she was captured.

If to the positive testimony of these witnesses we add the inference to be drawn from the statement of the libel and the improbability that so large a number of Africans as are claimed could have been procured under the circumstances in which the *Antelope* was placed between the 13th, when she was liberated by the first pirate who seized her, and the 23d, when she was finally captured, we are rather disposed to think the weight of testimony is in favor of the smaller number. But supposing perfect equality in this respect, the decision ought, we think, to be against the claimant.

Whatever doubts may attend the question whether the Spanish claimants are entitled to restitution of all the Africans taken out of their possession with the *Antelope,* we cannot doubt the propriety of demanding ample proof of the extent of that possession. Every legal principle which requires the plaintiff to prove his claim in any case applies with full force to this point, and no countervailing consideration exists. The *onus probandi* as to the number of Africans which were on board when the vessel was captured unquestionably lies on the Spanish libellants. Their proof is not satisfactory beyond ninety-three. The individuals who compose this number must be designated to the satisfaction of the circuit court.

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We proceed next to consider the libel of the Vice-Consul of Portugal. It claims one hundred and thirty slaves or more, "all of whom, as the libellant is informed and believes," are the property of a subject or subjects of his Most Faithful Majesty, and although "the rightful owners of such slaves be not at this time individually and certainly known to the libellant, he hopes and expects soon to discover them."

John Smith and William Brunton, whose depositions have already been noticed, both state that several Africans were taken out of Portuguese vessels, but neither of them states the means by which he ascertained the national character of the

vessels they had plundered. It does not appear that their opinions were founded on any other fact than the flag under which the vessels sailed. Grondona also states the plunder of a Portuguese vessel lying in the same port and engaged in the same traffic with the *Antelope* when she was captured, but his testimony is entirely destitute of all those circumstances which would enable us to say that he had any knowledge of the real character of the vessel other than was derived from her flag. The cause furnishes no testimony of any description, other than these general declarations, that the proprietors of the Africans now claimed by the Vice-Consul of Portugal were the subjects of his King; nor is there any allusion to the individuals to whom they belong. These vessels were plundered in March, 1820, and the libel was filed in August of the same year. From

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that time to this, a period of more than five years, no subject of the Crown of Portugal has appeared to assert his title to this property,; no individual has been designated as its probable owner. This inattention to a subject of so much real interest, this total disregard of a valuable property, is so contrary to the common course of human action as to justify serious suspicion that the real owner dares not avow himself.

That Americans and others who cannot use the flag of their own nation carry on this criminal and inhuman traffic under the flags of other countries is a fact of such general notoriety that courts of admiralty may act upon it. It cannot be necessary to take particular depositions to prove a fact which is matter of general and public history. This long and otherwise unaccountable absence of any Portuguese claimant furnishes irresistible testimony that no such claimant exists and that the real owner belongs to some other nation and feels the necessity of concealment.

An attempt has been made to supply this defect of testimony by adducing a letter from the secretary to whose department the foreign relations of Portugal are supposed to be entrusted suggesting the means of transporting to Portugal those slaves which may be in the possession of the vice-consul as the property of his fellow subjects. Allow to this document all the effect which can be claimed for it

and it can do no more than supply the want of an express power

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from the owners of the slaves to receive them. It cannot be considered as ascertaining the owners or as proving their property.

The difficulty, then, is not diminished by this paper. These Africans still remain unclaimed by the owner or by any person professing to know the owner. They are rightfully taken from American citizens and placed in possession of the law. No property whatever in them is shown. It is said that possession, in a case of this description, is equivalent to property. Could this be conceded, who had the possession? From whom were they taken by the *Arraganta?* It is not alleged that they are the property of the Crown, but of some individual. Who is that individual? No such person is shown to exist, and his existence after such a lapse of time cannot be presumed.

The libel, which claims them for persons entirely unknown, alleges a state of things which is *prima facie* evidence of an intent to violate the laws of the United States by the commission of an act which according to those laws entitles these men to freedom. Nothing whatever can interpose to arrest the course of the law but the title of the real proprietor. No such title appears, and every presumption is against its existence.

We think, then, that all the Africans now in possession of the Marshal for the District of Georgia and under the control of the circuit court of the United States for that district which were brought in with the *Antelope,* otherwise

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called the *General Ramirez,* except those which may be designated as the property of the Spanish claimants ought to be delivered up to the United States to be disposed of according to law. So much of the sentence of the circuit court as is contrary to this opinion is to be

Reversed, and the residue affirmed.

DECREE. This cause came on to be heard, &c.;, on consideration whereof this Court is of opinion that there is error in so much of the sentence and decree of the said circuit court as directs the restitution to the Spanish claimant of the Africans in the proceedings mentioned in the ratio which one hundred and sixty-six bears to the whole number of those which remained alive at the time of pronouncing the said decree, and also in so much thereof as directs restitution to the Portuguese claimant, and that so much of the said decree ought to be reversed, and it is hereby reversed and annulled. And this Court, proceeding to give such decree as the said circuit court ought to have given, doth DIRECT and ORDER that the restitution to be made to the Spanish claimant, shall be according to the ratio which ninety-three (instead of one hundred and sixty-six) bears to the whole number, comprehending as well those originally on board the *Antelope* as those which were put on board that vessel by the Captain of the *Arraganta.* After making the apportionment according to this ratio and deducting from the number the ratable loss which must fall on the slaves to which the Spanish claimants were originally entitled, the

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residue of the said ninety-three are to be delivered to the Spanish claimant on the terms in the said decree mentioned, and all the remaining Africans are to be delivered to the United States, to be disposed of according to law, and the said decree of the said circuit court is in all things not contrary to this decree affirmed.