

**United States Vs. Morris**

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**SooperKanoon Citation :** [sooperkanoon.com/79029](http://sooperkanoon.com/79029)

**Court :** US Supreme Court

**Decided On :** 1825

**Appeal No. :** 23 U.S. 246

**Appellant :** United States

**Respondent :** Morris

**Judgement :**

United States v. Morris - 23 U.S. 246 (1825)

U.S. Supreme Court United States v. Morris, 23 U.S. 10 Wheat. 246 246 (1825)

**United States v. Morris**

**23 U.S. (10 Wheat.) 246**

*ERROR TO THE CIRCUIT COURT FOR*

*THE SOUTHERN DISTRICT OF NEW YORK*

## **SYLLABUS**

The Secretary of the Treasury has authority under the Remission Act of 3 March, 1797, c. 361 [lvii] to remit a forfeiture or penalty accruing under the revenue laws at any time, before or after a final sentence of condemnation or judgment for the

penalty until the money is actually paid over to the collector for distribution.

Such remission extends to the shares of the forfeiture or penalty to which the officers of the customs are entitled, as well as to the interest of the United States.

*Quaere* whether an execution upon a judgment obtained in the district Court of Maine could run into and be executed in the Southern District of New York.

In a plea of justification by the marshal for not levying an execution, setting forth a remission by the Secretary of the Treasury of the forfeiture or penalty on which the judgment was obtained, it is not necessary to set forth the statement of facts upon which the remission was founded.

This was an action brought against the defendant in the court below, as Marshal of the Southern District of New York, for a misfeasance in neglecting to proceed on a *venditioni exponas* issued out of the District Court of the United States for the District of Maine requiring him to sell the goods and chattels of Andrew Ogden, Abraham K. Smedes, and Thomas C. Butler which he had levied upon by virtue of certain executions issued against them in favor of the United States on a judgment recovered in the said District Court of Maine and which goods and chattels remained in his hands for want

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of buyers, according to his return on said executions. The misconduct or neglect of duty alleged against the Marshal was that he did not sell the property so levied upon according to the command of the writ, but delivered the same up to the defendants discharged from the execution. The declaration stated the judgment to have been recovered in the September term of the court in the year 1817 for \$22,361.75 damages, and which, in part, to-wit, in the sum of \$11,180.87, remained in full force, not reversed, paid off, or satisfied to the plaintiffs, and that execution to that amount remains to be done. The *venditioni exponas*, as was alleged, was put into the hands of the marshal on 13 August, 1819.

The pleadings in the cause show that Andrew Ogden, of the City of New York, in or about the month of June in the year 1813, imported into Portland, in the District of Maine, certain goods and merchandise in the brig *Hollen*, which vessel, as well as the goods, belonged to him. These goods, together with the brig, were thereupon seized as forfeited to the United States on the ground that the goods had been imported in that vessel in violation of the nonintercourse acts then in existence. The goods and vessel were libeled in the District Court of Maine on 6 July, 1813, and on the 19th of the same month were delivered up to Andrew Ogden, after having been regularly appraised, upon his having executed, together with Abraham K. Smedes, and Thomas C. Butler, a bond for their appraised

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value. The vessel and goods were afterwards, on 27 May, 1817, condemned as forfeited to the use of the United States. And such proceedings were thereupon had that in the following September term of the court, a judgment was entered upon the bond of appraisement for \$22,361.75, with costs.

The defendant, Morris, pleaded the general issue and a special plea in justification that the forfeitures had been remitted by the Secretary of the Treasury, setting out *in haec verba* two warrants of remission which were duly served upon him before the return day of the *venditioni exponas*, and averring a compliance on the part of the defendants with all the terms and conditions required by the warrants of remission. All which were duly set forth in the return on the *venditioni exponas* before the commencement of the present suit.

To this special plea a replication was filed stating in substance that at the time of the forfeiture, seizure, and condemnation of the brig *Hollen* and the goods imported in her, and also at the time of their condemnation and the entering up of the judgment on the bond for their appraised value and of the issuing of the several writs of execution, and at the time of the making and issuing the said warrants of remission and of the service thereof on the defendant, &c.;, Isaac Ilsley, and James C. Jewett were the collector and surveyor of the port of Portland, and as such entitled to one-half of the said forfeiture, and that the said several

executions

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were issued for their benefit, and solely to collect the said sum of \$11,180.87 for their own separate use, and that the defendant had notice thereof when the said several writs of execution were delivered to him to be executed, setting out, also, two endorsements on the execution, one signed by the District Attorney of Maine, notifying the defendant that the execution was for the benefit of the said collector and Surveyor and directing the Marshal to collect the same by their order. The other was signed by the collector and surveyor, requiring the marshal to collect the execution forthwith and deposit the money agreeably to the command of the writ and notifying him that the property in the execution was in them and directing him to receive orders from them and from no other person whatsoever in whatever related to the said execution. And it was then averred that the present suit was for the purpose of enabling the collector and surveyor to recover their damages for the injury they had sustained by reason of the misfeasance of the defendant in the declaration mentioned, and not for the benefit, use, or behoof of the said plaintiffs.

To this replication the defendant demurred specially and stated the following causes of demurrer:

(1) For that the replication is a departure from the declaration, in this that the declaration proceeds upon a cause of action in favor of the United States; whereas the replication proceeds upon a cause of action in favor of the said Ilsley and Jewett, &c.;

(2) For that the

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replication discloses no lawful and sufficient authority for the said I. and J. to prosecute the said action against the said T.M., &c., and in the name of the United States.

(3) For that the declaration proceeds upon the ground that the several writs of execution therein respectively mentioned were issued upon a judgment obtained for the use of the United States, and therefore, according to the act in such case made, &c.;, might lawfully run and be executed in any other state or territory of the United States than the said District of Maine in which the said judgment was obtained. Whereas the replication discloses the fact that the said judgment was not obtained for the use of the said United States, but for the use and benefit of the said I. and J., and, therefore, could not run and be executed in any other state, &c.;

(4) That the suit is prosecuted in the name of the United States, by an attorney, on record, other than the District Attorney of the United States for the Southern District of New York.

A joinder in demurrer having been filed, judgment was given for the defendant in the court below and the cause brought by writ of error to this Court.

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

The judgment of this Court being placed upon the validity of the plea and the merits of the defense therein set up, it is unnecessary particularly to notice any other questions that have been discussed at the bar. To guard, however, against an inference, not intended by the Court to be admitted, that the execution, in this case was properly issued from the District Court of Maine to the Marshal of New York, it is proper to observe that this must depend on the construction to be given to the Act of Congress of 3 March, 1797, entitled, "An act to provide more effectually for the settlement of accounts between the United States and the receivers of public money." Independent of this act, it has not and certainly cannot be pretended that an execution from the District Court of Maine could run into any other state. The sixth section of that act declares

"That all writs of execution upon any judgments obtained for the use of the United States in any of the courts of the United States in one state may run and be executed in any other state, but shall be issued from and made returnable to the court where the judgment was obtained. The pleadings in this case show conclusively that although the

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judgment is nominally in favor of the United States, yet it is substantially and beneficially for the use of the custom house officers of Portland and that the execution was issued solely and exclusively for their benefit, and not for the use of the United States. If it was necessary to decide this point, it might be difficult to maintain that this case came within the true intent and meaning of the act; but as the decision of the cause is put upon a point more extensive in its practical application, this is passed by without the expression of any opinion upon it. Nor is it deemed necessary to notice any objections taken to the replication. The argument has been confined principally to the plea, as being the first error on the record."

The plaintiff having replied, without taking any exceptions to the plea, he cannot now avail himself of any defect that would not have been fatal on a general demurrer.

The objections to the plea may be considered under the following heads:

1. That it does not set forth with proper averments the facts and circumstances stated in the petition to the Secretary of the Treasury and upon which the remission of the forfeiture was granted.
2. That the Secretary of the Treasury had no power to remit after condemnation.

The first objection supposes the case to fall within the rule that where a justification is set up under a special or limited authority, everything should be set out to show the case to be

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within the jurisdiction of the authority whose protection is claimed and relied upon.

It may be observed preliminarily that this objection, coming so late, and at this stage of the cause, is not entitled to much indulgence. If well founded, and it had been made at an earlier day, the plea could have been amended and much expense and litigation prevented. Every reasonable intendment, therefore, in favor of the plea ought now to be made.

It by no means follows that in order to sustain this plea it is necessary to show that it would have been held good on general demurrer. For it is a rule founded in good sense and supported by the settled doctrines of pleading that many defects are waived and cured by pleading over that might have been fatal on demurrer.

But it is far from being admitted that this plea would not have stood the test of a general demurrer. The defendant was a ministerial officer, and placed in a situation in which he was obliged to judge and determine whether to obey the command of the execution, or that of the warrant of remission from the Secretary of the Treasury. The latter is set out *in haec verba* in the plea, and upon its face refers to the law under which it was issued, which was a public act, and in which warrant the Secretary of the Treasury sets forth that a statement of facts, with the petition of Andrew Ogden touching the forfeiture, had been transmitted to him by the District Judge of the District of Maine pursuant to the statute of the United States, entitled "An

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act to provide for mitigating or remitting the forfeitures, penalties, and disabilities accruing in certain cases therein mentioned," as by the said statement of facts and petitions remaining in the Treasury Department of the United States may fully appear, and that, he having maturely considered said statement of facts, it appeared to his satisfaction that the said forfeitures were incurred without willful negligence or any intention of fraud, and thereupon remitted all the right, claim, and demand of the United States and of all others whomsoever upon certain conditions therein specified. This warrant, therefore, upon its face contained

everything required by the law and which was necessary to bring the case within the cognizance of the Secretary of the Treasury, and to require anything more from a ministerial officer for his justification would be imposing upon him great hardship.

This plea, by setting out the warrant at large, adopts and asserts all the facts therein set forth, and must be taken as alleging that a statement of facts had been made by the proper officer and transmitted to the Secretary of the Treasury, and is therefore an averment of that fact. It is not, to be sure, a formal, but is a substantial, averment, which is nothing more than a positive statement of facts, in opposition to argument or inference.

It would be altogether useless and mere surplusage to set forth such statement of facts in the plea; they would not be traversable. It is not competent for any other tribunal collaterally to call in question the competency of the evidence

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or its sufficiency to procure the remission. The Secretary of the Treasury is by the law made the exclusive judge of these facts, and there is no appeal from his decision. The law declares that on receiving such statement, he shall have power to mitigate or remit such fine, forfeiture, or penalty or remove such disability or any part thereof if in his opinion the same shall have been incurred without willful negligence or any intention of fraud in the person or persons incurring the same. The facts are submitted to the Secretary for the sole purpose of enabling him to form an opinion whether there was willful negligence or intentional fraud in the transaction, and the correctness of his conclusion therefrom no one can question. It is a subject submitted to his sound discretion. It would be a singular issue to present to a jury for trial, whether the facts contained in such statement were sufficient or not to satisfy the Secretary of the Treasury, that there was no willful negligence or intentional fraud. If the plea, by setting out the warrant at large, contains, as I have endeavored to show, an averment that a statement of facts had been transmitted to the Secretary by the proper officer, as required by the law, it was all that was necessary. This gave the Secretary cognizance of the case, and

which was sufficient to give him jurisdiction. But what effect that statement of facts would or ought to have upon his opinion whether the forfeiture was incurred without willful negligence or any intention of fraud is a matter that could not be inquired into.

But should any doubt remain on this point, it

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is removed by the admissions in the replication, which begins by saying that although true it is that the said William H. Crawford, as such Secretary of the Treasury of the United States, did make and issue the said warrants of remission as in the said plea of the said defendant is alleged, yet, &c.;, proceeding to set out facts and circumstances to show that the legal effect and operation of such remission cannot take away the moiety of the custom house officers, but affirming its validity as to the moiety of the United States, and thereby admitting the authority and jurisdiction of the Secretary of the Treasury and placing the avoidance of the operation of the remission on the rights of the custom house officers on a totally distinct ground. The only purpose for which the statement of facts upon which the Secretary acted could be required to be set out in the plea would be to show his jurisdiction, and if the replication admits this, it must certainly work a cure or waiver of the defect. It is laid down by Chitty, Chitty on Plead. 547, and for which he cites adjudged cases which support him, that as a defective declaration may be aided at common law by the plea, so a defective plea may be aided in some cases, by the replication. As if, in debt on bond to make an estate to A., the defendant pleads that he enfeoffed another to the use of A. (which is not sufficient, without showing that A. was a party, or had the deed), yet if the plaintiff reply that he did not enfeoff, this aids the bar. So if the defendant plead an award without sufficient

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certainty, and the plaintiff makes a replication which imports the award to have been made, it aids the uncertainty of the bar. And this rule is not confined to

matters of form merely, but extends to matters of substance. Thus, in an action of trespass for taking goods, not stating them to be the property of the plaintiff, this defect will be aided if the defendant by his plea admits the plaintiff's property. So where several acts are to be performed by the plaintiff as a condition precedent, and he does not aver performance of all, if it appear by the plea that the act omitted to be stated was in fact performed, the defect is cured. 6 Binny 24; Chitty 402. We may, then, conclude that the plea is not, in the present stage of the cause, to be deemed defective on account of the first exception taken to it.

And the remaining and more important inquiry is whether the Secretary of the Treasury had authority to remit the share of the forfeiture claimed by the custom house officers. And this must depend on the construction to be given to the act under which the power was exercised. The authority of the Secretary to remit at any time before condemnation of the property seized is not denied on the part of the plaintiff, and it cannot be maintained that Congress has not the power to vest in this officer authority to remit after condemnation, and the only inquiry would seem to be whether this has been done by the act referred to. 2 L.U.S. 585. The present case ought not perhaps to be considered

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altogether as a remission after condemnation. For it appears by the warrant of remission that the statement of facts by the district judge upon which the remission is founded bears date on 13 June, 1814, and the condemnation did not take place until May, 1817, and although the remission was not actually granted until January, 1819, yet as the facts on which it was founded were judicially ascertained three years before the condemnation, there would be some plausibility in maintaining that the remission should relate back to the time when the application was made to the Secretary. But we think a broader ground may be taken, and that the authority to remit is limited only by the payment of the money to the collector for distribution.

It may safely be affirmed that the question now presented has never received any judicial decision in this Court. Nor has any case been cited at the bar or

recollected by the Court to have been decided here containing any principle at variance with the construction of the act now adopted.

In the case of [Jones v. Shore's Executors](#), 1 Wheat. 462, no such question was involved. The United States there asserted no claim. Nor had the Secretary of the Treasury exercised any authority under the act in question. The money was in court for distribution, and the sole question before this Court was whether the then collector and surveyor were the actual incumbents in office or the representatives of the late collector and surveyor, in right of their testator,

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and intestate, were entitled to the money, and it was decided in favor of the latter. The same principle governed the case of [Van Ness v. Buel](#), 4 Wheat. 75. But these cases decide no more than that the right of the custom house officers to forfeitures *in rem* attaches on seizure, and to personal penalties on suits brought, and in each case this right is ascertained and consummated by the judgment as between such officers and the party who has incurred the forfeiture or penalty. But they decide nothing with respect to the right or the control of the United States over such penalties and forfeitures. The rights and interests of these officers must necessarily be held subordinate to the authority of the United States over the subject. And that such is the light in which they are viewed is evidence from what fell from the Court in the case of [Gelston v. Hoyt](#), 3 Wheat. 319. It is there said the seizing officer is the agent of the government from the moment of the seizure up to the termination of the suit. His own will is bound up in the acts of the government in reference to the suit. By the very act of seizure, he agrees to become a party to the suit under the government, for in no other manner can he show and authority to make the seizure or to enforce the forfeiture. If the government refuse to adopt his acts or waive the forfeiture, there is an end to his claim; he cannot proceed to enforce that which the government repudiates.

It is not denied but that the custom house officers have an inchoate interest upon the seizure,

and it is admitted that this may be defeated by a remission at any time before condemnation. But if this is not the limitation put upon the authority to remit by the act giving the power, it is difficult to discover any solid ground upon which such limitation can be assumed. If the interest of the custom house officers before condemnation is conditional and subject to the power of remission, the judgment of condemnation can have no other effect than to fix and determine that interest as against the claimant. Those officers, although they may be considered parties in interest, are not parties on the record, and it cannot with propriety be said they have a vested right in the sense in which the law considers such rights. Their interest still continues conditional, and the condemnation only ascertains and determines the fact on which the right is consummated should no remission take place. This is evidently the scope and policy of the laws on this subject. The forfeiture is to the United States, and must be sued for in the name of the United States. 3 L.U.S. 221, s. 89. It is made the duty of the collector to prosecute, and he is authorized to receive the money, and on receipt thereof is required to distribute the same according to law. In all this, however, he acts as the agent of the government, and subject to the authority of the Secretary of the Treasury, who may direct the prosecution to cease. And the act creating the right of the custom house officers to a portion of the forfeiture does not

vest any absolute right in them until the money is received (s. 91). It declares that all fines, penalties, and forfeitures recovered by virtue of this act shall, after deducting all proper costs and charges, be paid, one moiety into the Treasury and the other moiety divided between the collector, naval officer, and surveyor.

No part of the act warrants the conclusion that the right of these officers becomes absolute by the condemnation. But on the contrary, the plain and obvious interpretation is that the right does not become fixed until the receipt of the money by the collector. Unless, therefore, the act under which the remission is allowed, 2 L.U.S. 585, limits the authority of the Secretary of the Treasury to the time of

condemnation, the custom house officers have no right to question the remission. That the act does not, in terms, so limit the power is very certain; nor is such a construction warranted by the general object and policy of the law, which is intended to provide equitable relief where the forfeiture has been incurred without willful negligence or intentional fraud. It presupposes that the offense has been committed and the forfeiture attached according to the letter of the law, and affords relief for inadvertencies and unintentional error. And why should such relief be foreclosed by the condemnation? The law was made for the benefit of those who had innocently incurred the penalty, and not for the benefit of the custom house officers. If any prosecution has been instituted, the Secretary has authority to direct it to cease

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and be discontinued upon such terms or conditions as he may deem reasonable and just. This enables him to do ample justice to the custom house officers, not only by reimbursing all costs and expenses incurred, but rewarding them for their vigilance and encouraging them in the active and diligent discharge of their duty in the execution of the revenue laws.

But to consider their right to a moiety of the forfeiture as absolute and beyond the reach of the law after condemnation would be subjecting the innocent to great and inequitable losses, contrary to the manifest spirit and intention of the law. The Secretary is authorized to direct the prosecution to cease and be discontinued. This undoubtedly gives him a control over the execution. The suit or prosecution does not end with the judgment, but embraces the execution, and it has so been considered by this Court at the present term. And that such is the sense in which the term prosecution is used in these laws is evident from the 89th section of the Collection act, where the collector is required to cause suits to be commenced and prosecuted to effect. But the prosecution would be to very little effect unless it extended to and included the execution. The provision in the third section of the act, under which the remission is allowed, affords a very strong inference that the rights of the custom house officers are conditional and subordinate to the authority to remit. It declares that nothing herein contained shall be construed to affect the

right or claim of any person to that part of any

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fine, penalty, or forfeiture to which he may be entitled when a prosecution has been commenced or information has been given before the passing of this act or any other act relative to the mitigation or remission of such fines, penalties, or forfeitures, thereby clearly showing, that before such power to remit was given, the right of the custom house officers attached upon the commencement of the prosecution, and could not be divested, but that such right was now modified and made conditional. This provision is contained in the first law which passed in the year 1790, 2 L.U.S. 103, giving authority to the Secretary of the Treasury to remit penalties and forfeitures. This act was temporary, but continued from time to time until 8 May, 1795, when it expired, and was not revived until March, 1797, leaving a period of two years when the power to remit was not vested in the Secretary of the Treasury, and to which period the provision in the third section of the act of 1797 probably refers.

The powers of the Secretary of the Treasury have been supposed analogous to those of the commissioners of the Customs in England under the statute 27 Geo. III, c. 32. s. 15. But it is very obvious on reference to that statute that the authority of the commissioners to remit was limited to the condemnation. These powers were afterwards, by statute 51 Geo. III, c. 96, extended, but still limited to remissions before condemnation. It was probably not deemed advisable to confer more enlarged powers

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upon the commissioners of customs, but that a power somewhere to remit after judgment of condemnation was proper and necessary, and accordingly by statute 54 Geo. III, c. 171. This power is transferred to the commissioners of the Treasury. The two former acts are recited, and the recital then proceeds thus:

"Whereas it is expedient that the provisions of the said acts should be further extended and that the commissioners of his Majesty's Treasury should be

empowered to restore, remit, or mitigate any forfeiture or penalty incurred under any laws relating to the revenue or customs or excise or navigation or trade, either before or after the same shall have been adjudged in any court of law or by or before any commissioner of excise or Justice of the Peace,"

and it is then enacted that the commissioners of the Treasury may order any goods seized as forfeited to be restored on the terms and conditions mentioned in the order, and may mitigate or remit any penalty or forfeiture which shall have been incurred under the revenue laws, and upon such terms and conditions as to costs or otherwise as under the circumstances of the case shall appear reasonable.

The enacting clause in this statute is general, like our act. It does not in terms give the power to the commissioners of the Treasury to remit after condemnation, and yet there can be no doubt the power extends to such cases, and if this be so, what becomes of the rights of informers, which have been supposed to become, by the judgment of condemnation,

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so vested, as not to be divested even by a pardon.

The powers given by this statute to the commissioners of the Treasury are very analogous to those given by our act to the Secretary of the Treasury, and the phraseology employed to confer such powers is nearly the same in both. Neither the one nor the other in terms extends the power to remission after condemnation, and there can be no reason why the same construction should not be given to both. No vested rights of informers or custom house officers are violated in either case. These rights are conditional, and subordinate to the power of remission, and to be provided for in the terms and conditions upon which the remission is granted.

The practical construction given at the Treasury Department to our act has not been particularly inquired into. It is understood, however, that until within a few years, remissions were granted as well after as before condemnation, but that latterly this power is not exercised after condemnation, nor will the remission be

granted before condemnation unless the petitioner will admit the forfeiture has been incurred. This practice is probably founded on the impression that the equitable powers of the Secretary ought not to be interposed until the legal guilt of the petitioner is ascertained. But the rights of the custom house officers would seem to be as much affected under such a practice as to remit after condemnation. Those rights are said to be inchoate by the seizure and to be consummated

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by the condemnation. The confession of the forfeiture before condemnation, remaining on the record of the Treasury Department, although not a judicial condemnation, might well be said to consummate the rights of the custom house officers if they are to be considered as becoming absolute when the forfeiture is ascertained. The condemnation does no more than to determine that question so far as respects the rights of those officers, for the condemnation is not to them, but to the United States; they are no parties to the judgment, and their rights must depend upon and be governed and controlled by the acts of Congress which create and regulate such rights, and by these acts, those rights, in the opinion of the Court, do not become fixed and absolute by the condemnation, but are subject to the power of remission by the Secretary of the Treasury until the money arising from the forfeiture is received by the collector for distribution. The warrant of remission, therefore, in this case, when served upon the marshal, operated as a supersedeas to the execution and justified a discharge and restoration of the property levied upon, and exonerates him from all claim to damages by the custom house officers.

MR. JUSTICE JOHNSON.

I entirely concur with my brethren in the opinion that the power of the Secretary to remit extends as well to cases after as before judgment rendered. The question is one which I have had to consider repeatedly in my circuit, and which I so decided more than

twelve years ago. The reasons on which I then founded and still adhere to this opinion were briefly these:

I consider the contrary doctrine as neither consistent with the words nor the spirit of the act of 1797. The unavoidable consequence of it would be that the suitor for grace is shut out of every legal defense, and it would be difficult to assign a reason why justice should be refused by the hand that tenders mercy. Many defenses are not only consistent with the claim for remission, but furnish in themselves the best ground for extending the benefit of the act to the party defendant. He who supposes his case not to come within the construction of a law, or that the law is repealed, expired, or unconstitutional, cannot be visited with moral offense, either in the act charged or the defense of it. Yet how is the question of right ever to be decided unless he is permitted to try the question before a court of law? In such a case, pertinacious adherence to his offense cannot be imputed to him, since resisting the suit on the one hand, while he sues for remission on the other, amounts to no more than this -- that he denies having violated the law; but if the court thinks otherwise, he then petitions for grace on the ground of unaffected mistake, a point on which, of course, he must satisfy the Secretary, before he can obtain a remission.

If the question be tested by the letter of the law, it will be found, I think, to lead to the same conclusion. The words are

"Whenever any

person who shall have incurred any fine, penalty, forfeiture, or disability or shall have been interested in any vessel, goods, wares, or merchandise, which shall have been subject to any seizure, forfeiture, or disability by force of any present or future law of the United States for laying or collecting any duties or taxes, or by force of any present or future act concerning the registering and recording of ships or vessels, &c.; shall prefer his petition to the judge of the district in which such

fine, penalty, forfeiture, or disability shall have accrued, truly and particularly setting forth,"

&c.;, then, &c.;, the power of remission may be exercised by the Secretary, and the prosecution if any, ordered to be stayed.

On perusing this act it must be conceded that the terms are sufficiently general to extend the powers of the Secretary without limit to the cases of fine, forfeiture, or disability occurring under the several laws specified. The limitation therefore must be sought for either in some principle of construction or in some principle *aliunde* which is competent to impose such limitation.

But with a view to construction, there will be found several considerations calculated to extend the power granted to cases wherein judgments have been obtained, rather than to restrain it to any preexisting state of things. If the question be tested by the technical signification of the terms, in strictness the power would be confined to cases in which judgment had been obtained, rather than to those of a contrary description.

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Fines, penalties, and disabilities are not incurred and do not accrue in the technical sense of the terms until judgment. With regard to disabilities particularly (and there is no discrimination made between the cases), I would notice that disqualification to hold any office under the United States which is imposed upon a smuggler for seven years. Who can question that it must be counted from the day of judgment, and not from the day of the offense or information? Or who can suppose that it could be made a plea to the authority of a public officer at any time before conviction?

But with regard to fines and forfeitures also there are various provisions of the United States laws which look positively to a trial as necessary to determining whether such fines and forfeitures have been incurred. I would notice particularly the 29th section of the Collection Law of 1799, under which incurring the penalty for the offense there stated is made to depend upon the master's not being able to

satisfy the court, by his own oath or other sufficient testimony, of certain facts which in the given case prevent his incurring the fine.

So also of the 67th section of the same law, in which a forfeiture is made to accrue upon a state of facts which positively requires the intervention of a court of justice and which, of consequence, cannot be said to have been incurred or accrued until judgment.

But other considerations present themselves upon this law which lead to the same conclusion.

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The words are, "shall prefer his petition to the judge of the district in which such fine, penalty, forfeiture, or disability shall have accrued." That this word "accrued" meant something more than the term "incurred," used in the previous part of the section, is obvious from this consideration, that an offense might be committed in one district and the offender prosecuted in another; but it never was imagined that the suit for remission could be going on in the district where the penalty was incurred, in one sense of the term, and the prosecution in another. The term "accrued," therefore, has been universally held to be here used with relation to the seizure, information, or suit for the penalty, and so far from its being held to have any effect in confining the time of prosecuting this claim for remission to the interval between information and judgment, that practically we know, in some of the most commercial districts, the construction adopted was that the penalty did not accrue until conviction, and hence suffering a decree or judgment to pass was considered as essential to making up the case in which the suit for remission might be preferred. And there was some reason for this practice, since the necessary meaning of the term, as distinguished from the word "incurred," shows that there could hardly ever occur a case in which the suit for remission was not preceded by the suit for the penalty. But if the defendant was compelled to confess that he had violated the law, and so the act requires, what reason could exist why judgment should not forthwith

pass against him? And if, under such circumstances, the judgment was a bar to the remission, the boon held out to them was all a fallacy -- nay, more, it was a lure to ensnare him, for the law imposes no obligation on the judge to stay proceedings, and whether he would or not rested with him or with the district attorney until the Secretary should have time to act upon the application for remission.

The replication, however, exhibits the true ground on which the real plaintiff in this suit is compelled to rest his case, which is that by virtue of the judgment, certain rights were vested in him over which the remitting power of the Secretary does not extend. In making up this replication, the party ought to have felt the real difficulties of his case. It is generally true that the rules of pleading furnish the best test of a right of action. The effect in this case was to introduce a new personage into the cause, and if I were disposed to get rid of the question on a technical ground, I should find no difficulty in coming to the conclusion that there is a departure in this plea, and he has abated his writ. How in fact the name of the United States comes at all to be used in this cause is to me a mystery. The very policy of the law in this part of its revenue system is avoided by it, and would be frustrated if the practice could be countenanced. That the name of the United States should be used against its will and an attorney for the United States nominated by a judge to act where the attorney of the United

States refuses to act, and that without any authority by statute, I acknowledge has excited my surprise.

The principles asserted are that an absolute interest is vested by law in the collector; that the United States is the trustee to their use; that the act of the trustee shall not defeat the interests of the *cestui que use*, and that he shall have the use of the trustee's name to vindicate his rights, that too in an action for damages.

The whole of this thing appears to me to be wrong. If the right was an absolute, substantive, individual right, why was not the suit brought in the name of the collector? If his interest is only an equitable interest, by what known rules of pleading can he avail himself of his mere equitable interest in a suit at law? -- or rather can he make his appearance as party in the suit instituted by his trustee? -- and that too, a suit for damages? It all results in a strong attempt to modify the operation of our laws and to regulate the rights and powers of our officers by some fancied analogy with the British laws of trade and British revenue officers.

Our system is a peculiar system, and nothing is clearer to my mind than that in many particulars it is constructed with a view to avoid that very analogy which is here set up and those consequences and embarrassments which might grow out of it. In the instance before us, relief was to be provided for a case of misfortune and of innocence, and nothing could have been more absurd than to suffer the vested rights of informers

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and seizing officers to embarrass the government in its benevolent and just views towards the objects of this law. Mercy and justice could only have been administered by halves if collectors could have hurried causes to judgment and then clung to the one-half of the forfeiture in contempt of the cries of distress or the mandates of the Secretary. Hence, according to our system, all the suits to be instituted under the laws over which the Secretary's power extends are commenced in the name of the United States. No other party is permitted to sue; they are all made national prosecutions; all the legal actors are those who are bound in obedience to the government that prosecutes.

Nothing is more untenable than the idea that at any one stage of the prosecution, the government assumes the character of a trustee -- an idea so abhorrent to the principles of the common law that to make the King a trustee was to make him absolute proprietor. Nor is it until the character of prosecutor for offenses against itself is put off that the law raises a state of things in which the relation of trustee and *cestui que use* actually can arise. This is when the money is paid into the

hands of the collector. To him the law directs that it shall be paid in order that it may be distributed. What right, I would ask, would any one of the distributees here have to move the court that the money be paid to him, and not to the collector? There are cases in which other persons than a collector may be entitled in the capacity of informers, and it may then be necessary for the

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court to decide on individual rights. But in no case that I am aware of arising under the collection law can the court be called upon to pay the money in any other way than to the collector, to be by him distributed, and this distribution I consider as a mere boon from the government, which they may justly, and do practically reserve a sovereign control over, until so paid under their laws. The gift is from them, of a thing perfected to them, and they may modify and withdraw that gift, ad libitum. When once paid away, according to legislative will, their control is at an end, and the right then, and not till then, becomes vested and absolute, as between them and their officers, whom, to the last, the law regards as absolute donees. That such is the view of the legislature, and that in the exercise of that discretion, they still meant to be reasonable and just, and not to exercise an *ex post facto* power in such case, is all conclusively proved in the third section of this act, as has been very justly insisted on in argument. During two years, this power of the Secretary had remained suspended, and with regard to rights accruing during that time, the legislature declares that as the modification imposed upon the grant to the informer, or seizing officer, by virtue of that dispensing power, did not then exist, their proportions should not afterwards be subjected to it, but the court may assess their proportions in a summary manner. There cannot be a more explicit declaration of legislative understanding than this clause presents, inasmuch as it makes no discrimination

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between the cases of judgment and other cases, but considers the right accruing to them the same before judgment as it is after.

There is one peculiarity in this case which, in my opinion, precludes the possibility of recovery independently of the general principle, which is that this action is brought against the marshal for not executing process issuing from another state. It certainly presents a dilemma from which I think it impossible for the party plaintiff to escape. The right to issue such process originates in the 6th section of the "Act more effectually to provide for the settlement of accounts between the United States and receivers of public money," by the words of which the power is explicitly confined to the case of executions on judgments obtained for the use of the United States.

The real plaintiff here, then, is reduced to this alternative: either the judgment was for his use or it was not. If not for his use, then he cannot be damnified by the defendant in refusing to execute it. But if for his use, it cannot be for the use of the United States, and then the execution issued wrongfully and was rightfully disobeyed. If it be replied that the judgment in the first place was obtained for the use of the United States, it only brings us back to what I before observed -- that so entirely is this true as to raise no vested right in anyone on the solitary ground of an eventual contingent interest.

*Judgment affirmed.*